Public Record, cellular phone records

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Subject:
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Mr. Richard R. Michelson
City Attorney
City of Lauderhill
Suite 200
7101 West McNab Road
Tamarac, Florida 33321

Dear Mr. Michelson:

You ask whether records of calls made by municipal officials and employees held by a cellular telephone company are public records subject to disclosure and copying pursuant to s. 119.07(1)(a), F.S.

According to your letter, the city leases and pays for cellular telephones which are used by city officials and employees in carrying out city business. The cellular telephone company which supplies the service makes a record of each call made on these telephones. The city is furnished with a monthly fee statement which reflects the amount of usage of these telephones but, other than long distance calls, the monthly statement does not reflect individual calls. Records of individual local telephone calls are prepared and retained by the cellular telephone company in accordance with its usual record keeping procedures. The retention of such records by the telephone company appears to be the usual practice for this company

Although this office has been supplied with several documents relating to the lease of this equipment, no documentation regarding billing practices or access to billing information has been provided. In the absence of such documentation, no definitive determination can be made concerning the relationship between the telephone company and the city, nor can the nature of the billing records be determined. However, in an effort to provide you with some guidance, the following informal comments are offered.

Section 119.01, F.S., states that "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." Every person who has custody of a public record is required to "permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee."[1]

Section 119.011(2), F.S., provides that an agency subject to the Public Records Law includes "any . . . private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." A number of factors have been used by the courts to determine whether a

private entity may be said to be acting on behalf of a public agency. These include (1) whether the entity performs a government function, (2) the level of governmental funding, (3) the extent of governmental involvement or regulation, and (4) whether the entity was created by the government.[2] In making the determination whether a private entity is "acting on behalf of" a public agency, the courts generally consider these factors in their totality rather than considering any single factor.[3]

For example, in Parsons & Whittemore, Inc. v. Metropolitan Dade County,[4] the court held that the records of a private engineering and construction firm and their affiliates which had contracted to construct a solid waste facility and to manage and operate the facility were not public records but reflected only the work product of the private company. As the court stated, "[w]e are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation act ‘on behalf of’ the agency."[5]

More recently, in News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.,[6] the court concluded that the records generated by a professional architectural firm hired to perform services in connection with construction of public schools were not public records subject to disclosure. The court emphasized that "the architects did not participate in the school district’s process to decide whether schools should be built."[7]

Under the above test, the cellular telephone company in the instant case would not appear to be "acting on behalf of" the City of Lauderhill in providing telephone services: it does not perform a city function, receive city funding except in payment for services rendered, and the company has not been created by the city. Thus, under such a test, the telephone company would not appear to be an "agency" for purposes of Ch. 119, F.S.

However, in light of the fact that public funds are being used to lease the cellular telephone equipment and to pay the charges for calls made on these telephones, the city is under an obligation to insure that these funds are being properly spent to satisfy a public purpose.[8] This office has suggested, in light of the Florida Supreme Court's decision in O’Neill v. Burns,[9] that some degree of control should be retained by the public authority to assure accomplishment of the public purpose.[10] Thus, it may be prudent for the city to maintain records of the service supplied by the cellular telephone company in sufficient detail to enable the city to satisfy this requirement.

I trust that these informal comments will assist you in advising the City of Lauderhill.

Sincerely,

Robert A. Butterworth
Attorney General

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[1] Section 119.07(1)(a), F.S. *And see Wait v. Florida Power & Light Company,* 372 So.2d 420,

425 (Fla. 1979), stating:

"It is clear to us that this statutory phrase [at reasonable times, under reasonable conditions, and under supervision by the custodian of the public record or his designee] refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of the records to protect them [the records] from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review."

And see s. 119.011(1), F.S. (public records include "all documents, papers, letters . . .tapes . . . or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency"); Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980) (definition of records encompasses all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge).

[2] *See, e.g.,* Fritz v. Norflor Construction Company, 386 So.2d 899 (5 D.C.A. Fla., 1980) (engineering corporation performing services for city as city engineer is an agency within Ch. 119); Fox v. News-Press Publishing Company, Inc., 545 So.2d 941 (2 D.C.A. Fla., 1989) (towing company under contract to remove motor vehicles from public streets is performing a governmental function and is subject to Ch. 119). *Compare* Parsons & Whittemore, Inc. v. Metropolitan Dade County, 429 So.2d 343, 346 (3 D.C.A. Fla., 1983); News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 570 So.2d 1095 (4 D.C.A. Fla., 1990) (architectural firm hired by school board to perform design services not an agency).

[3] *See, e.g.*, Schwartzman v. Merritt Island Volunteer Fire Department, 352 So.2d 1230 (4 D.C.A. Fla., 1977), *cert. denied*, 358 So.2d 132 (Fla. 1978).

[4] 429 So.2d 343 (3 D.C.A. Fla., 1983).

[5] *Id*. at 346.

[6] 570 So.2d 1095 (4 D.C.A. Fla., 1990).

[7] *Id*. at 1095-1096.

[8] *See* s. 10, Art. VII, State Const., which prohibits the state or a county, municipality, special district or any agency thereof from lending or using its taxing power or credit to aid any private corporation, association, partnership, or person. *Cf*. Dickinson v. Stone, 251 So.2d 268 (Fla. 1971) (unless otherwise expressly provided by law, appropriated money must be expended only for the purposes for which it was appropriated); Taylor v. Williams, 196 So. 214 (Fla. 1940); Supreme Forest Woodmen Circle v. Hobe Sound Co., 189 So. 249 (Fla. 1939).

[9] 198 So.2d 1 (Fla. 1967).

[10] *See, e.g.*, AGO 86-44 (county authorized to donate revenue sharing monies to nonprofit senior citizens' organization provided program is open to the public and is determined to serve a

valid public purpose and provided proper safeguards are implemented to assure accomplishment of public purpose); AGO 83-6 (municipality may contribute directly, or indirectly through purchase of equipment, to nonprofit quasi-public corporation's football program if program is open to the public, satisfies a need for public recreation program, and there is a reasonable expectation that the public purpose will be accomplished), and AGO 71-150 (contributions to blood bank from county funds authorized when contributions made on item-by-item basis after each claim audited and approved by county commissioners and clerk).