

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 Rules

BILL: CS/SB 162

INTRODUCER: Rules Committee and Senator Perry

SUBJECT: Public Records

DATE: February 19, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	<u>Elsesser</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Hackett</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 162 amends s. 119.07, F.S., regarding public records. In simplest terms, the bill prohibits an agency 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. This effectively prohibits an agency from initiating a declaratory judgment seeking a judicial interpretation on the application of a public records exemption.

The fiscal impact of the bill on state and local governments and their contractors is indeterminate. However, to the extent an agency is no longer permitted to use the declaratory judgment action as a tool to interpret the laws pertaining to public records exemption, an agency may incur greater litigation costs associated with cases challenging an agency's denial of access to records (presumably based on the confidential and exempt or exempt status of the records).

The bill takes effect July 1, 2020.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business

¹ FLA. CONST., art. I, s. 24(a).

of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁶

Section 119.011(2), F.S., broadly 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 Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

Making a Public Records Request

Section 119.07, F.S., sets out an orderly process for a citizen to request a public record:

1. The requestor contacts the agency in writing or orally to request to inspect or copy certain records.

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), 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” 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.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

2. The custodian or designee must acknowledge the request and respond to it in good faith.
3. The agency may then provide the records subject to exemptions and confidentiality, or deny the request and state the basis for its denial.

In cases where the agency is uncertain whether the requested documents are subject to a public records exemption, the agency may:

- Refuse to release the requested documents and risk having suit brought against the agency by any number of plaintiffs for the release of the documents and the award of statutory attorney's fees;⁹
- Release the requested documents, assuming any risk of having unlawfully released confidential documents;
- Seek voluntary mediation of the dispute using the Attorney General's public records mediation program pursuant to s. 16.60, F.S.;¹⁰
- Seek an Attorney General Opinion; or
- Bring suit in its local court seeking a declaratory judgment on the uncertainty.

If a 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. The requestor may also:

- File a civil lawsuit alleging that the agency's action is a violation of 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.¹¹

Criminal and Noncriminal Penalties

If a person willfully and knowingly violates public records laws either by failing to release unprotected information or by releasing exempt or confidential information, that employee may be subject to criminal prosecution for a first degree misdemeanor, which carries a sentence of imprisonment up to one year and a fine of up to \$1000.¹² Additionally, knowing and willful failure to protect the public records of victims of crimes or accidents under s. 119.105, F.S., constitutes a third degree felony, punishable by a sentence of imprisonment up to five years and a fine of up to \$5,000.¹³

Reasonable attorney's fees will be assessed against an agency found to have violated public records law.¹⁴

⁹ See *Bd. Of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120 (Fla. 2016) (a prevailing party is entitled to statutory attorney's fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public records Act in failing to permit a public record to be inspected or copied).

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¹² Section 119.10(2)(a), F.S.

¹³ Section 119.10(2)(b), F.S.

¹⁴ Section 286.011(4), F.S.

Florida Attorney General Advisory Legal Opinions

The Attorney General must respond to requests for opinions from the Governor, members of the Cabinet, the head of an executive branch department, or certain members of the Florida Legislature. They are authorized, but not required, to respond to requests for opinions from members of the Legislature, other state officers, and officers of a county, municipality, other unit of local government, or political subdivision.¹⁵ Private companies contracting with local governments may be subject to public records laws but may not request Attorney General Opinions.

In order to request an Attorney General Opinion, attorneys for the public entity requesting an opinion must produce a legal memorandum to supply with their request. In 2018, the Attorney General issued six formal opinions.¹⁶

Florida Attorney General Open Government Mediation

Section 16.60, F.S., creates the public records mediation program within the Office of the Attorney General. It tasks that office with employing mediators to mediate disputes involving access to public records.

The open government mediation program is voluntary. Both sides to a dispute must agree to consider mediation if the program is to be utilized. The process is nonbinding, and decision-making authority remains with the parties.¹⁷

Declaratory Judgments

When an agency is uncertain whether a 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 against the requestor for declaratory judgment.¹⁸ When such an action is filed, the court is required to set an “immediate hearing.”¹⁹ Declaratory judgment actions are used to resolve legal uncertainties for the parties. A declaratory judgment is a binding decision by which a court establishes the rights of the parties, having “the full force and effect of a final judgment.”²⁰

Section 86.081, F.S., provides that the court may award costs as are equitable. Generally, each party bears its own costs and attorney fees. However, if such a civil action against an agency is required to enforce the public records law, and the requestor gave 5 days’ notice before filing the civil action, the court is required to award the costs of enforcement, including reasonable attorney’s fees, against the agency, if the court finds that the agency “unlawfully refused” to

¹⁵ Section 16.01(3), F.S.

¹⁶ The Attorney General’s Office filed 6 formal opinions in 2018, 8 in 2017, 18 in 2016, 14 in 2015, and 13 in 2014, <http://myfloridalegal.com/ago.nsf/Opinions>.

¹⁷ Section 16.60, F.S.

¹⁸ See *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011).

¹⁹ Section 119.11, F.S.

²⁰ Section 86.011, F.S.

release the records.²¹ If a court determines that the requestor made their request or filed suit for an improper purpose (e.g., harassment), the court awards attorney fees to the agency.²²

Because attorney fees are granted to a prevailing requestor, it is sometimes prudent for an agency or local government to bring suit immediately for clarification of the public records dispute in order to reduce fees at stake. Additionally, an agency facing harassing or otherwise improper requests has the option to bring suit to seek a determination that it does not need to respond to such requests.

III. Effect of Proposed Changes:

Section 1 amends s. 119.07, F.S. to prohibit an agency, including most state and local government entities and their contractors, 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.

The bill prohibits any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government from initiating any type of civil legal action, including a declaratory judgment, against a person or entity who has made a public records request. If the option to use a declaratory judgment action is not available to an agency in instances where the duty to produce or protect records is not clear, an agency may face additional lawsuits (and associated costs) for refusing to provide access (even if the agency action is ultimately upheld as valid) or for producing records that should have been protected from public disclosure.

Section 2 provides that the bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. 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 shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

²¹ Section 119.12, F.S.

²² Section 119.12(3), F.S.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive impact on the private sector because individuals and entities that request public records will incur legal costs and fees associated with being sued by an agency.

C. Government Sector Impact:

No agency bill analysis has been reported at this time projecting how this bill may affect an agency. However, removing an agency's ability to request a declaratory judgment and avoid sanctions or further lawsuits may result in increased litigation and associated costs.

VI. Technical Deficiencies:

The bill amends s. 119.07(1), F.S., which sets out an agency's statutory duties to maintain public records and how to respond to requests to inspect and copy such records. Generally, public records exemptions exempt the records from the provisions of s. 119.07(1), F.S. If the language of this bill is enacted as a provision of s. 119.07(1), F.S., public records exemptions that cite to s. 119.07(1), F.S., will not be affected by this bill. If the intent is to apply this prohibition on litigation to current public records that cite to s. 119.071(1), F.S., the Legislature should change the language to create a new subsection of s. 119.07, F.S., rather than adding the language to s. 119.07(1), F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.07.

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 Rules on February 19, 2020:

The CS prohibits agencies from bringing suit against public records requestors for declaratory judgment, as opposed to allowing the practice but shifting the costs of litigation to the agency.

- B. **Amendments:**

None.