**South Carolina General Assembly**

122nd Session, 2017-2018

**S. 99**

**STATUS INFORMATION**

General Bill

Sponsors: Senator Campsen

Document Path: l:\s-jud\bills\campsen\jud0001.rem.docx

Companion/Similar bill(s): 481, 3352, 3482, 4396

Introduced in the Senate on January 10, 2017

Currently residing in the Senate Committee on **Judiciary**

Summary: Office of Freedom of Information Act Review

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

12/13/2016 Senate Prefiled

12/13/2016 Senate Referred to Committee on **Judiciary**

1/10/2017 Senate Introduced and read first time ([Senate Journal‑page 57](file:///h:\sj\20170110.docx))

1/10/2017 Senate Referred to Committee on **Judiciary** ([Senate Journal‑page 57](file:///h:\sj\20170110.docx))

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**VERSIONS OF THIS BILL**

[12/13/2016](file:///p:\pprever\2017-18\99_20161213.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 1-23-665 AND AMENDING SECTION 1-23-500 TO CREATE THE OFFICE OF FREEDOM OF INFORMATION ACT REVIEW WITHIN THE ADMINISTRATIVE LAW COURT, TO PROVIDE FOR THE ADMINISTRATION, FUNCTIONS, AND RELATED PROCEDURES OF THE OFFICE, ITS HEARING OFFICERS, AND APPEALS FROM DECISIONS OF THE OFFICE; TO AMEND SECTION 30-4-30, RELATING TO THE RIGHT TO INSPECT OR COPY PUBLIC RECORDS, SO AS TO EXPAND THE RIGHT TO INCLUDE RECEIPT OF EXISTING ELECTRONIC TRANSMISSIONS OF PUBLIC RECORDS, TO REVISE THE MANNER IN WHICH RELATED FEES AND CHARGES MAY BE ESTABLISHED AND COLLECTED, TO REDUCE THE TIME IN WHICH A PUBLIC BODY MUST RESPOND WITH NOTICE OF ITS FINAL DETERMINATION CONCERNING A RECORDS REQUEST FROM FIFTEEN TO TEN DAYS, TO PROVIDE TWO SETS OF TIME LIMITS WITHIN WHICH RECORDS SUBSEQUENTLY MUST BE FURNISHED OR MADE AVAILABLE FOR INSPECTION OR COPYING BASED ON WHETHER THE DOCUMENTS ARE LESS OR MORE THAN TWO YEARS OLD, TO INCLUDE AMONG THOSE RECORDS THAT MUST BE AVAILABLE FOR COPYING AND INSPECTION WITHOUT WRITTEN REQUEST DURING NORMAL BUSINESS HOURS ALL DOCUMENTS PRODUCED BY THE PUBLIC BODY OR ITS AGENT THAT WERE DISTRIBUTED TO OR REVIEWED BY ANY MEMBER OF THE PUBLIC BODY DURING A PUBLIC MEETING FOR THE PRECEDING SIX-MONTH PERIOD, AND TO PROVIDE THAT A PUBLIC BODY MAY COMPLY WITH REQUIREMENTS FOR MAKING CERTAIN RECORDS AVAILABLE FOR COPYING AND INSPECTION WITHOUT WRITTEN REQUEST DURING NORMAL BUSINESS HOURS BY MAKING THE RECORDS AVAILABLE ON A PUBLICLY AVAILABLE INTERNET WEBSITE; TO AMEND SECTION 30-4-100, RELATING TO REMEDIES AVAILABLE FOR VIOLATIONS, SO AS TO INCLUDE HEARINGS BEFORE THE OFFICE OF FREEDOM OF INFORMATION ACT REVIEW TO SEEK SPECIFIC ENFORCEMENT, TO CHALLENGE THE REASONABLENESS OF FEES, AND TO SEEK RELIEF FROM UNDULY BURDENSOME, OVERLY BROAD, AND OTHERWISE IMPROPER REQUESTS TO PUBLIC BODIES; TO AMEND SECTION 30-4-110, RELATING TO PENALTIES FOR VIOLATIONS, SO AS TO REMOVE EXISTING CRIMINAL PENALTIES, TO PROVIDE A PRIVATE CAUSE OF ACTION FOR A VIOLATION, AND TO PROVIDE FOR THE AWARD OF DAMAGES AND ATTORNEY FEES; AND TO AMEND SECTION 30‑2‑50 TO PROHIBIT THE OBTAINMENT OR USE OF PERSONAL INFORMATION OBTAINED FROM A LOCAL GOVERNMENT OR POLITICAL SUBDIVISION OF THE STATE FOR COMMERCIAL SOLICITATION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Article 5, Chapter 23, Title 1 of the 1976 Code is amended by adding:

“Section 1‑23‑665. (A) There is created within the Administrative Law Court the Office of Freedom of Information Act Review. The Chief Judge of the Administrative Law Court shall serve as the Director of the Office of Freedom of Information Act Review. The hearing officers and staff must be appointed, hired, contracted, and supervised by the chief judge of the court, shall exercise their adjudicatory functions, duties, and responsibilities under the auspices of the Administrative Law Court as directed by the chief judge, and shall perform such other functions and duties as the chief judge of the court prescribes. All employees of the office shall serve at the discretion of the chief judge. The chief judge is solely responsible for the administration of the office, the assignment of cases, and the administrative duties and responsibilities of the hearing officers and staff. Notwithstanding another provision of law, the chief judge also has the authority to promulgate rules governing practice and procedures before the Office of Freedom of Information Act Review. These rules are subject to review as are the rules of procedure promulgated by the Supreme Court pursuant to Article V of the South Carolina Constitution, 1895.

(B) Notwithstanding another provision of law, the hearing officers shall conduct hearings in accordance with Chapter 23, Title 1, the Administrative Procedures Act, and the rules of procedure for the Office of Freedom of Information Act Review, at suitable locations as determined by the chief judge.

(C) The hearing officers are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. The sole grounds for discipline and sanctions for hearing officers are those contained in the Code of Judicial Conduct in Rule 502, Rule 7 of the South Carolina Appellate Court Rules. The Commission on Judicial Conduct, under the authority of the Supreme Court, shall handle complaints against hearing officers for possible violations of the Code of Judicial Conduct in the same manner as complaints against other judges. Notwithstanding another provision of law, an administrative law judge or hearing officer, and the judge’s or hearing officer’s spouse or guest, may accept an invitation to, and attend, a judicial‑related or bar‑related function, or an activity devoted to the improvement of the law, the legal system, or the administration of justice.

(D) Appeals from decisions of the hearing officers must be filed with the Administrative Law Court pursuant to the court’s appellate rules of procedure. Recordings of all hearings must be made part of the record on appeal, along with all evidence introduced at hearings, and copies will be provided to parties to those appeals at no charge. The chief judge shall not hear any appeals from these decisions.

(E) A hearing officer must issue an order containing findings of fact and conclusions of law. If a hearing officer determines that records are not subject to disclosure, such a determination shall constitute a finding of good faith on the part of the public body or public official, and shall act as a complete bar against the award of attorney’s fees or other costs to the prevailing party should the hearing officer’s determination be reversed on appeal. If a hearing officer determines that a record is subject to disclosure, the order must set forth in writing what information must be disclosed and when that disclosure must occur. If the decision of the hearing officer is not timely appealed to the Administrative Law Court, a prevailing party may apply to the Administrative Law Court to enforce the determination. If the decision is appealed to the Administrative Law Court, and the administrative law judge upholds a decision ordering disclosure of information, the administrative law judge may enforce the hearing officer’s determination as the court considers appropriate. If the administrative law judge rules that the determination must be enforced, the court may hold a person, the responsible officer, or the public official of a public body in civil contempt for failing to comply with the provisions of Section 30‑4‑30 or an order of the court relating to Section 30‑4‑30. The administrative law judge also may award attorney’s fees pursuant to Section 30‑4‑110.”

SECTION 2. Section 1‑23‑500 of the 1976 Code is amended to read:

“Section 1‑23‑500. There is created the South Carolina Administrative Law Court, which is an agency and a court of record within the executive branch of the government of this State. The court shall consist of a total of six administrative law judges. The administrative law judges shall be part of the state employees retirement system. For purposes of Chapter 13 of Title 8 the Administrative Law Court is considered part of the unified judicial system.”

SECTION 3. Section 30‑4‑30 of the 1976 Code is amended to read:

“Section 30‑4‑30. ~~(a)~~(A)(1) ~~Any~~ A person has a right to inspect ~~or~~, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30‑4‑40, in accordance with reasonable rules concerning time and place of access. This right does not extend to individuals serving a sentence of imprisonment in a state or county correctional facility in this State, in any other state, or in a federal correctional facility; however, this must not be construed to prevent such persons from exercising their constitutionally protected rights, including, but not limited to, their right to call for evidence in their favor in a criminal prosecution under the South Carolina Rules of Criminal Procedure.

(2) A public body is not required to create an electronic version of a public record when one does not exist to fulfill a records request.

~~(b)~~(B) The public body may establish and collect fees ~~not to exceed the actual cost of searching for or making copies of records~~ as provided for in this section. The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records. The public body must develop a fee schedule to be posted online. The fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request. Fees charged by a public body must be uniform for copies of the same record or document and may not exceed the prevailing commercial rate for the producing of copies. Copy charges may not apply to records that are transmitted in an electronic format. If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. ~~Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records~~ A deposit not to exceed twenty‑five percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records.

~~(c)~~(C) Each public body, upon written request for records made under this chapter, shall within ~~fifteen~~ ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any ~~such~~ request, notify the person making ~~such~~ the request of its determination and the reasons ~~therefor.~~ for it; provided, however, that if the record is more than twenty-four months old at the date the request is made, the public body has twenty days (excepting Saturdays, Sundays, and legal public holidays) of the receipt to make this notification. Such a determination ~~shall~~ must constitute the final opinion of the public body as to the public availability of the requested public record ~~and, if~~, however, the determination is not required to include a final decision or express an opinion as to whether specific portions of the documents or information may be subject to redaction according to exemptions provided for by Section 30-4-40 or other state or federal laws. If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided, unless the records are more than twenty‑four months old, in which case the public body has no later than thirty‑five calendar days from the date on which the final determination was provided. If a deposit as provided in subsection (B) is required by the public body, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the deposit is received, unless the records are more than twenty‑four months old, in which case the public body has no later than thirty‑five calendar days from the date on which the deposit was received to fulfill the request. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed, electronically transmitted, nor personally delivered to the person requesting the document within the ~~fifteen days allowed herein,~~ time set forth by this section, the request must be considered approved as to non-exempt records or information. Exemptions from disclosure as set forth in Section 30-4-40 or by other state or federal laws are not waived by the public body’s failure to respond as set forth in this subsection. The various response, determination, and production deadlines provided by this subsection are subject to extension by written mutual agreement of the public body and the requesting party at issue, and such agreement shall not be unreasonably withheld.

~~(d)~~(D) The following records of a public body must be made available for public inspection and copying during the hours of operations of the public body, unless the record is exempt pursuant to Section 30‑4‑40 or other state or federal laws, without the requestor being required to make a written request to inspect or copy the records when the requestor appears in person:

(1) minutes of the meetings of the public body for the preceding six months;

(2) all reports identified in Section 30‑4‑50(A)(8) for at least the fourteen‑day period before the current day; ~~and~~

(3) documents identifying persons confined in any jail, detention center, or prison for the preceding three months; and

(4) all documents produced by the public body or its agent that were distributed to or reviewed by any member of the public body during a public meeting for the preceding six‑month period.

(E) A public body that places the records in a form that is both convenient and practical for use on a publicly available Internet website is deemed in compliance with the provisions of subsection (D), provided that the public body also must produce documents pursuant to this section if requested to do so.”

SECTION 4. Section 30‑4‑100 of the 1976 Code is amended to read:

“Section 30‑4‑100. ~~(a)~~(A) ~~Any~~ Except for violations arising from Section 30-4-30 or challenges to exemption under Section 30-4-40, a citizen of the State may apply to the circuit court for ~~either or both~~ a declaratory judgment ~~and~~, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases ~~as long as such~~ if the application is made no later than one year ~~following~~ after the date ~~on which the~~ of the alleged violation ~~occurs~~ or one year after a public vote in public session, whichever comes later. The circuit court shall also have exclusive jurisdiction to hear a challenge to a determination that an organization is not a public body as defined by Section 30-4-20(a). The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

~~(b)~~(B) If a person or entity seeking ~~such~~ relief under this section prevails, he ~~or it~~ may be awarded reasonable attorney fees and other costs of litigation specific to the request. If ~~such~~ the person or entity prevails in part, the court may in its discretion award him ~~or it~~ reasonable attorney fees or an appropriate portion ~~thereof~~ of those attorney’s fees.”

SECTION 5. Section 30‑4‑110 of the 1976 Code is amended to read:

“Section 30‑4‑110. ~~Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and, upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense, shall be fined not more than two hundred dollars or imprisoned for not more than sixty days for the second offense and shall be fined three hundred dollars or imprisoned for not more than ninety days for the third or subsequent offense.~~

(A) The Office of Freedom of Information Act Review has exclusive jurisdiction over all cases arising from Section 30-4-30 or challenges to exemptions under Section 30-4-40 subject only to appellate review consistent with Section 1-23-380. A person aggrieved by a violation of Section 30-4-30 or challenges to exemptions under Section 30-4-40 or other state or federal laws may file a request for a hearing before the Office of Freedom of Information Act Review within one year after the occurrence of the alleged violation.

(B) A citizen of this State may file a request for a hearing with the Office of Freedom of Information Act Review pursuant to Section 1‑23‑665 in the following instances:

(1) to seek specific enforcement of a request made pursuant to Section 30‑4‑30 when the public body from which the records are requested fails to comply with the time limits provided in Section 30‑4‑30(C),

(2) to challenge the reasonableness of a fee assessed pursuant to Section 30‑4‑30, and

(3) to challenge a public body’s determination that the requested information is not a public record under Section 30-4-20(c), or that the requested information is exempt from disclosure under Section 30-4-40 or other state or federal laws.

(C) A public body may file a request for hearing with the Office of Freedom of Information Act Review pursuant to Section 1‑23‑665 to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

(D) If a request for disclosure may result in the release of records or information exempt from disclosure under Section 30-4-40(a)(1), (2), (4), (5), (9), (14), (15), or (19), a person or entity with a specific interest in the underlying records or information shall have the right to request a hearing with the Office of Freedom of Information Act Review or to intervene in an action previously filed.

(E) If a person or entity seeking such relief under this section prevails, the hearing officer may order:

(1) equitable relief as he considers appropriate,

(2) actual or compensatory damages, or

(3) reasonable attorney’s fees and other costs of litigation specific to the request, unless otherwise barred by a finding of good faith pursuant to Section 1‑23‑665(E).

(F) If the person or entity prevails in part, he may be awarded reasonable attorney’s fees or other costs of litigation specific to the request, or an appropriate portion thereof, unless otherwise barred.

(G) If the hearing officer finds that the public body has arbitrarily and capriciously violated the provisions of this chapter by refusal or delay in disclosing or providing copies of a public record, it may, in addition to any actual or compensatory damages or equitable relief, impose a civil fine of five hundred dollars.

(H) A determination of the Office of Freedom of Information Act Review may be appealed to the Administrative Law Court or enforced by an administrative law judge pursuant to Section 1-23-665. The service of a notice of appeal to the Administrative Law Court acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect until the final judgement or decision of the Administrative Law Court or unless otherwise ordered by the administrative law judge. Further appeals to the Court of Appeals are subject to Section 1-23-610 and the South Carolina Appellate Court Rules.”

SECTION 6. Section 30‑2‑50 of the 1976 Code is amended to read:

“Section 30-2-50. (A) A person or private entity shall not knowingly obtain or use any personal information obtained from a state agency, a local government, or any other political subdivision of the State for commercial solicitation directed to any person in this State.

(B) Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

(C) All state agencies, local governments, and political subdivisions of the State shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.

(D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both.

~~(E)~~ ~~This chapter does not apply to a local governmental entity of a subdivision of this state or local government.~~”

SECTION 7. This act takes effect on October 1, 2017.

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