

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 Judiciary

BILL: CS/SB 224

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Simpson

SUBJECT: Public Records/Public Agency Contracts

DATE: March 9, 2015

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Kim	McVaney	GO	Fav/CS
2. Brown	Cibula	JU	Pre-meeting
3.		FP	

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 also include language providing that public records law applies to the contractor unless the agency has determined otherwise.

The bill removes the requirement that records, including records that are electronically stored, be transferred to the public agency upon termination of the contract. Under the bill, a former contractor has the option to retain public records, unless a public agency requests the records.

The bill changes the way a person must request a public record from a contractor. A public records request regarding contracts for services must be made directly to the agency contracting with the contractor rather than to the contractor. If the agency does not have the records, the contractor must produce them in a reasonable time or is subject to criminal penalties. As a prerequisite to the entitlement to attorney fees and cost in an action to compel the production of public records, a person must send a notice to the public agency by certified mail at least 3 business 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 Florida law specifies 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

Enforcing Public Records Laws and Attorney Fees

Article I, Section 24(c), Florida Constitution authorizes the legislature to enact laws governing the enforcement of public records requirements, including the "maintenance, control, destruction, disposal, and disposition of records made public by this section ..."

Section 119.11, F.S., provides that if a public agency unlawfully fails to provide a public record, the person making the public records request may sue for enforcement. The court must set the

¹ Article I, s. 24(a), FLA. CONST.

² *Id.*

³ Article I, s. 24(b), FLA. CONST.

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., 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., 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), 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 Article 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.

case for an accelerated hearing.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 consider as relevant intent by a records custodian to violate public records laws, incompetence,¹¹ or that the 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 a legal consequence independent of the public records request.¹³ Once an enforcement action has been filed, a public agency can be assessed attorney fees even after the agency has produced the 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, including local and statewide governmental entities and 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 Private contractors who act on behalf of a public agency are required by 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

Contracts for services must include language that upon the completion of the contract, the contractor will transfer all public records to the public agency at no cost. The 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.

⁹ Section 119.11(1), 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.

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 providing 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 Attorney General Opinion and Litigation

Attorney General Opinion

On June 18, 2014, the Attorney General issued an opinion on whether a contractor who enters into a contract for services with an agency is automatically acting on behalf of the agency and subject to public record law, or whether application of public records law is determined by the nature and scope of the services provided by the contractor.²⁵ Section 119.0701(1)(a), F.S., defines a contractor as an "individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency . . .".

The AGO concludes that a court must additionally examine the nature and scope of services provided, citing in support *Parsons & Whittemore*, which held that a contract with a public agency alone is insufficient to trigger public records requirements.²⁶ In *Stanfield v. Salvation Army*, the Salvation Army contracted with the county to provide all of the county's probation services. Here, the court held that the Salvation Army took the place of the agency in this regard, acted on behalf of the agency, and was therefore subject to public records law.²⁷

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 to assess attorney fees.²⁸ 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

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 AGO 2014-06 (June 18, 2014).

²⁶ *Parsons & Whittemore*, 429 So. 2d 343, 346 (Fla. 3d DCA 1983).

²⁷ *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

²⁸ 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. 2014).

his companions) made the request ensured that “they obtained exactly what they wanted, namely, an initial denial of an unreasonable and bogus request.”²⁹

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.”³⁰ 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.”³¹ Generally, an attorney may not share his or her fees with someone who is not a lawyer.³² The court noted that in 2014, the plaintiff had filed 18 public records lawsuits in Duval County, and the same attorney represented the plaintiff in approximately 13 of those cases.

The court further opined:

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 Act for financial gain.³³

The case is currently on appeal.³⁴

III. Effect of Proposed Changes:

Changes to Contract Provisions

This bill requires contracts for services to include statements that:

- The requirements of s. 119.0701, F.S., apply to the contractor unless the public agency has determined that the person or entity contracted with is not a contractor.
- The contractor must contact the custodian of the agency’s public records if the contractor has questions about the applicability of public records laws.
- Identify the name and contact information of the public agency’s records custodian.

The bill does not provide an exception to the form language for contracts for services in which the contractor is not acting on behalf of the agency. Instead, 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 is unclear.

The bill requires a public agency to make a legal determination regarding the applicability of the public records laws to a particular contractor. In certain circumstances, a court may not hold a contractor liable for attorney fees if the contractor denies a valid public records request based on

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Florida State Bar Rule 4-5.4.

³³ *Jeffery Marcus Gray, supra* note 28, at 7.

³⁴ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014).

a good faith belief that the contractor is not subject to public records law.³⁵ The bill does not indicate whether a public agency that inaccurately determines that a contractor is not subject to public records law is required to indemnify the contractor for attorney fees or costs.

The bill does not address what happens if the records custodian or his or her contact information changes during the contract. The Department of Management Services (DMS) notes that staff turnover may make this provision challenging, but that many agencies list generic, unchanging contact information for public records requests to avoid this problem.³⁶

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 must 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 to the agency relating to contracts for services. 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.

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 records to the agency. Unlike current law, the contractor may be permitted to retain information that is confidential and exempt or exempt from disclosure.

This bill does not specifically impose any contractual duty upon the former contractor to maintain public records,³⁷ or their confidentiality, in the same manner as a public custodian of public records. However, s. 119.0701, F.S., already requires each public agency contract for services to include a provision that requires contractors to ensure "that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law." Also, the provision in s. 119.10(2), F.S., that creates a first degree misdemeanor for any person who violates any provision of the public records law would apply to contractors.

Another provision, s. 119.10(2)(b), F.S., may apply to contractors in a limited situation. This provision specifically makes using certain information from a police report for commercial purposes a felony.

³⁵ *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).

³⁶ Department of Management Services, *Legislative Bill Analysis for SB 224 Public Records/Public Agency Contracts* (January 12, 2015).

³⁷ Section 119.021, F.S.

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. The contractor must also be noticed if a lawsuit names the contractor 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 3 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.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact of the bill is indeterminate, but a fiscal impact may result from:

- 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 contractors retains the public records after termination of a contract.

C. Government Sector Impact:

This bill will require revision of contracts for each contractor responsible for maintaining public records to include the 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, the Legislature may wish to provide additional clarity.

The bill removes a provision in current law which requires in a contract that a contractor “meet all requirements for retaining public records.” This change removes the 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,³⁸ and the public has a right to photograph or inspect records in person.³⁹ A records custodian may also permit records to be inspected and copied under reasonable conditions under supervision.⁴⁰

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:

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

³⁸ Section 119.021(1), F.S.

³⁹ Section 119.07, F.S.

⁴⁰ Section 119.07(1)(a), F.S.

compensation). If a terminated contractor goes out of business, whether the contractor is required to deliver the public records to the agency is unknown.

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.
