

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 Appropriations

BILL: SB 1648

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Public Records and Meetings

DATE: March 13, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Kim</u>	<u>McVaney</u>		GO SPB 7064 as introduced
1.	<u>Betta</u>	<u>Kynoch</u>	<u>AP</u>	Favorable

I. Summary:

SB 1648 substantially amends the public records and public meetings laws. This bill clarifies how the public may access records and how agencies should respond. This bill also outlines what an agency may charge as a service fee and incorporates the cost of litigating attorney fees if an agency loses an enforcement action. This bill places additional requirements on organizations that accept membership fees from the government and on businesses contracted with the government.

The bill:

- Requires organizations that accept public funds for membership dues or fees keep records related to those funds and members. Organizations will also be required to make records it gives its members or the public available for inspection and copying.
- Provides definitions for “confidential and exempt” and “exempt” records consistent with court interpretations.
- Provides that public records requests do not need to be made in writing unless there is a specific statutory requirement present. If a public records request must be made in writing, the records custodian must provide the statutory citation to the requestor.
- Provides that the fee charged for satisfying a voluminous or complicated public records request is limited to the cost of the lowest paid personnel capable of performing the work, and excludes employer-paid benefits.
- Requires a private contractor acting on behalf of a public agency to inform the agency before denying a public records request and to notify the agency if the private contractor is sued for failing to provide public records.
- Requires agencies to train their employees regarding Florida’s public records laws.
- Specifies that the attorney’s fees to which a prevailing public records plaintiff is entitled includes the fees incurred in litigating entitlement to and amount of attorney fees. Courts will be required to award the costs of enforcement, including attorney’s fees, on each count on which the plaintiff prevailed.

- Relieves a plaintiff in a public records or public meetings enforcement action who claims attorney fees from being required to serve the Department of Financial Services (DFS) with the claim for attorney fees. A state agency covered by the DFS will be given the option of informing the DFS that a claim for attorney fees has been filed.

The fiscal impact of this bill, if any, is indeterminate.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution specifies requirements for public access to government records and meetings. It 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 Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.³

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶ The Sunshine Law⁷ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ 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 "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁶ Section 119.07(1)(a), F.S.

⁷ Section 286.011, F.S.

⁸ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Art. III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

Only the Legislature may create an exemption to public records or open meetings requirements.⁹ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ 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 provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

Section 119.01, F.S. General state policy on public records.¹³

Section 119.01(3), F.S., states that if state funds are used to pay dues for any person or organization, the financial and membership records of that organization are subject to public inspection and copying.

Section 119.07, F.S. Inspection and copying of records; photographing public records: fees; exemptions.

Section 119.07(1), F.S., describes the duties of the custodian of public records. These duties include acknowledging a public records request and responding in good faith.¹⁴ A records custodian must also redact exempt information and provide the remainder to the public.¹⁵ If a records custodian believes that all or part of a record is exempt from public inspection, the records custodian is required to state the basis and statutory citation of the exemption.¹⁶

Section 119.07(4), F.S., currently permits the records custodian to charge fees for making copies or for supervising the public while they inspect or photograph public records. If the nature or volume of a public records request requires extensive use of technology, clerical staff or supervisory personal, an agency may charge a reasonable special service charge in addition to copying fees.¹⁷

⁹ 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).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c).

¹³ Section 119.01, F.S., provides that it is the general policy of the state of Florida that all state, agency, county and municipal records are open to the public for inspection and copying. This section provides an overview of an agency's duty to provide records to the public.

¹⁴ Section 119.07(1)(c), F.S.

¹⁵ Section 119.07(1)(d), F.S.

¹⁶ Section 119.07(1)(e), F.S.

¹⁷ Section 119.07(4)(d), F.S. Section 119.07(4)(d), F.S. also provides that the special service charge may include "the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required." Florida has long required those who seek public records "defray the extraordinary costs associated with their requests." *Board of County Commissioners of Highland County v. Colby*, 976 So.2d 31,35 (2008). The court found "the statute at issue here employs the term "labor cost," the plain meaning of which is more inclusive than the

Section 119.0701, F.S. Contracts; public records.

Agencies can contract with private businesses to offer services that the agency would normally perform. Section 119.0701, F.S., requires a business that acts on behalf of a government agency to comply with public records laws.

Section 119.12, F.S. Attorney fees.

If an agency fails to comply with a public records request, the requestor can sue the agency to get access to public records in an enforcement action. The requestor can also sue the agency for “the reasonable costs of the enforcement,” which include reasonable attorney fees.¹⁸ When the requestor sues a state agency for attorney fees, he or she is also required to serve the DFS.¹⁹

Section 286.011, F.S. Public meetings and records; public inspection; criminal and civil penalties.

Chapter 286, F.S., requires that government boards and commissions must be open to the public. Failure to provide reasonable notice to the public invalidates any official business conducted during a meeting.²⁰ Section 286.011(4), F.S., provides that a person or entity can sue a board or commission in order to enforce public meetings laws and for attorney fees. Section 286.011(4), F.S., permits the court to award attorney fees to a plaintiff if a board or commission violates public meetings laws and also permits the court to award attorney fees to the board or commission if a plaintiff files a lawsuit frivolously or in bad faith.

III. Effect of Proposed Changes:

Section 1 amends s. 119.01(3), F.S., to require organizations that accept public funds as membership dues make records they provide to their members or to the public available for public inspection and copying. Information protected by state or federal law will remain exempt from disclosure. An editorial change has also been made which eliminates enumerated organizations in favor of the definition of a legal person.

Section 2 amends s. 119.011, F.S., to codify the current case law interpretation of the terms “confidential and exempt” and “exempt.”²¹ The term “confidential and exempt” is defined as a record that is statutorily exempt and can only be released to the people or entities specified in the exemption. The term “exempt” is defined as a record which is statutorily exempt, but may be released at the discretion of the records custodian. The records custodian will be required to

words “wages” or “salary.” That benefits may be a significant component of labor costs is widely understood. *Board of County Commissioners*, 976 So.2d at 36.

¹⁸ Section 119.12, F.S.

¹⁹ Section 284.30, F.S. Generally, when a plaintiff sues a state agency for attorney fees, the plaintiff is required to serve a copy of the claim for attorney fees on the Department of Financial Services State Risk Management Trust Fund in addition to serving a copy of the lawsuit on the agency itself. The Department of Financial Services is entitled to participate in the defense of the state in a claim for attorney fees and any appeal. See also section 284.31, F.S.

²⁰ Section 286.011(1), F.S.

²¹ 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).

determine if there is a statutory or substantial need for disclosure before releasing a record. In addition, the elements of “active” (as they relate to criminal intelligence and investigative information) are placed together for clarity.

Section 3 amends s. 119.07(1), F.S., to provide that public records requests are not required to be made in writing.²² If the law requires a public records request to be made in writing, the records custodian must provide the statutory citation to the requestor.²³ Special service charges must be limited to the lowest paid personnel capable of providing the needed assistance and may not include the cost of health insurance premiums or other benefits paid by an agency.

Section 4 amends s. 119.0701, F.S., to require a business acting on behalf of an agency to notify the agency before denying a public records request. The business is required to inform the agency of a public records enforcement lawsuit.

Section 5 creates s. 119.0702, F.S., to require agencies to provide public records training to each of their employees, commensurate with his or her duties.

Section 6 amends s. 119.12, F.S., to expand the definition of “reasonable cost enforcement” to include the attorney fees incurred when a requestor sues for attorney fees. Courts must award attorney fees to the requestor on the portions of the enforcement action he or she won. This new law does not entitle an agency to recover costs or attorney fees when the agency prevails. Under current law, anyone who sues the State of Florida or its agencies for attorney fees must serve a copy of the claim for attorney fees on the DFS. This section amends the law so that a plaintiff in a public records enforcement action who also claims attorney fees will not be required to serve a copy of the claim for attorney fees on the DFS. If an agency intends to have the DFS cover its attorney fees, the agency will be required to inform the DFS.

Section 7 amends s. 286.011, F.S., to eliminate the requirement that a plaintiff suing a state entity to enforce public meetings laws and claiming attorney fees serve a copy of the claim for attorney fees on the DFS. If a state entity intends to have the DFS cover its attorney fees, the state entity must inform the DFS of the claim for attorney fees.

Section 8 amends s. 257.35, F.S., to correct cross references and to make editorial changes.

Section 9 amends s. 383.402, F.S., to correct cross references and to make editorial changes.

Section 10 amends s. 497.140, F.S., to correct cross references.

Section 11 amends s. 627.311, F.S., to correct cross references.

Section 12 amends s. 627.351, F.S., to correct cross references and to make editorial changes.

Section 13 amends s. 943.031, F.S., to make editorial changes.

²² In the footnote, the court stated “[t]here is no requirement in the Public Records Act that requests for records must be in writing.” *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So.2d 302 (Fla. 3d DCA 2001), rehearing denied.

²³ Section 119.07(1)(e), F.S., similarly provides that a records custodian must provide the basis and statutory citation if the records custodian believes that all or part of a record is exempt from public inspection and copying.

Section 14 amends s. 943.0313, F.S., to correct cross references and to make editorial changes.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to 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, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill substantially changes public records law and public meetings law but does not create any new public records or public meetings exemptions. This bill does not require a two-thirds vote.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

SB 1648 does not appear to require new taxes.

Section 119.01(3)(b)2., F.S., as amended, increases the types of records which must be retained and produced as public records by an entity that accepts state funds for membership dues. It is unknown if costs will be passed on to members in the form of higher fees or dues.

It remains to be determined if the special service charges currently being assessed to the public pursuant to s. 119.07(4)(d), F.S., will be reduced by this bill.

B. Private Sector Impact:

Section 119.01(3)(b)2., F.S., as amended, increases the types of records which must be retained and produced as public records by an organization that accepts state funds as membership dues. An organization will be required to make those records available for public inspection and copying and, therefore, personnel costs and copying requirements may increase expenditures.

As amended, s. 119.0701, F.S., may increase costs on the private sector. Existing contracts with government agencies and businesses may need to be renegotiated since this statute imposes new duties on businesses.

Section 119.07(4)(d), F.S., as amended, may reduce the special services charges assessed to members of the public. It is unknown if agencies have been including their employer contributions to their employees' health insurance premiums or other employer-paid benefits when assessing special service charges.

Section 119.12, F.S., as amended, may decrease the cost of filing an enforcement action and the associated attorney fees since a plaintiff will not be obligated to serve legal notice on the Department of Financial Services when claiming attorney fees.

Businesses acting on behalf of a government agency may experience increases in costs similar to those that the government sector may encounter if this bill is enacted.

C. Government Sector Impact:

Section 119.01(3)(b)2., F.S., as amended, increases the types of records which must be kept and produced as public records by an entity that accepts state funds for membership dues. It is unknown if costs will be passed on to members in the form of higher fees or dues.

Section 119.07(1)(c), F.S., as amended, puts an additional burden on a records custodian by requiring the custodian to provide the statutory citation for each public records request which must be made in writing. Records custodians may have to spend more time consulting with legal counsel in order to meet this statutory requirement, but it is unclear if this will increase government expenditures.

Section 119.07(4)(d), F.S., as amended, may require government entities expend resources in order to assess and calculate which clerical or supervisory staff is the lowest paid person capable of providing requisite supervision if a public record is being inspected or resources are used. If a municipality or a county currently includes the cost of employee benefits as part of its special service charge, then its ability to defray the cost of providing public records may be adversely impacted.²⁴

It is unknown if state agencies have been including their employer contributions to their employees' health insurance premiums or other employer-paid benefits when assessing special service charges. If a state agency has been including the cost of employee benefits as part of its special service charge, then its ability to defray the cost of providing public records may be adversely impacted.²⁵

As amended, Section 119.0701, F.S., may increase government expenditures because existing contracts may have to be renegotiated or amended.

Section 119.0702, F.S., which is a new provision, may increase costs on agencies because the agency will be statutorily required to train all of their employees about public records laws.

²⁴ See s. 119.07(4)(d), F.S. and *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d 31 (2008).

²⁵ See s. 119.07(4)(d), F.S. An agency could have relied on *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d 31 (2008) and included benefits when calculating a special service charge.

Sections 119.12 and 284.011(4)(b), F.S., as amended, may increase the amount of attorney fees paid by agencies. It is unclear if the state or agencies will experience an increase in costs if agencies are required to provide notice to DFS when a claim for attorney fees are filed. It is unclear whether an agency's risk management allotment will be affected if it fails to provide timely notice to the DFS when a claim for attorney fees is made.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.01, 119.011, 119.07, 119.0701, 119.12 and 286.011.

This bill creates section 119.0702 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.