

## Fla.'s Public Records Act Now Impacts Gov't Contractors

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A new Florida statute requires the adoption of Public Records Act requirements in state contracts with private companies. Many private entity contractors are now subject to public records requirements and could face penalties for failure to comply with the Public Records Act.

Private companies are subject to the Public Records Act to the extent they possess “public records.” A private entity may also be subject to the act to the extent it has been deemed to be acting on behalf of a public agency. This can arise when a private entity contracts with a public agency to perform an agency function.

### **Do You Have Custody of “Public Records?”**

“Public records” are broadly defined as “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.”[1]

“By this definition, a document may qualify as a public record under the statute if it was prepared by a private party, so long as it was ‘received’ by a government agent and used in the transaction of public business.”[2] “Received” refers “not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer.”[3]

Regardless of whether a private entity's document is physically received, or remotely viewed, the document will be a "public record" if it was used in connection with the transaction of official business by an agency.

If any document requested in a public records request is deemed a "public record," the private entity must produce it for inspection. "Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." [4]

"[T]he public records law can be enforced against any person who has custody of public records, whether that person is employed by the public agency creating or receiving the records or not. It makes no difference that the records in question are in the hands of a private party." [5]

"The determining factor is the nature of the record, not its physical location." [6] Any document in a private entity's custody that satisfies the definition of "public record" must be produced for inspection and copying upon request.

### **What is an "Agency?"**

Documents that would not otherwise be subject to disclosure may become so if the private entity is deemed to be an "agency." [7] "Agency" is defined to include any person, partnership, corporation or business entity "acting on behalf of any public agency." [8] The private entity may be subject to Chapter 119 if it has "assumed the role of the government." [9]

"Typically, the private entity has a contract with the government and performs a public function in the course of its duties under the contract. The private entity is acting not as a business adversary to the government but as a surrogate for the government." [10]

A private entity does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency. [11] Courts look at the totality of the following factors:

- the level of public funding;
- commingling of funds;
- whether the activity was conducted on publicly owned property;
- whether services contracted for are an integral part of the public agency's decision-making process;

- whether the private entity is performing a governmental function or a function that the public agency otherwise would perform;
- the extent of the public agency's involvement with, regulation of, or control over the private entity;
- whether the private entity was created by the public agency;
- whether the public agency has a substantial financial interest in the private entity; and
- for whose benefit the private entity is functioning.

Effective July 1, 2013, Section 119.0701 requires every Florida public agency contract for services to include a provision that the contractor (acting for the public agency) must comply with the Public Records Act, including:

- maintaining public records that ordinarily and necessarily would be required by the public agency to perform the service;
- providing the public with access to public records on the same terms and conditions that the public agency would provide;
- ensuring public records exempt from disclosure are not disclosed except as authorized by law;
- meeting all requirements for retaining public records;
- transferring, at no cost, to the agency all public records in possession of the contractor upon termination of the contract;
- destroying any duplicate public records that are exempt from disclosure; and
- providing all electronically stored records to the agency in a format compatible with the agency's information technology systems.[12]

If a contractor subject to Section 119.0701 does not comply with a public records request, the agency must enforce the contract provisions against the contractor.[13] Such provisions can include holding the contractor in default, termination of the contract or imposition of financial penalties.

“Contractor” is defined as an entity that “enters into a contract for services with a public agency and acts on behalf of the public agency.”[14] Courts interpreting this newly defined term will likely apply the same factors used to determine whether a private entity is an “agency,” discussed above.[15] Regardless of whether a private entity is a contractor or

otherwise acts as an agency, it will be subject to the Public Records Act.

Even if Section 119.0701 does not apply, a private entity may be subject to Section 287.0571(5)(j), Florida Statutes, which imposes similar public records requirements upon contracts for any outsourcing project that is a Purchasing Category Two (\$35,000) and has an expected cost of more than \$10 million within a single fiscal year.

Exemptions from these additional public records requirements exist.[16] No case law, administrative decisions or attorney general opinions address this statute.

### **Exemptions from the Public Records Act**

The Public Records Act provides exemptions for categories of documents generally identified as:

- Agency administration, i.e., questions and answers for examinations administered by an agency; sealed bids, proposals or replies received by an agency pursuant to a competitive solicitation; agency attorney work product; certain videos; and trade secret data processing software
- Agency investigations, i.e., certain criminal intelligence and criminal investigative information, information revealing surveillance techniques or procedures or personnel, information revealing the substance of a confession, information revealing the identity of a confidential informant or a confidential source, discrimination complaints, information identifying the victim of a crime, certain videotapes of minors, and agency employee complaints
- Security, i.e., security system plans and certain building plans, blueprints, schematic drawings and diagrams, including draft, preliminary and final formats
- Agency personnel information, i.e., governmental employee social security numbers, medical information, home addresses and telephone numbers; personal identifying information of a governmental employee's dependent child; and information revealing undercover personnel of any criminal justice agency

- Other personal information, i.e., social security numbers; bank account numbers, debit, charge and credit card numbers held by an agency; name, address and telephone number of telecommunications subscribers; ridesharing information; certain medical history records; certain biometric identification information; paratransit services; and emergency notification information[17]

Some of these exemptions are temporary. For example, an agency attorney's work product is exempt until conclusion of the litigation or adversarial proceeding.[18] To the extent an exemption applies, it must be specifically identified in response to any public records request.[19]

### **III. Voluntarily Responses**

Any doubt about application of the Public Records Act is generally resolved in favor of disclosing the material.[20] Given Florida's deeply rooted policy favoring disclosure, a private entity may choose to voluntarily disclose requested public records to avoid litigation.

If a court determines that the entity unlawfully withheld public records and lacked a good-faith basis to do so, the requestor may be awarded costs and attorneys' fees.[21] When considering voluntary disclosure, the private entity must take care to avoid potential liability for disclosing exempt material.

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[1] § 119.011(12), Fla. Stat. (emphasis added).

[2] Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009).

[3] Id.

[4] See § 119.07(1)(a), Fla. Stat.

[5] Nat'l Collegiate Athletic Ass'n, 18 So. 3d at 1210.

[6] See *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010).

[7] See § 119.011(12), Fla. Stat.

[8] See § 119.011(2), Fla. Stat. "Agency" is defined to include private entities acting on behalf of any public agency in order to ensure that a public agency cannot avoid disclosure under the act by contractually delegating to a private entity that which otherwise would be an agency responsibility. *B & S Utilities, Inc. v. Baskerville-Donovan Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008).

[9] See, e.g., *New York Times Co. v. PHH Mental Health Servs. Inc.*, 616 So. 2d 27 (Fla. 1993); *Weekly Planet, Inc. v. Hillsborough County Aviation Auth.*, 829 So. 2d 970 (Fla. 2d DCA 2002); *Dade Aviation Consultants, Inc. v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001); *Putnam County Humane Society, Inc. v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999).

[10] Nat'l Collegiate Athletic Ass'n, 18 So. 3d at 1209.

[11] See *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

[12] See § 119.0701(2), Fla. Stat.

[13] See § 119.0701(3), Fla. Stat.

[14] See § 119.0701(1), Fla. Stat.

[15] See *News & Sun-Sentinel Co.*, 596 So. 2d at 1031.

[16] See § 287.0571(3), Fla. Stat. The following are excepted from the requirements of Section 287.0571(5)(j), Florida Statutes: (a) a procurement of commodities and contractual services listed in s. 287.057(3)(d) and (e) and (21) (i.e., prescriptive assistive devices for medical, developmental or vocational rehabilitation of clients; artistic services, academic program reviews under \$50,000; lectures; legal services; health services involving examination, diagnosis, treatment, prevention, medical consultation or administration; certain services provided to persons with mental or physical disabilities; Medicaid services to eligible recipients; family placement services; prevention services related to mental health operated by nonprofit corporations; certain training and education services provided to injured employees; certain contracts related to public transportation; services or commodities provided by governmental entities; certain

statewide public service announcement programs; and certain independent, nonprofit colleges or universities); (b) a procurement of contractual services subject to s. 287.055 (i.e., acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services); (c) a contract to support the planning, development, implementation, operation or maintenance of the road, bridge and public transportation construction program of the Department of Transportation; and (d) a procurement of commodities or contractual services, which does not constitute an outsourcing of services or activities.

[17] See § 119.071, Fla. Stat.

[18] Id. at § 119.071(1)(d)(1), Fla. Stat.

[19] See § 119.01(1)(e), Fla. Stat.

[20] See *Dade County Aviation v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001).

[21] See § 119.12, Fla. Stat.; *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 901 (Fla. 4th DCA 2012) (“[e]ntitlement to fees ... based upon whether the public entity had a ‘reasonable’ or ‘good-faith’ belief in the soundness of its position in refusing production”); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 23 (Fla. 1st DCA 2008) (private entity not liable for attorneys’ fees where it refused production on a good faith belief it was not subject to the public records law). Under certain circumstances, violation of the Public Records Act is punishable as a misdemeanor. See § 119.10, Fla. Stat.