

# REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

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for purposes of identification.*

January 28, 2016

Senator Rene Garcia  
Florida Senate  
310 Senate Office Building  
404 South Monroe Street  
Tallahassee, FL 32399-1100

Representative W. Gregory Steube  
Florida House of Representatives  
204 House Office Building  
402 South Monroe Street  
Tallahassee, FL 32399-1300

## VIA EMAIL AND U.S. MAIL

*Re: HB 1021 and SB 1220*

Dear Senator Garcia and Representative Steube,

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) and the undersigned 24 media organizations write to express their concerns regarding HB 1021 and SB 1220, two bills currently before the Florida House and Senate that, if passed, would substantially weaken Florida’s Public Records Law, Fla. Stat. §§ 119.01 *et seq.*, and undermine this State’s longstanding commitment to government transparency.

HB 1021 and SB 1220 seek to amend Fla. Stat. § 119.12 to eliminate mandatory attorney’s fee awards for public records requesters who successfully vindicate their statutory right to access public records. This proposed shift from mandatory to permissive fee awards is not only contrary to trends at both the state and federal level, but will dissuade the public and the press from pursuing clearly meritorious public records litigation for the benefit of the public at large. Because members of the news media, including the undersigned organizations, necessarily depend on public records laws to obtain documents and information concerning the conduct of state and local government officials and agencies, and to keep the public informed, we are deeply troubled by the legislation being considered by you and your colleagues. We strongly urge the Florida Legislature to reject these measures.

Robust public records laws that provide prompt, effective mechanisms for judicial review of denials of public access are critical to ensuring government accountability. Yet, even where denials of requests for access at the state and local level are clearly in violation of a state public records law, financial hurdles can, and frequently do, prevent journalists and members of

the public from challenging those denials in court. In states that do not mandate an award of attorney's fees to successful plaintiffs in public records lawsuits, journalists and members of the public may be forced to bear thousands of dollars in attorney's fees and other litigation costs simply to enforce a statutory guarantee of access to public records in a given case, making the pursuit of meritorious litigation often unaffordable.

Since 1984, Florida has followed a different path by mandating an award of attorneys' fees in cases where records are "unlawfully" withheld. That provision assures public records requesters that they will be able to recover costs and attorney's fees incurred in successful public records litigation, and ensures that the press and the public will not shy away from enforcing the public's right to government records and information. Fla. Stat. § 119.12. As one Florida Court of Appeal has explained, this State's mandatory fee shifting provision recognizes that such litigation benefits the public as whole:

It is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by court order at least have his attorney's fees reimbursed for that endeavor. The public should not be required to underwrite clarification of a law passed for its special benefit.

*News & Sun-Sentinel Co. v. Palm Beach Cty.*, 517 So. 2d 743, 744 (Fla. Dist. Ct. App. 1987).

Mandatory fee shifting provisions also create a financial incentive for state and local government officials and agencies to consistently comply with public records laws when responding to requests for access. As the Florida Supreme Court stated in *N.Y. Times Co. v. PHH Mental Health Services*: "If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents." 616 So. 2d 27, 29 (Fla. 1993). Thus, mandatory fee shifting provisions, like Section 119.12, have the potential to *save* both the State and public records requesters from unnecessary litigation.

HB 1021 and SB 1220 run contrary to the trend at both the federal and state level, which has been in favor of making awards of attorney's fees in public records litigation mandatory. In 1992 West Virginia amended its Freedom of Information Act to include a mandatory fee shifting provision,<sup>1</sup> and in 2011 the discretionary attorney's fees provision of Vermont's Public Records Law was amended to mandate fee shifting in almost all cases.<sup>2</sup> Additionally, amendments to the federal Freedom of Information Act that were recently approved by the U.S. House of Representatives change the current permissive

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<sup>1</sup> W. Va. Code § 29B-1-7.

<sup>2</sup> 1 V.S.A. § 319(d).

attorney's fee award provision to a mandatory one.<sup>3</sup> This nationwide trend speaks directly to the importance of encouraging members of the press and the public to enforce their right to access government records in court, and ensuring that they are not financially penalized for doing so.

Florida is known as the Sunshine State in no small part due to its commitment to the principles of open government and transparency. The Reporters Committee and the undersigned 24 media organizations strongly urge you and your colleagues to honor that commitment by rejecting HB 1021 and SB 1220.

Sincerely,

The Reporters Committee for Freedom of the Press  
American Society of News Editors  
The Associated Press  
Association of Alternative Newsmedia  
*The Bradenton Herald*  
The Center for Investigative Reporting  
*Florida Today*  
Investigative Reporting Workshop at American University  
Media Law Resource Center  
*The Miami Herald*  
MPA – The Association of Magazine Media  
The National Press Club  
National Press Photographers Association  
Newspaper Association of America  
*The News-Press*  
Online News Association  
*The Orlando Sentinel*  
*Pensacola News Journal*  
Radio Television Digital News Association  
Society of Professional Journalists  
*Sun Sentinel*  
*Tallahassee Democrat*  
Tully Center for Free Speech  
WTLV-TV/WJXX-TV (Jacksonville)  
WTSP-TV (Tampa)

cc: Senator Miguel Diaz de la Portilla, Chair, Senate Committee on Judiciary  
Representative Matt Caldwell, Chair, House State Affairs Committee

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<sup>3</sup> FOIA Oversight and Implementation Act of 2016, H.R. 653, 114th Cong. (2016), available at <https://www.congress.gov/bill/114th-congress/house-bill/653/text/eh>.