Public Records -- Unopened Job Applications

Number: AGO 2015-10

Date: August 06, 2015

Subject:
Public Records -- Unopened Job Applications

Mr. Hal A. Airth
Attorney at Law
Post Office Box 448
Live Oak, Florida 32064

RE: PUBLIC RECORDS – SEALED RECORDS – JOB APPLICATIONS – PERSONNEL RECORDS – whether sealed job applications which are unopened are subject to public inspection and copying as public records. ss. 119.07 and 119.071, Fla. Stat.

Dear Mr. Airth:

As attorney for the Suwannee Valley Transit Authority (the SVTA) and on behalf of the Board of Governors of the Authority, you have asked for my opinion on substantially the following question:

Are sealed job applications which were received by the Suwannee Valley Transit Authority but rejected before the applications were opened public records subject to inspection and copying under section 119.07, Florida Statutes?

In sum:

Job applications, like other personnel records, are public records made or received by the public agency in the usual course of business[1] and are subject to inspection and copying under section 119.07, Florida Statutes, once they are received. An agency may not "seal" job applications or request that they be submitted as "sealed" records to foreclose public access.

According to your letter, the Suwannee Valley Transit Authority was created in the 1970s by interlocal agreement between Columbia, Hamilton, and Suwannee Counties. The mission of the agency is set forth in the authority's Vision Statement:

"Suwannee Valley Transit Authority (SVTA) will continue to improve the safe, and reliable transportation services provided to those with disabilities; to those who are 'transportation disadvantaged'; and those who are eligible to consider SVTA as their transportation of last resort. SVTA will also develop, plan and implement service that will allow the general public to use SVTA transportation as a preferred choice of transportation particularly in and around the communities Jasper, Lake City and Live Oak."[2]

You acknowledge that the SVTA is subject to Florida's Public Records Law. From my research it

appears that the SVTA has recently been involved in a search for an administrator for that agency but, when the position was advertised, only two applications for that position were received. The board rejected both applications and will readvertise in order to attract more applicants. Apparently, the board accepts sealed job applications, but did not open either of the two that were received prior to making the decision to readvertise. A public records request has been received for the two sealed applications and you have requested our assistance in determining whether these records are subject to inspection and copying.

For purposes of Florida's Public Records Law, the term "public records" is defined in section 119.011(12), Florida Statutes:

"'Public records' means 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."[3]

The Florida Supreme Court has determined that the definition of "public records" encompasses *all material received by an agency in connection with official business that is used to perpetuate, communicate, or formalize knowledge*.[4] (e.s.) All such material, regardless of whether it is in final form, is open for public inspection and copying unless the Legislature has exempted it from disclosure.[5]

The general rule applicable to other public records applies equally to personnel records. That is, unless the Legislature has expressly exempted the particular personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under the Public Records Law, section 119.07(1), Florida Statutes.[6]

Based on this office's conclusion that personnel records are public records, this office has determined that an agency is not authorized to "seal" disciplinary notices and thereby remove those notices from disclosure under the Public Records Act.[7] Further, an agency may not, in the absence of a statutory exemption, agree to remove counseling slips and written reprimands from an employee's personnel file and maintain such documents in a separate disciplinary file for the purpose of removing such records from public access.[8] Thus, this office and the courts have advised that applications for employment, references, and resumes are subject to disclosure after redaction of statutorily exempt information such as social security numbers.[9]

Section 119.071, Florida Statutes, contains the general exemptions from inspection or copying of public records. Among the exemptions contained therein is section 119.071(1)(b)2., Florida Statutes, which provides an exemption from public inspection and copying for "sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation." Such material is exempt until such time as the agency provides notice of an intended decision or until 30 days after opening "the bids, proposals, or final replies," whichever is earlier. The statute continues:

"If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt from s. 119.07(1) and s. 24(a),

Art. I of the State Constitution until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies."

Thus, the Legislature has made clear provision for sealed bids, proposals, or replies related to competitive solicitation and their ultimate release even if the agency rejects the sealed bids. No such language appears in the statutes with regard to employment applications.[10]

The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[11] In the absence of any specific legislative provision for the confidentiality of employment applications, this office will not read such an exception into the statutes.

In sum, job applications, like other personnel records, are public records made or received by the public agency in the usual course of business[12] and are subject to inspection and copying under section 119.07, Florida Statutes, once they are received. Further, an agency may not "seal" job applications or request that they be submitted as "sealed" records to foreclose public access.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Op. Att'y Gen. Fla. 84-37 (1984), concluding that sealed bids, even if unopened, which are in the custody and control of the county have been "received" by the county in connection with the transaction of its official business and are public records.

[2] http://www.suwanneesolutions.com/transit/index.php?option=com_content&view=article&id=38&Itemid=179.

[3] *See* s. 119.011(2), Fla. Stat., defining the term "[a]gency" to mean "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."

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

[5] *See Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

[6] *See Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985).

[7] Op. Att'y Gen. Fla. 94-75 (1994).

[8] Op. Att'y Gen. Fla. 94-75 (1994). *And see* Op. Att'y Gen. Fla. 11-19 (2011) (superintendent's failure to comply with a statutory requirement to discuss a performance evaluation with the employee before filing it in the employee's personnel file, does not change the public records status of the evaluation; the evaluation is a public record and may not be removed from public view or destroyed).

[9] *See, e.g., Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980) and Op. Att'y Gen. Fla. 77-48 (1977). *And see Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *questions answered and approved*, 464 So. 2d 545 (Fla. 1985) (communications from third parties included in employment file are subject to disclosure); Op. Att'y Gen. Fla. 13-14 (2013) (written employment contract is a public record).

[10] *But see* s. 435.09, Fla. Stat., that provides confidentiality of personnel background check information.

[11] *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010); *Lightbourne v. McCollum*, 969 So. 2d 326 (2007), *rehearing denied, certiorari denied*, 128 S.Ct. 2485, 553 U.S. 1059, 171 L.Ed.2d 777; *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987). *See also Southern Bell Telephone and Telegraph Company v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that statutory exemption for proprietary confidential business information should be narrowly construed and did not apply to company(s internal self-analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open government").

[12] *See* Op. Att'y Gen. Fla. 84-37 (1984), concluding that sealed bids, even if unopened, which are in the custody and control of the county have been "received" by the county in connection with the transaction of its official business and are public records. I would note that Op. Att'y Gen. Fla. 84-37 (1984) was issued prior to the adoption of the language in s. 119.071(1)(b)2., Fla. Stat., cited above. *See* Ch. 85-45, Laws of Fla., providing that "[s]ealed bids or proposals received by an agency pursuant to invitations to bid or requests for proposals are exempt from the provisions of subsection (1) until such time as the bids or proposals are opened."