

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 163 Public Records  
**SPONSOR(S):** Civil Justice & Claims Subcommittee; Burgess, Jr. and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 80; SB 246

| REFERENCE  | ACTION              | ANALYST   | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|---------------------|-----------|--|
| 1) Oversight, Transparency & Administration Subcommittee | 13 Y, 0 N           | Moore     | Harrington                               |
| 2) Civil Justice & Claims Subcommittee                   | 14 Y, 0 N, As<br>CS | MacNamara | Bond                                     |
| 3) Government Accountability Committee                   | 20 Y, 0 N           | Moore     | Williamson                               |

### SUMMARY ANALYSIS

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. 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 even after the agency has produced the requested records. 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 must assess and award the reasonable costs of enforcement, including reasonable attorney fees, 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 provided written notice identifying the public record request to the agency's custodian of public records at least 5 days before filing the civil action.

However, the complainant is not required to provide written notice of the public record request, as required 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.

The bill requires a court to determine whether a complainant made a public record request or participated in the civil action for an improper purpose. If the court determines there was an improper purpose, the bill prohibits the court from awarding the reasonable costs of enforcement, including attorney fees, to the complainant, and instead requires the court to award against the complainant and to the agency such reasonable costs incurred by the agency in responding to the civil action.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.01, F.S., provides that it is the policy of the state that all state, county, and municipal records are open for personal inspection and copying by any person, and that it is the responsibility of each agency<sup>1</sup> to provide access to public records.<sup>2</sup> Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies. The state's public records laws are construed liberally in favor of granting public access to public records.

###### Inspection and Copying of Public Records

Current law describes the duties and responsibilities of a custodian of public records<sup>3</sup> (records custodian). Section 119.07(1), F.S., requires a records custodian to permit records to be inspected and copied by any person, at any reasonable time,<sup>4</sup> under reasonable conditions, and under supervision by the records custodian. Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.<sup>5</sup>

An agency is permitted to charge fees for inspection or copying of records. Those fees are prescribed by law and are based upon the nature or volume of the public records requested. Section 119.07(4), F.S., provides that if the nature or volume of the request requires extensive use of information technology or extensive clerical or supervisory assistance, the agency may charge, in addition to the actual cost of duplication, a reasonable service charge based on the cost incurred for the use of information technology and the labor cost that is actually incurred by the agency in responding to the request. The term "labor cost" includes the entire labor cost, including benefits in addition to wages or salary.<sup>6</sup> Such service charge may be assessed, and payment may be required, by an agency prior to providing a response to the request.<sup>7</sup>

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<sup>1</sup> Section 119.011(2), F.S., defines the term "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 chapter 119, F.S., 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 agency.

<sup>2</sup> Section 119.011(12), F.S., defines the term "public records" 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.

<sup>3</sup> Section 119.011(5), F.S., defines the term "custodian of public records" to mean 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.

<sup>4</sup> There is no specific time limit established for compliance with public records requests. A response must be prepared within a reasonable time of the request. *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984). What constitutes a reasonable time for a response will depend on such factors as the volume of records that are responsive to a request, as well as the amount of confidential or exempt information contained within the request.

<sup>5</sup> See *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001) (holding that public records requests need not be made in writing).

<sup>6</sup> *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

<sup>7</sup> Section 119.07(4), F.S.; see also *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (stating if a requestor identifies a record with sufficient specificity to permit an agency to identify it and forwards the appropriate fee, the agency must furnish by mail a copy of the record).

## Enforcing Public Records Laws 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> The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.<sup>12</sup> Granting attorney fees also makes it more likely that agencies will comply with public records laws and deter improper denials of requests.<sup>13</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>14</sup> A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept,<sup>15</sup> and it is immaterial if a records custodian did not willfully refuse to provide a public record.<sup>16</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.<sup>17</sup>

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.<sup>18</sup> 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>19</sup>

A contractor who complies with a public records request within 8 business days after the notice is sent is not liable for the reasonable costs of enforcement.<sup>20</sup> Attorney fees for efforts expended to obtain attorney fees are not currently permitted.<sup>21</sup>

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

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

<sup>10</sup> Section 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> *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> Section 119.12, F.S.

<sup>15</sup> *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

<sup>16</sup> *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014).

<sup>17</sup> Section 284.30, F.S.

<sup>18</sup> *See New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993).

<sup>19</sup> Section 119.0701(4), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> *Downs v. Austin*, 559 So. 2d 246, 248 (Fla. 1st DCA 1990).

## Recent Litigation

In recent years, allegations have arisen that some individuals and entities have used public records enforcement lawsuits as a way to generate fees rather than to make lawful public records requests.<sup>22</sup> Governmental entities often settle these lawsuits because settlements are less costly than litigation.<sup>23</sup>

In 2015, the Town of Gulf Stream filed a federal class action lawsuit on behalf of state and local governmental entities against multiple individuals and entities based on their use of public records laws.<sup>24</sup> The Town of Gulf Stream alleged that the defendants violated the federal Racketeer Influenced Corrupt Organizations Act by filing frivolous public records requests that were intended to be overlooked, then bringing lawsuits when the requests were not addressed and attempting to obtain settlements.<sup>25</sup> The case was dismissed by a federal judge, who stated:

To the extent Defendants are abusing the rights afforded them by the Florida public records laws, those abuses must be addressed in the individual lawsuits filed, or through a change in the laws by the Florida Legislature.<sup>26</sup>

Counties and state agencies have also been sued as a result of their failure to provide public records after a public records request has been made. In another case, an entity called Consumer Rights, LLC, filed a public records lawsuit against Union County, which was ultimately appealed after the trial court ruled in favor of the county and did not award attorney fees to Consumer Rights, LLC.<sup>27</sup> On appeal, the First District Court of Appeal found that:

The plaintiff made the request in a suspicious email that could not be easily verified, directed it to a general email account that might not be checked by the person having anything to do with the records at issue, waited four months without saying anything and then sued the county, claiming a right to attorney fees.<sup>28</sup>

The court affirmed the lower court's decision to deny attorney fees to the plaintiff, holding that the manner in which the public records request was made, as well as the fact that the county ultimately provided the requested record when it became apparent that the email was not spam, indicated that there was no unlawful refusal to provide the requested records.<sup>29</sup> Since there was no refusal, there was no basis for awarding attorney fees.<sup>30</sup>

Consumer Rights, LLC, also filed a public records enforcement lawsuit against the Department of Economic Opportunity (DEO), but was not awarded attorney fees due to procedural issues.<sup>31</sup> The First District Court of Appeal noted that there was some evidence to support DEO's allegations that Consumer Rights, LLC, was engaged in a "scheme [that] was designed to generate fees," but the court declined to rule on the allegation.<sup>32</sup>

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<sup>22</sup> See Tristram Korten and Trevor Aaronson, *Florida nonprofit's ties to law firm questioned after dozens of lawsuits filed*, NAPLES DAILY NEWS, Dec. 6, 2014; Jan Pudlow, *A new scam: Public records shakedown*, THE FLORIDA BAR NEWS, Feb. 1, 2015, at 1.

<sup>23</sup> For example, the City of Dunedin settled a public records enforcement lawsuit for \$2,500 rather than spending as much as \$10,000 to fight the suit. Mike Brassfield, *Lawsuits from Public Records Group are a Nuisance, Florida Cities Say*, TAMPA BAY TIMES, July 6, 2015, available at <http://www.tampabay.com/news/humaninterest/lawsuits-from-public-records-group-are-a-nuisance-florida-cities-say/2236362>.

<sup>24</sup> *Town of Gulf Stream v. O'Boyle*, No. 15-80182-CIV-MARRA, U.S. Dist. LEXIS 84778 (S.D. Fla. June 30, 2015).

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.* at \*11.

<sup>27</sup> *Consumer Rights, LLC v. Union County, Fla.*, 159 So. 3d 882 (Fla. 1st DCA 2015).

<sup>28</sup> *Id.* at 885.

<sup>29</sup> *Id.* at 886-87.

<sup>30</sup> *Id.*

<sup>31</sup> *State v. Consumer Rights, LLC*, 181 So. 3d 1239, 1241 (Fla. 1st DCA 2015).

<sup>32</sup> *Id.*

## Effect of Proposed Changes

The bill requires a court to assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if it determines that:

- The agency unlawfully refused to permit the public record to be inspected or copied; and
- The complainant provided written notice identifying the public record request to the agency's custodian of public records at least five business days before filing the civil action.

However, a complainant is not required to provide written notice of the public record request, as required above, if the agency does not prominently post the contact information for the agency's records custodian 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.

The bill requires a court to determine whether a complainant made a public record request or participated in the civil action for an improper purpose. The bill defines the term "improper purpose" to mean "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." If the court determines there was an improper purpose, the bill prohibits the court from awarding the reasonable costs of enforcement, including attorney fees, to the complainant, and instead requires the court to award against the complainant and to the agency such reasonable costs incurred by the agency in responding to the civil action.

The bill also provides that the attorney fee provisions do not create a private right of action authorizing the award of monetary damages for a person who brings an action to enforce the public records laws. Rather, payments by the responsible agency may include only the reasonable costs of enforcement, including reasonable attorney fees, directly attributable to a civil action brought to enforce the provisions of this chapter.

Lastly, the bill specifies that it only applies to public record requests made on or after the effective date of the bill.

### 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.