

FLORIDA STATE AND LOCAL GOVERNMENTS

How The New Public Records Law Affects Companies Providing Services

Presented by:
Patricia J. Burke, MPA, MMC Town of Palm Shores
and
Julie Hennessy, MMC City of DeLand

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Introduction

- In 2013, CS/CS/HB 1309 was passed by the Florida Legislature
- This relates to governmental accountability in contracting
- This created new Section 119.0701, Florida Statutes effective July 1, 2013

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What does it do?

- Section 119.0701 mandates that Florida state and local public agencies include provisions in services contracts where the contractor is acting on behalf of the public agency confirming the contractor's obligations under the Public Records Act.

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What is a “Public Agency?”

- A “Public Agency” is defined for purposes of the new law to include a “state, county, district, authority, or municipal officer, or department, division, board, bureau, commission, or other separate unit of government created or established by law.”

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What is a “Contractor?”

- A “Contractor” as defined for purposes of the new law means “an individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency.”

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New Provisions in Certain Contracts

- Florida’s Public Records Act has historically applied to business and entities that are acting on behalf of a public agency.
- The issue of whether or not a private contractor is acting on behalf of a public agency has been the subject of numerous court decisions and Florida Attorney General opinions.

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New Provisions in Certain Contracts (cont'd)

- For many years, Section 287.058 Florida Statutes, has required all Florida executive branch contracts above a certain dollar threshold to include a provision allowing the agency to unilaterally terminate the contract if the contractor does not allow public access to records made or received in connection with the contract unless legally exempt from disclosure.

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New Provisions in Certain Contracts (cont'd)

- Even though the new law does not appear to expand the applicability of the Public Records Act to private entities contracting with public agencies, new Section 119.0701, requires a state or local public agency to include certain provisions in each public agency contract or services where an individual, partnership, corporation or business entity is acting on behalf of the public agency.

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New Provisions in Certain Contracts (cont'd)

- These new provisions **MUST** require a contractor to do each of the following:
 - Keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service.
 - Provide the public access to the public records on the same terms and conditions that the public agency would provide and at the same statutorily authorized cost

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New Provisions in Certain Contracts (cont'd)

- Ensure that exempt or confidential records are not disclosed except as authorized by law
- Meet all requirements for retaining public records and transferring public records at the contractor's cost upon contract termination
- The new law also requires the contractor to provide the public agency with electronically stored records in a format that is compatible with the agency's information technology.

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New Provisions in Certain Contracts (cont'd)

- Florida law previously required that the same contract provisions in the new law be included in state outsourcing contracts with an expected cost in excess of \$10 million in a fiscal year.

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New Provisions in Certain Contracts (cont'd)

- Now they apply to all services contracts where the contractor is acting on behalf of the public agency.
- Such requirements confirm that the Public Records Act applies to the private entity to the same extent that it would apply to the public agency if it were performing the services being contracted.

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Risks of Noncompliance

- Section 119.0701 requires the public agency to enforce the contract provisions in accordance with the contract.
- This could mean not only the risk of termination or default, but also potential financial penalties

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Risks of Noncompliance (cont'd)

- Additionally, as Florida state and local governments already know, any person can submit a public records request and public records issues are frequently the subject of litigation.

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Risks of Noncompliance (cont'd)

- The enactment of this new public records law, along with related publicity, could result in increased public records requests and associated litigation directed at private contractors who provide services to Florida state and local government entities.

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