

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 Judiciary

BILL: SB 750

INTRODUCER: Senator Perry

SUBJECT: Public Records

DATE: January 17, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	<u>Favorable</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 750 prohibits an agency, which includes a wide variety of state and local government entities, from responding to a request to inspect or copy a public record by filing a civil action against the individual or entity making the request.

II. Present Situation:

Public Records Law

The Florida Constitution

Under the Florida Constitution, the public is guaranteed the right of access to government records and meetings. Article I, s. 24(a) of the State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Florida Statutes

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., contains the main body of public records laws and is known as the Public Records Act.¹ 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 agency² to provide access to

¹ Additional public records laws are found throughout the Florida Statutes.

² 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 public agency.

public records.³ Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies.⁴ 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. A records custodian must permit records to be inspected and copied by any person,⁵ at any reasonable time,⁶ 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.⁷

An agency is permitted to charge fees for the inspection or copying of records. These fees are prescribed by law and are based upon the nature or volume of the public records requested. Section 119.07(4)(d), 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.⁸ The service charge may be assessed, and payment may be required, by an agency before providing a response to the request.⁹

The Process for Making a Public Record Request

The statutes set out an orderly process for someone to request a public record.¹⁰

1. The requestor contacts the agency and asks to copy or inspect certain records.
2. The custodian or designee must acknowledge the request promptly and respond to the request in good faith.
3. The agency may then either:
 - Provide the record as it exists;
 - Provide the record after redactions are made if an exemption applies to a portion of a record; or

³ 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.

⁴ See s. 119.071, F.S., for a list of general exemptions contained in chapter 119, F.S.

⁵ Section 119.07(1), F.S.

⁶ 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.

⁷ 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).

⁸ *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

⁹ Section 119.07(4), F.S.; *Morris Publishing Group, LLC v. State*, 154 So. 3d 528, 534 (Fla. 1st DCA 2015), *review denied*, 163 So. 3d 512 (Fla. 2015); see also *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (stating that 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).

¹⁰ Section 119.07(1), F.S.

- Deny the request and state the basis for the exemption along with a statutory citation to the exemption. If the person seeking to inspect or copy the records requests, the custodian must state in writing and with particularity, the reasons the record is exempt or confidential.

If the request is denied, the requestor has the option to work with the agency in an effort to refine or alter its request so that the agency might disclose the information if the request is clarified, presented differently, or modified.

When all efforts by the requestor fail, the requestor may:

- File a civil lawsuit alleging that the agency's action is a violation of the public records law;
- File a complaint with the local state attorney; or
- Seek voluntary mediation of the dispute using the Attorney General's public records mediation program pursuant to s. 16.60, F.S., but the mediator does not impose a binding legal decision.¹¹

Criminal and Noncriminal Penalties

Any public officer who *knowingly* violates the provisions governing the inspection and copying of records in his or her custody, s. 119.07(1), F.S., is subject to suspension and removal or impeachment and also commits a first degree misdemeanor.¹² A first degree misdemeanor is punishable by a sentence of up to 1 year in prison, a \$1,000 fine, or both. Whoever violates any provision of chapter 119, F.S., commits a noncriminal infraction, punishable by a fine that does not exceed \$500.¹³

Declaratory Judgments

When a person submits a request to an agency and the agency is uncertain if the document is a record that must be disclosed to the public or is otherwise protected from disclosure, the agency may seek guidance from a court by filing a complaint for declaratory judgment.¹⁴ A declaratory judgment¹⁵ is a binding adjudication in which the court establishes the rights of the parties without requiring enforcement of its decision. It is used to resolve legal uncertainties for the parties.

Regarding the issue of costs in a declaratory judgment action, s. 86.081, F.S., provides that the court may award costs as are equitable. This generally means that each party bears its own

¹¹ According to a phone interview conducted with Pat Gleason, the mediator for the Attorney General's Office, the office mediates approximately 100 cases each year. This is a voluntary process and both sides agree in advance to use the process. All correspondence is conducted through email and no travel is involved. The process is free and non-binding on the parties. The parties generally agree to the outcome but are not required to. Telephone interview with Pat Gleason, Public Records Mediation Program, Office of the Attorney General, Tallahassee, FL (Jan. 14, 2018).

¹² Section 119.10(1)(b), F.S.

¹³ Section 119.10(1)(a), F.S.

¹⁴ See *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011).

¹⁵ BLACK'S LAW DICTIONARY (10th ed. 2014).

attorney fees and costs.¹⁶ Therefore, if an agency seeks a declaratory judgment and names the requestor as a party, each side will be expected to pay its own attorney fees and costs.

Agencies of the state may use this tool to ask a court to determine whether a particular record is protected from disclosure or whether the record is available to the public for inspection or copying. It is not uncommon for an agency to ask the court whether certain material in their records meets the definition of a trade secret that is protected from public disclosure.¹⁷ The Legislature has found that it is a public necessity that trade secret information be expressly made confidential and exempt from public records law.¹⁸ In creating this exemption the Legislature noted:

Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.¹⁹

Attorney Fees and Costs

A court is generally required to award attorney fees and enforcement costs to the plaintiff²⁰ in an action to enforce public records laws if the court determines that:

- An agency unlawfully refused access to a public record, and
- The plaintiff provided written notice identifying the public records request to an agency records custodian at least 5 business day before filing the action.²¹

However, if the court determines that a plaintiff requested records or filed the enforcement action based on an improper purpose, the court must award reasonable costs and attorney fees against the plaintiff. An improper purpose is one in which a person requests records mainly to harass an agency, cause a violation of the public records law, or for a frivolous purpose.

¹⁶ In *Price v. Tyler*, 890 So. 2d 246 (Fla. 2004), the Florida Supreme Court held that attorney fees are not recoverable in declaratory relief actions unless there is an independent statutory or contractual basis authorizing recovery of those fees. The Court noted that it follows the 'American Rule,' whereby attorney fees may be awarded by a court only when authorized by statute or agreement of the parties.

¹⁷ *Office of Insurance Regulation v. State Farm Florida Insurance Company*, 213 So. 3d 1104 (Fla. 1st DCA 2017). Chapter 65, Financial Institutions Generally, establishes how trade secret requests are to be handled for purposes of that chapter. If someone submits documents that are believed to be trade secrets, he or she must designate them as such and provide the name of a contact person. If the office then receives a public records request for that information, the office notifies the contact person of the request and states that he or she must file an action in circuit court within 30 days seeking a declaratory judgment that the document contains trade secrets and an order barring public disclosure of the document.

¹⁸ See *Surterra Florida, LLC. v. Florida Department of Health*, 223 So. 3d 376 (Fla. 1st DCA 2017).

¹⁹ Section 815.045, F.S.

²⁰ Section 119.12, F.S.

²¹ The 5-day notice period excludes holidays and weekends. Advance written notice is not required if the agency does not prominently post contact information for its records custodian in the agency's primary administrative building in which public records are kept and on the agency's website, if the agency has a website.

Additional Litigation

If an agency is about to disclose information that someone believes is confidential and exempt and entitled to protection, a party might sue the agency to keep the information out of the public domain.²²

The bill takes effect on July 1, 2018.

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 119.07, F.S., and prohibits an agency, which includes a wide variety of state and local government entities, from responding to a request to inspect or copy a public record by filing a civil action against the individual or entity making the request.

Court cases have held, however, that the governmental agency claiming the benefit of a public record exemption bears the burden of proving its right to the exemption.²³ By prohibiting an agency from filing a “civil action” in response to a public records request, an agency would be prohibited from filing a declaratory judgment action with a court to determine whether the disclosure requirements of the public records law apply or whether the requested material is shielded from the disclosure requirements. If this option for a declaratory judgment action is removed from an agency when the duty to produce records is reasonably debatable, agencies may face additional lawsuits for refusing to provide access to public records and for producing records that are protected from public disclosure.

Section 2 of the bill provides an effective date of July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²² *Office of Insurance Regulation v. State Farm Florida Insurance Company*, 213 So. 3d 1104 (Fla. 1st DCA 2017).

²³ *Central Florida Regional Transp. Authority v. Post-Newsweek*, 157 So. 3d 401, 404 (Fla. 5th DCA 2015); *Barfield v. School Bd. Of Manatee County*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may have an indeterminate positive impact on the private sector because individuals and entities that request public records would not be required to pay the legal costs and fees associated with being sued by a state or local government entity.

C. Government Sector Impact:

No agency bill analysis has been reported at this time projecting how this bill might affect an agency. However, removing an agency's ability to request a declaratory judgment and possibly avoid sanctions might result in more litigation filed against an agency. This could result in more litigation costs to the agency.

VI. Technical Deficiencies:

The phrase "civil action" is very broad and could prohibit an agency from filing any form of litigation, possibly even litigation to protect itself. Perhaps this phrase should be amended to state with greater specificity what legal actions are prohibited by the bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.07 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.