

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 1004

INTRODUCER: Senator Brandes

SUBJECT: Public Data

DATE: April 1, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	McVaney	GO	Pre-meeting
2.			ATD	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB 1004 creates public data inventory requirements.

Current law requires state executive branch agencies and local governments subject to the Public Records Act (Act) to prepare inventories of public records in their custody for use by the Department of State in its duties under the Act. This bill creates an unnumbered section of law with additional public data inventory and reporting requirements for the legislative, executive, and judicial branches of government, as well as for specified local government offices.

The bill specifies timelines by which the subject governmental agencies must submit public data inventories to the Secretary of State, who is tasked with collecting, analyzing, and creating a website for posting the public data inventories. The bill requires specified information to be included in the agencies' public data inventories.

The bill authorizes the Department of State:

- To use fees in the Records Management Trust Fund to implement the bill.
- To adopt rules to implement and administer the bill.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Public Records Access Requirements

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ (Act) guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵ The "custodian of public records" is 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.⁶ The Act does not apply to legislative or judicial records.⁷

Only the Legislature may create an exemption to public records requirements.⁸ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹⁰ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹¹

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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" to mean 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."

⁵ Section 119.07(1)(a), F.S.

⁶ Section 119.011(5), F.S.

⁷ See *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

⁸ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances (see *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (see Attorney General Opinion 85-62, August 1, 1985).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ The bill may, however, contain multiple exemptions that relate to one subject.

¹¹ FLA. CONST., art. I, s. 24(c).

Public Records Act: Retention and Inventory Requirements

The Act requires the Division of Library and Information Services of the Department of State (Division) to adopt rules to establish retention schedules and a disposal process for public records, with which other agencies must comply.¹² The Act also authorizes the Division to advise public officials on problems related to the preservation, creation, filing, and public accessibility of public records in their custody.¹³ To assist the Division, public officials must prepare an inclusive inventory of categories of public records in their custody. The Division must establish a time period for the retention or disposal of each series of records.¹⁴

Pursuant to its authority under the Act, the Division has developed a “Basics of Records Management Handbook” (handbook).¹⁵ In pertinent part, the handbook provides guidelines for record inventory procedures. The guidelines specify that, at a minimum, each inventory should identify and describe each record series created and maintained by the agency.¹⁶

A record series is a group of related public records arranged under a single filing arrangement or kept together as a unit (physically or intellectually) because they consist of the same form, relate to the same subject, result from the same activity, document a specific type of transaction, or have some other relationship arising from their creation, receipt, or use.¹⁷ Examples of record series might be personnel files, equipment maintenance and repair records, or procurement files. The handbook provides that the following information should be compiled for each record series:

- Record series title, which summarizes the form, function, and/or subject of the records.
- Description, which identifies the purpose and function of the record series with regard to the agency’s operation.
- Inclusive dates.
- Volume, which is usually expressed in terms of cubic feet.
- Retention schedule.
- Whether the record series constitutes “vital records,” which are those that are essential to the continuation of operations in an agency in the event of a disaster or emergency.¹⁸

Agencies do not currently submit their public record inventories to the Division because the relevant statute does not explicitly require them to do so.¹⁹

Records Management Trust Fund

The Florida State Archives is created within the Division to preserve public records (as defined in the Act), manuscripts, and other archival material that the Division determines has sufficient historical or other value to warrant their continued preservation and that have been accepted by

¹² Section 119.021(2)(a)-(b), F.S.

¹³ Section 119.021(2)(d), F.S.

¹⁴ *Id.*

¹⁵ Available online at <http://dlis.dos.state.fl.us/barm/handbooks/basics.pdf> (last viewed March 30, 2013).

¹⁶ “Basics of Records Management Handbook,” Department of State, at page 12.

¹⁷ Rule 1B-24, F.A.C.

¹⁸ “Basics of Records Management Handbook,” Department of State, at pages 12-13.

¹⁹ Phone call with Department of State staff on April 1, 2013.

the Division for deposit in its custody.²⁰ The Division may establish and maintain a schedule of fees which include, but are not limited to, restoration of archival materials, storage of archival materials, special research services, and publications.²¹

There is also created within the Division a records and information management program, which is tasked with a variety of duties relating to records and information management, preservation, and storage.²² The Division may charge fees for supplies and services, including, but not limited to, shipping containers, pickup, delivery, reference, and storage. Such fees must be based upon the actual cost of the supplies or service.²³

The Records Management Trust Fund is created within the Division to support the programs of the state archives and records and information management programs. It is funded with fees the Division collects for records management and archival services.²⁴

III. Effect of Proposed Changes:

The bill creates an unnumbered section of law that requires additional public record inventory requirements to those currently required by the Act.

The bill requires each agency to submit an inventory of all public data in its custody to the Secretary of State by July 1, 2014, and every 6 months thereafter. It defines “public data” to mean any public record made or received in connection with the official business of an agency, unless otherwise made confidential or exempt pursuant to law. It defines “agency” to mean any committee, unit, or office of the legislative branch of government as described in ch. 11, F.S.,²⁵ an agency as described in ch. 20, F.S.,²⁶ and any government entity under ch. 25,²⁷ 26,²⁸ 27,²⁹ 28,³⁰ 30,³¹ 34,³² and 35,³³ F.S.

²⁰ Section 257.35(1), F.S.

²¹ Section 257.35(5), F.S.

²² Section 257.36(1), F.S.

²³ Section 257.36(3), F.S.

²⁴ Section 257.375, F.S.

²⁵ Appears to include the Office of Legislative Services, Joint Legislative Auditing Committee, Auditor General, Office of Program and Policy Analysis and Government Accountability, Legislative Budget Commission, and Government Efficiency Task Force.

²⁶ Section 20.03(11), F.S., defines “agency” to mean an official, officer, commission, authority, council, committee, department, division, bureau, board, section, or another unit or entity of government. Therefore, the subject agencies in ch. 20, F.S., appear to be the Department of State, Department of Legal Affairs, Department of Financial Services, Department of Agriculture and Consumer Services, Department of Education, Board of Governors of the State University System, Department of Business and Professional Regulation, Department of Children and Families, Agency for Persons with Disabilities, Department of Law Enforcement, Department of Revenue, Department of Management Services, Department of Transportation, Department of Highway Safety and Motor Vehicles, Department of Environmental Protection, State Board of Administration, Department of Citrus, Florida Citrus Commission, Department of Corrections, Department of Juvenile Justice, Department of the Lottery, Parole Commission, Fish and Wildlife Conservation Commission, Department of Veterans’ Affairs, Department of Elderly Affairs, Agency for Health Care Administration, and Department of Health, Department of Economic Opportunity.

²⁷ Appears to include the Florida Supreme Court and the rest of the state courts system.

²⁸ Includes circuit courts.

²⁹ Appears to include state attorney offices, public defender offices, criminal conflict and civil regional counsel offices.

³⁰ Appears to include the clerks of the circuit courts and the Florida Clerks of Court Operations Corporation.

³¹ Includes sheriff offices.

The bill's inventory requirements, therefore, apply to a different group of governmental entities than do the existing Act requirements, which apply to state executive branch agencies and local governments.

The range of information required by the bill is also different from that currently required by the Act, or by Division rule. The bill authorizes the Secretary of State to develop guidelines for the processing and submission of the public data inventories; however, each inventory must include the following information for each type or category of data held by the agency:

- A description of the data, including a record layout.
- The format, source, quality, and accuracy of the data.
- Whether the data is currently available to the public without a public records request pursuant to the Act.
- A description of data not currently available to the public without a public records request pursuant to the Act, but which the agency recommends be made publicly available.
- A description of all data that is confidential or exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.
- An explanation of any data-sharing activities with any other agency.

The bill requires the Secretary of State to establish a website on which the inventories of public data must be posted by January 1, 2015. At a minimum, the website must include:

- For each agency, the information required to be submitted in its inventory.
- The relationship of the data reported by one agency to another agency's data, including, but not limited to, dependence, association, commonality, similarity, and affinity.
- A comparison of existing data distribution methods.

The bill authorizes the Department of State to use fees collected and deposited into the Records Management Trust Fund for the purpose of paying for costs it incurs in administering the bill's provisions.

The bill authorizes the Department of State to adopt rules to implement and administer the bill's provisions.

The bill's effective date is July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The Florida Constitution provides that no county or municipality may be bound by any general law that mandates it to spend funds or to take an action requiring the expenditure of funds unless the Legislature determines that such law fulfills an important state interest

³² Includes county courts.

³³ Includes district courts of appeal.

and one of specified other requirements is met.³⁴ Certain laws, including those with an insignificant fiscal impact, are exempt from the mandates restrictions of the section.³⁵

This bill requires counties to take actions that may require the expenditure of funds. If so, the bill may be exempt if the fiscal impact is insignificant.

If the bill has a significant fiscal impact, it may still qualify for an exception if it contains a legislative finding that it fulfills an important state interest *and* meets one of the other specified requirements. The bill does not contain a finding that it fulfills an important state interest; however, it could satisfy one of the additional specified requirements by passing with a two-thirds vote of the membership of each house.³⁶

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida Supreme Court has ruled that when acting pursuant to its Article V state constitutional powers, the judicial branch, including clerks of the circuit court when acting as an arm of the judicial branch, is subject to the oversight and control of the Supreme Court of Florida, not the Legislature.³⁷ It is unclear whether the separation of

³⁴ Article VII, s. 18(a) of the Florida Constitution. The specified other requirements are:

- Funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure;
- The Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality;
- The law requiring such expenditure is approved by two-thirds of the membership in each house of the Legislature;
- The expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; *or*
- The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance. *Id.*

³⁵ Article VII, s. 18(d) of the Florida Constitution. Other laws that are exempt from the mandates requirements are:

- Laws adopted to require funding of pension benefits existing on the effective date of Art. VII, s. 18 of the Florida Constitution;
- Criminal laws;
- Election laws;
- The general appropriations act;
- Special appropriations acts;
- Laws reauthorizing but not expanding then-existing statutory authority; and
- Laws creating, modifying, or repealing noncriminal infractions. *Id.*

³⁶ A two-thirds vote of the membership of each house requires a two-thirds vote of *all* members, not just of those present and voting.

³⁷ See *Times Publishing Company v. Richard Ake*, 660 So.2d 255 (Fla. 1995) and *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

powers doctrine³⁸ would prevent the applicability of the bill's provisions, including the Department of State's rulemaking authority, to records of the judicial branch.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill is likely to require indeterminate costs for agencies that are required to comply with the bill's public data inventory requirements.

According to the Department of State (Department), the twice-a-year data collection coordination, data analysis, training of agency staff, and web reporting would require additional staffing as well as development and maintenance of technical infrastructure for reporting and public access. Therefore, the Department states it would require one full-time-equivalent position at a rate of \$30,989 to collect, analyze, and compile the information from the agencies and to develop and manage the public data program; the Department states that the costs for the necessary technical infrastructure are currently indeterminate, as the definition and amount of public data is unknown.³⁹

Although the bill authorizes the Department to use funds from the Records Management Trust Fund to administer the bill's provisions, because the bill does not specifically authorize the collection of additional fees, the bill may still increase costs for the Department because the trust funds are collected from and used to recoup costs incurred by the performance of the Division of Library and Information Services' archival and records management duties.

VI. Technical Deficiencies:

The bill's public data inventory requirements apply to the legislative, executive, and judicial branches of state government, as well as to sheriffs. However, the information that must be included in an inventory:

- Includes references to public records requests pursuant to the Public Records Act, which only applies to state executive branch agencies and local governments. Therefore, the Legislature may wish to remove the references to the Public Records Act in that context.

³⁸ Section 3, Art. II of the Florida Constitution provides that, "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

³⁹ Department of State Bill Analysis for Senate Bill 1004, on file with the Senate Governmental Oversight and Accountability Committee.

- Includes a description of all data that is confidential or exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution. Chapter 119, F.S., the Public Records Act, only applies to state executive branch agencies and local governments; therefore, the Legislature may wish to replace “and” with “or.”

The bill requires agencies to submit inventories of “public data,” which it defines to mean any public record made or received in connection with the official business of an agency, unless otherwise made confidential or exempt pursuant to law; therefore, the definition excludes confidential and exempt data from inclusion in the inventory. The bill also requires, however, that an inventory include a description of all data that is confidential and exempt, which implies that confidential and exempt data must be included in the inventory. The Legislature may wish to clarify whether confidential and exempt data must be included in a public data inventory.

VII. Related Issues:

Rulemaking

The constitutional separation of powers doctrine prevents the Legislature from delegating its constitutional duties. Because legislative power involves the exercise of policy-related discretion over the content of law, any discretion given an agency to implement a rule must be “pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.”⁴⁰

The bill grants rulemaking authority to the Department of State to implement provisions of the bill generally, and also grants specific authority to the Secretary of State to develop guidelines for the processing and submission of public data inventories. For clarity, the Legislature may wish to consolidate the two grants of rulemaking authority.

The bill appears to provide sufficient standards for the Department of State’s implementation of the bill’s provisions.

Drafting Comments

The bill defines “public data” to mean any public record made or received in connection with the official business of an agency, unless otherwise made confidential or exempt pursuant to law; however, current law⁴¹ contains a definition for “public records” that may create confusion because it:

- Applies to state executive branch agencies and local governments, which is a different scope of applicable entities than those provided by this bill;
- Includes the phrase “made or received . . . in connection with the transaction of official business by any agency,” which is duplicative of additional language provided in this bill’s definition of “public data;” and
- Includes records regardless of whether they are confidential or exempt.

⁴⁰ *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

⁴¹ Section 119.011(12), F.S. See footnote 4 for definition.

Therefore, the Legislature may wish to clarify the definition of “public data.”

The bill assigns some duties to the Secretary of State and others to the Department of State. For clarity, the Legislature may wish to assign all duties to the Department of State.

It is unclear what would be included in “any government entity under” ch. 25, 26, 27, 28, 30, 34, and 35, F.S. For example, it is unclear whether the Florida Clerks of Court Operations Corporation, a public corporation and state budget entity but not specifically titled a unit of government, would constitute a “governmental entity.”

The bill requires the Secretary of State to establish a website on which the public data inventories must be posted by January

Trust Fund Fees

The bill provides that the Department of State may use fees collected and deposited into the Records Management Trust Fund (trust fund) to pay costs incurred by administering the bill’s provisions. The trust fund, however, is funded with fees the Division collects for the provision of its statutorily-required archival and records management services. Such fees allow the Division to recoup the costs it incurs in the course of providing such services.

It is unclear whether the bill is intended to authorize the Division to collect additional fees for costs it incurs while implementing the bill’s provisions.

Other Comments: Department of Revenue

In its bill analysis, the Department of Revenue states that:

- Given current resources, it would be difficult for it to implement the bill’s provisions by July 1, 2014.
- Posting public data inventories that include data location may cause the Department of Revenue’s data storage system to be more vulnerable to breach.⁴²

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial 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.

⁴² Department of Revenue Bill Analysis for Senate Bill 1004, on file with the Senate Governmental Oversight and Accountability Committee.