

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: CS/SB 80

INTRODUCER: Community Affairs Committee and Senator Steube

SUBJECT: Public Records

DATE: March 7, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<b>Favorable</b>
2.	<u>Cochran</u>	<u>Yeatman</u>	<u>CA</u>	<b>Fav/CS</b>
3.	_____	_____	<u>JU</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

SB 80 grants discretion to a court to award attorney fees and costs relating to public records enforcement actions when it has determined that a public records request was unlawfully refused and that the plaintiff provided written notice of the public records request to the agency's custodian of public records at least 5 business days before filing the lawsuit. The bill also provides guidance to the court when determining whether a public record was unlawfully refused for inspection. Additionally, the bill provides that attorney fees may be awarded against a complainant if the court finds the action was filed in bad faith or was frivolous. Finally, the bill adds that if a complainant can show by a preponderance of the evidence that an agency intentionally or willfully refused to permit a public record to be inspected or copied, the court shall award attorneys fees.

**II. Present Situation:**

**Public Records Requirements**

The Florida Constitution provides that every individual has a right of access to public records which are made or received in connection with official public business.<sup>1</sup> This right applies to records of the legislative, executive, and judicial branches.<sup>2</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record<sup>3</sup> at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.<sup>4</sup> The Public Records Act also applies to a private contractor if that private business acts on behalf of a governmental entity.<sup>5</sup>

An agency, as defined by ch. 119, F.S., may not impose greater conditions on responding to a public records request than those required by law. For example, an agency may not require a person seeking a public record to disclose his or her background.<sup>6</sup> Nor may an agency require an individual to put his or her request in writing as a condition of production.<sup>7</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>8</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.<sup>9</sup> 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;<sup>10</sup>
- Producing records after redacting exempt information or providing the statutory citation for an exemption if the entire document is exempt;<sup>11</sup>
- Maintaining records which are the subject of public records litigation;<sup>12</sup>
- Ensuring that public records are secure if they are provided electronically;<sup>13</sup>
- Providing supervision if someone wishes to photograph records;<sup>14</sup> and

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<sup>3</sup> 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.”

<sup>4</sup> Section 119.07(1)(a), F.S.

<sup>5</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>6</sup> *Bevan v. Wanichka*, 505 So. 2d 1116, 1118 (Fla. 2d DCA Fla. 1987).

<sup>7</sup> *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, n.1 (Fla. 3d DCA 2001); Op. Att’y Gen. Informal Opinion (Dec. 16, 2003). *Chandler v. City of Greenacres*, 140 So. 3d 7 (Fla. 4th DCA 2014).

<sup>8</sup> Op. Att’y Gen. Fla. 80-57, pg. 3 (1980).

<sup>9</sup> Section 119.021, F.S.

<sup>10</sup> Section 119.07(1)(c), F.S.

<sup>11</sup> Section 119.07(1)(d)-(f), F.S.

<sup>12</sup> Section 119.07(1)(g)-(i), F.S.

<sup>13</sup> Section 119.07(2), F.S.

<sup>14</sup> Section 119.07(3), F.S.

- Providing certified copies of public records upon payment of a fee.<sup>15</sup>

Public records custodians are also responsible for supervising the production of records by all 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.”

### **Enforcing Public Records Laws and Attorney Fees**

Article I, Section 24(c), Florida Constitution, requires the Legislature to enact laws governing the enforcement of public records requirements, including the “maintenance, control, destruction, disposal, and disposition of records.”

Under s. 119.11, F.S., a person may enforce his or her right to inspect a public record by filing a lawsuit against an agency. In those lawsuits, the court must set an immediate hearing, giving the case priority over other cases.<sup>16</sup> If a court orders an agency to open its records for inspection, the agency must comply within 48 hours.<sup>17</sup>

Section 119.12, F.S., provides that if a court finds that an agency unlawfully refused access to a public record, the court will order the public agency to pay costs and attorney fees related to the enforcement lawsuit.<sup>18</sup> An unjustified delay in turning over public records is also considered an unlawful refusal, and a court will award attorney fees even if the delay was not willful or if the delay was due to incompetence.<sup>19</sup> When a court awards attorney fees in a public records case, “there is no additional requirement...that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably.”<sup>20</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 a legal consequence independent of the public records request.<sup>21</sup> Once the requestor files suit, the court will require a public agency to pay the requestor’s attorney fees even after the agency has produced the records.<sup>22</sup> The Florida

<sup>15</sup> Section 119.07(4), F.S.

<sup>16</sup> Section 119.11(1), F.S.

<sup>17</sup> Section 119.11(2), F.S.

<sup>18</sup> Section 119.12, F.S. In 1984, the Legislature amended the public records attorney fee provision, deleting language which would permit attorney fees to be awarded only when records are “unreasonably” refused and replaced it with “unlawfully” refused. Ch. 84-298, s. 7, Laws of Fla. The Florida Supreme Court stated what once the Legislature amended s. 119.12, F.S., from “unreasonable” refusal to “unlawful” refusal, the Legislature “eliminated the potential that an award for attorney’s fees would be denied just because the public agency acted reasonably in violating the Public Records Act...The public agency’s failure to comply, rather than its good or bad faith in doing so, became the relevant inquiry.” *Bd. of Trs. v. Lee*, 189 So. 3d 120 at 126 (Fla. Apr. 14, 2016). Based on the Legislature’s removal of the word “unreasonably,” a court concluded that good faith or honest mistakes do not excuse a defendant from being assessed attorney fees.” *News and Sun-Sentinel Co. v. Palm Beach County*, 517 So. 2d 743, 744 (Fla. 4th DCA 1987), partially disapproved of in *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 30 (Fla. 1993).

<sup>19</sup> *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655-656 (Fla. 1st DCA 2014); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

<sup>20</sup> *Bd. Of Trs. v. Lee*, 189 So. 3d 120 at 126 (Fla. Apr. 14, 2016).

<sup>21</sup> *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

<sup>22</sup> *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); *Cookston v. Office of the Pub. Defender*, LEXIS 10858 at \*6 (Fla. 5th DCA July 15, 2016).

Supreme Court stated that the public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial, and that granting attorney fees makes it more likely that public agencies will comply with public records laws.<sup>23</sup>

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.<sup>24</sup> Open meetings laws also include an attorney fee provision. Section 286.0114(7)(a), F.S., provides:

- (a) Whenever an action is filed against a board or commission to enforce this section, the court shall assess reasonable attorney fees against such board or commission if the court determines that the defendant to such action acted in violation of this section. The court may assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. This paragraph does not apply to a state attorney or his or her duly authorized assistants or an officer charged with enforcing this section.
- (b) Whenever a board or commission appeals a court order that has found the board or commission to have violated this section, and such order is affirmed, the court shall assess reasonable attorney fees for the appeal against such board or commission.

### **Public Records Requests, Settlements and Attorney Fees**

Over the past few years, governmental entities have been sued based on their failure to provide public records in cases that appear to be less about private citizens getting access to public records than about generating settlements or attorney fees. Governmental entities often settle the public records complaints because settlements are less costly than litigation.

The Town of Gulf Stream filed a federal lawsuit against a resident, the Citizen's Awareness Foundation, Inc., Our Public Records LLC, and other defendants based on their use of public records laws.<sup>25</sup> The Town of Gulf Stream alleged that the defendants sent bogus public records requests that were intended to be overlooked, and then asked for settlements that were higher than actual attorney fees and costs, or they filed frivolous lawsuits and then attempted to obtain settlements.<sup>26</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>27</sup>

Counties and state agencies also have been sued because of their failure to provide public records. In another case, an entity called Consumer Rights, LLC, filed a public records lawsuit

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<sup>23</sup> *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>24</sup> FLA. CONST., art. I, s. 24(b).

<sup>25</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>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 11.

against Union County, which ultimately was appealed when the trial court refused to grant attorney fees to Consumer Rights, LLC. The First District Court found:

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>

In this case, the First District Court of Appeal affirmed the lower court's decision to deny attorney fees to the plaintiff. The First District Court found 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 refusal to provide the requested records.<sup>29</sup> Since there was no refusal, there was no basis for awarding attorney fees.

Consumer Rights, LLC, also filed an enforcement lawsuit against the Department of Economic Opportunity, but was not awarded fees because of procedural issues. The First District Court found that there was some evidence to support the state agency'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>30</sup>

### **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.<sup>31</sup> Contractors can be individuals or business entities.<sup>32</sup> 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>33</sup> These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.<sup>34</sup> A request for a contractor's records must be submitted to the agency. The agency will then request the records from the contractor or arrange for the public to inspect the requested records.<sup>35</sup>

If a contractor fails to comply with a public records request, the requestor may sue the contractor.<sup>36</sup> Enforcement costs (including attorney fees) will be awarded only if the contractor unlawfully refused to comply with the request and the requestor provided written notice to the

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<sup>28</sup> *Consumer Rights, LLC, v. Union County, Fla.*, 159 So. 3d 882, 885 (Fla. 1st DCA 2015).

<sup>29</sup> *Consumer Rights, LLC*, at 886-887. *Accord Citizens Awareness Found., Inc., v. Wantman Grp., Inc.*, LEXIS 7970 (Fla. 4th DCA May 25, 2016).

<sup>30</sup> *State v. Consumer Rights, LLC*, 181 So. 3d 1239, 1241 (Fla. 1st DCA 2015).

<sup>31</sup> 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.

<sup>32</sup> Section 119.0701(1)(a), F.S.

<sup>33</sup> Section 119.011(2), s. 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

<sup>34</sup> Section 119.0701(2)(b), F.S.

<sup>35</sup> Section 119.0701(2)(b)2. and (3), F.S.

<sup>36</sup> Section 119.0701(4), F.S.

agency that the contractor had not complied with the public records request.<sup>37</sup> The requestor must mail or email the notice at least eight days before filing suit.<sup>38</sup>

If the contractor fulfills the public records request within 8 days, then the contractor is no longer liable for the enforcement costs.<sup>39</sup> The law is silent on whether an agency would be liable for attorney fees after the contractor has fulfilled the public records request. If a contractor fails to fulfill the public records request within 8 days, the contractor will be liable for enforcement costs.

### **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.”

To determine if a contractor is acting on behalf of a public agency, a totality of factors test may be applied.<sup>40</sup> 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.<sup>41</sup>

### **Private Contractors and Public Records Lawsuits**

Private contractors also have been subject to lawsuits which appear to be more about generating settlements and attorney fees than about the individuals exercising their right to copy and inspect public records. In one such case, a circuit court judge in Duval County declined to award attorney fees in a public records enforcement case.<sup>42</sup> 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 the documents because the contract manager believed the documents were not public records. 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.”<sup>43</sup>

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<sup>37</sup> Section 119.0701(4)(a), F.S.

<sup>38</sup> Section 119.0701(4)(a)2., F.S.

<sup>39</sup> Section 119.0701(4)(a), F.S.

<sup>40</sup> *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

<sup>41</sup> *Id.* at 1032.

<sup>42</sup> *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, Final Order Denying Relief Under Public Records Act, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014). *Lutheran Social Services of Northeast Florida, Inc.*, 179 So. 3d 322 (Fla. 1st DCA 2015) AFFIRMED.

<sup>43</sup> *Id.*

The court found that the plaintiff's method of requesting public records was an abuse of the public records laws noting that the actions of the requester amounted to "nothing more than a scam."<sup>44</sup> 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."<sup>45</sup> The court noted that in 2014, the plaintiff filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases; the court noted that all of the cases followed a similar pattern.

The court opined that:

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 [Public Records] Act for financial gain.<sup>46</sup>

The First District Court of Appeal affirmed the trial court's decision on December 16, 2015.<sup>47</sup>

Similarly, a suspicious email requesting public records was sent to a contractor and the sender subsequently sued the contractor in an enforcement action.<sup>48</sup> The court found that the contractor believed that the email was spam and did not comply with the request.<sup>49</sup> The court ruled that contractor had not refused to provide records, and therefore, no fees were due.<sup>50</sup> The court stated public records laws "should not be applied in a way that encourages the manufacture of public records requests designed to obtain no response, for the purpose of generating attorney's fees."<sup>51</sup>

### III. Effect of Proposed Changes:

The bill makes granting enforcement costs (including attorney fees) discretionary when the court determines:

- The plaintiff has provided 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; and
- A public entity has unlawfully refused to grant access to public records.

The bill also provides that in determining whether the responsible agency unlawfully refused to permit a public record to be inspected or copied, the court shall consider if the request was made in bad faith or was made to harass the agency or to cause a violation of ch. 119, and if the

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Lutheran Social Services of Northeast Florida, Inc.*, 179 So. 3d 322 (Fla. 1st DCA 2015).

<sup>48</sup> *Citizens Awareness Found. Inc., v. Wantman Grp., Inc.*, LEXIS 7970 at 12 (Fla. 4<sup>th</sup> DCA March 25, 2016).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.* at 11.

responsible agency responded in good faith to the request to inspect or copy the records. Additionally, the bill provides that attorney fees may be awarded against a complainant if the court finds the action was filed in bad faith or was frivolous. Finally, the bill adds that if a complainant can show by a preponderance of the evidence that an agency intentionally or willfully refused to permit a public record to be inspected or copied, the court shall award attorneys fees.

The bill will take effect July 1, 2017.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

The bill will grant greater discretion to judges on when they will award attorney fees in public records request lawsuits. This may have the effect of reducing the likelihood of an attorney accepting a public records lawsuit if he or she will not be guaranteed fees. This provision also may have the effect of essentially imposing a requirement for the public to make public records requests in writing every time if they wish to receive attorney fees.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact**

Private contractors which are agencies under the public records laws may spend less in settlements and attorney fees related to public records requests.

Individuals and groups who file public records lawsuits may spend more money to send letters to public records custodians. There would be little or no costs to these people or groups if they sent an email instead of a letter.

##### **C. Government Sector Impact:**

Governmental entities may spend less in settlements and enforcement costs related to public records requests because the courts are given more discretion. If the intent of the new notice requirement is to allow time for the public agency to “cure” the violation by producing the requested records prior to the initiation of the enforcement action and, thus, to minimize the award of attorney fees and costs, the provision may need to be clarified.



Current case law states that the enforcement action (the part of the lawsuit that seeks access to the public records) is independent of the part of the lawsuit that seeks an award for attorney fees and costs.<sup>52</sup> A plaintiff may seek attorney fees and costs if the public agency has unlawfully refused access to the public records, even though the public agency ultimately provided the requested records.

In addition, the 5-day notice period may be too short. Mailing a letter 5 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.

## **VI. Technical Deficiencies:**

Since private contractors who act on behalf of an agency are also subject to public records laws, they also would have records custodians. It is not clear if this bill requires a citizen to send a notice to the contracting agency's public records custodian or to the business's records custodian.

## **VII. Related Issues:**

### **Custodian of public records**

Private citizens who are unable to get a public agency to provide access to public records may find it more cumbersome to send a letter to the public records custodian if his or her identity is not readily apparent. It may be difficult for a citizen to identify the custodian of public records because he or she may be the agency head, another officer or a designee.

## **VIII. Statutes Affected:**

This bill substantially amends section 119.12 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 by Community Affairs Committee on March 7, 2017:**

- Adds guidance for the court when determining whether a public record was unlawfully refused for inspection.
- Provides that attorney fees may be awarded against a complainant if the court finds an action was filed in bad faith or was frivolous.
- Adds that if a complainant can show by a preponderance of the evidence that the agency intentionally or willfully refused to permit a public record to be inspected or copied, the court shall award the reasonable costs of enforcement and attorney fees against the agency.
- Removes the phrase “listed in the notice” for clarity.

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<sup>52</sup> *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002); *Cookston v. Office of the Pub. Defender*, LEXIS 10858 at 6 (Fla. 5th DCA July 15, 2016); *Schweickert v. Citrus Cnty. Fla. Bd.*, 193 So. 3d 1075 (Fla. 5th DCA 2016).

B. Amendments:

None.

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

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