

Feature

HOW TO NAVIGATE FLORIDA'S PUBLIC RECORDS ACT



By David J. Metcalf & Angelika VandenBerg, McRae & Metcalf, P.A.

Each public agency in Florida that contracts for services must include a provision in its contracts requiring its contractors to comply with the Florida Public Records Act (the Act)¹ and provide access to public records in their control. In other words, contractors working for any public or quasi-public owners are subject to the Act, including contractors working for the Florida Department of Transportation, expressway authorities, county and municipal governments, water districts, development districts, boards, commissions and other such bodies. By entering into a contract for services with a public agency and acting on behalf of an agency, a contractor has custody of public records and therefore, compliance with the Act is required.

In an attempt to take advantage of the Act, a host of lawsuits have been filed in Florida seeking substantial attorneys' fee awards based on delays in providing access to public records. This places contractors in the unenviable position of trying to produce public records quickly so as to avoid litigation and attorneys' fee awards against them; while at the same time ensuring that trade secrets, private personal information and other exempt records are not produced.

What is "Access" to Public Records?

Members of the public have the right of access to public records for the purpose of making photocopies, or to simply inspect them without making copies. The custodian must permit the record to be inspected and copied at any reasonable time, under reasonable conditions, and under supervision by the custodian.² A contractor cannot impose conditions on inspection that would restrict or thwart a requester's right to access.

The Act requires that the custodian of public records acknowledge a request to inspect promptly, respond in good faith, and permit access to the record. The Act does not specify a set time limit for response to a public records request. However, the Florida Supreme Court has stated that "[t]he only delay permitted by (Chapter 119) is the limited

reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt."³

What are Public Records?

The definition of public records under the Act is extremely broad and includes 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.⁴

A document may qualify as a public record under the Act if it was prepared by a private party and was "received" by a government agent, or was used in the transaction of public business.⁵ A contractor's project files, emails, computer calendars, project schedules, spreadsheets, databases, CAD, BIM, or other design files, notes, estimates, phone records, media files and even text messages may be considered "public records" depending on the circumstances. In short, contractors should assume that virtually all project documents may be public records, unless a specific determination is made that the document is outside the definition or is exempt.

How to Respond to Requests

The impact of the Act is far reaching and nearly all encompassing. So, what is a contractor to do when it receives a public records request?

Under the Act, anyone can show up at a contractor's place of business and demand to see a public record. In order to properly comply with a records request, whether written, verbal or in person, the following preliminary steps should be considered:

- 1 Note the date and time the request was received and any contact information of the person making the request. But be careful. The law does not require the requestor to make a written request or provide his or her contact information, although having this information will of course help in gathering the correct documents and knowing where to send them.
- 2 If the requestor provides a mailing or email address, promptly provide a written acknowledgement of the request and confirmation that you will make any required documents available as soon as reasonably possible.

- 3 If the request is one that cannot be responded to immediately, the request and the written acknowledgement should then be sent to a designated records custodian for the contractor who is well versed in the requirements for compliance. Because prompt action is critical, it is prudent to designate a second person to fill in if the designated custodian is unavailable.

Once the request has been properly channeled within the company, the custodian must ensure a prompt response and proper access to the requester.

What if a Record is Exempt?

The Act recognizes that not all project documents are susceptible to the Act. For example, trade secret information is "expressly made confidential and exempt from the public records law because it is a felony to disclose such records."⁶ In this context, a "trade secret" includes any information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. Also, subject to various rules and qualifications, there are further exemptions for such things as financial statements submitted by bidders or in prequalification applications; records relating to the physical security of a facility (such as building plans, schematics, emergency evacuation plans or its security systems); a 30-day exemption for bid proposals if there has not been a notice of intended award; and personal information, such as social security numbers, identifying medical information and fingerprints or other biometric identification.

If the contractor contends that all or part of the record is exempt from inspection and copying, it must state in a written response the basis of the exemption with the statutory citation identifying the specific exemption.⁷ If only part of a document is exempt, that portion should be redacted and the non-exempt portion produced. Even if the public record requested is exempt, the custodian may not dispose of the record for 30 days after the record request is made on the custodian. If a civil action is instituted within that 30-day period, the custodian may not dispose of the record without a court order.⁸

Enforcement of Requests

A requester who believes a contractor has not properly complied with a public records request may file suit to enforce the request. If named in such a suit, the contractor could be liable to pay the attorneys' fees and expenses

of the requester if a court determines that the requested documents were public records and were not exempt. It is important to note that the right to attorneys' fees flows only one way; so, even if a contractor were to prevail on a public records request dispute, it would not be entitled to recover its own attorneys' fees.⁹

Abusive Requests

In recent years, a number of lawyers have begun to specialize in representing plaintiffs in public records cases. Because they are typically paid out of attorneys' fee awards entered against the records custodian, many of these attorneys file suit first and try to work out a solution later.¹⁰ In extreme instances, nonprofit groups – set up under the guise of keeping citizens informed – have filed an absurd number of public records requests. When the records custodian does not respond as quickly as they would like, these nonprofits and their accomplice law firm file suit seeking recovery of attorneys' fees and damages.¹¹

Now that the public records laws have been extended to private contractors, these abuses have increased and are impacting the public contracting industry. Although courts usually strongly support the right of access to public records, some courts have begun to push back against awarding attorneys' fees in the more extreme cases. In one recent case, the court labeled a "civil rights activist's" use of the public records act as an "unreasonable and flagrant abuse of (the Act)."¹² The court refused to award attorneys' fees and noted that:

If a private entity must pay an attorney's fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further, the Act was not designed to create a cottage industry for so-called "civil rights activists" or others who seek to abuse the Act for financial gain.

In another case, a court found that public records requests sent from a generic email address without providing any contact information was intentionally designed to be deceptive and refused to award attorneys' fees.¹³

Conclusion

The Act has far-reaching repercussions, and failure to comply with the Act can lead to litigation and an award of attorneys' fees against the contractor or a finding by the governing agency that the contractor has breached its contract.

In the 2015 legislative session, FTBA was in the forefront of an effort to amend the Act to ease the burden on contractors. Although that effort was unsuccessful due to the abrupt end of the legislative session, it seems likely that some sort of relief will be adopted in the 2016 session. In the meantime, while nothing can completely shield a contractor from frivolous claims, with proper protocols in place, sufficient commitment of resources and prompt action upon receipt of a public records request, it is possible to meet the requirements of the Act.

- 1 Fla. Stat. § 119.0701(2).
- 2 Fla. Stat. § 119.07(1)(a).
- 3 *Morris Pub. Group, LLC v. State*, 154 So. 3d 528, 533 (Fla. 1st DCA 2015) (internal citations omitted)(citing *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984)).
- 4 Fla. Stat. 119.011(12).
- 5 *National Collegiate Athletic Assoc. v. Assoc. Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009)(explaining that the term "received" in section 119.011(2) also pertains to documents reviewed by a public agent on a remote computer).
- 6 *Coventry First, LLC v. State of Fla. Office of Ins. Reg.*, 30 So. 3d 552 (Fla. 7 1st DCA 2010).
- 7 Fla. Stat. §119.07(e).
- 8 Fla. Stat. §119.07(h).
- 9 Although rarely applied, the Act also provides for criminal sanctions, and any person, who is not a public officer, who willfully and knowingly violates any provisions of Chapter 119 commits a misdemeanor of the first degree, punishable by up to one year in prison and up to a \$1,000 fine. Fla. Stat. § 119.10 and 775.082 or 775.083.
- 10 Such tactics have long been seen in ADA-compliance cases.
- 11 In an effort to combat such predatory practices, a class action RICO lawsuit was filed in February 2015 against some of these nonprofits and their law firm for filing more than 1,200 public records request to a municipality. *Town of Gulf Stream v. Martin E. O'Boyle, et al.*, Southern District of Florida, Case No. 9:15-cv-80182-KAM. The Florida Bar began an investigation and the nonprofit halted operations.
- 12 *Gray v. Lutheran Social Svcs.*, 2014 WL 7693526 (Fla. 4th Cir. Ct. Dec. 1, 2014)(The "Activist" had been a plaintiff in 18 separate 2014 lawsuits).
- 13 *Consumer Rights, LLC v. Union Cnty. Fla.*, 159 So. 3d 882, 884 (Fla. 1st DCA 2015)(The county did provide the records as soon as the requester filed suit).



David J. Metcalf is a partner in the Tallahassee office of McRae & Metcalf, P.A. He practices in the areas of construction, surety and business law.



Angelika Vandenberg is an associate in the Tampa office of McRae & Metcalf, P.A. She practices in the areas of construction and surety law.

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