

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 Rules

BILL: CS/SB 400

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Rodrigues

SUBJECT: Public Records

DATE: April 2, 2021 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|------------------|
| 1. | <u>Ponder</u> | <u>McVaney</u> | <u>GO</u> | Fav/CS |
| 2. | <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | Favorable |
| 3. | <u>Ponder</u> | <u>Phelps</u> | <u>RC</u> | Favorable |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 400 amends s. 119.07, F.S., to prohibit an agency that receives a public record request from responding to the request by filing an action for declaratory relief against the requester to determine whether that record meets the definition of a public record or if it is confidential or exempt.

The fiscal impact of the bill on state and local governments and their contractors is indeterminate. However, to the extent an agency is no longer permitted to use the declaratory judgment action as a vehicle to determine the rights and obligations of the parties under Chapter 119, F.S., an agency may incur greater litigation costs associated with cases challenging an agency's denial of access to records.

The bill takes effect July 1, 2021.

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

¹ FLA. CONST., art. I, s. 24(a).

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

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.

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

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.

3. The agency may then provide the records subject to exemptions and confidentiality, or deny the request and state the basis for their denial.

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

- File an opinion request to the Attorney General; or
- File an action for declaratory relief in their local court seeking a declaratory judgment on the complained of uncertainty.

When 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 action to enforce the Public Records Act;
- File a complaint with their local state attorney; or
- If it is a qualifying dispute, seek voluntary mediation using the Attorney General’s public records mediation program pursuant to s. 16.60, F.S.

Civil and Criminal 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 1 year and a fine of up to \$1000.⁹ 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 5 years and a fine of up to \$5,000.¹⁰

Reasonable attorney’s fees will be assessed against an agency found to have violated public records law.¹¹

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.¹² Private companies contracting with governments may be subject to public records laws but may not request Attorney General Opinions (AGO).

In order to request an AGO, attorneys for the public entity requesting an opinion must produce a legal memorandum to supply with their request. In 2020, the Attorney General issued nine

⁹ Section 119.10(2)(a), F.S.

¹⁰ Section 119.10(2)(b), F.S.

¹¹ Section 286.011(4), F.S.

¹² Section 16.01(3), F.S.

formal opinions – none of which related to the resolution of a public records dispute or a request under the Public Records Act, generally.¹³

In 2019, the Attorney General issued two opinions directed to requests regarding the Public Records Act:

- AGO 2019-14, addressing whether the Education Practices Commission is a state agency under ch. 119, 120, and 286, F.S.; and
- AGO 2019-08, addressing whether ch. 119, F.S., precludes an agency from engaging a “vendor to conduct penetration testing of the agency’s electronic data storage systems for the purpose of detecting and remedying vulnerabilities” where such testing would potentially allow the vendor to access information that is exempt under s. 119.071(4)(d)2.a & d., F.S., and confidential under s. 119.071(4)(a)l., F.S., (pertaining to social security numbers).

Public Records Mediation Program within the Office of Attorney General

Section 16.60(2), F.S., establishes a public records mediation program (Mediation Program) within the Office of the Attorney General (OAG). This unfunded and voluntary program is designed to assist the public in avoiding litigation regarding disputes over public records access. The term “mediation” is defined to mean a process whereby a neutral third person, the mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties.¹⁴ Section 16.60(1), F.S., is silent as to when mediation is appropriate or required. Section 16.60(3), F.S., requires the OAG to employ one or more mediators to mediate disputes involving access to public records. Currently, the mediation program employs one mediator.

The kinds of disputes that qualify for resolution under the s. 16.60, F.S., Mediation Program are extremely limited. An OAG mediator lacks authority to make a determination as to whether an agency has or has not violated the public records law. Additionally, an OAG mediator may not resolve a dispute involving whether an agency’s statement that it has no responsive records is or is not true. Thus, the Mediation Program’s process is foreclosed to parties that dispute a record’s status as a public record or as exempt/confidential. If these parties wish to avoid litigation - and time is not of the essence - they may seek an AGO. Otherwise, a civil action must be filed to resolve the dispute.

The OAG does not maintain a record of the number of mediations. However, the OAG estimates that the Mediation Program handles approximately 25 mediations a year which it considers to be informal dispute resolutions. The OAG considers a mediation to include only those instances in which there are communications from both sides with an OAG mediator and the mediator acts as a problem solver with both sides. Qualifying mediations generally fall into two categories:

- Where an OAG mediator works with a requestor to explain how to clarify their request such that the communication constitutes a request for records and does not merely pose a question; and

¹³ <http://www.myfloridalegal.com/ago.nsf/OP?open&RestricttoCategory=2020&Start=1&Count=30> (last visited Mar. 10, 2021). The Attorney General’s Office filed 14 formal opinions in 2019, 6 formal opinions in 2018, 8 in 2017, 18 in 2016, 14 in 2015, and 13 in 2014.

¹⁴ Section 16.60(1), F.S.

- Where disputes exist concerning the fees charged (as authorized by Chapter 119) by an agency to a requestor in disclosing the requested records.

Excluded from s. 16.60, F.S., mediations are those instances where an OAG mediator reaches out on behalf of the requestor and the matter is subsequently resolved without further action by the mediator. For example, the Mediation Program is frequently contacted by a requestor who has not received any response from an agency to the public records request. In these circumstances, the OAG mediator contacts counsel for the agency. Such contact, in the vast majority of cases, results in the agency notifying the mediator of its intent to contact the requestor and the mediator hears nothing further from either party.

Declaratory Judgments

A declaratory judgment is a binding decision issued by a court that establishes the rights of parties without providing for the enforcement of those rights.¹⁵ The Declaratory Judgment Act (the Act), Chapter 86, F.S., provides parties with a mechanism to adjudicate their rights without having to wait for a violation of those rights to occur, or the need to engage in conduct that might violate the rights of others.¹⁶ The Act exists “to settle and afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.”¹⁷ “A party is entitled to a declaration of rights where the ripening seeds of controversy make litigation in the immediate future appear unavoidable.”¹⁸

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.¹⁹ For example, the South Florida Water Management District (District), approximately 13 days after receiving a public records request, filed for a declaratory judgment that the requested transcripts were exempt from disclosure.²⁰ The trial court rendered final judgment for the District. The Fourth District Court of Appeal upheld the trial court’s ruling to permanently withhold portions or all of certain transcripts, and remanded for an in-camera review of the claimed “mediation communication” redactions.²¹

In *Butler*, Michael Butler made a public records request to the City of Hallandale Beach (City), on or about February 20, 2009, for the “distribution list” of a personal e-mail sent by the City’s mayor.²² On March 25, 2009, the City informed Butler the requested information did not constitute a “public record” because the email was not sent in connection with the discharge of any municipal duty.²³ Butler responded on April 1, 2009, asserting his right to access the

¹⁵ BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁶ See *Murphy v. Bay Colony Property Owners Ass’n*, 12 So.3d 924 (Fla. 2d DCA 2009).

¹⁷ Section 86.101, F.S.

¹⁸ *S. Riverwalk Investments, LLC v. City of Ft. Lauderdale*, 934 So. 2d 620, 623 (Fla. 4th DCA 2006).

¹⁹ *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011).

²⁰ *South Florida Water Management District v. Everglades Law Center, Inc.*, 2017-1098-CA (19th Jud. Dist. Cir. Ct.).

²¹ *Everglades Law Ctr., Inc. v. S. Florida Water Mgmt. Dist.*, 290 So. 3d 123 (Fla. 4th DCA 2019), *review denied sub nom. Melzer v. S. Florida Water Mgmt. Dist.*, SC19-1993, 2020 WL 1894672 (Fla. Apr. 16, 2020), and *review denied*, SC19-2135, 2020 WL 1894689 (Fla. Apr. 16, 2020).

²² *Butler*, 68 So. 3d at 279.

²³ Complaint for Declaratory Relief at 3, *City of Hallandale Beach v. Michael Butler*, 2009 WL 10461181 (Fla. Cir. Ct.).

requested information.²⁴ The City, to determine the rights and obligations of the parties under Chapter 119, filed a complaint for declaratory relief against Butler, on or about April 27, 2009. The City sought a declaration that the requested information was not a “public record” and need not be disclosed.²⁵ The trial court agreed with the City and the Fourth District Court of Appeal affirmed.²⁶

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. However, if such a civil action against an agency is required to enforce the public records law, and the requestor gave 5 days’ notice before filing the civil action, the court is required to award the costs of enforcement, including reasonable attorney’s fees, against the agency, if the court finds that the agency “unlawfully refused” to release the records.²⁷ If a court determines that the requestor made the request or filed suit for an improper purpose (e.g., harassment), the court awards attorney fees to the agency.²⁸

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 it does not need to respond to such requests.

III. Effect of Proposed Changes:

Section 1 amends s. 119.07, F.S., to prohibit an agency from responding to a request to inspect or copy a record by filing an action for declaratory relief against the requester to determine whether the record is a public record as defined by s. 119.011, F.S., or the status of the record as confidential or exempt from the provisions of s. 119.07(1), F.S. Thus, if an agency is uncertain as to whether the requested information is a public record, or is confidential or exempt, the agency must now: (1) release the records in question and risk being subject to the penalty provisions of s. 119.10, F.S.; (2) wait for the requestor to enforce the public records act by filing a civil action, and risk being subject to an award of attorney fees; or (3) initiate the process of requesting an AGO.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

²⁴ *Id.*

²⁵ *Butler*, 68 So. 3d at 279.

²⁶ *Id.* at 281.

²⁷ Section 119.12, F.S.

²⁸ Section 119.12(3), F.S.

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:

CS/SB 400 may have an indeterminate positive fiscal impact on the private sector because individuals and entities that request public records will not be required to pay legal costs and fees associated with a declaratory action by an agency. However, to the extent a dispute arises and continues between an agency and a requestor as to the agency's violation of ch. 119, F.S., the private sector will be required to pay legal costs and fees associated with bringing a civil action to enforce the public records laws.

C. Government Sector Impact:

It is possible that removing an agency's ability to request a declaratory judgment and avoid sanctions or further lawsuits may result in increased litigation and associated costs being incurred by the governmental entities.

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 Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on January 27, 2021:

The CS clarifies that after receiving a request to inspect or copy a record, an agency may not bring a declaratory judgment action against the requestor to determine whether that record meets the definition of a public record.

- B. **Amendments:**

None.