

**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.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on General Government

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BILL: CS/SB 1284

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Soto

SUBJECT: Maintenance of Agency Final Orders

DATE: April 7, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 1284 revises the requirements governing the maintenance of all agency final orders and requires each state agency to electronically transmit specified final orders rendered on or after July 1, 2015, to the electronic database of the Division of Administrative Hearings (DOAH) within 90 days of rendering such order. Before electronically transmitting agency final orders to DOAH's database, each agency must redact all information in the document which is exempt or confidential and exempt from public records requirements. The bill provides database requirements for the DOAH.

The bill also requires that each state agency maintain a list of all final orders that are not required to be electronically transmitted to the DOAH's database. A state agency must maintain a subject-matter index for final orders rendered before July 1, 2015, and identify the location of this index on the agency's website. The DOAH's database will constitute the official compilation of administrative final orders rendered after July 1, 2015, for each agency.

The bill revises the duties of the Department of State (DOS) to coordinate the transmittal and listing of agency final orders. The DOS is required to provide standards and guidelines for the certification, electronic transmittal, and maintenance of agency final orders in DOAH's database.

The bill authorizes the DOS to adopt rules that are binding on state agencies and the DOAH, which acts in the capacity of official compiler of final orders. The DOS is also authorized to designate an alternative official compiler under certain circumstances.

Further, the technical assistance advisements issued by the Department of Revenue (DOR) continue to be exempt from the final order maintenance requirements specified in s. 120.53, F.S.

The bill may have a minimal, indeterminate fiscal impact on some state agencies not presently submitting electronic copies of their final orders to the DOAH. The bill may reduce some agency costs associated with reporting or indexing and maintaining final orders for public access.

The bill has an effective date of July 1, 2015.

## II. Present Situation:

### Administrative Procedure Act

Chapter 120, F.S., known as the Administrative Procedure Act (APA),<sup>1</sup> regulates administrative rulemaking, administrative enforcement and administrative resolution of disputes arising out of administrative actions of most state agencies and some subdivisions of state government. The term “agency” is defined in s. 120.52(1), F.S., as:

- Each state officer and state department, and departmental unit described in s. 20.04, F.S.<sup>2</sup>
- The Board of Governors of the State University System, the Commission on Ethics, and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- A regional water supply authority.
- A regional planning agency.
- A multicounty special district with a majority of its governing board comprised of non-elected persons.
- Educational units.
- Each entity described in chs. 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.<sup>3</sup>

The definition of “agency” also includes the Governor<sup>4</sup> in the exercise of all executive powers other than those derived from the State Constitution.

Administrative actions authorized by law and regulated by the APA include adoption of a rule,<sup>5</sup> granting or denying a permit or license, an order enforcing a law or rule that assesses a fine or other discipline and final decisions in administrative disputes or other matters resulting in an agency decision. Such disputes include challenges to the validity of a rule or proposed rule or

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<sup>1</sup> Section 120.51, F.S.

<sup>2</sup> Section 20.04, F.S., sets the structure of the executive branch of state government.

<sup>3</sup> The definition of agency expressly excludes certain legal entities or organizations found in chs. 343, 348, 349 and 361, F.S., and ss. 339.175 and 163.01(7), F.S.

<sup>4</sup> Section 120.52(1)(a), F.S.

<sup>5</sup> Section 120.54, F.S.

challenges to agency reliance on unadopted rules,<sup>6</sup> as well as challenges to other proposed agency actions which affect substantial interests of any party.<sup>7</sup> In addition to disputes, agency action occurs when the agency acts on a petition for a declaratory statement<sup>8</sup> or settles a dispute through mediation.<sup>9</sup>

### Agency Final Orders

Section 120.52(7), F.S., defines the term “final order,” in pertinent part, as “a written final decision which results from a proceeding under ss. 120.56,<sup>10</sup> 120.565,<sup>11</sup> 120.569,<sup>12</sup> 120.57,<sup>13</sup> 120.573,<sup>14</sup> or 120.574, F.S.,<sup>15</sup> which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it.”

The APA requires agencies to “maintain” all final orders (with certain exceptions) and a hierarchical subject-matter index thereof, allowing orders to be located and publicly accessed for research or copying.<sup>16</sup> One purpose of the requirement was to enhance public notice of agency policy expressed in precedents.<sup>17</sup> In lieu of the requirement for making available for public inspection and copying a hierarchical subject-matter index of agency orders, the APA authorizes agencies to maintain an electronic database of final orders that allow public users to research and retrieve the full text of final orders using common logical search terms.<sup>18</sup>

Currently, state agencies must index the following within 120 days of rendering:<sup>19</sup>

- Each final order resulting from a proceeding under s. 120.57, F.S., or s. 120.573, F.S.
- Each final agency order rendered pursuant to s. 120.57(4), F.S.,<sup>20</sup> which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.

<sup>6</sup> Section 120.56, F.S.

<sup>7</sup> Section 120.569, F.S.

<sup>8</sup> Section 120.565, F.S.

<sup>9</sup> Section 120.573, F.S.

<sup>10</sup> Section 120.56, F.S., provides procedures for challenging the validity of an agency’s existing rule, proposed rule, agency statements defined as rules, and emergency rules.

<sup>11</sup> Section 120.565, F.S., governs procedures for requesting a declaratory statement from an agency by a substantially affected person regarding the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the person’s particular set of circumstances.

<sup>12</sup> Section 120.569, F.S., governs procedures which affect substantial interests.

<sup>13</sup> Section 120.57, F.S., provides additional procedures for particular cases regarding hearings involving disputed issues of material fact and hearings not involving disputed issues of material fact.

<sup>14</sup> Section 120.573, F.S., governs procedures for the mediation of disputes of agency action that affects substantial interests.

<sup>15</sup> Section 120.574, F.S., governs summary hearing procedures.

<sup>16</sup> Section 120.53(1)(a)2.a., F.S.

<sup>17</sup> *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 582 (1<sup>st</sup> DCA 1977). Also, see *Gessler v. Dep’t of Bus. & Prof. Reg.*, 627 So.2d 501, 503 (Fla. 4<sup>th</sup> DCA 1993) (“Persons have the right to examine agency precedent and the right to know the factual basis and policy reasons for agency action.”).

<sup>18</sup> Section 120.53(1)(a)2.b., F.S.

<sup>19</sup> Section 120.53(1)(b), F.S.

<sup>20</sup> Section 120.57(4), F.S., provides that “[u]nless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.”

- Each declaratory statement issued by an agency.
- Each final order resulting from a proceeding under s. 120.56, F.S., or s. 120.574, F.S.

Agency final orders may be maintained in hard copy in agency files, published by a reporter<sup>21</sup> or made available online in an electronic database. These various methods can make finding agency final orders difficult at times. The Ad Hoc Orders Access Committee of the Florida Bar's Administrative Law Section surveyed state agencies to gather information on how agencies index final orders and where final orders may be accessed.<sup>22</sup> The survey revealed that some agencies still require a public records request to access their index and copies of final orders, or they simply identify a particular agency employee to contact for access. Such methods are not always in keeping with the information age. Florida's public records law require agencies to permanently maintain records of agency final orders.<sup>23</sup>

### **Coordination of Indexing of Final Orders by Department of State**

In addition to its supervisory role in the archiving of state records,<sup>24</sup> the DOS is required to administer the coordination of the indexing, management, preservation, and availability of agency final orders that must be indexed or listed in accordance with s. 120.53(1), F.S.<sup>25</sup> The DOS has rulemaking authority over the system of indexing that agencies may use<sup>26</sup> and the storage and retrieval systems used to provide access.<sup>27</sup> The DOS may approve more than one system.<sup>28</sup> Authorized storage and retrieval systems for agencies include reporters, microfilm, automated systems or any other system considered appropriate by the DOS.<sup>29</sup> Also, the DOS is required to determine which final orders agencies must index.<sup>30</sup> Agencies must receive approval in writing from the DOS regarding various provisions for indexing final orders.<sup>31</sup>

### **Division of Administrative Hearings**

The DOAH is a state agency consisting of an independent group of administrative law judges (ALJs) that presides over disputes under the APA and other state laws.<sup>32</sup> The DOAH is placed administratively under the Department of Management Services (DMS);<sup>33</sup> however, DOAH is not subject to any control, supervision, or direction by the DMS. The director of the DOAH, who

<sup>21</sup> Section 120.53(2)(a), F.S., provides, in part, that “[a]n agency may comply with subparagraphs (1)(a)1. and 2. by designating an official reporter to publish and index by subject matter each agency order that must be indexed and made available to the public . . .”

<sup>22</sup> Jowanna N. Oates, *Access to Agency Final Orders*, The Florida Bar, Administrative Law Section Newsletter, Vol. XXXIV, No. 4 (June 2013). For an updated list on accessing agency final orders, see <http://www.fladminlaw.org/pdf/information-about-accessing-agency-final-orders.pdf>.

<sup>23</sup> Section 119.021(3), F.S.

<sup>24</sup> Section 257.35, F.S., Also, see s. 15.02, F.S.

<sup>25</sup> Section 120.533(1), F.S.

<sup>26</sup> Section 120.533(2), F.S.

<sup>27</sup> Section 120.533(3), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Section 120.533(4), F.S. The rules adopted under this section are found in ch. 1B-32, F.A.C.

<sup>31</sup> Section 120.53(1)(c), F.S.

<sup>32</sup> Section 120.65, F.S.

<sup>33</sup> Section 120.65(1), F.S.

also serves as chief administrative law judge, has effective administrative control over DOAH, its resources and operations.<sup>34</sup>

Since the 2008 amendments to the APA,<sup>35</sup> agencies have been permitted to satisfy the final order index requirement by electronically transmitting a copy of its final orders to DOAH for posting on its website.<sup>36</sup> Many agencies use the DOAH alternative.<sup>37</sup> There does not appear to be any law requiring the DOAH to maintain its electronic database that is accessible for searching orders. However, the DOS has adopted a rule governing the use of a database for maintaining final orders. The rule provides:

If an electronic database is used by an agency, it shall allow users to research and retrieve agency orders by searching the text of the order and descriptive information about the order, which shall contain, at a minimum, major subject headings. To promote consistent, reliable indexing, the indexing system for an electronic database shall have fixed fields to ensure common usage of search terms by anyone that uses the system.<sup>38</sup>

### **Department of Revenue (DOR) Technical Assistance Advisements**

Upon request, the DOR issues informal technical assistance regarding certain tax consequences.<sup>39</sup> Currently, these technical assistance advisements are exempted from the requirements of s. 120.53(1), F.S.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 119.021(3), F.S., to make conforming changes regarding the requirement of each state agency to permanently maintain all final orders rendered before July 1, 2015, which were indexed or listed pursuant to s. 120.53, F.S., and agency final orders rendered on or after July 1, 2015, which must be listed or copies of which must be electronically transmitted to the DOAH pursuant to s. 120.53, F.S.

**Section 2** amends s. 120.53, F.S., to require each state agency, in addition to the agency requirement of maintaining records in accordance with s. 119.021(3), F.S., to electronically

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<sup>34</sup> *Id.*

<sup>35</sup> Ch. 2008-104, L.O.F.

<sup>36</sup> Section 120.53(2)(a), F.S., provides, in part that that “[a]n agency may comply with subparagraphs (1)(a)1. and 2. by . . . electronically transmitting to the division a copy of such orders for posting on the division’s website.” Also, see DOAH’s website at <https://www.doah.state.fl.us/FLAIO/>.

<sup>37</sup> The DOAH website lists the following agencies having final orders accessible: Department of Agriculture and Consumer Services, Agency for Persons with Disabilities, Department of Children and Family Services, Department of Corrections, Department of Community Affairs, Department of Economic Opportunity, Department of Environmental Protection, Department of Health, Department of Education, Department of State, Department of Business and Professional Regulation, Florida Housing Finance Corporation, Office of the Governor, Agency for Health Care Administration, and Department of Highway Safety and Motor Vehicles.

<sup>38</sup> Chapter 1B-32.002(2)(e), F.A.C.

<sup>39</sup> Section 213.22(1), F.S.

transmit a certified text-searchable copy of each agency final orders rendered on or after July 1, 2015, to a centralized electronic database maintained by the DOAH.

The DOAH database must allow users to search and retrieve the full texts of agency final orders by the:

- Name of the agency that issued the final order.
- Date the final agency order was issued.
- Type of final order.
- Subject of the final order.
- Terms contained in the text of the final order.

The types of agency final orders that must be electronically transmitted to DOAH's database include the following:

- Each final order resulting from a proceeding under s. 120.57, F.S., or s. 120.573, F.S.
- Each final order rendered pursuant to s. 120.57(4), F.S., which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.
- Each declaratory statement issued by an agency.
- Each final order resulting from a proceeding under s. 120.56, F.S., or s. 120.574, F.S.

Also, the bill requires each agency to maintain a list of all agency final orders rendered pursuant to s. 120.57(4), F.S., which are not required to be electronically transmitted to DOAH's database.

The bill requires each agency to maintain a subject matter index for final orders rendered before July 1, 2015, and the agency must identify where this index is located on its website.

Within 90 days after the final order is rendered, each agency must electronically transmit the order to DOAH's database. If the final order is rendered pursuant to s. 120.57(4), F.S., the agency must maintain such order on its list as required by this bill.

Additionally, for cases where DOAH has final order authority, the DOAH must transmit the final order to its database within 90 days of issuance of such order.

The bill authorizes an agency to electronically transmit to DOAH's database certified copies of all final orders rendered before July 1, 2015, that are required to be placed in a subject-matter index. The DOAH's centralized electronic database constitutes the official compilation of administrative final orders rendered on or after July 1, 2015.

The bill requires each agency to redact all information in a final order that is exempt or confidential and exempt from public records requirements before electronically transmitting the agency final order to DOAH.

**Section 3** amends s. 120.533, F.S., to require the Department of State (DOS) to coordinate the transmittal of agency final orders pursuant to s. 120.53, F.S. The DOS is required to provide for storage and retrieval systems to be maintained by agencies pursuant to s. 120.53(5), F.S., for

indexing and making available agency final orders by subject matter. The DOS is authorized to approve more than one of these systems.

The DOS is required to provide standards and guidelines for the certification and electronic transmittal of copies of agency final orders to DOAH in accordance with s. 120.53, F.S., and for protection of integrity and authenticity of information publicly accessible through the electronic database.

The DOS is also required to provide standards and guidelines to ensure security of copies of agency final orders transmitted and maintained in DOAH's electronic database.

The bill authorizes the DOS to adopt rules to administer its responsibilities that are binding on state agencies and DOAH, which acts in capacity of official compiler of administrative final orders under s. 120.53, F.S. The DOS is also authorized to designate an alternative official compiler if the Administration Commission<sup>40</sup> determines that DOAH's performance is unsatisfactory.

**Section 4** amends s. 213.22, F.S., to make conforming changes regarding the non-applicability of s. 120.53, F.S., requirements to technical assistance advisements issued by the DOR.

**Section 5** provides an effective date of July 1, 2015.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 1284 may have a slight positive economic impact on the private sector by offering easy internet access to agency orders that may only be accessible in person under current law.

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<sup>40</sup> Section 14.202, F.S. Also, see s. 120.65, F.S.

**C. Government Sector Impact:**

The bill may have a minimal fiscal impact on some state agencies that do not presently use a searchable electronic database of final orders; however this impact is should be minimal and most likely could be absorbed within agency resources. The bill could reduce some agency costs associated with reporting or indexing and maintaining final orders for public access.

According to the DOAH, the agency supports the uniform indexing and maintenance of final orders set forth in the bill, and it can maintain all final orders on its website and host full public access with current resources, personnel and equipment.<sup>41</sup>

According to the Department of State (DOS), rulemaking, coordinating and providing standards and guidelines related to the certification, electronic transmittal, and maintenance of agency final orders in the DOAH's database may have a minimal fiscal impact that can be absorbed with existing resources. The fiscal impact related to authorizing the DOS to provide an alternative official compiler if the Administration Commission determines that the DOAH's performance is unsatisfactory is indeterminate at this time.<sup>42</sup>

**VI. Technical Deficiencies:**

Amendments to s. 120.533(7), F.S. contained in Section 3 of the bill, requires the DOAH to act as the official compiler of "administrative final orders" under s. 120.53, F.S. The bill consistently refers to "agency final orders". The use of the word "administrative" may create ambiguity in regards to the DOAH's responsibilities under this legislation. It is recommended that the word "administrative" be deleted and replaced with the word "agency."

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 119.021, 120.53, 120.533, and 213.22.

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<sup>41</sup> See DOAH legislative bill analysis dated February 12, 2015. A copy of this analysis is on file with the Governmental Oversight and Accountability Committee.

<sup>42</sup> Telephone conversation with the Department of State staff on April 2, 2015.



**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

**CS by Governmental Oversight and Accountability on March 17, 2015:**

Each agency is required to redact all information in a final order that is exempt or confidential and exempt from public records requirements before electronically transmitting such order to DOAH.

The DOAH's electronic database will constitute the official compilation of administrative final orders rendered after July 1, 2015, for each agency.

The bill amends s. 120.533, F.S., regarding DOS's duty to coordinate the transmittal and listing of agency final orders.

The DOS is required to provide standards and guidelines for the certification and electronic transmittal of copies of agency final orders to DOAH in accordance with s. 120.53, F.S., and for protection of integrity and authenticity of information publicly accessible through the electronic database.

The DOS is also required to provide standards and guidelines to ensure security of copies of agency final orders transmitted and maintained in DOAH's electronic database.

The DOS is authorized to adopt rules to administer its responsibilities that are binding on state agencies and DOAH, which acts in capacity of official compiler of administrative final orders under s. 120.53, F.S. DOS is also authorized to designate an alternative official compiler if the Administration Commission determines that DOAH's performance is unsatisfactory.

**B. Amendments:**

None.