

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1097 CS

Public Records

**SPONSOR(S):** Vana

**TIED BILLS:**

**IDEN./SIM. BILLS:** CS/SB 2714

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Governmental Operations Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Williamson</u>	<u>Williamson</u>
2) <u>Insurance Committee</u>	<u>(W/D)</u>	<u></u>	<u></u>
3) <u>State Administration Council</u>	<u></u>	<u>Williamson</u>	<u>Bussey</u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The bill amends the Public Records Act to require each agency head who appoints a designee to act as a custodian of public records to provide notice to the public of such designation. The notice must include the name, title, e-mail address, office telephone number, and office mailing address of the designee. It must be prominently posted in those portions of the agency offices that are accessible to the public. If the agency maintains a website, the notice must be prominently displayed on the home page of that website and must be made available by any employee who responds to telephone calls from the public.

The bill also prohibits denying that a record exists and prohibits misleading anyone as to the existence of a public record.

The bill requires a custodian or designee to respond to requests to inspect or copy records promptly and in good faith. It also requires the availability of a custodian or designee to respond to requests during regular business hours for the office having public records.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

### B. EFFECT OF PROPOSED CHANGES:

#### Background

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> The Florida Supreme Court has noted that chapter 119, F.S., the Public Records Act, was enacted “. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.”<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>4</sup> 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency<sup>5</sup> records are available for public inspection. The term “public record” is broadly defined 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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>5</sup> The word “agency” is defined in s. 119.011(2), F.S., 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.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The Public Records Act<sup>9</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>10</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>11</sup> Section 119.011(5), F.S., defines “custodian of public records” to mean “. . . the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining public records, or his or her designee.”

### Effect of Bill

This bill provides that each agency head who appoints a designee to act as a custodian of public records must provide notice to the public of such designation. The notice must include the name, title, e-mail address, office telephone number, and office mailing address of the designee. The notice must be prominently posted in those portions of the agency offices that are accessible to the public. If the agency maintains a website, the notice must be prominently displayed on the home page of that website and must be made available by any employee who responds to telephone calls from the public.

The bill also prohibits denying that a record exists and prohibits misleading anyone as to the existence of a public record.

The bill requires a custodian or designee to respond to requests to inspect or copy records promptly and in good faith. It also requires the availability of a custodian or designee to respond to requests during regular business hours for the office having public records.

#### C. SECTION DIRECTORY:

Section 1 amends s. 119.07, F.S., relating to inspection and copying of public records.

Section 2 amends s. 497.140, F.S., conforming a cross-reference.

Section 3 amends s. 627.311, F.S., conforming a cross-reference.

Section 4 amends s. 627.351, F.S., conforming a cross-reference.

Section 5 provides a July 1, 2006, effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

##### 2. Expenditures:

See FISCAL COMMENTS.

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<sup>9</sup> Chapter 119, F.S.

<sup>10</sup> Section 119.07(1)(b), F.S.

<sup>11</sup> Section 119.07(1)(c) and (d), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

There could be a fiscal impact on agencies due to the requirement that agencies respond “promptly” instead of in a “reasonable time” as “promptly” appears to be a shorter time frame than “a reasonable time.”

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Designation of the Custodian

Section 119.011(5), F.S., defines “custodian of public records” to mean “. . . the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining public records, or his or her designee.”

While the Public Records Act specifically identifies a “custodian of public records,” the courts have concluded that the statutory reference to the custodian does not alter the “duty of disclosure” imposed upon every person who has custody of a public record.<sup>12</sup> For purposes of the act, “custodian” refers to all agency personnel who have it within their power to release or communicate public records.<sup>13</sup> Mere temporary possession of a document does not necessarily mean that the person has custody, however. In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping or guardianship.<sup>14</sup> Nevertheless, it has been held that only a custodian, not an employee, may assert an applicable statutory exemption.<sup>15</sup>

<sup>12</sup> *Puls v. City of Port St. Lucie*, 678 So.2d 514 (Fla. 4<sup>th</sup> DCA 1996).

<sup>13</sup> *Mintus v. City of West Palm Beach*, 711 So.2d 1359 (Fla. 5<sup>th</sup> DCA 1991).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Alterra Healthcare Corporation v. Estate of Shelley*, 827 So.2d 936, 940 (Fla. 2002).

Currently, the Public Records Act permits the defined “custodian of public records” to delegate custodial responsibilities to a designee. No such delegation is provided to other agency employees with custody. This bill would appear to permit such a delegation by those employees with custody of a public record. It is not clear that multiple designations by various persons with custody would provide more clarity for the public regarding who should respond to their request to inspect or copy a public record.

#### Other Comments: Response to a Public Records Request

The Public Records Act does not contain a specific period in which an agency must respond to a request to inspect or copy a record. The Florida Supreme Court has established that the only permissible delay is the “limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.”<sup>16</sup> Unreasonable or excessive delays in producing public records can constitute an unlawful refusal to provide access.<sup>17</sup> The bill requires agencies to respond to requests “promptly and in good faith.” The bill does not define “promptly,” thus, the common meaning of the term would apply. The American Heritage Dictionary<sup>18</sup> defines “promptly” to mean “1. On time; punctual. 2. Done without delay.” As such, the standard provided in the bill appears to reduce the amount of time an agency has to respond to a public records request.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On April 5, 2006, the Governmental Operations Committee adopted an amendment and reported the bill favorably with committee substitute. The amendment:

- Required the agency to provide public notice when the agency head appoints a designee to serve as the custodian of public records;
- Provided that a person who is not a custodian or appointed designee may not deny the existence of a public record nor mislead anyone as to the existence of a public record; and
- Required a custodian or his or her designee to respond to requests to inspect and copy public records during regular business hours for the office having public records.

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<sup>16</sup> *Tribune Company v. Cannella*, 458 So.2d 1075, 1078 (Fla. 1984), appeal dismissed sub nom., *DePerte v. Tribune Company*, 105 S.Ct 2315 (1985).

<sup>17</sup> *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996), review denied, 684 So.2d 1353 (Fla. 1996).

<sup>18</sup> Second College Edition, Houghton Mifflin Company (1982, 1985).