

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that chapter 119, F.S., the Public Records Act, was enacted "...to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people."²

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution...

Unless specifically exempted, all agency⁵ records are available for public inspection. The term "public record" is broadly defined 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.⁶

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

The Public Records Act specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

³ Article I, s. 24 of the State Constitution.

⁴ Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ The word "agency" is defined in s. 119.011(2), F.S., 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."

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.* 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.⁹ The records custodian must state the basis for the exemption, in writing if requested.¹⁰ Section 119.011(5), F.S., defines “custodian of public records” to mean “... the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining public records, or his or her designee.”

Effect of Bill

This bill requires each agency head who appoints a designee to act as a custodian of public records to disclose the identity of the designee to the person requesting to inspect or copy public records. The bill also prohibits denying that a record exists and prohibits misleading anyone as to the existence of a public record.

The bill requires a custodian or designee to promptly acknowledge requests to inspect or copy records and to respond to such requests in good faith.¹¹ It also requires the availability of a custodian or designee to respond to requests during regular business hours for the office having public records.

C. SECTION DIRECTORY:

Section 1 amends s. 119.07, F.S., relating to inspection and copying of public records.

Section 2 amends s. 497.140, F.S., conforming a cross-reference.

Section 3 amends s. 627.311, F.S., conforming a cross-reference.

Section 4 amends s. 627.351, F.S., conforming a cross-reference.

Section 5 provides a July 1, 2007, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

⁹ Section 119.07(1)(b), F.S.

¹⁰ Section 119.07(1)(c) and (d), F.S.

¹¹ A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a records exists and, if so, the location at which the record can be accessed.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Designation of the Custodian

Section 119.011(5), F.S., defines “custodian of public records” to mean “. . . the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining public records, or his or her designee.”

While the Public Records Act specifically identifies a “custodian of public records,” the courts have concluded that the statutory reference to the custodian does not alter the “duty of disclosure” imposed upon every person who has custody of a public record.¹² For purposes of the act, “custodian” refers to all agency personnel who have it within their power to release or communicate public records.¹³ Mere temporary possession of a document, however, does not necessarily mean that the person has custody. In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping or guardianship.¹⁴ Nevertheless, it has been held that only a custodian, not an employee, may assert an applicable statutory exemption.¹⁵

Currently, the Public Records Act permits the defined “custodian of public records” to delegate custodial responsibilities to a designee. No such delegation is provided to other agency employees with custody. This bill would appear to permit such a delegation by those employees with custody of a public record. It is not clear that multiple designations by various persons with custody would provide more clarity for the public regarding who should respond to their request to inspect or copy a public record.

¹² *Puls v. City of Port St. Lucie*, 678 So.2d 514 (Fla. 4th DCA 1996).

¹³ *Mintus v. City of West Palm Beach*, 711 So.2d 1359 (Fla. 5th DCA 1991).

¹⁴ *Ibid.*

¹⁵ *Alterra Healthcare Corporation v. Estate of Shelley*, 827 So.2d 936, 940 (Fla. 2002).

Other Comments: Veto of HB 1097

On June 20, 2006, Governor Bush vetoed HB 1097, an identical bill, for the following reasons:

- The bill leaves the impression that the designee is responsible for all records and that all requests for records must come through the designee, whereas under the prevailing law the public record custodian is the person with supervision and control over a document or responsibility for its care and a request for records can be served on any public employee.
- The bill restates principles already memorialized in public records law without enhancing them.
- The bill confuses the prevailing standard for when an agency must respond to a public records request.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 21, 2007, the Committee on State Affairs adopted a strike-all amendment and reported HB 541 favorable with amendment. The amendment removes from the bill the provision that required the records custodian to prominently post, in the agency and on the agency website homepage, the name, title, email, office telephone number and office mailing address of an appointed records custodian designee. The amendment adds language to reiterate that a records custodian may designate another officer or employee of the agency to permit the inspection and copying of public records; however, the records custodian must disclose the identity of the designee to a person making a public records request.

On April 18, 2007, the Government Efficiency & Accountability Council adopted an amendment to the strike-all amendment adopted by the Committee on State Affairs which provides that a custodian of public records must acknowledge requests promptly as well as respond to such requests in good faith.

The council reported HB 541 favorably with a council substitute.