

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: SB 390

INTRODUCER: Senator Simpson

SUBJECT: Public Records/Public Agency Contract for Services

DATE: November 16, 2015 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	McVaney	GO	Pre-meeting
2.			JU	
3.			FP	

I. Summary:

SB 390 amends s. 119.0701, F.S., to revise procedures for obtaining records relating to a public agency's contract for services with a private contractor. Specifically, the bill:

- Requires all public records requests regarding contracts for services be made directly to the agency rather than to the contractor;
- Requires each public agency contract for services include the contact information of the agency's public records custodian and provisions requiring the contractor to comply with public records laws after the contract is completed; and
- Limits the liability of contractors acting as records custodians for costs and attorney fees in certain instances. The party requesting the public records must send written notice that its public records request has not been honored prior to filing an enforcement lawsuit if the party wishes to recover costs and attorney fees from the contractor.

The fiscal impact of the bill is indeterminate.

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

¹ Article I, s. 24(a), FLA. CONST.

² *Id.*

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

An agency may not place any conditions upon responding to a public records request other than what is in law. For example, an agency may not require a person seeking a public record reveal his or her background.⁹ Nor may an agency require an individual to put his or her request in writing as a condition of production.¹⁰ A request must be honored whether it is made by phone, in writing, or in person.¹¹

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."

Section 119.11, F.S., provides that if a public agency fails to provide a public record, the person making the public records request may sue for enforcement. Whenever an action is filed to enforce the provisions of ch. 119, F.S., the court must set an immediate hearing, giving the case priority over other pending cases.¹² 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.¹³ A delay in turning over public records is considered an unlawful refusal, and a court will award attorney fees even if the delay was not willful or was due to incompetence.¹⁴

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.

⁹ *Bevan v. Wanichka*, 505 So. 2d 1116, 1118 (Fla. 2d DCA Fla. 1987).

¹⁰ *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 n.1 (Fla. 3d DCA 2001). Op. Att'y Gen. Informal Opinion dated December 16, 2003.

¹¹ Op. Att'y Gen. Fla. 80-57 (1980).

¹² Section 119.11(1), F.S.

¹³ Section 119.12, F.S.

¹⁴ *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014). *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

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.¹⁵ Once an enforcement action has been filed, court will require a public agency to pay the requestor's attorney fees even after the agency has produced the records.¹⁶

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.¹⁷ In addition, granting attorney fees also makes it more likely that public agencies will comply with public records laws and deters improper denials of requests.¹⁸

Public Records and Private Contractors

Public agencies, including local and statewide governmental entities and municipal officers may hire contractors to provide services or act on behalf of the public agency.¹⁹ Contractors can be individuals or business entities.²⁰ 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.²¹ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.²² A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²³ This may include unilateral cancellation of the contract by a state agency if a contractor refuses to allow public access to materials the contractor receives in conjunction with the contract.²⁴

Contracts must include language that upon completion of the contract, the contractor will transfer all public records to the public agency at no cost.²⁵ The contractor is not permitted to retain any public records that are confidential and exempt or exempt from public records disclosure.²⁶ 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.²⁷

¹⁵ *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002). *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014).

¹⁶ *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002). *Barfield v. Town of Eatonville*, 675 So. 2d 223, 224 (Fla. 5th DCA 1996). *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

¹⁷ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

¹⁸ *Id.*

¹⁹ Section 119.0701(1)(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.

²⁰ Section 119.0701(1)(a), F.S.

²¹ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

²² Section 119.0701(2), F.S.

²³ Section 119.0701(3), F.S.

²⁴ Section 287.058(1)(c), F.S., provides that state agency contracts which exceeding \$35,000.00 must include a provision that permits the state to unilaterally cancel the contract if the contractor refuses to permit access to public records. This does not apply to contracts related to certain state employee benefits. Section 287.058(1), F.S.

²⁵ Section 119.0701(2)(d), F.S.

²⁶ *Id.*

²⁷ *Id.*

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 the records.²⁸ 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.²⁹ 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."³⁰

When is a Private Contractor an Agency for Public Records Purposes?

Pursuant to s. 119.011(2), F.S., the definition of 'agency' in the Public Records Act includes a "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." In addition, s. 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." It is not always clear, however, when a private contractor is 'acting on behalf of' an agency and is subject to public records laws.

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 the public records law, or whether application of the public records law is determined by the nature and scope of the services provided by the contractor. The AGO concludes that a court must examine the nature and scope of services provided.³¹

To determine when a contractor is acting on behalf of a public agency, a totality of factors test may be applied.³² Some of the factors a court may consider include, but are not limited to:

- Whether the public agency created the contractor;
- How much public funding was involved;
- How much the public agency regulated the contractor;
- The comingling of decision making processes;
- Whether the contractor was performing a government function; and
- The goals of the contractor.³³

A contractor's uncertainty as to whether it is an agency for public records purposes is not necessarily considered an unlawful delay or an unlawful refusal. If a contractor fails comply with

²⁸ See ss. 119.011(2), 119.0701(1), and 119.11, F.S..

²⁹ See ss. 119.011(2) and 119.12, F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

³⁰ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

³¹ Op. Att'y Gen. Fla. 2014-06 (2014).

³² *News and Sun-Sentinel Co. v. Schawb, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

³³ *Id.* at 1032.

public records laws because of its uncertainty, a court may not require the contractor to pay the requestor's costs and attorney fees.³⁴

Recent Litigation

On September 9, 2014, a circuit court judge in Palm Beach County denied attorney fees in a public records case in which the plaintiff requested to see a contractor's contract with the Department of Health. (The contractor processed claims for the Department of Health for underserved women aged 50-64 suffering from breast or cervical cancer.) The plaintiff already had a copy of the contract on his smart phone, which he showed the contractor, and asked to see the contractor's copy. In addition, the plaintiff also wished to inspect the contractor's proof of insurance. The contractor denied the request in part, because the documents were kept in a restricted area where confidential medical records were being worked on and also refused the request in part because the plaintiff made him feel uncomfortable. This was because the plaintiff showed up unannounced, dressed in shorts, with a camera around his neck and refused to identify himself. The plaintiff was recording the encounter but did not inform the contractor that he was doing so. The contractor asked the plaintiff to make a written request for the records.

The court ultimately found that the contractor was an agency for public records purposes, but noted that it was reasonable for the contractor "to have safety and security concerns in light of the secure nature of the facility and his responsibility to balance confidentiality concerns and the safety of his employees."³⁵ The court stated:

A person cannot just show up, demand to see public records of his random choosing, and if he experiences any delay then file suit. The facts of this case show clearly how the Statute can be misused.³⁶

The court denied the plaintiff's request for attorney fees based on his finding that the denial was reasonable. The parties ultimately settled the matter and the case was dismissed with prejudice.³⁷ The plaintiff filed an appeal then subsequently requested that his appeal be dismissed.³⁸

On December 1, 2014, a circuit court judge in Duval County denied relief to the same plaintiff in a lawsuit to enforce a public records request and to assess attorney fees.³⁹ 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

³⁴ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993). *Stanfield v. Salvation Army*, 695 So. 2d 501, 502 (Fla. 5th DCA 1997).

³⁵ Order Denying Plaintiff's Complaint to Enforce Florida's Public Records Act and for Declaratory Injunctive and Monetary Relief and Denying Plaintiff's Request for Attorney Fees, *Jeff Gray v. United Group Programs, Inc.*, No 502014CA-004858 (Fla. 15th Cir. Ct. 2014).

³⁶ Order Denying Plaintiff's Complaint to Enforce Florida's Public Records Act and for Declaratory Injunctive and Monetary Relief and Denying Plaintiff's Request for Attorney Fees, *Jeff Gray v. United Group Programs, Inc.*, No 502014CA-004858 (Fla. 15th Cir. Ct. 2014).

³⁷ Order of Dismissal with Prejudice, *Jeff Gray v. United Group Programs, Inc.*, No 502014CA-004858 (Fla. 15th Cir. Ct. 2014).

³⁸ Order Granting Voluntary Dismissal, *Jeff Gray v. United Group Programs, Inc.*, Fourth District Court of Appeal case number 4D14-3700 (February 23, 2015).

³⁹ Final Order Denying Relief Under Public Records Act, *Jeffrey Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. 2014).

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.”⁴⁰

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.”⁴¹ 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.”⁴² Generally, an attorney may not share his or her fees with someone who is not a lawyer.⁴³ 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.⁴⁴

The case is currently on appeal.⁴⁵

These incidents do not appear to be unique to this individual plaintiff and his acquaintances. Two organizations and a law firm allegedly partnered to target business that were unaware of how public records laws applied to them. The public records requests were emailed during the weekend from “An Onama” and when the requests are not fulfilled, the firm filed a lawsuit and demanded a settlement in excess of costs and fees. The organizations had a quota of generating 25 new lawsuits per week. At one point, the group had filed over 140 law suits in 27 counties. Industry groups, such as the Florida Engineering Society sent out a warning to its members due to the frequency of the legal actions made against engineers.⁴⁶

III. Effect of Proposed Changes:

The bill requires all public records requests relating to a contract for services to be made directly to a public agency. The agency must notify the contractor if the agency does not have the records. The contractor, in turn, must provide the records to the agency or allow inspection and copying within a reasonable time. A contractor who fails to produce the records within a

⁴⁰ *Id* at 6.

⁴¹ *Id*.

⁴² *Id* at 4.

⁴³ R. Regulating Fla. Bar 4-5.4.

⁴⁴ Final Order Denying Relief Under Public Records Act, *Jeffrey Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. 2014)..

⁴⁵ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014). The last action on this case occurred on September 28, 2015, when the court denied oral arguments.

⁴⁶ Tristram Korten and Trevor Aaronson, *In Lawsuits Statewide, Questions of Profits and Public Records*, Florida Center for Investigative Reporting, <http://fcir.org/2014/11/09/in-lawsuits-statewide-questions-of-profits-and-public-records/> (last viewed November 12, 2015).

reasonable time is subject to penalties under s. 119.10, F.S. For example, the contractor may be subject to a first degree misdemeanor for failing to comply with a public records request within a reasonable time.

In addition, the bill requires each public agency contract for services to include:

- Contact information of the agency's public records custodian if the contractor has questions regarding the applicability of the public records law.
- A requirement that the contractor either provide the public agency a copy of the requested public records in the possession of the contractor or allow records to be inspected or copied within a reasonable time.
- A provision that allows the contractor the option of transferring all public records to the public agency upon completion of the contract or keeping the records. If the contractor chooses to keep the records, it must continue to comply with public records laws and provide records to the agency upon request.
- A provision that if public records that are exempt or confidential and exempt from disclosure, such records cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records.

All agencies must revised their contracts to include these provisions by October 1, 2016.

The bill provides that a contractor may be sued for failing to respond to a public records request. For a court to award costs and attorney fees, the requestor must meet certain requirements. The requestor must send a written notice of the public records request which includes a statement reflecting the contractor's failure to comply. The requestor must have sent the notice at least eight (8) business days before filing suit. The notice must be sent in one of the following manners:

- Common carrier;
- Registered Global Express Guaranteed; or
- Certified mail.

Presumably, the notice and evidence of its delivery will be provided to the court with the lawsuit or the lawsuit will state that such steps have been taken.

The bill provides that agencies will continue to be liable for public records enforcement actions pursuant to current law.

The bill takes effect upon becoming a law.

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

C. Government Sector Impact:

If the contractor retains 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 failed to produce records in a timely manner.

VI. Technical Deficiencies:

The bill requires a requestor to send a notice of the contractor's failure to produce public records but does not state whether the notice must be sent to the agency, the contractor, or both.

It is not clear whether the intent of providing notice of a failure to comply with a public records request is meant to cure further legal action. The current case law states that enforcement of a public records request and the request for attorney fees are legally independent. Even if a contractor or an agency responds to a public records request after receiving a notice, the lawsuit for costs and fees does not become moot.

There is no legal standard provided for when a court may grant attorney fees when a private contractor is sued for failure to comply with a public records request. This is in contrast to s. 119.12, F.S., provides that attorney fees must be granted if a "court determines that such agency unlawfully refused to permit a public record to be inspected or copied."

The bill provides that a contractor who fails to provide public records to a public agency within a reasonable time may be subject to criminal and civil penalties pursuant to s. 119.10, F.S. Section 119.10, F.S., provides civil and criminal penalties for violations of any provision of ch. 119, F.S. It is not clear from the language of this bill if the intent is to limit a contractor's liability under s. 119.10, F.S., to only those instances when the contractor fails to produce records. A records custodian is responsible for a variety of duties other than just the production of records. For example, a records custodian is responsible for how records are stored, when they may be destroyed and for redacting confidential information.⁴⁷

Although the bill permits a requester to sue a contractor for failure to produce records, it is not clear if a requestor is required to sue the contractor if the contractor fails to comply with a public records request. It is unclear if requestor may sue an agency, or the contractor, or both. Assuming the agency can be held liable for a contractor's failure to produce records, this bill appears to limit the agency's ability to recoup its losses unless its contract includes such a provision.

VII. Related Issues:

Under the bill, the service contractor is permitted to retain the public records after the completion of the contract. The bill is silent on what duties, if any, a terminated contractor has regarding those retained records if the contractor subsequently goes out of business. Most likely the public agencies can address this issue in the contract. However, the legislature may want to provide some direction to ensure public records remain available for inspection for an appropriate time period.

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.)

None.

B. Amendments:

None.

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

⁴⁷ Section 119.021, F.S., titled Custodial requirements; maintenance, preservation, and retention of public records, outlines some of a records custodian's duties.