

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 Governmental Oversight and Accountability

BILL: SB 162

INTRODUCER: Senator Perry

SUBJECT: Public Records

DATE: October 11, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 162 amends s. 119.07, F.S., regarding public records. The bill requires a court to assess the costs of litigation for the named respondent against a government agency if the agency files a declaratory judgment action seeking a court determination of whether certain public records are exempt or confidential and exempt, and the court finds that the records are neither.

The bill takes effect July 1, 2020.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁶

Section 119.011(2), F.S., broadly defines “agency” to mean 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 Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

Making a Public Records Request

Section 119.07, F.S., sets out an orderly process for a citizen to request a public record:

1. The requestor contacts the agency in writing or orally to request to inspect or copy certain records.
2. The custodian or designee must acknowledge the request and respond to it in good faith.
3. The agency may then provide the records subject to exemptions and confidentiality, or deny the request and state the basis for its denial.

In cases where the agency is uncertain whether the requested documents are subject to a public records exemption, the agency may:

- Refuse to release the requested documents and risk having suit brought against the agency by any number of plaintiffs for the release of the documents;
- Release the requested documents, assuming any risk of having unlawfully released confidential documents;
- Seek voluntary mediation of the dispute using the Attorney General’s public records mediation program pursuant to s. 16.60, F.S.;⁹

⁵ Section 119.011(12), F.S., defines “public record” to mean “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.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ The Attorney General’s Office mediates approximately 100 such cases each year, which is a free and non-binding process.

- Seek an Attorney General Opinion; or
- Bring suit in its local court seeking a declaratory judgment on the uncertainty.

If a request is denied, the requestor has the option to work with the agency in an effort to refine or alter its request so that the agency might disclose the information if the request is clarified, presented differently, or modified. The requestor may also:

- File a civil lawsuit alleging that the agency's action is a violation of public records law;
- File a complaint with the local state attorney; or
- Seek voluntary mediation of the dispute using the Attorney General's public records mediation program pursuant to s. 16.60, F.S.¹⁰

Criminal and Noncriminal Penalties

If a person willfully and knowingly violates public records laws either by failing to release unprotected information or by releasing exempt or confidential information, that employee may be subject to criminal prosecution for a first degree misdemeanor, which carries a sentence of imprisonment up to one year and a fine of up to \$1000.¹¹ Additionally, knowing and willful failure to protect the public records of victims of crimes or accidents under s. 119.105, F.S., constitutes a third degree felony, punishable by a sentence of imprisonment up to five years and a fine of up to \$5,000.¹²

Reasonable attorney's fees will be assessed against an agency found to have violated public records law.¹³

Florida Attorney General Advisory Legal Opinions

The Attorney General must respond to requests for opinions from the Governor, members of the Cabinet, the head of an executive branch department, or certain members of the Florida Legislature. They are authorized, but not required, to respond to requests for opinions from members of the Legislature, other state officers, and officers of a county, municipality, other unit of local government, or political subdivision.¹⁴ Private companies contracting with local governments may be subject to public records laws but may not request Attorney General Opinions.

In order to request an Attorney General Opinion, attorneys for the public entity requesting an opinion must produce a legal memorandum to supply with their request. In 2018, the Attorney General issued six formal opinions.¹⁵

¹⁰ The Attorney General's Office mediates approximately 100 such cases each year, which is a free and non-binding process.

¹¹ Section 119.10(2)(a), F.S.

¹² Section 119.10(2)(b), F.S.

¹³ Section 286.011(4), F.S.

¹⁴ Section 16.01(3), F.S.

¹⁵ The Attorney General's Office filed 6 formal opinions in 2018, 8 in 2017, 18 in 2016, 14 in 2015, and 13 in 2014, <http://myfloridalegal.com/ago.nsf/Opinions>.

Florida Attorney General Open Government Mediation

Section 16.60, F.S., creates the public records mediation program within the Office of the Attorney General. It tasks that office with employing mediators to mediate disputes involving access to public records.

The open government mediation program is voluntary. Both sides to a dispute must agree to consider mediation if the program is to be utilized. The process is nonbinding, and decision-making authority remains with the parties.¹⁶

Declaratory Judgments

When an agency is uncertain whether a document is a record that must be disclosed to the public or is otherwise protected from disclosure, the agency may seek guidance from a court by filing a complaint against the requestor for declaratory judgment.¹⁷ Declaratory judgment actions are used to resolve legal uncertainties for the parties. A declaratory judgment is a binding decision by which a court establishes the rights of the parties.

Section 86.081, F.S., provides that the court may award costs as are equitable. Generally, each party bears its own costs and attorney fees. A court is required, however, to award attorney fees to the requestor if they determine that an agency unlawfully refused access to a public record.¹⁸ If a court determines that the requestor made their request or filed suit for an improper purpose (e.g., harassment), the court awards attorney fees to the agency.¹⁹

Because attorney fees are granted to a prevailing requestor, it is sometimes prudent for an agency or local government to bring suit immediately for clarification of the public records dispute in order to reduce fees at stake. Additionally, an agency facing harassing or otherwise improper requests has the option to bring suit to seek a determination that they do not need to respond to such requests.

III. Effect of Proposed Changes:

Section 1 amends s. 119.07, F.S., to provide that the costs of litigation of the named respondent will be assessed against a government agency where the agency files for declaratory judgment for a declaration that certain public records are exempt or confidential and exempt, and the court finds that the records are neither.

Section 2 provides that the bill takes effect July 1, 2020.

¹⁶ Section 16.60, F.S.

¹⁷ See *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011).

¹⁸ Section 119.12, F.S.

¹⁹ Section 119.12(3), F.S.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may have a positive fiscal impact on the private sector to the extent an agency is required to reimburse legal costs and fees incurred for participation in a declaratory action filed by an agency.

C. Government Sector Impact:

No agency bill analysis has been reported at this time projecting how this bill may affect an agency. However, the bill will have a negative fiscal impact on any agency who has legal fees assessed against it in a declaratory judgment action regarding public records.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.07 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
