SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: CS/SB 2714

INTRODUCER: Governmental Oversight and Productivity Committee and Senator Klein

SUBJECT: Public Records/Custodians

DATE: April 26, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	**Fav/CS**
2.	Thompson	Maclure	JU	**Favorable**
3.				
4.				
5.				
6.				

I. Summary:

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 is required to specify contact information of the designee. The notice is required to be prominently posted. 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. The bill also requires a custodian or designee to be available to respond to requests during regular business hours for the office having public records.

This bill amends the following sections of the Florida Statutes: 119.07, 497.140, 627.311, and 627.351.

II. Present Situation:

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 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."[2]

[1] Sections 1390, 1391, F.S. (Rev. 1892).

[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

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

> (a) Every person[4] 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[5] 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.[6]

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

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[3] Article I, s. 24 of the State Constitution.
[4] 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.
[5] 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."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.
[10] *See Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] Art. I, s. 24(c) of the State Constitution.
[13] *Id*.

The Public Records Act[14] 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

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.[15] The records custodian must state the basis for the exemption, in writing if requested.[16] 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 the office having public records, or his or her designee."

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative

[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole*, 874 So.2d 48 at 53,54 (Fla. 5th DCA 2004), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Id* at 53; *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So.2d 203 (Fla. 1998).
[21] 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

> information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" (emphasis added). Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

III. Effect of Proposed Changes:

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 is required to be prominently posted in those portions of the agency offices which are accessible to the public. If the agency maintains a website, the notice must be prominently displayed on the home page of the 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. The bill also requires a custodian or designee to be available to respond to requests during regular business hours for the office having public records.

The bill provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[22] *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

B. Public Records/Open Meetings Issues:

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 the office having 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.[23] For purposes of the act, "custodian" refers to all agency personnel who have it within their power to release or communicate public records.[24] However, mere temporary possession of a document does not necessarily mean that the person has custody. In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping, or guardianship.[25] Nevertheless, it has been held that only a custodian, not an employee, may assert an applicable statutory exemption.[26]

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.

The Public Records Act does not contain a specific time frame 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."[27] Unreasonable or excessive delays in producing public records can constitute an unlawful refusal to provide access.[28] The bill requires agencies to respond to requests "promptly and in good faith." The bill does not define the term "promptly," thus the common meaning of the term would apply. The American Heritage Dictionary[29] 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.

C. Trust Funds Restrictions:

None.

[23] *Puls v. City of Port St. Lucie*, 678 So.2d 514 (Fla. 4th DCA 1996).
[24] *Mintus v. City of West Palm Beach*, 711 So.2d 1359 (Fla. 5th DCA 1991).
[25] *Id*.
[26] *Alterra Healthcare Corporation v. Estate of Shelley*, 827 So.2d 936, 940 (Fla. 2002).
[27] *Tribune Company v. Cannella*, 458 So.2d 1075, 1079 (Fla. 1984), appeal dismissed sub nom., *DePerte v. Tribune Company*, 105 S.Ct 2315 (1985).
[28] *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996), review denied, 684 So.2d 1353 (Fla. 1996).
[29] Second College Edition, Houghton Mifflin Company (1982, 1985).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

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."

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.