Records, handwritten notes taken by city commissioner

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Date: June 02, 2009

Subject:
Records, handwritten notes taken by city commissioner

Mr. George Trovato
City Attorney
City of Deltona
2345 Providence Boulevard
Deltona, Florida 32725-1806

Dear Mr. Trovato:

This office has received your request for an opinion as to whether hand-written notes, taken by a city commissioner on agenda items during a commission meeting but not disclosed to anyone, are public records subject to disclosure. You also ask whether text messages sent or received by city commissioners during city commission meetings are public records.

The City of Deltona has received a public records request for all notes made by a particular commissioner at workshops and city commission meetings since January 1, 2009, as well as all text messages sent or received on the commissioner's cell phone during such workshops and meetings. The subject city commissioner has responded that the notes are personal thoughts on agenda items that were not disclosed to anyone. The commissioner has also stated that the phone used for text messaging does not retain a permanent record of any text messages. Moreover, the commissioner has asserted that all text messages made or received during meetings were private and did not pertain to public business.

Access to public records is currently guaranteed by Article I, section 24 of the Florida Constitution, and Chapter 119, Florida Statutes. Article I, section 24 provides in pertinent part:

"(a) Every person has the right to inspect or copy *any public record made or received in connection with the official business of any public body, officer, or employee* of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive and judicial branches of government. . . ." (e.s.)

Chapter 119, Florida Statutes, defines public records as

"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]

Both Article I, section 24 of the Florida Constitution and Chapter 119, Florida Statutes, specify that public records are those records that are in some way connected to "official business." Thus, any portion of handwritten notes that were not made or received in the official course of business would not be public records. Likewise, private text messages made or received during meetings would not appear to be public records subject to disclosure.[2] It is well settled, however, that no means should be used to circumvent or evade the requirements of the Public Records Law.[3]

If the purpose of a document prepared in connection with official business is to perpetuate, communicate, or formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of the agency.[4] Moreover, nonfinal documents need not be communicated to anyone in order to constitute a public record.[5]

Initially, I must note that this office has been advised that the question of whether text messages are public records subject to disclosure is presently before a circuit court in Broward County.[6] While the City of Deltona is not located within the circuit in which the case is being heard, this office will decline to comment upon the issue at this time in order to avoid intruding upon the jurisdiction of the judiciary.

As to your initial question, the following general comments are offered.

In instances where an official has made personal notes, they may still be considered public records if they are created to communicate, perpetuate, or formalize knowledge of some type. For example, this office has stated that handwritten notes prepared by a city's assistant labor attorney during interviews with city personnel are public records when the notes are used to communicate information to the labor attorney regarding future personnel actions.[7]

More recently, the court in *Miami Herald Media Company v. Sarnoff*,[8] concluded that a memorandum prepared by a city commissioner after a meeting with a former city official which summarized the details of what was said and contained alleged factual information about possible criminal activity was a public record. The court stated that the memorandum was not a draft or a note containing mental impressions that would later form a part of a governmental record, but rather formalized and perpetuated the commissioner's final knowledge gained at the meeting and was subject to disclosure.[9]

When a public employee or officer has made notes to himself or herself "which are designed for their own personal use in remembering certain things[,]" such notes are not considered public records.[10] Handwritten notes which are not intended to perpetuate, communicate, or formalize knowledge are not public records, but rather are precursors of governmental records.[11]

Accordingly, to the extent the city commissioner has taken notes for his or her own personal use and such notes are not intended to perpetuate, communicate, or formalize knowledge, personal notes taken at a workshop or during a commission meeting would not be considered public records.

I trust these informal comments will be of assistance to you. Hopefully, you will understand the position of this office in declining to render a formal opinion at this time regarding text messages

sent or received during workshops or official meetings.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 119.011(1), Fla. Stat.

[2] *Cf. State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) (private e-mail stored in a government computer not automatically a public record; "private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer.")

[3] *See Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. 2d DCA 1990); *WFTV, Inc. v. School Board of Palm Beach County*, No. CL 94-8549-AD (Fla. 15th Cir. Ct. March 29, 1995), *affirmed per curiam*, 675 So. 2d 945 (Fla. 4th DCA 1996); *and Wisner v. City of Tampa Police Department*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (city may not allow private entity to maintain physical custody of public records to circumvent the public records chapter).

[4] *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc*., 379 So. 2d 633 (Fla. 1980). *See also State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th DCA 1977), *cert. denied*, 360 So. 2d 1247 (Fla. 1978) (report prepared by assistant city attorney for the city council concerning suspected irregularities in the city's building department was a public record); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976) (working papers used in preparing a college budget were public records); and *State ex rel. Copeland v. Cartwright*, 38 Fla. Supp. 6 (Fla. 17th Cir. Ct. 1972), *affirmed*, 282 So. 2d 45 (Fla. 4th DCA 1973) (site plan review prepared for public building project must be open for public inspection, even though it was a preliminary working paper).

[5] *See, e.g., Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (drafts and notes of an autopsy performed by the medical examiner are public records); *Florida Sugar Cane League v. Florida Department of Environmental Regulation*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) (handwritten notes of agency staff "utilized to communicate and formulate knowledge within [the agency], are public records subject to no exemption"); and Inf. Op. to Michael S. Davis, March 16, 1992, in which this office advised that a personnel director's retention of notes which were originally handwritten, but were subsequently typed and kept by the director in his office for two years, "might well be construed by a court as evidence of the director's intent to perpetuate the information contained therein."

[6] *See Fort Lauderdale Fraternal Order of Police Lodge No. 31, Inc. v. George Gretsas, City Manager of Ft. Lauderdale; David Hebert, Assistant City Manager of Ft. Lauderdale; and the City of Ft. Lauderdale*, Case No. 08-32515 (17th Judicial Cir., Broward Co.).

[7] Attorney General Opinion 05-23 (2005). *See also City of Pinellas Park, Florida v. Times Publishing Co.*, No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001) (rejecting city's argument that employees' responses to survey were "notes" not subject to disclosure since responses were prepared in connection with official agency business and were intended to communicate, perpetuate, or formalize knowledge employees had about their departments); *and Florida Sugar Cane League, Inc. v. Florida Department of Environmental Protection*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) (handwritten notes by agency staff used to communicate and formalize knowledge within the agency are public records).

[8] 971 So. 2d 915 (Fla. 3d DCA 2007).

[9] *Id. at* 917.

[10] See *Justice Coalition v. First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185 (Fla. 1st DCA 2002) (individual commission members notes to selves are not designed to perpetuate, communicate, or formalize knowledge of some type, and are not public records).

[11] *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).