Public Records, maintenance of records

Number: INFORMAL

Date: September 05, 1997

Subject:
Public Records, maintenance of records

Mr. Robert A. Sugarman
2801 Ponce De Leon Boulevard
Suite 750
Coral Gables, Florida 33134

RE: PUBLIC RECORDS--MUNICIPALITIES--PENSION FUNDS--designation of custodian of public records; maintenance of public records. ss. 119.021, 119.031, Fla. Stat.

Dear Mr. Sugarman:

On behalf of the City Clerk for the City of Tamarac and the Board of Trustees of the City of Tamarac Employees Pension Trust Fund (the fund), you have asked this office for assistance in resolving questions that have arisen regarding the maintenance of public records. You ask whether the public records of the fund can be maintained in the custody of the Pension Trust Fund's Board of Trustees (the board) rather than the City Clerk, and be retained and made available for inspection at the office of the fund's third party administrator, located outside the city limits in neighboring Dade County.

You have advised this office that the fund is established pursuant to provisions of the Tamarac City Code. The fund covers the general employees and firefighters employed by the City of Tamarac, and certain deputy sheriffs employed by the Broward County Sheriff's Office. These deputy sheriffs were previously employed by the City of Tamarac as police officers before the City of Tamarac contracted for police services with the Sheriff of Broward County. The fund maintains numerous public records, including contracts with service providers, copies of actuarial reports, individual records on employees and pension recipients showing eligibility for benefits and benefits paid, minutes of meetings, and correspondence. From the time of the fund's inception, these records have been maintained by the City Clerk at Tamarac City Hall.

According to your letter, the amount of business transacted by the fund grew until there were no longer sufficient city employees for its administration. The trustees therefore retained a third party administrator to conduct correspondence on behalf of the fund, maintain employee eligibility records, answer employee and beneficiary questions, and perform the other day-to-day tasks of running the fund. To facilitate the third party administrator's operations, the trustees and the third party administrator would like to consolidate all of the fund's records and locate them in the office of the third party administrator.

The City Clerk, fund trustees, and third party administrator all acknowledge that the fund's records, whether located in City Hall or in the Dade County office of the third party administrator,

are subject to public inspection and copying pursuant to Chapter 119, Florida Statutes. Your request, therefore, does not deal with whether the fund's records, located in the third party administrator's office, are subject to inspection and copying under Chapter 119, since all the parties involved agree that they are public. Instead, your request asks whether all of the fund's public records, past and present, can be located exclusively in the office of the third party administrator and no longer kept in the City Clerk's custody in City Hall.

Section 119.011(1), Florida Statutes, defines "[p]ublic records" to include

"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."[1]

The Florida Supreme Court has interpreted this definition to encompass all materials received by an agency in connection with official business that are used to perpetuate, communicate, or formalize knowledge.[2] All such materials, regardless of whether they are in final form, are open for public inspection and copying unless the Legislature has exempted them from disclosure.[3]

Florida courts have recognized that an agency's responsibility to provide public records is as broad in scope as the term "public records." The only delay allowed is the time it takes for the agency to locate the record, review it for exemptions, and copying the record if a copy has been requested.[4]

Further, an agency may not avoid its responsibility under the Public Records Law by transferring custody of a record to another entity. For example, in *Tober v. Sanchez*,[5] the court held that an official charged with the maintenance of records may not transfer actual physical custody of records to the county attorney in an effort to avoid compliance with a request for inspection pursuant to the Public Records Law.

Thus, while Chapter 119, Florida Statutes, does not contain an express requirement mandating all of an agency's public records be maintained within the jurisdictional boundaries of the agency,[6] the agency is under a statutory and constitutional mandate to provide reasonable access to these records.

Although the Public Records Law does not prescribe a location at which public records must be maintained, it does suggest that such records be kept where they are ordinarily used. Section 119.031, Florida Statutes, provides in part:

"Insofar as practicable, custodians of vital, permanent, or archival records shall keep them in fireproof and waterproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used."[7]

In Attorney General's Opinion 88-26, this office considered whether a county was required to provide access to microfilmed public records maintained outside the county when the originals were available for inspection and copying at the county courthouse. In concluding that the law

did not require the transportation of copies of public records to the county courthouse when the originals were available, the issue of availability of public records and copies of these records was discussed. As that opinion states:

By storing and maintaining public records at a private storage facility, the county has designated the storage company as custodian of the microfilmed copies of the public records subject to the inspection and copying provisions of Ch. 119, F.S. Absent a statutory provision exempting the microfilmed copies from public disclosure, the storage company, as the designated custodian, may not withhold the public records from inspection and copying.[8]

The intent of the Legislature in enacting the Public Records Law and the impetus behind the adoption of Article I, section 24, Florida Constitution, was the facilitation of public access to governmental records.[9] The effect of Chapter 119, Florida Statutes, is to provide for an expedient and practical, not theoretical, inspection of public records. Thus, any nonexempt record must be available for inspection at reasonable times and under reasonable circumstances.

In the absence of any legislative direction, a rule similar to that developed by the First District Court of Appeal in *Rhea v. School Board of Alachua County*[10] may be helpful. In that case, which dealt with access requirements for public meetings under the Sunshine Law,[11] the court determined that a balancing of interests test is the most appropriate method to determine whether public or governmental interest should predominate in a particular situation.

In *Rhea*, a school board workshop had been held outside the county limits, 100 miles away from the board's headquarters. The court held that the advantage to the board resulting from the out-of-town gathering (*i.e.*, the elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. However, the court refused to adopt a rule prohibiting any board workshops from being held at a site more than 100 miles from its headquarters; rather, it held that a balancing test must be used to determine the more compelling interest to be served in such a situation.

Accordingly, it is this office's view that the city should seek to balance the interests involved. The city's need to store some public records outside the city limits (if, for example, the records can be better maintained or are more secure at the remote site) must be weighed against the inconvenience to the public of having to wait for the records to be produced or traveling to the remote site. This balancing of interests must be made on a case by case basis and will depend on the facts unique to each case.

This office suggests the following safeguards in the event it is determined that public records should be removed to a remote location: the public records must be readily available upon request; the requesting party may not be required to travel to the remote location in order to inspect and copy the records, rather, it is the duty of the custodian to retrieve the records and make them available; the cost of any transportation of records maintained outside the city in response to a request for production of records must be an expense of the custodian of records; these costs may not be passed on to the person making a public records request.

Imposing additional fees for the transportation of public records, or for the safe and convenient storage of public records off-site, may subject the custodian or his or her designee to the sanctions provided for violation of the law, including criminal penalties, a noncriminal fine and attorney's fees.[12] Any delay in production of these records beyond what is reasonable under the circumstances may result in liability on the part of the custodian.

I trust that these informal comments will be of assistance to you.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

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[1] *See also* s. 119.011(2), Fla. Stat., which defines an "[a]gency" for purposes of the Public Records Law as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[2] *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).

[3] *See, e.g.,* s. 119.07(3)(l), Fla. Stat., providing a limited work product exemption for agency attorneys.

[4] *Tribune Company v. Cannella,* 438 So. 2d 516 (Fla. 2d DCA 1983), *rev'd on other grounds,* 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company,* 105 S. Ct. 2315 (1985).

[5] 417 So. 2d 1053 (Fla. 3d DCA 1982), *review denied sub nom., Metropolitan Dade County Transit Agency v. Sanchez,* 426 So. 2d 27 (Fla. 1983).

[6] *Compare* s. 28.13, Fla. Stat., requiring the clerk of the circuit court to keep all papers filed in the clerk's office with the utmost care and security, and not to permit any person to take papers which have been filed out of the clerk's office without leave of the court.

[7] *And see* Op. Att'y Gen. Fla. 93-16 (1993), in which it was concluded that, pursuant to Ch. 119, Fla. Stat., public records may routinely be removed from the building or office in which such records are ordinarily kept only for official purposes. The specific facts of that case involved the retention of public records in the home of a public official which this office suggested might constitute a violation of the Public Records Law.

[8] *See Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984) (no provision in the Public Records Law for anyone other than the custodian of records to withhold a record with the assertion of a statutory exemption) and *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982) (privilege to withhold a public record attaches only if the records are privileged in the custodian's hands; custodian may not transfer actual custody of records to the county attorney to avoid compliance with a request for inspection under Ch. 119, Fla. Stat.). *Cf. Warden v. Bennett*, 340 So. 2d 977, 979 (Fla. 2d DCA 1976), in which the court concluded there was no requirement in the Public Records Law that, because information contained in public records is available from other sources, a person seeking access to the records must first show an unsuccessful attempt to obtain the information from those sources.

[9] *See* s. 119.01(1), Fla. Stat., and Art. I, s. 24(a), Fla. Const.

[10] 636 So. 2d 1383 (Fla. 1st DCA 1994).

[11] *See, e.g., Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc.*, 390 So. 2d 1216, 1218 fn. 5 (Fla. 2d DCA 1980), in which the court noted that since the policy behind both the Public Records Law and the Government in the Sunshine Law is similar, the two statutes should be read together and the rules relating to access apply without regard to which statute is under consideration.

[12] *See* ss. 119.10(1)-(2), and 119.12, Fla. Stat.