

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: CS/SB 390

INTRODUCER: Judiciary Committee and Senator Simpson

SUBJECT: Public Records/Public Agency Contract for Services

DATE: January 19, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	<u>Pace</u>	<u>Hrdlicka</u>	<u>FP</u>	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 390 requires requests for public agency records relating to contracts for services to be made directly to the public agency and requires several provisions in agency contracts for services related to public records. Specifically, the bill:

- Revises the procedures a person must follow to obtain public records from a contractor that is acting on behalf of a public agency;
- Provides for the assessment of attorney fees and costs against a contractor who fails to provide access to a public record;
- Provides that a contractor who fails to provide records to a public agency commits a noncriminal infraction, punishable by a fine, or if the failure was willful and knowing, commits a misdemeanor;
- Provides that the requestor, to be entitled to fees and costs, must provide notice to the custodian and contractor, and an opportunity to correct a violation of public records law, at least 8 business days before filing a lawsuit; and
- Authorizes contractors to retain public records upon the completion of a contract. Under current law, these records must be returned to the contracting agency.

The bill has no impact on state funds.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that every individual has a right of access to public records, unless exempted, which are made or received in connection with official public business.¹ This right applies to records of the legislative, executive, and judicial branches. The Florida Constitution also requires all meetings of a collegial public body of the executive branch or any local government at which official acts are taken or public business is discussed to be open and noticed to the public.²

Florida law implements the constitutional right of access to records and meetings by specifying conditions under which qualifying entities must provide public access to government records and meetings. The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record³ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.⁴ The Sunshine Law requires all meetings of a board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁵

An agency may not impose greater conditions on responding to a public records request than that required by law. For example, an agency may not require a person seeking a public record to disclose his or her background.⁶ Nor may an agency require an individual to put his or her request in writing as a condition of production.⁷ An agency must honor a request whether a person requests records by phone, in writing, or in person, provided that the request is sufficient to identify the records sought.⁸

¹ Article I, s. 24(a), FLA. CONST.

² Article I, s. 24(b), FLA. CONST.

³ Section 119.011(12), F.S., defines "public record" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32, 36-37 (Fla. 1992).

⁴ Section 119.07(1)(a), F.S.

⁵ Section 286.011(1), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Article III, s. 4(e) of the Florida Constitution.

⁶ *Bevan v. Wanicka*, 505 So. 2d 1116, 1118 (Fla. 2d DCA 1987).

⁷ *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, n.1 (Fla. 3d DCA 2001); Op. Att'y Gen. Informal Opinion (Dec. 16, 2003), available at:

<http://myfloridalegal.com/ago.nsf/informalprintview/7AA59B4C58D0818085256DFF00627B55> (last visited Jan. 15, 2016).

⁸ Op. Att'y Gen. Fla. 80-57 (1980), available at:

<http://www.myfloridalegal.com/ago.nsf/printview/29B1FE397E99E1238525658D005C903B> (last visited Jan. 15, 2016).

Enforcing Public Records Laws and Attorney Fees

The Florida Constitution, requires the Legislature to enact laws governing the enforcement of public records requirements, including the “maintenance, control, destruction, disposal, and disposition of records.”⁹

Florida law provides that a person may enforce the right to a public record by a lawsuit against an agency.¹⁰ In those lawsuits, the court must set an immediate hearing, giving the case priority over other cases.¹¹ If a court orders an agency to open its records for inspection, the agency must comply within 48 hours.¹² If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay costs and attorney fees.¹³ An unjustified delay in turning over public records is considered an unlawful refusal, and a court will award attorney fees even if the delay is not willful or is due to incompetence.¹⁴

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is a legal consequence independent of the public records request.¹⁵ Once an enforcement action is filed, the court will require a public agency to pay the requestor’s attorney fees even after the agency has produced the records.¹⁶

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial. In addition, granting attorney fees makes it more likely that public agencies will comply with public records laws.¹⁷

Contracts for Services and Public Records Law

Public agencies, including local and statewide governmental entities and municipal officers, may hire contractors to provide services and act on behalf of the agency. Contractors can be individuals or business entities. Private contractors who act on behalf of a public agency are required by law and the terms of their contracts to comply with public records laws in the same manner as a public agency.¹⁸

Every public records contract for services must include a provision that requires the contractor to comply with public records law. Specifically, a contractor must:

- Keep and maintain public records typically required by the public agency to perform the service;

⁹ Article I, s. 24(c), FLA. CONST.

¹⁰ Section 119.11, F.S.,

¹¹ Section 119.11(1), F.S.

¹² Section 119.11(2), F.S.

¹³ Section 119.12, F.S.

¹⁴ *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655-656 (Fla. 1st DCA 2014); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

¹⁵ *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

¹⁶ *Mazer*, 811 So. 2d at 860; *Barfield*, 675 So. 2d at 224; *Althouse v. Palm Beach County Sheriff’s Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

¹⁷ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

¹⁸ Section 119.0701(1) and (2), F.S.; *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

- Provide public access to public records on the same terms and conditions that the public agency would provide the record and at the same cost authorized by law;
- Protect from disclosure records that are exempt from disclosure requirements or confidential; and
- Retain records as required by law and transfer at no cost all public records to the public agency upon termination of the contract.¹⁹

Currently, there is no statutory requirement to include the contact information of the public agency's custodian of records in a contract for service.

A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²⁰ Actions may include unilateral cancellation of the contract by a state agency if a contractor refuses to allow public access to materials the contractor receives in conjunction with the contract.²¹

Contractors may unlawfully place conditions on the release of records, refuse to provide public records, or unlawfully delay in providing records. If a contractor fails to comply with a public records request, the requestor may sue the contractor to enforce the right to have access to the records. If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the lawsuit and the requestor's attorney fees in the same manner that a public agency would be liable.²² Therefore, once a lawsuit is filed, a contractor may also be held liable for attorney fees even after providing the requested records. The fees provision, however, "was not intended to force private entities to comply with the inspection requirements of [the Public Records Act] by threatening to award attorney's fees against them."²³

When is a Private Contractor an Agency for Public Records Purposes?

Not all contracts for services subject a contractor to public records requirements. The Attorney General was asked to issue an opinion on whether a contractor who enters into a contract for services with an agency is automatically acting on behalf of the agency and subject to public records law.²⁴ The issue required the Attorney General to construe the meaning of the term "contractor" which is defined in s. 119.0701(1)(a), F.S., as an "individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency ..." The Attorney General Opinion (AGO) concludes that a court must additionally examine the nature and scope of services provided, citing in support

¹⁹ Section 119.0701(2), F.S. Upon termination of a contract, the contractor must destroy any duplicate public records that are exempt or confidential and exempt from disclosure. All records stored electronically must be provided to the public agency in a format compatible with the information technology systems of the public agency. Section 119.0701(2)(d), F.S.

²⁰ Section 119.0701(3), F.S.

²¹ Section 287.058(1)(c), F.S., provides that state agency contracts which exceed \$35,000 must include a provision that permits the state to unilaterally cancel the contract if the contractor refuses to permit access to public records. This does not apply to contracts related to certain state employee benefits.

²² Sections 119.0701(2) and 119.12, F.S.; *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

²³ *New York Times Co.*, 616 So. 2d at 29.

²⁴ Op. Att'y Gen. Fla. 2014-06 (June 18, 2014), available at:

<http://www.myfloridalegal.com/ago.nsf/Opinions/FFA361674B780AE085257CFD00650CCB> (last visited Jan. 15, 2016).

Parsons & Whittemore, which held that a contract with a public agency alone is insufficient to trigger public records requirements.²⁵ In another case cited in the AGO, *Stanfield v. Salvation Army*, the Salvation Army had contracted with a county to provide all of the county's probation services. The court held that the Salvation Army took the place of the county, acted on behalf of the county, and was therefore subject to public records law.²⁶

In contrast to the Attorney General Opinion, courts have applied a totality of factors test, which asks the following questions:²⁷

- Whether the public agency created the contractor?
- How much public funding was involved?
- How much the public agency regulated the contractor?
- To what extent was there commingling of decision making processes?
- Whether the contractor was performing a government function?
- What are the goals of the contractor?²⁸

A contractor's uncertainty as to whether it is an agency for public records purposes is not necessarily considered an unlawful delay or refusal. A court may consider uncertainty to be reasonable, and not impose attorney fees and costs.²⁹

Specious Requests of Public Records

Over the past few years, there have been several examples of lawsuits predicated on the failure of a contractor to provide records in response to a public records request, but in reality were attempts to collect attorney fees.

For example, on September 9, 2014, the circuit court in Palm Beach County denied attorney fees in a public records case in which a contractor denied access to a requestor of a contractor's proof of insurance and contract with the Department of Health. The contractor processed claims for the Department of Health for underserved women aged 50-64 who had breast or cervical cancer. The contractor asserted that he denied the request because he kept the documents in a restricted area where confidential medical records were being processed and because the requestor's behavior made the contractor uncomfortable.³⁰

The court ultimately found that the contractor was an agency for public records purposes, but noted that it was reasonable for the contractor "to have safety and security concerns in light of the secure nature of the facility and his responsibility to balance confidentiality concerns and the

²⁵ *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343, 346 (Fla. 3d DCA 1983).

²⁶ *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

²⁷ *News and Sun-Sentinel Co.*, 596 So. 2d at 1031.

²⁸ *Id.* at 1032 – 1033.

²⁹ *New York Times Co.*, 616 So. 2d at 29; *Stanfield*, 695 So. 2d at 502.

³⁰ Other facts of the case are: The plaintiff already had a copy of the contract on his smart phone which he showed the contractor. The contractor was uncomfortable because the plaintiff showed up unannounced, dressed in shorts, with a camera around his neck and refused to identify himself. The plaintiff was recording the encounter but did not inform the contractor that he was doing so. Also, the contractor asked the plaintiff to make a written request for the records.

safety of his employees.”³¹ Further, the court explained that “a person cannot just show up, demand to see public records of his random choosing, and if he experiences any delay then file suit. The facts of this case show clearly how the Statute can be misused.”³²

The court denied the plaintiff’s request for attorney fees based on the court’s finding that the denial was reasonable. The parties ultimately settled the matter, and the court dismissed the case with prejudice.³³

On December 1, 2014, a circuit court in Duval County denied relief to the same plaintiff in a lawsuit to enforce a public records request and assess attorney fees.³⁴ According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The plaintiff did not provide advance notice or written notice of any kind prior to the request. The contract manager refused to provide a document because the contract manager believed that the document was not a public record. The plaintiff secretly documented the requests and denials on video. The plaintiff also videotaped the time on a clock during the interactions and later admitted to having done so to present as evidence in a subsequent lawsuit.³⁵ The court found that the manner in which the requestors made the request ensured that “they obtained exactly what they wanted, namely, an initial denial of an unreasonable and bogus request.”³⁶

The court ruled the plaintiff’s method of requesting public records an abuse of public records laws and “nothing more than a scam.”³⁷ The final order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had “a financial interest in assuring that his requests for public records [were] refused.”³⁸ Generally, an attorney may not share his or her fees with someone who is not a lawyer.³⁹ The court noted that in 2014, the plaintiff had filed 18 public records lawsuits in Duval County and the same attorney represented the plaintiff in approximately 13 of those

³¹ Order Denying Plaintiff’s Complaint to Enforce Florida’s Public Records Act and for Declaratory Injunctive and Monetary Relief and Denying Plaintiff’s Request for Attorney Fees, *Jeff Gray v. United Group Programs, Inc.*, No 502014CA-004858, pg. 5 (Fla. 15th Cir. Ct. 2014).

³² *Id.* at 4.

³³ Order of Dismissal with Prejudice, *Jeff Gray v. United Group Programs, Inc.*, No 502014CA-004858 (Fla. 15th Cir. Ct. 2014).

³⁴ Final Order Denying Relief Under Public Records Act, *Jeffrey Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. 2014).

³⁵ *Id.* at 4.

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 4.

³⁹ R. Regulating Fla. Bar 4-5.4.

cases.⁴⁰ The case is currently on appeal, although the First District Court of Appeal has denied the plaintiff's request for oral argument.⁴¹

In addition to the court cases discussed above, a 2014 article in the *Miami Herald* details similar incidents. Two organizations and a law firm allegedly partnered to target unsuspecting businesses that were unaware that public records laws applied to them. In one case, the requestors emailed requests over a weekend, and when the businesses failed to comply, the requestors filed a lawsuit and demanded a settlement in excess of costs and fees. The requestors implemented a quota of generating 25 new lawsuits per week. The group filed more than 140 lawsuits in 27 counties. In fact, industry groups such as the Florida Engineering Society sent out a warning to its members due to the frequency of legal actions filed against engineers.⁴²

III. Effect of Proposed Changes:

The bill establishes the custodian of records at a public agency as the point of contact for both the requestor of public records and a contractor that has questions about its duties under the public record laws. The bill also authorizes an agency contractor to retain public records after the completion of a contract instead of returning them to the agency. These revised duties and responsibilities must be set forth in contracts between the agency and the contractor, and all agency contracts must be revised accordingly by October 1, 2016.

Specifically, the bill requires each public agency contract for services to include:

- A statement that the contractor may contact the agency public records custodian if the contractor has questions about the application of the public records law to the contract. The statement must identify the contact information of the agency's custodian of public records;
- A provision that the contractor "[k]eep and maintain public records required by the public agency to perform the service;"⁴³
- A provision that the contractor provide the public agency with a copy of requested records or allow the records to be copied or inspected within a reasonable time;
- A provision to ensure that the contractor prevents the disclosure of confidential and exempt records for the duration of the contract and after the completion of the contract if the records are not transferred to the public agency; and

⁴⁰ Final Order Denying Relief Under Public Records Act, *Jeffrey Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647, pg. 7 (Fla. 4th Cir. Ct. 2014). The court further opined, "If a private entity must pay an attorney's fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called "civil rights activists" or others who seek to abuse the Act for financial gain."

⁴¹ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014). The last action on this case occurred on September 28, 2015, when the court denied oral arguments.

⁴² Tristram Korten and Trevor Aaronson, *In Lawsuits Statewide, Questions of Profits and Public Records*, FLORIDA CENTER FOR INVESTIGATIVE REPORTING, MIAMI HERALD, Nov. 9, 2014, available at: <http://www.miamiherald.com/news/state/florida/article3683176.html> (last visited Jan. 15, 2016).

⁴³ Article I, s. 24 of the Florida Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." As such, an agency may not authorize a contractor to maintain fewer documents than the Constitution requires.

- A provision requiring a contractor that retains public records after the completion of a contract to continue to make records available to the contracting agency upon its request.

The bill requires all public records requests relating to a contract for services must be made directly to the public agency. The public agency must notify the contractor if the agency does not have the requested records, and the contractor must provide the records or allow them to be inspected or copied within a reasonable time.

The bill specifies penalties that apply to a contractor who fails to timely provide public records to the agency. A contractor who fails to provide public records within a reasonable time commits a noncriminal infraction punishable by up to a \$500 fine. A contractor who willfully and knowingly fails to comply commits a first degree misdemeanor, punishable by up to a year in jail and up to a \$1,000 fine.

Similarly, the bill provides that a contractor may be sued for failing to respond to a public records request. To be entitled to attorney fees and costs, however, the requestor must meet certain requirements. The requestor must send a written notice of the public records request and the failure to comply to the agency public records custodian and the contractor at least 8 business days before filing suit. The notice must be sent by common carrier, registered, Global Express Guaranteed, or certified mail. A contractor who complies with the public records request within 8 business days after the notice is sent is not liable for attorney fees or costs.

The bill, in s. 119.0701(4)(d), F.S., also allows the “reasonable costs of enforcement” to be assessed against a public agency. The bill, however, does not indicate what act or omission would subject an agency to liability or authorize a lawsuit against the agency.⁴⁴

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require counties or municipalities to take an action requiring the significant expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

The bill makes it possible for former private contractors to be public records custodians even when the contractor is no longer acting on behalf of an agency.

⁴⁴ The potential bases of an agency’s liability which might be implied by the bill include: failing to immediately forward a public records request to a contractor, improperly directing a contractor to withhold access to a public record, failing to terminate the agency’s contract with a contractor that fails to provide access to a record, or making an agency vicariously liable for the misconduct of a contractor, including the destruction of public records.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill, by placing prerequisites to the entitlement to attorney fees and costs in an action to compel compliance with the public record laws may encourage the resolution of disputes before the initiation of lawsuits. The requestor, however, may incur attorney fees that cannot be recovered from the contractor if the contractor provides records within the 8 day period after pre-suit notice is sent.

C. Government Sector Impact:

Agencies that Contract for Services

If the contractor retains public records upon termination of a contract, an agency may have to rely on the former contractor to provide records upon request. An agency may be liable for attorney fees because the contractor failed to produce records in a timely manner.

Department of Management Services

The Department of Management Services indicates that the department does not expect a fiscal impact from the provisions of the bill.⁴⁵

VI. Technical Deficiencies:

Under the bill, the contractor is permitted to retain the public records after the completion of the contract. The bill is silent on what duties, if any, a terminated contractor has regarding retained records if the contractor goes out of business. Most likely the public agencies can address this issue in the contract.

The bill, in s. 119.0701(4)(d), F.S., also allows the “reasonable costs of enforcement” to be assessed against a public agency. The bill, however, does not indicate what act or omission would subject an agency to liability or authorize a lawsuit against the agency.

VII. Related Issues:

None.

⁴⁵ Department of Management Services, *2016 Legislative Bill Analysis* (Nov. 12, 2015) (on file with the Senate Committee on Judiciary).

VIII. Statutes Affected:

This bill substantially amends section 119.0701 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on December 1, 2015:

- Revises the penalties that apply to a contractor who fails to comply with a public records request;
- Clarifies that a plaintiff's written notice of a public records violation must be provided to the custodian of records and the contractor; and
- Relieves from liability for costs of enforcement a contractor who complies with a public records request within 8 business days after a pre-suit notice is sent.

B. Amendments:

None.