

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 163 Public Records

**SPONSOR(S):** Civil Justice & Claims Subcommittee; Burgess, Jr. and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 80; SB 246

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	13 Y, 0 N	Moore	Harrington
2) Civil Justice & Claims Subcommittee	14 Y, 0 N, As CS	MacNamara	Bond
3) Government Accountability Committee			

### SUMMARY ANALYSIS

The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government, unless such record is specifically exempt. If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced. Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of attorney fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.

Once an enforcement action has been filed, an agency, or a contractor acting on behalf of an agency, can be held liable for attorney fees. If a court finds that an agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.

The bill provides that a court may only assess and award the reasonable costs of enforcement against the responsible agency if the court determines that:

- The agency unlawfully refused to permit the public record to be inspected or copied; and
- The complainant gave written notice identifying the public record request to the agency's custodian of public records at least 5 days before filing the civil action, provided that the agency posts the contact information for the agency records custodian in their building and on the agency's website.

A court may not assess and award any reasonable costs of enforcement, including reasonable attorney fees, against the agency if the court determines that the request to inspect or copy the public record was made for an improper purpose. If the court determines the request was made for an improper purpose, it is allowed to award reasonable costs and attorney fees to the agency.

The bill may have a positive fiscal impact on state and local governments.

The bill provides for an effective date of upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background: The Public Records Act**

The Florida Constitution provides that every individual has a right of access to public records that are made or received in connection with official public business unless such record is specifically exempt. This right applies to records of the legislative, executive, and judicial branches.<sup>1</sup>

The Public Records Act, codified in ch. 119, F.S., guarantees every person's right to inspect and copy any state or local government public record at a reasonable time, under reasonable conditions, and under the supervision of the public records custodian.<sup>2</sup> The Public Records Act also applies to a private contractor if that private business acts on behalf of a governmental entity. Section 119.011(12), F.S., defines "public record" as:

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.

An agency<sup>3</sup> may not impose greater conditions on responding to a public records request than those required by law. Nor may an agency require an individual to put his or her request in writing as a condition of production, or to disclose his or her name, address, or other contact information.<sup>4</sup> An agency must honor a request whether a person requests records by phone, in writing, or in person, if the request is sufficient to identify the records sought.<sup>5</sup>

##### Custodian of Public Records

Pursuant to s. 119.011(5), F.S., a custodian of public records is "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee." A custodian of public records is required to perform statutorily required duties such as maintaining records in fireproof vaults, repairing records and complying with retention schedules set by the Department of State. Section 119.07, F.S., also provides that a public records custodian has duties that include:

- Acknowledging public records requests and responding to those requests in good faith;
- Producing records after redacting exempt information or providing the statutory citation for an exemption if the entire document is exempt;
- Maintaining records that are the subject of public records litigation;
- Ensuring that public records are secure if they are provided electronically;
- Providing supervision if someone wishes to photograph records; and
- Providing certified copies of public records upon payment of a fee.<sup>6</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> s. 119.07(1)(a), F.S.

<sup>3</sup> Section 119.011(2), F.S., defines "agency" 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."

<sup>4</sup> Op. Att'y Gen. Informal Opinion, pg. 1 (Dec. 16, 2003).

<sup>5</sup> Op. Att'y Gen. Fla. 80-57, pg. 3 (1980).

<sup>6</sup> See ss. 119.07(1)(c-i) and 119.07(2-4), F.S.

Public records custodians are also responsible for supervising the production of records by agency personnel. Section 119.07(1)(a), F.S., provides that “[e]very person who has custody of a public record shall permit the record to be inspected and copied . . . at any reasonable time, under reasonable conditions, and under reasonable supervision by the custodian of the public records.”

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. Contractors can be individuals or business entities. 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.<sup>7</sup>

### Enforcement Actions and Attorney Fees

If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced.<sup>8</sup> Whenever such an action is filed, the court must give the case priority over other pending cases and must set an immediate hearing date.<sup>9</sup>

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.<sup>10</sup> Once an enforcement action has been filed, an agency can be held liable for attorney fees even after the agency has produced the requested records.<sup>11</sup>

If the court finds that the agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor’s reasonable costs of enforcement, including reasonable attorney fees.<sup>12</sup> A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept, and it is immaterial if a records custodian did not willfully refuse to provide a public record.<sup>13</sup> In addition, to be entitled to attorney fees against the state or any of its agencies, the plaintiff must serve a copy of the pleading claiming the fees on the Department of Financial Services (DFS). DFS is then entitled to participate with the agency in the defense of the suit and any appeal thereof with respect to such fees.

If a contractor acting on behalf of the agency 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. 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 an agency would be liable if:

- The court determines that the contractor unlawfully refused to comply with the public records request within a reasonable time; and
- At least 8 business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that the contractor has not complied with the request, to the public agency and to the contractor.<sup>14</sup>

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<sup>7</sup> See s. 119.011(2), F.S., and s. 119.0701, F.S.

<sup>8</sup> s. 119.11, F.S.

<sup>9</sup> s. 119.11(1), F.S.

<sup>10</sup> s. 119.12, F.S.

<sup>11</sup> *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002); *Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996); *Althouse v. Palm Beach County Sheriff’s Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

<sup>12</sup> s. 119.12, F.S.

<sup>13</sup> See generally, *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996) and *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014) .

<sup>14</sup> s. 119.0701(4), F.S.

## Effect of Bill

The bill directs courts to award attorney fees and enforcement costs in actions to enforce public records laws only in instances where:

- The agency unlawfully refuses to permit a public record to be inspected or copied; and
- The plaintiff provides written notice of the public records request to the agency's custodian of public records at least 5 business days before filing the enforcement action.

A complainant is not required to provide written notice, as stated above, if the agency does not prominently post the contact information for the agency's custodian of public records in the agency's primary administrative building in which public records are routinely created, sent, received, maintained, and requested and on the agency's website, if the agency has a website.

When considering whether an agency unlawfully refused to comply with a public records request, the bill requires the court to evaluate the actions of the plaintiff and the agency. Additionally, the bill allows the court to award attorney fees and costs against the plaintiff if the court finds the request was made for an improper purpose. The bill defines improper purpose as "a request to inspect or copy a public record or to participate in the civil action primarily to harass the agency, cause a violation of this chapter, or for a frivolous purpose."

Lastly, the bill provides that no private right of action is created authorizing the award of monetary damages for persons who bring actions under the provisions simply by the enactment of this bill. Rather, payments by the responsible agency are limited to the reasonable costs of enforcement directly attributable to a civil action brought to enforce the provisions of this chapter.

### B. SECTION DIRECTORY:

Section 1 amends s. 119.12, F.S., relating to attorney fees.

Section 2 provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have an impact on state revenues.

#### 2. Expenditures:

The bill may have a positive fiscal impact on the state if there are fewer instances when a court assesses against an agency the reasonable costs of enforcement in a public records lawsuit.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have an impact on local government revenues.

#### 2. Expenditures:

The bill may have a positive fiscal impact on local governments if there are fewer instances when a court assesses against a local government the reasonable costs of enforcement in a public records lawsuit.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a negative fiscal impact on individuals and entities who file public records lawsuits if there are fewer instances when a court awards to a prevailing complainant in a public records lawsuit the reasonable costs of enforcement.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 20, 2017, the Civil Justice & Claims Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Including a limitation on an award of attorney fees where the requesting party requested public records for an improper purpose.
- Defining the 5-day period.
- Adding that an agency may be awarded fees where a request was made for an improper purpose.

This analysis is drafted to the committee substitute as passed by the Civil Justice & Claims Subcommittee.