Public Records -- Contracts -- Public Agencies

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Subject:
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The Honorable Wilton Simpson
Senator, District 18
322 Senate Office Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Dear Senator Simpson:

As Senator for the Eighteenth District of Florida and in anticipation of filing amendatory legislation clarifying this matter, you have requested my opinion on substantially the following question:

Does the language of section 119.0701(1)(a), Florida Statutes, ". . . and is acting on behalf of the public agency . . . ", result in the nature of the services provided being the determining factor as to the applicability of Chapter 119, Florida Statutes, to a contractor; or does a contract for services with a public agency, regardless of the nature of the services, automatically result in that private contractor being subject to the requirements of the Public Records Law?

In sum:

The requirements of section 119.0701, Florida Statutes, apply to "contractor[s]" who contract with public agencies *and* are acting on behalf of the public agency in providing those services. Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is acting on behalf of an agency and would be subject to the requirements of the statute.

Section 119.0701, Florida Statutes, was created by the Legislature during the 2013 Legislative Session as a component of a bill relating to governmental accountability.[1] Section 1 of CS/CS/HB 1309, which became section 119.0701, Florida Statutes (2013), "requires public agency contracts for services performed on behalf of the agency to contain contract provisions clarifying the public record responsibilities of the contractor."[2] The language about which you inquire is found in section 119.0701(1)(a), Florida Statutes, defining a "contractor" for purposes of the statute:

"'Contractor' 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* as provided under s. 119.011(2)." (e.s.)[3]

Thus, for those contractors who are subject to its provisions, the statute treats the private contractor as one taking the place of or standing in the shoes of the public agency, that is "acting on behalf of" the public agency, and requires that the private entity comply with the same public records requirements as the public agency.[4]

While I am aware that section 119.0701(2), Florida Statutes, provides that "each public agency contract for services must include" the provisions set forth in the statute, these requirements are imposed on contracts entered into by public agencies with certain "contractors." "Contractors" coming within the scope of the statute are defined as those "enter[ing] into a contract for services with a public agency and . . . acting on behalf of the public agency . . . ."[5] Thus, the statutory requirements for contractual provisions relating to Florida's Public Records Law apply to "contractor[s]" coming within the scope of the statute, that is, those who not only enter into a contract for services with a public agency, but are "acting on behalf of the public agency" in providing those services.[6]

This conclusion is supported by case law construing the language of section 119.011(2), Florida Statutes, addressing the definition of the term "agency" for purposes of the Public Records Law. The statute includes public or private agencies or persons "acting on behalf of any public agency" within the definition of an "agency." As the court in *Parsons & Whittemore, Inc. v. Metropolitan Dade County* noted:

"We are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation acts 'on behalf of' the agency."[7]

Thus, for example, a private entity, the Salvation Army,[8] which had contracted with a county to provide all of the county's probation services for misdemeanants was held by the court to have taken the place of the county as the provider of probation services. The Salvation Army was acting on behalf of the county and the private entity's records "which would be public if the county were providing the . . . services" were public records when the Salvation Army performed these tasks. The courts will look to whether a private entity has been delegated that which would otherwise be an agency responsibility in order to determine whether the private entity is "acting on behalf of" the public agency within the scope of the statute.[9]

In sum, it is my opinion that the requirements of section 119.0701, Florida Statutes, apply to "contractor[s]" who contract with public agencies *and* are acting on behalf of the public agency in providing those services. Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is "acting on behalf of" an agency and thus, would be subject to the requirements of the statute.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* CS/CS/HB 1309, Florida House of Representatives, 2013 Legislative Session, and the title of the act.

[2] *See* Summary Analysis, House of Representatives Final Bill Analysis for CS/CS/HB 1309, dated June 10, 2013.

[3] *Compare* the definition of the term "contractor" in ss. 119.0701(1)(a) and 119.011(2), Fla. Stat., with the definition of "contractor" in s. 287.012(7), Fla. Stat.: "Contractor" means a person who contracts to sell commodities or contractual services to an agency."

[4] *See* Letter from Senator Don Gaetz to Attorney General Bondi dated June 13, 2013, discussing the crafting of the language of s. 119.0701(2), Fla. Stat., by the Senate and the inclusion of the language in HB 1309.

[5] The definition provides that the contractor is "acting on behalf of the public agency as provided under s. 119.011(2)." Section 119.011(2), Fla. Stat., is a definitional section and provides the definition of "[a]gency" as follows:

"'Agency' means 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." (e.s.)

[6] When the language of the statute is clear and unequivocal, the legislative intent may be gleaned from the words used without applying incidental rules of construction. *See M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826 (Fla. 1st DCA 1996); Ops. Att'y Gen. Fla. 00-46 (2000), 99-44 (1999), and 97-81 (1997).

[7] 429 So. 2d 343, at 346 (Fla. 3d DCA 1983). *And see News and Sun-Sentinel Co. v. Schwab, Twitty, Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

[8] *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

[9] *See News and Sun-Sentinel Company, supra* n.8. *And see Booksmart v. Barnes & Noble*, 718 So. 2d 227, 229 n.4 (Fla. 3d DCA 1998) (privately owned on-campus bookstore, which kept university instructors' course book list forms, was custodian of public records and agent of university and could not deny access to forms to others); *Sarasota Herald - Tribune Co. v. Community Health Corp., Inc.*, 582 So.2d 730 (Fla. 2d DCA 1991) (separate corporation created by county public hospital board was subject to Public Records Act as business entity acting on behalf of county board, in at least some of the corporation's functions).