



11 April 2013

Mr. Curt Kiser, General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Mr. Kiser:

It has come to our attention that independent reporter Chip Skambis made a public records request for billing records of the Blackberry cellular phones used by Commissioner Lisa Edgar and Chief Advisor Roberta Bass. The Commission provided Mr. Skambis with the billing records, but redacted 23 phone numbers, claiming that the phone calls were personal and therefore fall outside the definition of "public record". We believe that the Commission's position is legally invalid and that the Public Service Commission must provide Mr. Skambis with the unredacted billing records pursuant to his public record request.

FACTUAL BACKGROUND

On February 14, 2013, Mr. Skambis made a public record request for the billing records associated with Commissioner Edgar's business cell phone number of 850-228-2155 and for Ms. Bass's business cell number of 850-559-7291 for the period of April, 23, 2007 through August 1, 2007. On March 6, 2013, the Commission provided Mr. Skambis with the requested records, but redacted 23 numbers claiming that the records "do not meet the definition of 'public records' and are not subject to disclosure." The billing records came from AT&T and both numbers had the identical account numbers.

The Public Service Commission's Statement of Agency Organizations & Operations states that the Bureau of Information Technology Services reviews the phone use of the Commission:

The Bureau of Information Technology Services monitors and evaluates the information processing and telephony needs of the FPSC, proposing enhancements to information processing resources to management and providing technical support services. Additionally, the bureau manages the agency-wide administrative procedures manual and forms inventory/tracking programs.

Statement of Agency Organization & Operations, The Public Service Commission, page 5,
<http://www.floridapsc.com/home/files/SAOO.pdf> (last visited April 3, 2013)

On the copies of the billing records that Mr. Skambis received pursuant to his public records request, there were handwritten notes on many of the pages that contained the redacted phone numbers, including figures at the bottom of the page that represented the total amount of the redacted phone calls. For example, the handwritten figure of ".66" on page 5 was the total cost of the five redacted phone calls listed on that page. On one page, there was a handwritten note stating, "14 minutes no payment necessary."

After receiving the records, Mr. Skambis requested further explanation to justify the redactions. The Commission responded on March 20, stating it "does not provide information concerning employees' personal telephone calls because personal telephone calls do not meet the definition of 'public record' and for that reason are not subject to disclosure pursuant to Chapter 119, Florida Statutes." (various citations omitted)

LAW & ANALYSIS

The Commission's claim that the personal phone calls on the billing records do not constitute a public record is specious. The information provided to the First Amendment Foundation by Mr. Skambis indicates that the personal phone calls on the billing records fits the statutory definition of "public record" since the Commission uses the records at issue in the course of its official business of reviewing cellular phone use.

"Public record" is defined in s. 119.011(12), F.S., 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.

The Florida Supreme Court interpreted this definition to encompass *all* materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). "[T]he form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business." AGO 04-33.

In *Bill of Rights, Inc. v. City of New Smyrna Beach*, a trial court considered whether a city could redact personal phone calls on the city's cellular telephone bills in response to a public records request. No. 2009-20218-CINS (Fla. 7th Cir. Ct. April 8, 2010). The city raised as an affirmative defense that billing records relating to personal phone calls were not public records, but the court rejected this defense. *Id.* The Court found that "as a matter of law, . . . billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones are public records, when those documents are received and maintained in connection with the transaction of official business; and, the 'official business' of a city includes paying for telephone service and obtaining reimbursement from employees for personal calls." *Id.* See also *2013 Government-in-the-Sunshine Manual*, page 140.

Similarly, in AGO 99-74, Attorney General Robert A. Butterworth opined that personal phone calls made on a school district's telephones are public records even when the employee reimburses the school district for the calls because records of the personal calls were kept and maintained in the transaction of official business, which includes paying phone bills.

Here, just like the city's defense in *New Smyrna Beach*, the Commission's basis for redacting the billing records is incorrect as a matter of law. The records belong to the Commission since both phone numbers have identical account numbers and Mr. Skambis received the records from the Commission pursuant to a public record request. The Commission retains the records of calls in the course its normal operations.

Additionally, the billing records, including the personal phone numbers, are used in the course of the Commission's official business to perpetuate, communicate or formalize knowledge regarding the use of Commission cell phones by Commissioners and staff who make calls on equipment owned or leased by Commission for use in carrying out the duties and responsibilities of the Commission.

As noted above, the Bureau of Information Technology Services reviews the phone use of the Commission, monitoring and evaluating its "information processing and telephony needs." The billing records at issue contain information pertaining to both personal and business phone calls in order facilitate review of the records by the Bureau. In fact, on most of the pages that contained the redacted phone numbers, there were handwritten figures at the bottom of the page and these figures totaled the amount of the redacted phone calls. Just like the school district phone records at issue in AGO 99-74, the information here is used in the course of the Commission's official business of receiving reimbursement – or not – from commissioners and staff for the personal use of Commission cell phones. Therefore, it is crystal clear that the personal phone calls on the billing record meets the definition of a public record, and cannot be redacted absent a statutory exemption.

When a public record contains both exempt and non-exempt information, the custodian of the record must redact that which is exempt and provide access to the remainder of the record. Information contained in a public record can be redacted only if there is a specific statutory exemption. Section 119.07(1)(e), F.S. An agency claiming an exemption bears the burden of proving the right to an exemption. *Woolling v. Lamar*, 764 So.2d 765, 768 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001). Because the cellular telephone bills requested by Mr. Skambis are public records, any information contained in those billing records can be redacted only if there is a specific statutory exemption authorizing the redaction.

It is our understanding the Commission mainly relies on three cases to support its position: *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003); *NCAA v. AP*, 18 So 3d. 1201 (Fla. 1st DCA 2009), *review denied*, 37 So. 2d 848 (Fla. 2010); and *Media General Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st DCA 2003). These cases do not support the redaction of the personal calls contained in the Commission's cellular telephone billing records.

In *City of Clearwater*, the court distinguished a request for personal emails sent or received by city employees from telephone billing records, noting that unlike phone records, the city did not purposely compile personal emails with the intent to "perpetuate, communicate, or formalize knowledge of some type." *City of Clearwater*, *supra*, at 155 (citation omitted). The Florida Bar's Reporter's Handbook even states that "[t]he *Clearwater* decision does not mean, however, that all records relating to personal matters which are found in agency files are outside the scope of the Public Records Act." Patricia R. Gleason, *Overview of the Sunshine and Public Records Laws - Part II*, Fla. Bar Reporters Handbook, <http://www.floridabar.org/DIVCOM/PI/RHandbook01.nsf/f5b2cbf2a827c0198525624b00057d30/8a7f62aad31bb456852575d300563191!OpenDocument>, (last visited March 29, 2013)

The *Feeney* case also differs from the instant situation in that the telephone records in that case were maintained by the Republican Party, which is not a state agency. In contrast, Mr. Skambis has requested records the Public Service Commission maintains as part of the Commission's official business – that of paying for cellular telephone use by Commissioners and staff.

In *NCAA*, the court clarified that 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." *NCAA*, supra, at 1207. In the situation at issue, the billing records are public records because the Commission received the bills from AT&T and the Commission used the documents in the course of its official business to make decisions regarding commissioners and staff use of Commission cell phones.

The law is clear that the cellular telephone bills received by the Commission in the course of public business are public records. The Commission fails to cite a statutory exemption that would authorize redaction of personal telephone calls recorded in those billing records, and thus must immediately provide Mr. Skambis with copies of the unredacted cellular billing records.

We greatly appreciate your attention to our concerns, Mr. Kiser. Should you have any questions or need additional information or clarification, please don't hesitate to contact me.

Sincerely,



Barbara A. Petersen, President

Cc: The Honorable Ronald A. Brisé, Chairman, Public Service Commission
The Honorable Lisa Edgar, Commissioner, Public Service Commission
Roberta Bass, Chief Advisor, Public Service Commission
Jon Kaney, General Counsel, First Amendment Foundation