

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: CS/SB 224

INTRODUCER: Governmental Oversight and Accountability Committee; and Senator Simpson

SUBJECT: Public Records/Public Agency Contracts

DATE: February 5, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 224 amends s. 119.0701, F.S., which governs public records maintained by private contractors performing services for a public agency.

The bill requires each public agency contract for services to include the contact information of the agency's public records custodian. The contract must state that the requirements of s. 119.0701, F.S., apply to the contractor unless the agency has determined otherwise. The contract must also state that the contractor must provide access to public records, but only upon the request of the agency's public records custodian. The bill also repeals a requirement that the contract state that records must be transferred to the public agency upon termination of the contract. Under the bill, a former contractor may retain public records. The bill amends a current provision which provides that all electronically stored records must be transferred to the agency upon termination of the contract and makes the transfer of those records conditional upon the agency's request.

The bill requires the public to make all public records requests regarding contracts for services directly to the agency rather than to the contractor. A contractor who fails to provide requested records to an agency within a reasonable time may be subject to criminal penalties.

The bill provides that costs and attorney fees will not be assessed in a public records enforcement lawsuit relating to a public agency's contract for services unless the plaintiff sent a certified letter

to the responsible public agency's records custodian or a contractor at least three days before filing suit.

II. Present Situation:

Public Records and Open Meetings 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 This includes the records of the legislative, executive, and judicial branches.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 the supervision of the public records custodian.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. (2014), defines "public record" 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. (2014), 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." 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), 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.

Enforcing Public Records Laws and Attorney Fees

If a public agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced.⁹ If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay for the requestor's costs and attorney fees.¹⁰ A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept,¹¹ and it is immaterial if a records custodian did not willfully refuse to provide a public record.¹²

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.¹³ Once an enforcement action has been filed, a public agency can be held liable for attorney fees even after the public agency has produced the requested records.¹⁴

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.¹⁵ Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests.¹⁶

Public Records and Private Contractors

Public agencies, which include local and statewide governmental entities, as well as municipal officers, are permitted to hire contractors to provide services or act on behalf of the public agency.¹⁷ Contractors can be individuals or business entities.¹⁸ Currently, private contractors who act on behalf of a public agency are required by the law and the terms of their contracts to comply with public records laws in the same manner as a public agency.¹⁹ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.²⁰ A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²¹

Currently, contracts for services must provide, at the completion of the contract, for the transfer of public records from the contractor to the public agency at no cost to the public agency. The

⁹ Section 119.11, F.S.

¹⁰ Section 119.12, F.S.

¹¹ *Barfield v. Town of Eatonville*, 675 So.2d 223, 225, (Fla. 5th DCA 1996).

¹² *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014).

¹³ *Id.*

¹⁴ *Mazer v. Orange County*, 811 So.2d 857, 860 (Fla. 5th DCA 2002). *Barfield v. Town of Eatonville*, 675 So.2d (Fla. 5th DCA 1996). *Althouse v. Palm Beach County Sheriff's Office*, 92 So.3d 899, 902 (Fla. 4th DCA 2012).

¹⁵ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

¹⁶ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

¹⁷ Section 119.0701(1)(a)-(b), F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992). Op. Att'y Gen. Fla. Informal Opinion dated December 31, 2014.

¹⁸ Section 119.0701(1)(a), F.S.

¹⁹ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

²⁰ Section 119.0701(1)-(2), F.S.

²¹ Section 119.0701(3), F.S.

contractor is not permitted to retain any public records that are confidential and exempt or exempt from public records disclosure. Records that are stored electronically must be transferred to the public agency in a format that is compatible with the public agency's information technology systems.

Although certain contractors are obligated to abide by Florida's public records laws, some contractors fail to do so. At times, contractors unlawfully place conditions on the release of records, refuse to provide public records, or unlawfully delay in providing records.

If a contractor fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to records.²² If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the enforcement lawsuit and the requestor's attorney fees in the same manner that a public agency would be liable.²³ Therefore, once a lawsuit is filed, a contractor may also be held liable for attorney fees even after it has provided the requested records. The fees provision, however, "was not intended to force private entities to comply with the inspection requirements of [the Public Records Act] by threatening to award attorney's fees against them."²⁴

Recent Litigation

On December 1, 2014, a circuit court judge in Duval County denied relief to a plaintiff in a lawsuit to enforce a public records request and for assessment of attorney fees.²⁵ According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The contract manager refused to provide a document because the contract manager believed that the document was not a public record. The court found that the manner in which the plaintiff (and his companions) made the request ensured that "they obtained exactly what they wanted, namely, an initial denial of an unreasonable and bogus request."²⁶

The court found that the plaintiff's method of requesting public records was an abuse of the public records laws and "nothing more than a scam."²⁷ The Final Order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had "a financial interest in assuring that his requests for public records [were] refused."²⁸ (Generally, an attorney may not share his or her fees with someone who is not a lawyer.²⁹) The court noted that in 2014, the plaintiff had filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases.

²² Section 119.0701(2), F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27 (Fla. 1993).

²³ Section 119.12, F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27, 29 (Fla. 1993).

²⁴ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27, 29 (Fla. 1993).

²⁵ Final Order Denying Relief Under Public Records Act, *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Florida State Bar Rule 4-5.4.

The court opined that:

if a private entity must pay an attorney's fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called "civil rights activists" or others who seek to abuse the [Public Records] Act for financial gain³⁰

The case is currently on appeal.³¹

III. Effect of Proposed Changes:

Changes to Contract Provisions

This bill provides that contracts for services must include a statement that:

- The requirements of s. 119.0701, F.S., apply to the contractor unless the public agency has determined that the contractor is not a contractor, (presumably, for the purposes of maintaining public records).
- Informs the contractor that it must contact the custodian of the agency's public records if the contractor has questions about the applicability of public records laws.
- Includes the name and contact information of the public agency's records custodian.

It appears that each contract for services by a public agency, regardless of whether the contractor is acting on behalf of the public agency, must include this new statement regarding the applicability of the public records laws. If the public agency has determined that the contractor is not acting on behalf of the public agency, an additional statement is required that includes an express determination by the public agency that the contractor "is not a contractor." The intent of this paragraph appears to be that the contract may provide that the contractor is not acting on behalf of the agency and is therefore, not required to keep public records; however, the language in the bill does not make this clear.

The bill requires a public agency to make a legal determination regarding the applicability of the public records laws on a particular contractor. In certain circumstances, a contractor who unlawfully denies a public records request based on a good faith belief that it was not subject to public records laws may not be held liable for paying attorney fees.³² It is unclear whether a public agency that inaccurately determines whether a contractor is a public records custodian will be required to indemnify the contractor for any attorney fees or costs if the contractor has relied on that determination. This potential liability may be mitigated by other provisions of the bill that require public record requests to be made to the public agency first.

³⁰ Final Order Denying Relief Under Public Records Act, *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

³¹ A Notice of Appeal was filed with the First District Court of Appeal on December 19, 2014, in *Jeff Gray vs. Lutheran Social Services of Social Services of Northeast, etc.*, Case Number 1D14-5793.

³² *Stanfield v. Salvation Army*, 695 So.2d 501, 502 (Fla. 5th DCA 1997). *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27 (Fla. 1993).

It should be noted that the bill does not address what happens if the records custodian or his or her contact information changes during the term of the contract. In its bill analysis on a similar provision in the original bill, the Department of Management Services stated that staff turnover may make this provision challenging. The Department of Management Services noted that many agencies have established generic, unchanging contact information for public records requests to avoid this problem.³³

The bill requires each contract for services to address whether, at the termination of the contract, the contractor will retain the public records or transfer the public records to the public agency. Unlike current law, the contractor may be permitted to retain information that is confidential and exempt or exempt from disclosure. The Legislature may wish to consider the implications of allowing former contractors to retain otherwise protected information and any restrictions on the use of such information. This bill does not impose any contractual duty upon the former contractor to maintain public records,³⁴ or their confidentiality, in the same manner as custodian of public records. A “custodian of public records” is defined as an “elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records or his or her designee.”³⁵ The bill does not delineate the legal status and duties of a former contractor who is acting as a *de facto* custodian of public records.

The bill requires each contract for services to require the contractor to provide public records to the public only upon the request of the agency’s public records custodian. With this change, a contractor will not be required to produce public records if a member of the public requests the records from the contractor. Instead, a member of the public is required to contact the public agency’s custodian first. The agency’s records custodian will be responsible for submitting the request to the contractor. This is a substantial departure from the current law which requires the contractor to provide records directly to the public.

Public Records Requests Made to Contractors

The bill provides that the public must make all public records requests relating to contracts for services to the agency. (Currently, the public may request records directly from the contractor.) If the agency is not in possession of a record, the agency may request the record from the contractor. Under the bill, a contractor who fails to provide records to an agency within a reasonable amount of time is subject to s. 119.10, F.S.

Section 119.10, F.S. provides that a public officer who violates the Public Records Act may be fined up to \$500.00, subject to impeachment, or held criminally liable.³⁶ The only applicable

³³ 2014 Legislative Bill Analysis for SB 224 Public Records/Public Agency Contracts from Department of Management Services, dated January 12, 2015.

³⁴ Section 119.021, F.S.

³⁵ Section 119.011(5), F.S.

³⁶ Section 119.10, F. S. provides: Violation of chapter; penalties.—

(1) Any public officer who:

(a) Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding \$500.

(b) Knowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who willfully and knowingly violates:

portion of s. 119.10, F.S., appears to be s. 119.10(2)(a), F.S., which makes a violation of public records laws a misdemeanor, or possibly s. 119.10(2)(b), F.S., which provides that using certain information from a police report for commercial purposes is a felony. It is not clear if the contractor's public records custodian or the business entity would be criminally liable.

Enforcement Lawsuits

The bill provides that an enforcement lawsuit related to the public agency's contract may be filed against the agency or the contractor. A court may only award costs and attorney fees to the requestor if the requestor sends a certified letter to the public agency's records custodian at least three days before filing suit. The letter must state that the contractor has not complied with a public records request. (Although an agency may also fail to comply with a public records request, the bill does not address such a situation.) The contractor must also be noticed if it is named as named as a defendant.

If the intent of the notice requirement is to allow time for the public agency to "cure" the violation by producing the requested records and minimize the potential award of attorney fees and costs, the three day period may be too short. Mailing a certified letter three days before filing suit may not give an agency sufficient time to cure any defects in responding to a public records request, since the lawsuit could be filed before the records custodian receives the letter. Under current law, and notwithstanding the impact of the bill, the public agency will still be subject to attorney fees once the lawsuit has been filed.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require counties or municipalities to take an action requiring the significant 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 amends the public records law by shifting the burden to produce public records to the agency, even when records are not in the agency's possession.

The bill also makes it possible for former private contractors to become public records custodians even when the contractor is no longer acting on behalf of an agency.

(a) Any of the provisions of this chapter commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) Section 119.105 commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It is unknown at this time what the fiscal impact on the private sector will be under the bill. The provisions that may have a fiscal impact on the private sector include:

- The requirement that members of the public send certified letters before filing suit if they intend to recover attorney fees in a public records enforcement action.
- The costs incurred by the former contractor if the contractor retains the public records after termination of a contract.

C. Government Sector Impact:

Contracts for each contractor responsible for maintaining public records will have to be revised to include new language. These changes may increase legal and administrative costs.

If the contractor keeps public records upon termination of a contract, an agency may have to rely on the former contractor to provide records upon request. An agency may be liable for attorney fees because the contractor has failed to produce records in a timely manner.

VI. Technical Deficiencies:

As noted above, it appears the new requirement that the contract for services (on lines 37 through 50) include a statement regarding the applicability of s. 119.01701, F.S., applies to all contracts for services, regardless of whether the contractor is acting on behalf of the public agency. If the intent is to require such statements in all contracts for services, additional clarity may be necessary to enhance compliance with this new requirement.

The bill removes a provision in currently law which provides that that a contract state that a contractor must “meet all requirements for retaining public records.” This change removes contractor’s responsibility to keep and maintain records during the term of the contract.

The use of the phrase ‘compel production of records’ appears to limit this bill to documents which can be produced (or reproduced) and given to the requestor. Public records requests, however, can be much broader. Public records are maintained and preserved in the building in which they are ordinarily used,³⁷ and the public has a right to photograph or inspect records in

³⁷ Section 119.021(1), F.S.

person.³⁸ A records custodian may also permit records to be inspected and copied under reasonable conditions under the supervision.³⁹

Notice that a public agency has failed to provide public records should be included since an agency may have failed to respond to a public records request. The notice requirement only contemplates the contractor failing to provide records.

The bill is ambiguous as to whether the scope of enforcement actions are limited to the actual four corners of the contract and documents directly related to the contract or all public records that encompass the business contemplated by the contract.

VII. Related Issues:

It is unclear what will happen to public records if the contractor is permitted to retain the public records upon termination of a contract. If the contractor becomes a default permanent records custodian for the records after the contract has been terminated, the contractor may be subject to public records laws and laws related to the retention and disposal of public records long after the contract has terminated (and without compensation). It is also unclear what happens to public records if a terminated contractor goes out of business.

VIII. Statutes Affected:

This bill substantially amends section 119.0701 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/SB 224 by Governmental Oversight and Accountability on February 3, 2015:

The CS differs from the original bill in the following ways:

- The CS removes the definition of contractor and “acting on behalf of a public agency.”
- The CS alters statements and terms which must be placed in each contract.
- The CS shortens the notice requirement from five days to three days.
- Removes a bad faith or willful refusal element from enforcement cases.

- B. **Amendments:**

None.

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

³⁸ Section 119.07, F.S.

³⁹ Section 119.07(1)(a), F.S.