

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 1151 Public Records  
**SPONSOR(S):** Government Operations Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1648

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Stramski	Williamson

### SUMMARY ANALYSIS

The State Constitution and Florida Statutes govern access to records and meetings of state and local agencies. With respect to public records, current law in part defines terms, provides for assessment of certain fees associated with responding to public record requests, requires certain contracts with public agencies to contain provisions regarding public records, and provides for assessment of attorney fees for an agency found in violation of the public records law. With respect to public meetings, current law requires a board or commission to give reasonable notice of its meetings and to provide that such meetings must be open to the public at all times. A person may bring a civil action to enforce public meetings requirements, and is entitled to reasonable attorney fees if the person prevails.

The bill makes changes to public records and public meetings laws.

The bill defines the terms “confidential and exempt” and “exempt.”

The bill clarifies that a public records request need not be made in writing unless required by law. If a written request is required, the record custodian must provide the statutory citation of that requirement.

The bill limits the cost of clerical or supervisory assistance charges that may be assessed by an agency responding to a public records request.

The bill provides that contracts between agencies and contractors must require the contractor to notify the public agency’s custodian of public records before denying a request for records held by the contractor, and to notify the public agency if the contractor is served with a civil action to enforce public records requirements.

The bill requires each agency to provide appropriate training on public records requirements to each employee.

The bill provides that the award of reasonable costs of enforcement available to a party who prevails against an agency to enforce public records requirements includes attorney fees incurred in litigating entitlement to and quantification of attorney fees for the underlying civil action. It also provides that a party filing an action related to public records or public meetings violations against the state is not required to file a copy of the pleading seeking attorney fees on the Department of Financial Services. The agency against whom the action is brought is required to provide such notice.

The bill appears to a fiscal impact on state and local governments. See FISCAL COMMENTS.

**The bill may be a county or municipality mandate. See Section III.A.1 of the analysis.**

# 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. 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 (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>2</sup> under reasonable conditions, and under supervision by the records custodian.<sup>3</sup> Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.<sup>4</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.<sup>5</sup> The term "labor cost" includes the entire labor cost, including benefits in addition to wages or salary.<sup>6</sup> Such a service charge may be assessed and payment 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 public agency.

<sup>2</sup> There is no specific limit established for compliance with public records requests. A response must be prepared within a reasonable time of the request. *Tribune Company 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 and/or exempt information contained within such a request.

<sup>3</sup> *Woodward v. State*, 8850 So.2d 444 (Fla. 4th DCA 2004).

<sup>4</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>5</sup> Section 119.07(4)(d), F.S.

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

<sup>7</sup> *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).

### *Contract Requirements for Service Contracts*

Section 119.0701, F.S., requires each public agency contract for services to include certain provisions that require the contractor to comply with public records laws. A contractor for a service must require the contractor to:

- Keep public records that would be required by the agency to perform the service;
- Provide the public access to public records on the same terms as the agency would;
- Ensure that public records that are exempt or confidential and exempt are not improperly disclosed; and
- Meet certain public records retention and transfer requirements.

### *Civil Action and Attorney Fees*

A person or other entity may file a civil action against an agency to enforce the provisions of ch. 119, F.S. 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>8</sup> If a court determines that an agency unlawfully refused to permit a public record to be inspected or copied, the court must assess and award reasonable costs of enforcement, including reasonable attorneys' fees, against the agency responsible.<sup>9</sup> However, attorney fees for efforts expended to obtain attorney fees are not currently permitted.<sup>10</sup>

To be entitled to attorney fees in an action filed under ch. 119, F.S., 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>11</sup>

### Public Meetings Law

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times. The board or commission must provide reasonable notice of all public meetings.<sup>12</sup> Minutes of a public meeting must be promptly recorded and be open to public inspection.<sup>13</sup>

No resolution, rule, or formal action is considered binding, unless action is taken or made at a public meeting.<sup>14</sup> Acts taken by a board or commission in violation of this requirement are considered void,<sup>15</sup> though a failure to comply with open meeting requirements may be cured by independent final action by the board or commission fully in compliance with public meeting requirements.<sup>16</sup>

If a party files an action against a board or commission for failure to follow public meeting requirements and the party prevails, that party is entitled to reasonable attorney fees. Such fees may be assessed against the individual members of the board or commission, unless the board or commission sought and followed the advice of its attorney with respect to the conduct of the meeting.<sup>17</sup> To be entitled to

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

<sup>9</sup> Section 119.12, F.S.

<sup>10</sup> *Downs v. Austin*, 559 So.2d 246, 248 (Fla. 1st DCA 1990).

<sup>11</sup> Section 284.30, F.S.

<sup>12</sup> Section 286.011(1), F.S.

<sup>13</sup> Section 286.011(2), F.S.

<sup>14</sup> Section 286.011(1), F.S.

<sup>15</sup> *Grapski v. City of Alachua*, 31 So.3d 193 (Fla. 1st DCA 2010).

<sup>16</sup> *Finch v. Seminole County School Board*, 995 So.2d 1068 (Fla. 5th DCA 2008).

<sup>17</sup> Section 286.011(4), F.S.

attorney fees in such an action filed against the state or any of its agencies, the plaintiff must serve a copy of the pleading claiming the fees on 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>18</sup>

Section 286.011(4), F.S., also allows a court to assess a reasonable attorney fee against the individual filing such an action if the court determines it was filed in bad faith or was frivolous.

### Public Record and Public Meeting Exemptions

Art. I, s. 24(c) of the State Constitution authorizes the Legislature to provide by general law for the exemption of records or meetings from the requirements of Art. I, s. 24(a) and (b) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

### *Exempt versus Confidential and Exempt*

When the Legislature creates a public record exemption, it either determines that the record is exempt or confidential and exempt from public record requirements. There is a difference between records the Legislature has determined to be exempt from public records requirements and those that have been determined to be confidential and exempt.<sup>19</sup>

If the Legislature has determined the information to be confidential and exempt then the information is not subject to inspection and may be released only to those persons or entities designated in the statute.<sup>20</sup> If the Legislature determines that the information is exempt only, then the agency is not prohibited from disclosing the records in all circumstances.<sup>21</sup> In determining whether such information should be disclosed, an agency should determine whether there is a statutory or substantial policy need for disclosure. In the absence of a statutory or other legal duty to be accomplished by disclosure, an agency should consider whether the release of such information is consistent with the purpose of the exemption.<sup>22</sup>

The terms "confidential and exempt" and "exempt" are not defined in Florida Statutes.

### **Effect of Bill**

The bill makes changes to public records and public meetings laws.

The bill defines the following terms:

- "Confidential and exempt" means that a record or information is not subject to inspection or copying except as authorized by statute.
- "Exempt" means that a record or information is not subject to inspection or copying unless the custodian of public records determines, in his or her discretion, that inspection or copying is appropriate.

The bill clarifies that a public records request need not be made in writing unless required by law. If a written request is required by law, the custodian of public records must provide the statutory citation of the requirement to a requestor.

The bill revises the fee provisions for cost of duplication or inspection of public records. It specifies that the cost of clerical or supervisory assistance that may be recovered by an agency responding to a public records request must be reasonable and based on the actual cost incurred or attributable to the agency. The cost may not exceed the rate of the lowest paid personnel who the agency reasonably determines is capable of providing such clerical or supervisory assistance. Such costs may not include employer-paid health insurance premiums or other employer-paid benefits.

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<sup>18</sup> Section 284.30, F.S.

<sup>19</sup> *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004).

<sup>20</sup> *Id.*; *see also*, Attorney General Opinions 2008-24, 2004-09, and 86-97.

<sup>21</sup> *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

<sup>22</sup> Attorney General Opinion 2007-21.

The bill amends s. 119.0701, F.S., related to contract terms for contracts between a public agency and a contractor for services. It provides that such terms now apply to all contracts, not just for contracts for services. In addition, such contracts must include the following additional contract provisions requiring the contractor to:

- Notify the public agency's custodian of public records before denying a request to inspect or copy a record held by the contractor; and
- Notify the public agency if the contractor is served with a civil action to enforce the provisions of ch. 119, F.S.

Such a notification does not impose any additional duty on the public agency.

The bill requires each agency to provide appropriate training on the requirements of ch. 119, F.S., to each employee. The training must be commensurate with the employee's duties.

The bill provides that the reasonable costs of enforcement awarded to a prevailing party that brings an action to enforce the provisions of ch. 119, F.S., include reasonable attorney fees, including reasonable attorney fees incurred in litigating entitlement to, and the determination or quantification of, attorney fees for the underlying civil action. At a minimum, the court must award the reasonable costs of enforcement for those counts upon which the plaintiff prevailed.

The bill provides that a party filing an action under ch. 119, F.S., or under s. 286.011, F.S., against the state or any of its agencies covered by the State Risk Management Trust Fund, is not required to file a copy of the pleadings seeking attorney fees on DFS. The agency against whom the action is brought is required to provide notice to DFS of the pleading claiming attorney fees upon receipt. DFS may participate in the defense of such a suit and any appeal thereof with respect to the attorney fees.

Finally, the bill makes editorial and conforming changes.

#### B. SECTION DIRECTORY:

Section 1 amends s. 119.011, F.S., defining the terms "confidential and exempt" and "exempt."

Section 2 amends s. 119.07, F.S., providing that public records requests need not be made in writing unless required by law; requiring a records custodian to cite such statute if a written request is required; restricting the special service charge assessed by an agency in producing records.

Section 3 amends s. 119.0701, F.S., revising contract requirements between a public agency and a contractor.

Section 4 creates s. 119.0702, F.S., requiring agencies to provide public records training.

Section 5 amends s. 119.12, F.S., specifying a reasonable cost of enforcement; providing that a party filing an action against certain agencies is not required to serve a copy of a pleading claiming attorney fees on DFS; requiring an agency to provide notice of such pleading to DFS; authorizing DFS to join the agency in defense of such suit.

Section 6 amends s. 286.011, F.S., providing that a party filing an enforcement action against a board or commission of a state agency is not required to serve a copy of a pleading claiming attorney fees on DFS; requiring the board or commission to provide notice of such pleading to DFS; authorizing DFS to join the board or commission in defense of such suit.

Section 7 amends s. 257.35, F.S., conforming cross-references.

Section 8 amends s. 383.402, F.S., conforming cross-references.

Section 9 amends s. 497.140, F.S., conforming cross-references.

Section 10 amends s. 627.311, F.S., conforming cross-references.

Section 11 amends s. 627.351, F.S., conforming cross-references.

Section 12 amends s. 943.031, F.S., conforming cross-references.

Section 13 amends s. 943.0313, F.S., conforming cross-references.

Section 14 provides an effective date of July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

See FISCAL COMMENTS.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

See FISCAL COMMENTS.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Businesses acting on behalf of a government agency may experience increases in costs similar to those that an agency may encounter if this bill is enacted.

### D. FISCAL COMMENTS:

State and local governments may experience a negative fiscal impact from the requirement that every agency provide adequate training to every employee relating to the requirements of ch. 119, F.S. This provision will require state and local governments to devote resources to preparing and disseminating training materials to employees.

If state and local governments currently include the cost of employee benefits as part of its special service charge, then the ability to defray the cost of providing public records may be adversely impacted.

State and local governments may experience a negative fiscal impact following unsuccessful civil actions brought to enforce the requirements of ch. 119, F.S., as agencies will now be liable not only for attorney fees incurred in trying the civil action, but also for any attorney fees incurred in the determination of entitlement to, and quantification of, attorney fees for the underlying civil action.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill requires counties and municipalities to provide training for employees relating to the requirements of ch. 119, F.S. An exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18 of the State Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.