

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 913 Requests for Public Records
SPONSOR(S): Government Operations Subcommittee; McClure
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 400

FINAL HOUSE FLOOR ACTION: Y's 113 N's 0 **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 913 passed the House on April 26, 2021, as CS/SB 400.

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. The Florida Statutes further provide 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 to provide access to public records unless an exemption applies.

The bill prohibits an agency from responding to a request to inspect or copy a record by filing an action for declaratory relief against the requester to determine whether the record is a public record or the status of the record as confidential or exempt.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill was approved by the Governor on June 29, 2021, ch. 2021-173, L.O.F., and will be come effective on July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 agency¹ to provide access to public records.² 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 records³ (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,⁴ under reasonable conditions, and under supervision by the records custodian unless an exemption applies. Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.⁵

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.⁶ Such service charge may be assessed, and payment may be required, by an agency prior to providing a response to the request.⁷

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

¹ 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.

² 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.

³ 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.

⁴ 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, 1079 (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.

⁵ 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).

⁶ *Bd. of Cnty Comm'rs of Highlands Cnty. v. Colby*, 976 So. 2d 31, 36 (Fla. 2d DCA 2008).

⁷ Section 119.07(4), F.S.; see also *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (stating that if a requester 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).

- The requester contacts the agency in writing or orally to request to inspect or copy certain records.
- The custodian or designee must acknowledge the request and respond to it in good faith.
- The agency may then provide the records subject to exemptions and confidentiality, or deny the request and state the basis for their denial.

In cases where an agency asserts a public record exemption, the agency may file a civil action for relief in their local court seeking a declaratory judgment.⁸ If the court finds that the asserted exemption is not applicable, it will order the public record or part thereof in question to be immediately produced for inspection or copying as requested by the requester.⁹

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.¹⁰ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine.¹¹ Additionally, a person convicted of knowing and willful failure to protect the public records of victims of crimes or accidents under s. 119.105, F.S., commits a third degree felony.¹² A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine.¹³

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

Florida Office of the Attorney General

Attorney General Opinions

The Office of the Attorney General (OAG) must respond to requests for opinions from the Governor, members of the Cabinet, the head of an executive branch department, and certain members of the Florida Legislature in leadership positions.¹⁵ The OAG is authorized, but not required, to respond to requests for opinions from other members of the Legislature, other state officers, and officers of a county, municipality, other unit of local government, or political subdivision.¹⁶ Attorney General Opinions (AGO), will not be issued to private citizens, for non-official duties, for disputes between agencies, for court matters, for local codes, ordinances, or charters, or for questions falling within the statutory jurisdiction of another state agency.¹⁷

To request an AGO, an attorney for the public entity requesting an opinion must produce a legal memorandum to supply with the request. In 2020, the OAG issued nine formal opinions – none of which related to the resolution of a public records dispute or a request under the Public Records Act, generally.¹⁸

⁸ Section 119.07(1)(g), F.S.

⁹ *Id.*

¹⁰ Section 119.10(2)(a), F.S.

¹¹ Sections 775.082 and 775.083, F.S.

¹² Section 119.10(2)(b), F.S.

¹³ Sections 775.082 and 775.083, F.S.

¹⁴ Section 286.011(4), F.S.

¹⁵ Section 16.01(3), F.S.

¹⁶ *Id.*

¹⁷ Florida Office of the Attorney General, *Requesting an Attorney General Opinion*, available at <http://myfloridalegal.com/pages.nsf/Main/DD177569F8FB0F1A85256CC6007B70AD> (last visited March 3, 2021).

¹⁸ Florida Office of the Attorney General, *2020 Attorney General's Advisory Legal Opinions*, available at <http://www.myfloridalegal.com/ago.nsf/OP?open&RestricttoCategory=2020&Start=1&Count=30> (last visited March 3, 2021). The Attorney General's Office filed 14 formal opinions in 2019, 6 formal opinions in 2018, 8 in 2017, 18 in 2016, 14 in 2015, and 13 in 2014.

In 2019, the OAG issued two opinions directed to requests regarding the Public Records Act:¹⁹

- AGO 2019-14, addressing whether the Education Practices Commission is a state agency under chs. 119, 120, and 286, F.S.; and
- AGO 2019-08, addressing whether ch. 119, F.S., precludes an agency from engaging a “vendor to conduct penetration testing of the agency's electronic data storage systems for the purpose of detecting and remedying vulnerabilities” where such testing would potentially allow the vendor to access information that is exempt under s. 119.071(4)(d)2.a and d., F.S., and confidential under s. 119.071(4)(a)1., F.S. (pertaining to social security numbers).

Mediation Program

A public records mediation program is established within the OAG.²⁰ The mediation program is an alternative for the resolution of public access disputes.²¹ The program is voluntary and both sides must agree to consider mediation if the program is to be initiated.²² The program is designed to assist the public in avoiding litigation regarding disputes over public records access.²³ The term “mediation” means a process whereby a neutral third person, the mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties.²⁴ Section 16.60(1), F.S., is silent as to when mediation is appropriate or required; however, the OAG is required to:²⁵

- Employ one or more mediators to mediate disputes involving access to public records;
- Recommend to the Legislature needed legislation governing access to public records; and
- Assist the Department of State in preparing training seminars regarding access to public records.

Declaratory Judgments

The Declaratory Judgment Act (the Act), ch. 86, F.S., provides parties with a mechanism to adjudicate their rights without having to wait for a violation of those rights to occur, or the need to engage in conduct that might violate the rights of others.²⁶ A declaratory judgment²⁷ is a binding adjudication in which the court establishes the rights of the parties without requiring enforcement of its decision. The Act exists “to settle and afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.”²⁸ “A party is entitled to a declaration of rights where the ripening seeds of controversy make litigation in the immediate future appear unavoidable.”²⁹

Florida courts have held that an agency claiming the benefit of a public record exemption bears the burden of proving its right to the exemption.³⁰ As such, when a person submits a public records 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 a determination from a trial court by filing a complaint for declaratory judgment.³¹ For example, the South Florida Water Management

¹⁹ See Florida Office of the Attorney General, *2019 Attorney General's Advisory Legal Opinions*, available at <http://www.myfloridalegal.com/ago.nsf/OP?open&RestricttoCategory=2019&Start=1&Count=30> (last visited March 3, 2021).

²⁰ Section 16.60(2), F.S.

²¹ Florida Office of the Attorney General, *Open Government Mediation*, available at <http://myfloridalegal.com/pages.nsf/main/d99b17eb63c2f12085256cc7000be171!OpenDocument#:~:text=The%20mediation%20program%20is%20established,program%20is%20to%20be%20initiated> (last visited March 3, 2021).

²² *Id.*

²³ *Id.*

²⁴ Section 16.60(1), F.S.

²⁵ Section 16.60(3), F.S.

²⁶ See *Murphy v. Bay Colony Property Owners Ass'n*, 12 So.3d 924 (Fla. 2d DCA 2009).

²⁷ BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁸ Section 86.101, F.S.

²⁹ *S. Riverwalk Investments, LLC v. City of Ft. Lauderdale*, 934 So. 2d 620, 623 (Fla. 4th DCA 2006).

³⁰ *Cent. Fla Reg'l Transp. Auth. v. Post-Newsweek*, 157 So. 3d 401, 404 (Fla. 5th DCA 2015); *Barfield v. Sch. Bd. of Manatee Cnty.*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014).

³¹ See *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011); see also Orlando Sentinel, *DOJ Moves Pulse Public Records Case to Federal Court* (June 28, 2016), available at <http://www.orlandosentinel.com/news/pulse-orlando-nightclub->

District (District), approximately 13 days after receiving a public records request, filed for a declaratory judgment that the requested transcripts were exempt from disclosure.³² The trial court rendered final judgment for the District. The Fourth District Court of Appeal upheld the trial court's ruling to permanently withhold portions or all of certain transcripts, and remanded for an in-camera review of the claimed "mediation communication" redactions.³³

In *Butler v. City of Hallandale Beach*, Michael Butler made a public records request to the City of Hallandale Beach (City), on or about February 20, 2009, for the "distribution list" of a personal e-mail sent by the City's mayor.³⁴ On March 25, 2009, the City informed Butler the requested information did not constitute a "public record" because the email was not sent in connection with the discharge of any municipal duty.³⁵ Butler responded on April 1, 2009, asserting his right to access the requested information.³⁶ The City, to determine the rights and obligations of the parties under ch. 119, F.S., filed a complaint for declaratory relief against Butler, on or about April 27, 2009. The City sought a declaration that the requested information was not a "public record" and need not be disclosed.³⁷ The trial court agreed with the City and the Fourth District Court of Appeal affirmed.³⁸

Section 86.081, F.S., provides that the court in a case where declaratory relief is sought may award costs as are equitable. Generally, each party bears its own costs and attorney fees.³⁹ However, if such a civil action against an agency is required to enforce the public records law, and the requester gave five days' notice before filing the civil action, the court is required to award the costs of enforcement, including reasonable attorney fees, against the agency, if the court finds that the agency "unlawfully refused" to release the records.⁴⁰ If a court determines that the requester made the request or filed suit for an improper purpose (e.g., harassment), the court awards attorney fees to the agency.⁴¹

Because attorney fees are granted to a prevailing requester in a civil action meeting the requirements of s. 119.12(1), F.S., 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.

Effect of the Bill

The bill prohibits an agency from responding to a request to inspect or copy a record by filing an action for declaratory relief against the requester to determine whether the record is a public record as defined by s. 119.011, F.S., or the status of the record as confidential or exempt from the provisions of s. 119.07(1), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

shooting/os-pulse-records-preliminary-hearing-20160628-story.html (last visited February 24, 2021) (The City of Orlando asked for a declaratory judgment after the FBI instructed it to withhold information pending the ongoing investigation and certain calls that may depict the killing of people, an exemption in Florida's public records laws).

³² *S. Florida Water Mgmt. Dist. v. Everglades Law Center, Inc.*, 2017-1098-CA (19th Jud. Dist. Cir. Ct.).

³³ *Everglades Law Ctr., Inc. v. S. Florida Water Mgmt. Dist.*, 290 So. 3d 123 (Fla. 4th DCA 2019), review denied sub nom. *Melzer v. S. Florida Water Mgmt. Dist.*, SC19-1993, 2020 WL 1894672 (Fla. Apr. 16, 2020), and review denied, SC19-2135, 2020 WL 1894689 (Fla. Apr. 16, 2020).

³⁴ *Butler*, 68 So. 3d at 279.

³⁵ Complaint for Declaratory Relief at 3, *City of Hallandale Beach v. Michael Butler*, 2009 WL 10461181 (Fla. Cir. Ct.).

³⁶ *Id.*

³⁷ *Butler*, 68 So. 3d at 279.

³⁸ *Id.* at 281.

³⁹ See *Price v. Tyler*, 890 So. 2d 246 (Fla. 2004) (holding that attorney fees are not recoverable in declaratory relief actions unless there is an independent statutory or contractual basis authorizing recovery of those fees).

⁴⁰ Section 119.12, F.S.

⁴¹ Section 119.12(3), F.S.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive fiscal 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 brought into court by an agency.

D. FISCAL COMMENTS:

It is possible that removing an agency's ability to request a declaratory judgment and avoid sanctions or further lawsuits may result in increased litigation and associated costs being incurred by government entities.