

The Florida Senate
PROFESSIONAL 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: Governmental Operations Committee

BILL: SB 1760

INTRODUCER: Governmental Operations Committee and Senator Justice

SUBJECT: Public Records; Custodians

DATE: April 12, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Fav/1 amendment
2.			JU	
3.				
4.				
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

This bill provides that a custodian of public records or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records.

The bill also provides that a custodian of public records and his or her designee must respond to requests to inspect or copy records promptly and in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.

A custodian of public records or his or her designee shall be available to respond to requests to inspect and copy public records during the regular business hours of the office at which public records are maintained.

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

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 person⁴ 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 agency⁵ 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

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).

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.

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 exemption¹¹ 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

The Public Records Act¹⁴ 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.”

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.

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.¹⁷ For purposes of the act, “custodian” refers to all agency personnel who have it within their power to release or communicate public records.¹⁸ 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

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.*

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *Puls v. City of Port St. Lucie*, 678 So.2d 514 (Fla. 4th DCA 1996).

¹⁸ *Mintus v. City of West Palm Beach*, 711 So.2d 1359 (Fla. 5th DCA 1991).

guardianship.¹⁹ Nevertheless, it has been held that only a custodian, not an employee, may assert an applicable statutory exemption.²⁰

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.”²¹ Unreasonable or excessive delays in producing public records can constitute an unlawful refusal to provide access.²²

III. Effect of Proposed Changes:

This bill provides that a custodian of public records or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records.

The bill also provides that a custodian of public records and his or her designee must respond to requests to inspect or copy records promptly and in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.

A custodian of public records or his or her designee must be available to respond to requests to inspect and copy public records during the regular business hours of the office at which public records are maintained.

The bill takes effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁹ *Id.*

²⁰ *Alterra Healthcare Corporation v. Estate of Shelley*, 827 So.2d 936, 940 (Fla. 2002).

²¹ *Tribune Company v. Cannella*, 458 So.2d 1075, 1079 (Fla. 1984), appeal dismissed sub nom., *DePerte v. Tribune Company*, 105 S.Ct 2315 (1985).

²² *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996), review denied, 684 So.2d 1353 (Fla. 1996).

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Corrections has reported that the bill may cause difficulties for the department because the phrase “regular business hours” is vague for correctional institutions which operate 24 hours a day.

VI. Technical Deficiencies:

None.

VII. Related Issues:

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 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 Dictionary²³ defines “promptly” to mean “1. On time; punctual. 2. Done without delay.” As such, it could be argued that the standard reduces the “reasonable” amount of time an agency has to respond to a public records request. Alternatively, it could be argued that there is a difference between the prompt response requirement in the proposed legislation and the reasonable production requirement in current law. In the latter case, a response would merely be an acknowledgement of the request which must be made promptly and in good faith while still allowing for a reasonable time for actual production of the record under s. 119.07(1)(a), F.S.

During the 2006 session, the Legislature passed HB 1097 (SB 2714) which has some similarities to this bill. HB 1097 provided that each agency head that designates a custodian is required to provide notice of the designation of that person. The notice would have been required to include the name, address, title, e-mail address, telephone number and other contact information. The notice also would have to have been posted in agency offices and on agency websites. The bill also expressly prohibited denying the existence of a public record and prohibited misleading someone regarding the existence of a record. Further, the bill required requests for public records

²³ Second College Edition, Houghton Mifflin Company (1982, 1985).

to be responded to promptly and in good faith, as well as required the custodian or designee to be available during working hours to respond to requests. The Governor vetoed this bill stating that

“[e]xisting law balances the importance of the public’s right to access records in a timely manner, the complexity of a record request, and the necessity of redacting those portions of a record which are confidential or exempt. This bill would reopen the entire body of law with little legislative discussion or guidance. . . . If “promptly” is interpreted to mean that an agency must produce records for inspection or copying as rapidly as possible under the circumstances, then there is no change to existing Florida law. However, some may argue that this new use of the word “promptly” to describe when the agency must respond reflects the legislature’s intent to impose a new standard: ‘without delay.’ This could require agencies either to set aside their primary missions to respond to public record requests immediately or to hire additional staff to ensure a more rapid response than is current practice and law. The legislature did not provide any additional funding or staff positions to comply with what the courts might interpret as a new standard.”

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

VIII. Summary of Amendments:

Barcode 535462 by Governmental Operations:

The amendment provides that a custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.

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