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Finally Relief for Florida Agencies: Safe Harbor with Public Records Requests

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Florida public agencies have made tremendous efforts in training their staff to comply with their responsibility under the Florida Public Records Act. Unfortunately, one technical mistake has turned this law into the Lawyer's Relief Act. For years, Florida public agencies have paid outrageous attorneys' fees to persons or companies who have proven even the most minor technical violation of the public records law. Florida courts have continued to interpret the law liberally to include virtually any document or computer data made or received in the ordinary course of business, while narrowly construing any statutory exemption relied on by the agency. The real question in many public records cases became whether the agency could afford to defend a meritless lawsuit or must settle simply to save scarce resources.

The Florida Legislature finally weighed in on this matter during this Session and passed reasonable reform that helps prevent the "gotcha" lawsuits. The bill is waiting upon Governor Scott to be signed. Under the new amendments to Chapter 119.12, Florida Statutes, before awarding attorney fees and costs to enforce the Act, a court has to determine:

1. whether the agency unlawfully refused to permit a public record to be inspected or copied; and
2. whether the complainant provided written notice identifying the public records request to the agency's custodian of public records at least five business days before filing the civil action.

The new law makes it clear that the five-day notice requirement only applies if the agency prominently posts its records custodian's contact information in the agency's primary administrative building in which public records are routinely—created, sent, received, maintained and requested and on the agency's website (if the agency has a website).

Public employers will now have a fighting chance to process public records requests that are sometimes verbal and anonymous. Now a written notice identifying the exact public records

request will alleviate the uncertainty that sometimes surrounds verbal requests. While five business days is not an eternity, currently some self-proclaimed enforcers of the public records law will sue within hours of an employee's mistake.

Is request for an improper purpose?

The new law finally deals with the serial public records requestor who really does not want the requested records and is just trying to catch an untrained employee. The court is now required to make a determination whether the complainant requested the public record or participated in the civil action for an improper purpose. If an improper purpose is found, the court may not assess an award of attorneys' fees and costs to the complainant. Instead, the court must award attorneys' fees and costs to the agency for its defense of a case filed with an improper purpose. The law defines an "improper purpose" as a request to inspect or copy a public record or to participate in a civil action primarily to cause a violation of this chapter or for a frivolous purpose.

Comply with timely posting

While this new law applies only to public records requests made on or after the effective date of the Act¹, this marks a dramatic shift in titling the scales back towards the middle by providing protection for both the public and the agencies. Last year, the Florida Supreme Court issued a ruling which allowed no room for public agency error under the Public Records Act.² In that case, the Florida Supreme Court held a claimant is entitled to attorneys' fees under the Act when a public agency unlawfully refuses access to public records, regardless of a public agency's reasonable or good faith mistake in refusing to produce the requested records. Though agencies are still required to process public records requests in a timely manner, it appears the motives of the requestor will finally be examined. The five business day safe harbor provision only applies if the agency prominently posts its custodian's contact information in the primary administrative building and on the agency's website. Agencies should comply with the posting requirements today.

¹ While these amendments have been passed by the Legislature, they will not become law until they have been signed by the Governor.

² *Board of Trustees, Jacksonville Police and Fire Pension Fund v. Lee*, 2016 WL 1458515 (Fla. April 14, 2016).