Records, letter sent to agency by mistake

Number: INFORMAL

Date: April 15, 2010

Subject:
Records, letter sent to agency by mistake

Mr. John Burke
Chairman
Florida Board of Professional Engineers
2507 Callaway Road, Suite 200
Tallahassee, Florida 32303

Dear Mr. Burke:

You have asked whether information allegedly mistakenly sent to the Florida Board of Professional Engineers and the Florida Engineers Management Corporation[1] constitutes a public record subject to the inspection and copying provisions of Chapter 119, Florida Statutes. The board has been contacted by the attorney representing Mr. Juan Lapica in connection with claims against a former business partner. Mr. Lapica is a licensed engineer and his attorney had previously contacted the board requesting public records regarding Mr. Lapica from Ms. "Carrie" Flynn, as executive director of the board. The attorney representing the former business partner was Ms. "Colleen" Flynn.

In his representation for the suit, Mr. Lapica's attorney prepared a letter addressed to Ms. Colleen Flynn regarding settlement negotiations. A facsimile was sent to Ms. Carrie Flynn, the board's executive director, although the letter was clearly addressed to Ms. Colleen Flynn. Subsequently, when Mr. Lapica made a public records request for files relating to himself, it came to his attention that the letter was in the possession of the board and that it had been placed in files relating to complaints by him. He has asked that the letter be removed from these files, returned, and that all copies be removed from the board's files and destroyed, asserting that it has no relevance to the board's business or the previous public records request.

Section 119.011(12), Florida Statutes, defines "public 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*."[2] (e.s.)

Previously, this office was asked whether all mail received by a public agency is a public record upon receipt, including correspondence not connected with official agency business or marked "personal."[3] Responding informally, this office noted that the Florida Supreme court has determined that the definition of "public records" encompasses all materials received by an agency in connection with official business that are used to perpetuate, communicate, or

formalize knowledge. 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.

The Supreme Court of Florida has recognized that there may be instances where an agency may receive or possess materials or information that is not a public record, since the materials or information are not made or received in the course of official business. For example, in *State v. City of Clearwater*,[4] the Court found that personal emails contained in public computers do not automatically become a public record by virtue of that storage:

"Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records,'. . . private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer."[5]

In reaching this conclusion, the Court agreed with the lower trial court's observation that "[c]ommon sense . . . opposes a mere possession rule."[6]

However, just as the sender of a letter may not characterize it as exempt or confidential, the sender does not control whether materials received by an agency constitute public records.[7] Rather, it is the statutory definition of "public record" that must control a record's status.[8] The determination, however, of whether a document has, in fact, been received in connection with the transaction of official business is one that must be made by the agency and not by this office.

Consequently, in reaching such a determination, the board may wish to consider whether circumstances characterize how the document was received, such as does the letter relate to a past, existing, or potential investigation by the board.

I trust that these informal comments will be of assistance to you in resolving this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 471.038, Fla. Stat., creates the Florida Engineers Management Corporation to provide administrative, investigative and prosecutorial services to the Florida Board of Professional Engineers in accordance with the provisions of Ch. 455, Fla. Stat.

[2] *See* s. 119.011(2), Fla. Stat., defining "Agency" 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." (e.s.)

[3] Inf. Op. to The Honorable Larry Dale, dated September 18, 1997.

[4] 863 So. 2d 149 (Fla. 2003).

[5] *Id. at* 154. *Cf. Media General Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st DCA 2003) (private or personal cellular telephone calls of public employees contained in billing records held by the Republican Party not public records subject to disclosure). *And see* Op. Att'y Gen. Fla. 99-74 (1999), in which this office concluded that records of personal telephone calls retained by a school district in the course of normal operations of the district were public records.

[6] *Id. at* 154.

[7] *Cf. Gadd v. News-Press Publishing Company*, 412 So. 2d 894 (Fla. 2d DCA 1982) (records of a utilization review committee of a county hospital not exempt from Ch. 119, Fla. Stat., even though the information may have come from sources who expected or were promised confidentiality); *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files); *Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005) (private party cannot render public records exempt from disclosure merely by designating as confidential material it furnishes to a state agency); Op. Att'y Gen. Fla. 71-394 (1971) (reports received by an agency and marked "confidential" or "return to sender" must be open to public inspection unless exempted from disclosure by the Legislature).

[8] *See generally National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009) (a document may qualify as a public record under the statute if it was prepared by a private party, so long as it was received by a government agent and used in the transaction of public business).