

Tape recordings of witness statements

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Subject:
Tape recordings of witness statements

Ms. Maria I. Matthews
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Florida Department of State
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Tallahassee, Florida 32399-0250

Dear Ms. Matthews:

On behalf of the Division of Library and Information Services (division) of the Florida Department of State, you ask when an audio or audiovisual tape of a witness statement is a public record and whether a transcript of the original or master audio or audiovisual recording constitutes a preservation copy or legal replacement (if not otherwise expressly provided by law) of the public record such that the original or master recording may be disposed of without regard to a public record retention schedule or permission of the Division of Library and Information Services.

Your first inquiry concerns the recording of witness statements that may be made or used by state or local agencies in any number of formal or informal settings such as for law enforcement purposes or for subsequent criminal, administrative, regulatory or disciplinary proceedings. This office, however, has not been provided with any specific factual situation and, therefore, the comments expressed herein must be general in nature.

Section 119.011(1), Florida Statutes, defines "[p]ublic records" for purposes of Florida Public Records Law, Chapter 119, Florida Statutes, 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] (e.s.)

"Agency" is defined in section 119.011(2), Florida Statutes, 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 . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

In Attorney General Opinion 86-93, this office was asked whether sound tape recordings of a school board meeting were public records when a written version of the proceedings was made

available to the public. In that case, the secretary for the school board used a tape recorder to assist in the production of typed minutes of the board's meetings. The opinion recognized that while there is no statutory requirement that sound recordings be made of the meeting, it was concluded that once made, such recordings were subject to the requirements of Chapter 119, Florida Statutes.[2]

More recently, this office in Attorney General Opinion 04-15 considered the issue of whether a tape recording of a staff meeting was a public record in light of *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*[3] In that case, the Florida Supreme Court contrasted public records which it considered to be records intended to communicate, perpetuate or formalize information with materials prepared as drafts or notes, which it characterized as "precursors" of governmental records not intended to be final evidence of the knowledge recorded. This office again concluded that tape recordings were public records since they were made at the request of the executive director as an independent record of the proceedings and, unlike tapes or notes taken by a secretary as dictation, were intended to perpetuate the discussion at a staff meeting.

Thus, an audio or audiovisual recording of a witness statement by an agency as defined in section 119.011(2), Florida Statutes, which is created in the transaction of official business and is intended to perpetuate, communicate or formalize knowledge, constitutes a public record and is subject to the requirements of Chapter 119, Florida Statutes, including maintenance and disposal.

Your second question concerns the retention of a tape recording of a witness statement which is considered to be a public record. Specifically, you inquire whether a transcript may be made of the recording and the recording destroyed or disposed of without regard to the retention schedule or permission of the Division of Library and Information Services. You have expressed your concern that a transcript is not necessarily the equivalent copy or replacement of an original or master audio or audiovisual recording.

Section 119.09, Florida Statutes, provides that the Division of Library and Information Services shall have the right to:

"examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, creating, filing, and making available the public records in their custody. Public officials shall assist the division by preparing an inclusive inventory of categories of public records in their custody. The division shall establish a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the division shall (subject to the availability of necessary space, staff, and other facilities for such purposes) make space available in its records center for the filing of semicurrent records so scheduled and in its archives for noncurrent records of permanent value and shall render such other assistance as needed, including the microfilming of records so scheduled."[4]

Section 257.36(1)(a), Florida Statutes, makes it the responsibility of the Division of Library and Information Services of the Department of State to "[e]stablish and administer a records management program directed to the application of efficient and economical management methods relating to the creation, utilization, *maintenance, retention, preservation, and disposal of*

records." (e.s.)

Section 119.041(1), Florida Statutes, provides in part that "[e]very public official shall systematically dispose of records no longer needed, *subject to the consent of the records and information management program of the Division of Library and Information Services of the Department of State in accordance with s. 257.36.*"[5] (e.s.) Section 257.36(6), Florida Statutes, provides:

"A public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the division. The division shall adopt reasonable rules not inconsistent with this chapter which shall be binding on all agencies relating to the destruction and disposition of records . . . but not be limited to:

- (a) Procedures for complying and submitting to the division records-retention schedules.
- (b) Procedures for the physical destruction or other disposal of records.
- (c) *Standards for the reproduction of records for security or with a view to the disposal of the original record.*"[6] (e.s.)

In light of the above provisions, it appears that it is the responsibility of the division to adopt rules establishing standards for the reproduction or duplication of an audio or audiovisual tape recording with a view to disposing of the original tape recordings, and that agencies should not dispose of the original or master audio or audiovisual recording without the consent of the division.[7] This office, however, cannot substitute its judgment for that of the division in determining what those standards should be.

I hope that the above informal advisory comments may be of assistance. Thank you for contacting the Attorney General's Office.

Sincerely,

Joslyn Wilson
Director, Division of Opinions
Assistant Attorney General

JW/tzg

[1] Section 119.011(1), Fla. Stat. Effective October 1, 2004, this subsection has been renumbered at s. 119.011(11), Fla. Stat. See s. 3, Ch. 04-335, Laws of Fla.

[2] See also Op. Att'y Gen. Fla. 75-50 (1975) (tape recording of city commission meeting is a public record).

[3] 379 So. 2d 633 (Fla. 1980).

[4] Section 119.09 is repealed by Ch. 04-335, Laws of Fla., effective October 1, 2004. Similar provisions will be contained in s. 119.021, Florida Statutes, as amended by s. 5, Ch. 04-335,

supra.

[5] Effective October 1, 2004, s. 119.041 is repealed by Ch. 04-335, Laws of Fla., and s. 119.021 is reworded to provide in subsection (2)(c) substantially the same language formerly contained in s. 119.041(1). *And see* s. 119.01(4), Fla. Stat., requiring agencies to establish a program for the disposal of records that do not have sufficient legal, fiscal, administrative or archival value pursuant to the retention schedules established by the records and information management program of the Division of Library and Information Services of the Department of State. Section 119.01(4) is repealed by Ch. 04-335, Laws of Florida, effective October 1, 2004. On that date, s. 119.021(2) will provide:

"(a) The Division of Library and Information Services of the Department of State shall adopt rules to establish retention schedules and a disposal process for public records.

(b) Each agency shall comply with the rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the division.

(c) Each public official shall systematically dispose of records no longer needed, subject to the consent of the records and information management program of the division in accordance with s. 257.36.

(d) The division may ascertain the condition of public records and shall give advice and assistance to public officials to solve problems related to the preservation, creation, filing, and public accessibility of public records in their custody. Public officials shall assist the division by preparing an inclusive inventory of categories of public records in their custody. The division shall establish a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the division shall, subject to the availability of necessary space, staff, and other facilities for such purposes, make space available in its records center for the filing of semicurrent records so scheduled and in its archives for noncurrent records of permanent value, and shall render such other assistance as needed, including the microfilming of records so scheduled."

[6] *And see* s. 119.031, Fla. Stat. [after October 1, 2004, *see* s. 119.021(1)], stating that record books should be copied or repaired, renovated, or rebound if worn, mutilated, damaged, or difficult to read and that any public official who causes a record book to be copied shall attest and certify on oath that it is an accurate copy of the original book with the copy then having the force and effect of the original; and s. 257.36(1)(l), Fla. Stat., providing that the division shall make, or have made, preservation duplicates, or designate existing copies as preservation duplicates, to be preserved in the place and manner of safekeeping as prescribed by the division. Pursuant to s. 257.36(4), Fla. Stat., any preservation duplicate of any record made pursuant to Ch. 257 has the same force and effect for all purposes as the original record and a transcript, exemplification, or certified copy of such preservation duplicate shall be deemed, for all purposes, to be a transcript, exemplification, or certified copy of the original record.

[7] *Cf.* s. 257.37, Fla. Stat., stating:

"In enacting this law, the Legislature is cognizant of the fact that there may be instances where an agency may be microfilming and destroying public records or performing other records management programs pursuant to local or special acts. The Legislature is further aware that it may not be possible to implement this chapter in its entirety immediately upon its enactment, and it is not the legislative intent by this chapter to disrupt the orderly microfilming and destruction of public records pursuant to such local or special acts above referred to, provided that such agencies make no further disposition of public records without approval of the Division of Library and Information Services of the Department of State pursuant to such rules and regulations as it may establish."