

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 985 Maintenance of Agency Final Orders

**SPONSOR(S):** Eisnaugle

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	12 Y, 0 N, As CS	Rubottom	Rubottom
2) Government Operations Appropriations Subcommittee	9 Y, 0 N	White	Topp
3) State Affairs Committee	18 Y, 0 N	Harrington	Camechis

### SUMMARY ANALYSIS

All agencies covered by Florida's Administrative Procedure Act must maintain most final agency orders and a subject matter index thereof, allowing orders to be publicly accessed for research or copying, or else maintain an electronic database of final orders allowing public users to research and retrieve the orders using common logical search terms. If an electronic database is not used, an agency may satisfy its public access requirement by designating an official reporter to index and publish its final orders. Thus, agency final orders in Florida may be indexed and maintained for retrieval on microfilm in agency offices, published by a reporter, or available online in a searchable electronic database.

Such orders must be maintained as permanent agency records. Implicitly, public access is required indefinitely.

Since 2008, agencies have been permitted to satisfy the requirement for public access by electronically transmitting a copy of its final orders to the Division of Administrative Hearings (DOAH) for access through DOAH's website. A number of large agencies have used the DOAH alternative with satisfaction. DOAH has no legal obligation to maintain its website.

The bill requires all agencies to use the DOAH website for publication of final orders that must be maintained for public access. Other methods of maintaining and accessing pre-existing orders will continue indefinitely. The bill also provides expanded rulemaking authority to the Department of State to coordinate and set standards on transmittal of certified copies of final orders and to assure integrity of the online documents and satisfactory operation of storage and retrieval functions assigned to DOAH.

The bill will ensure that all final agency orders entered after implementation of the bill will be available online in an easily searchable database.

The bill may have a minimal negative fiscal impact on some state agencies that do not presently create a searchable electronic copy of orders. The bill should reduce some agency costs associated with reporting or indexing and maintaining final orders for public access. It is not anticipated that the bill will have any impact on local government funds.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### The Administrative Procedure Act

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. Administrative actions authorized by law and regulated by the APA include the adoption of a rule, 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 challenges to agency reliance on unadopted rules,<sup>2</sup> as well as challenges to other proposed agency actions which affect substantial interests of any party.<sup>3</sup>

In addition to disputes, agency action occurs when the agency acts on a petition for a declaratory statement<sup>4</sup> or settles a dispute through mediation.<sup>5</sup>

##### Agency Final Orders

A final order is the written final decision of an agency or, in particular matters, an administrative law judge, resulting from any such dispute, declaratory statement petition or mediation. In other words, a final order is the written form of any agency action other than adoption of a rule<sup>6</sup> or an agency policy exempted from the definition of a rule under the APA.<sup>7</sup> A final order includes all materials explicitly adopted in it, and must be filed with the agency clerk.<sup>8</sup>

The 1974, the APA required agencies to “maintain” all final orders (with certain exceptions) and a subject matter index thereof, allowing orders to be located and publicly accessed for research or copying.<sup>9</sup> One purpose of the requirement was to enhance public notice of agency policy expressed in precedents.<sup>10</sup> In 1979, the law was amended to allow agencies to satisfy the requirement to maintain all agency orders by designating an official reporter to index and publish its orders.<sup>11</sup> Under this provision, agencies may use a third party such as the Florida Administrative Law Reports to index final orders. In practice, the commercial reporters published only select orders.<sup>12</sup> In 1992, APA amendments authorized agencies to satisfy the requirement by maintaining an electronic database of final orders allowing public users to research and retrieve the full text of final orders using common logical search terms.<sup>13</sup>

Today, agency final orders may be maintained in hard copy in agency files, published by a reporter, or made available online in an electronic database. These varied methods make finding agency orders difficult at times. The Ad Hoc Orders Access Committee of the Florida Bar’s Administrative Law Section recently surveyed state agencies to gather information on how agencies index final orders and where

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<sup>1</sup> Sections 120.50-120.81, F.S.

<sup>2</sup> Section 120.56, F.S.

<sup>3</sup> Section 120.569, F.S.

<sup>4</sup> Section 120.565, F.S.

<sup>5</sup> Section 120.573, F.S.

<sup>6</sup> The term “rule” is defined in s. 120.52(16), F.S., and includes most policies apart from statutes that purport to be legally binding. The definition lists a number of express exclusions.

<sup>7</sup> Section 120.52(7), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 120.53(1)(a), F.S.

<sup>10</sup> See *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 582 (1<sup>st</sup> DCA 1977).

<sup>11</sup> Section 120.53(2)(a), F.S.

<sup>12</sup> F. Scott Boyd, “From the Chair: ‘Order, Order!’”, Admin. Law Sec. Newsletter, Vol. XXXIV, No. 2, p. 2 (Jan. 2013).

<sup>13</sup> Section 120.53(1)(a), F.S.

final orders may be accessed.<sup>14</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.

In 2013, the Administrative Law Section of the Florida Bar sponsored a survey of agencies to catalogue how final orders are indexed and listed or maintained and how public access is provided. Eleven agencies specifically require a public records request to obtain or inspect a copy of a final order, others indicated a less formal request process, five had agency specific online databases, and seven agencies identified the DOAH website as their compilation for public access.<sup>15</sup>

### Preservation of Records

In addition to the maintenance, indexing and access requirements in the APA, Florida's public records laws require agencies to permanently maintain records of agency final orders.<sup>16</sup> Because such orders must be maintained as permanent agency records, public access of final orders is required indefinitely.

### Coordination by Department of State

In addition to its supervisory role in the archiving of state records, beginning in 1991, the Department of State (DOS) has exercised power to coordinate the indexing, management, preservation, and accessibility of agency final orders that must be indexed. The DOS has rulemaking authority over the system of indexing that agencies may use, and the storage and retrieval systems used to provide access. Authorized storage and retrieval systems include reporters, microfilm, automated systems or any other system considered appropriate by the DOS. The DOS also has authority to regulate which final orders agencies must index.<sup>17</sup>

### Division of Administrative Hearings

The Division of Administrative Hearings (DOAH) is a state agency providing Administrative Law Judges (ALJs) to preside over many disputes under the APA and other state laws. DOAH is placed administratively under the Department of Management Services (DMS). However, DOAH is not subject to any control, supervision, or direction by DMS.<sup>18</sup> The director of DOAH, who also serves as the Chief ALJ, has effective administrative control over DOAH, its resources, and operations.<sup>19</sup>

Since 2008, agencies have been permitted to satisfy the final order index and maintenance requirement by electronically transmitting a copy of its final orders to DOAH for posting on DOAH's website.<sup>20</sup> A number of large agencies use the DOAH alternative.<sup>21</sup> There does not appear to be any law requiring DOAH to maintain a database accessible for searching orders or other records. However, the DOS has adopted a rule governing the use of a database for maintaining final orders. The rule provides:<sup>22</sup>

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.

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<sup>14</sup> A copy of the survey results is available in the Rulemaking Oversight & Repeal Subcommittee offices.

<sup>15</sup> Jowanna N. Oates, *Access to Agency Final Orders*, Vol. 34, Admin. Law Sec. Newsletter, No. 4, p. 4 (June 2013). The Oates article contains a chart summarizing responses of about 40 agencies to inquiries about maintenance and access. A copy of the article is available in the Rulemaking Oversight & Repeal Subcommittee offices.

<sup>16</sup> Section 119.021(3), F.S.

<sup>17</sup> Section 120.533, F.S. The rules adopted under this section are found in ch. 1B-32, F.A.C.

<sup>18</sup> Section 120.65(1), F.S. This administrative independence reflects the independent judgment expected of ALJs employed by DOAH.  
<sup>19</sup> *Id.*

<sup>20</sup> Section 120.53(2)(a), F.S. (The relevant DOAH website address, accessed 3/27/15, is: <https://www.doah.state.fl.us/FLAIO/>.)

<sup>21</sup> The DOAH website lists the following agencies having orders accessible through DOAH: 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, DOS, 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>22</sup> Chapter 1B-32.002(2)(e), F.A.C.

Presently, it appears that an agency may not lawfully use DOAH's system unless it can be assured that these requirements are satisfied.

The quoted rule, however, does not appear to directly regulate DOAH. DOAH does not enter final orders on its own behalf, so DOAH is not governed by the requirement to maintain final orders or implementing rules. Final orders entered by ALJs are, as a matter of law, rendered by the agency on whose behalf the ALJ adjudicates a matter.

### **Effect of Proposed Changes**

The bill requires all agencies to transmit certified electronic copies of final orders rendered on or after July 1, 2015, to DOAH for compilation in its searchable database. Agencies must transmit copies within 90 days of the order's rendering. The bill makes the DOAH database the official compilation of administrative final orders rendered after July 1, 2015.

The bill provides that the database must allow users to research and retrieve the full texts of agency final orders by:

- The name of the agency that issued the final order.
- The date the final order was issued.
- The type of final order.
- The subject of the final order.
- Terms contained in the text of the final order.

The bill also deletes language that will be obsolete if final orders are maintained by DOAH, and other language that may be outdated or duplicative of other law or rules governing such records.

The changes in accessibility only affect agency final orders rendered on or after July 1, 2015. Orders indexed and listed through other means and rendered prior to that date must be retained as required under present law. Required indexes and lists will remain available through the prior means of access.

The bill expands the rulemaking authority of DOS to require DOS to coordinate and provide standards and guidelines for transmitting, certifying and maintaining final agency orders in the DOAH database. DOS' authority is specifically extended to DOAH acting in the capacity of official compiler of administrative final orders, notwithstanding the administrative independence of DOAH. DOS also may provide for an alternate official compiler to operate and manage the database in the event that the Administration Commission determines that the performance of DOAH is unsatisfactory.

The bill creates the expectation that, after implementation, all final agency orders rendered on or after July 1, 2015, will be available online in an easily searchable database.

#### **B. SECTION DIRECTORY:**

SECTION 1. amends s. 119.021(3), F.S., to conform the public records custodial requirements relating to agency final orders to the other changes in the bill.

SECTION 2. amends s. 120.53, F.S., to require all agencies to transmit certified electronic copies of final orders to DOAH for publication online in an electronic database.

SECTION 3. amends s. 120.533, F.S., to conform to changes in Section 2 and to expand rulemaking authority of DOS.

SECTION 4. amends s. 213.22, F.S., to correct a cross-reference to conform to changes in Section 2.

SECTION 5. provides an effective date of July 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to impact state revenues.

#### 2. Expenditures:

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

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could 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.

### D. FISCAL COMMENTS:

DOAH indicates that it can maintain all agency final orders on its website and host full public access with current resources, personnel, and equipment. In addition, DMS indicates that this bill may benefit an agency by reducing the administrative burdens of maintaining the final orders and indexes.<sup>23</sup>

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal mandates.

#### 2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The bill expands and revises the rulemaking authority of DOS respecting the coordination of maintenance and public access to agency final orders, as well as certification and transmission of final orders to DOAH. It also expands the authority of DOS rules over DOAH in the operation of the online database and the integrity of information maintained.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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<sup>23</sup> See DMS Legislative Bill Analysis for HB 985, p. 6 (Feb. 25, 2015).

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

The Rulemaking Oversight & Repeal Subcommittee adopted three amendments to HB 985 at its meeting on March 11, 2015. One amendment amended Section 1 to clarify which final orders must be retained for public records purposes. A second amendment clarified that certified copies of orders are to be transmitted to DOAH. The third amendment expanded and revised DOS rulemaking authority.

This Staff Analysis is drafted to the bill as amended by the Subcommittee.