

Office of the County Internal Performance Auditor

Promoting Government Accountability While Providing Fair and Objective Oversight, Insight, and Foresight into County Government Operations



Hillsborough County Board of
County Commissioners

MEMORANDUM

Date: March 4, 2010

To: Mr. Ken Hagan, Chairman, Board of County Commissioners (BOCC)
All County Commissioners

CC Ms. Pat Bean, County Administrator
Ms. Renee Lee, County Attorney

From:  Jim Barnes, County Internal Performance Auditor (IPA)

Subject: Public Records Tracking and Reporting

Attached is a memorandum summarizing what has come to our attention regarding recent searches of IPA e-mails. This memo is not the result of an audit but instead the result of an IPA administrative inquiry and follow up to a Commissioner request to determine the process for public record requests for audit-related documents and IPA staff e-mails. I consider this matter serious, one requiring your immediate attention.

As a courtesy and to assure balance, I presented a draft copy of this memo on February 25 to the County Administrator and County Attorney for their comments before release to you; they did not respond by the time requested which was COB March 3. The draft was marked "confidential" to indicate that we had not released a copy to anyone other than the two individuals to whom it was distributed and we wanted the document protected. We did not provide the draft document to any other individuals, or the press. We learned that the draft was distributed by them to certain members of their staff.

I did hear verbally from both officials, one just prior to its scheduled release, and the other through a representative this morning requesting additional time to respond. I was hoping to get their responses before this release. Verbally, they have indicated they do not agree with its contents. At around 2 p.m. today, the County Administrator informed me that a written response and rebuttal would be provided before 4 p.m. today; it was not provided but should be available to you all shortly. The County Attorney did not provide a formal response but I can assume one will also be provided at some time in the future.

ATTACHMENTS

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To: Ken Hagan, Chairman, Board of County Commissioners (BOCC)
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CC: Pat Bean, County Administrator
Renee Lee, County Attorney

From:  Jim Barnes, County Internal Performance Auditor (IPA)

Subject: Public Records Tracking and Reporting

The purpose of this memo is to inform you of an important administrative matter requiring your immediate attention.

As you are aware, e-mails of all County government employees using the County automated system's Microsoft Outlook, including county commissioners, constitutional officers, and the IPA, are subject to public record requests. As a result of the recent disclosure and discussion of business and personal e-mails of IPA staff at the January 13, 2010, workshop, we briefly examined public record policies, procedures, and practices, and inquires made to ITS, the County Administrator, and County Attorney as to their origin. Our examination revealed potential control risks and weaknesses in the process. Adequate controls are missing for ensuring only authorized searches are performed in accordance with administrative policy and Florida law. Specifically, our review of e-mail searches revealed that several were performed using questionable criteria and may have violated HIPAA. The subject employees or officials of these searches were not properly notified nor were these searches properly recorded and documented.

It is our opinion that controls must be strengthened to ensure only authorized searches are performed and documented and related laws and policies followed. We found the current process is fragmented --- there is no central tracking of requests received, requests acted upon and responded to, or other relevant information. We recommend that the controls, policies, processes, and practices for receiving, documenting, delivering, and reporting public record requests be examined and validated by an independent internal controls audit.

The County's public record requests process is governed by State statute 119.0713 and administrative directives (AD) #CO-02 and #CO-04, as well as ongoing practices. Our review of

a report documenting e-mail searches performed by County Attorney staff revealed topics and key word searches that could be considered problematic. According to the report requested by us and supplied by ITS:

- 1) "FDLE" word searches were conducted for "BecknerK" (County Commissioner) on October 27, 2009. Because the Commissioner had requested that Florida Department of Law Enforcement (FDLE) conduct an investigation of the County Attorney and County Administrator, it is problematic that these searches of the Commissioner's e-mails were not documented as a public record requests. Furthermore, on February 1, 2010, a request was made to ITS for e-mails and information sent to FDLE; ITS denied this request because FDLE investigators had restricted disclosure and confidentiality of information provided to them.¹ It is problematic to see the key word "FDLE" subsequently used in searches over the next 48 hours. Searches were conducted of two ITS employees, "ValentineS" and "AlfonsoS", on February 2 and 3, respectively. These employees had performed "restricted disclosure" searches for FDLE.
- 2) There were two searches performed on November 3, 2009, of the "BarnesJ" (IPA) e-mail folder with key words "animal services" and "hcas". Because there was an ongoing audit being conducted of HCAS, information related to the audit was exempt from public record requests until the final report was released. (See State statute 119.0713(2) and AD CO-02 "Exemptions") The verbal explanation given to us by County Attorney staff was that Mr. Wesley Roe of the Office of the County Administrator had asked for assistance in reviewing these files in response to a request made by Mr. Bill Armstrong, HCAS Director. Staff further explained that this was not a search but an "export" of an existing search made by Mr. Roe. Whether or not it was County Attorney or County Administration staff, the IPA should have been notified and given the opportunity to review the request in accordance with AD # CO-02 section "Notice to Employees" in order to determine whether there was any information that would compromise the results of the "in-progress" audit. If e-mail information was necessary to respond to the audit, why Mr. Armstrong did not make a direct request to this office is unknown.
- 3) Several other e-mail searches of the IPA and staff were made on 10/27/09, 11/03/09, 11/18/09, 12/28/09, and 1/13/10. These searches had no search criteria other than beginning and end dates and provided all e-mails during the identified timeframe. These searches contained thousands of e-mails. The IPA was not notified of these "public" record requests. We were not notified of the purposes or extent of these searches and there is no evidence of any request or notifications in County Attorney's records as to what initiated these searches or to whom these files were delivered. Due to the nature of our work, we must be notified of requests for our office records, including e-mails. This includes requests made by other County employees, not just the general public.

We were informed that County Administrator staff attempted a search of IPA e-mails on November 2, 2009. The search parameters and the result of that search are unknown. This could have been related to the subsequent "hcas" and "animal services" searches made by County Attorney staff as identified above.

¹ A similar request had been made of this office and it was denied for the same reasons.

We also confirmed through internal ITS logs that a search by ITS staff was requested on November 9, 2009, from Office of County Administrator staff of all IPA department e-mails for a period of 5 months dating back to July 2009. The purpose of the request was not conveyed to the ITS staff. Because no key word parameters were used, it is believed that as many as 6,000 e-mails may have been delivered to Office of the County Administrator containing information relating to ongoing audits and other IPA activities. HIPAA information was also contained in these e-mails. This search could impede our independence and the confidentiality of our work. We agree that transparency by this office is important but on-going audit work, certain internal working documents, and HIPAA-related information are protected from public disclosure. (We informed you this past January that our automated office files may have been copied and compromised by trespassers when the security block was lifted by unknown individuals at some unknown date.)

Recommendation

We recommend that an independent evaluation by an external third party be conducted of the public record requests polices, process, and practices for the purpose of identifying possible improvements in controls, process efficiencies, and overall compliance with State statutes and County policies. Internal controls should be identified, tested, revised and/or implemented to ensure compliance with policies and privacy restrictions. One possible solution would be to implement a Board policy or revise and/or strengthen the Administrative Directive.

Specifically, procedures and policies need to be reviewed and potentially modified to specifically delineate guidelines for intergovernmental/cross-agency requests, associated notifications to recipients, the use of County staff performing e-mail and public record searches, and definitions of legitimate business purposes for requesting and performing searches. Distinctions should be made for requests made by County staff as to whether such requests are for legitimate business purposes (investigations, Human Resource, etc.) consistent with the requestor's authority, or whether requests are made for personal reasons as a private citizen. If the requests are made as a private citizen or for personal use, then the same rules (i.e. reimbursement of reproduction costs, special service charges etc.) should be applied as with other public record requests.

Please contact us if you need additional details or information. Please consider this matter worthy of your immediate attention.

ADMINISTRATIVE DIRECTIVE #CO-04

SUBJECT: Electronic Mail & Public Access
EFFECTIVE DATE: February 8, 2004
EXPIRATION DATE:
SUPERSEDES: June 13, 1994

Authority:

To be implemented in accordance with Florida Statutes, Chapter 119, hereby made a part of this Administrative Directive.

Purpose:

To provide for the provision of public records made or received between departments under the County Administrator through the Electronic Mail (E-Mail) process.

Policy:

The Office of the County Administrator (OCA) is committed to a comprehensive records management program that insures that all public records are managed economically, effectively, and legally.

Responsibilities:

Administrative Services Director: Will be the designated records custodian for all OCA generated E-Mail only. It will be the responsibility of the Director to accommodate the public when copies of E-Mail are requested. The Director will also keep a log of requests for E-Mail records. The Director will handle charges for copies of records and associated labor, if necessary, based on Chapter 119 of the Florida Statutes.

The Information & Technology Services Department: Will provide technical support as needed. This department will also provide updated data from all departments on a weekly basis, to keep the E-Mail database current. This department will also provide any licensure or updates to the program as needed.

This department shall assure that E-Mail accounts are properly set up to archive E-mail to the Mailbag Program; shall also install and maintain a warning notice on all computers programmed to appear when users login onto the County's network, advising users that E-Mail is a public record, and it should be used for official purposes only. This message shall be included in the login script, with a built-in pause and instructions for the user to hit any key to go on to the E-mail program.

E-Mail Users: All employees under the County Administrator shall use E-Mail for Official Business Only and shall take notice that information generated on E-mail is public information and not confidential. All users will be responsible for assuring that any public records which are exempt from inspection by Statute or HIPPA laws will not be generated through E-Mail. All employees are prohibited from de-activating the GroupWise rules that cause the automatic sending of email to the Mailbag program. Employees de-activating these rules will be subject to disciplinary action.

In order to provide the requested information as efficiently as possible, the Administrative Services Director may request, but not require, persons that seek copies of E-Mail records furnish information as follows:

1. Name of Requestor
2. Date by which the E-Mails are needed
3. E-mail Search Parameters:
 - a. From Addressee and/or To Addressee
 - b. Subject Key Words
 - c. Time Period for the E-Mail sent date

Requestors will be charged for the cost of the printed copies and labor, based on Florida Statute Chapter 119. Payment will be accepted only in the form of a check made out to 'BOCC Hillsborough County'.

The mandatory warning notice is made a part of this directive and is listed as follows:

!!! IMPORTANT NOTICE !!!

Pursuant to Chapter 119 of Florida Statutes

All e-mails sent or received pursuant to law or ordinance or in connection with the transaction of official County business are Public Records and subject to public inspection and copying.

The e-mail system may only be used for official County business. The use of the e-mail system for anything other than official County business may result in disciplinary action up to and including termination.

Approved By:

County Administrator: Patricia G. Bean

Date: February 11, 2004

ADMINISTRATIVE DIRECTIVE #CO-02

**SUBJECT: PUBLIC RECORDS ACCESS AND RELEASE OF
PUBLIC INFORMATION**

EFFECTIVE DATE: AUGUST 27, 2007

REVIEW DATE: AUGUST 27, 2010

SUPERSEDES: NOVEMBER 30, 1989; A.D. 124, Approved November 12, 1987

Directive:

Under Florida Law, any material prepared in connection with official business that is intended to perpetuate, communicate or formalize knowledge, is a public record. Included are: documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristic, made or received in connection with the transaction of official business by the County.

Please be advised that many documents (or information within a document) are exempt from disclosure or are confidential. Please consult the County Attorney's Office should you have any questions.

Public records may be inspected and examined by any person desiring to do so at any reasonable time, under reasonable conditions and under the supervision of the custodian (the person responsible for keeping the public record) or his designee. Reasonable conditions mean that inspection must be done during normal business hours. Custodians of public records are not required to compile or put together a record, just to make the records available.

Method of Request:

A request to view public records does not have to be in writing and may be made by telephone. Moreover, Florida Law provides that a custodian of public records has no right to require a person to state the reason why an individual desires to inspect or copy a public record. A person requesting a public record does not have to fill out a form to do so. (If a County department desires to keep a log of the number and types of requests for public records and the date requested, it may of course do so. The log may be maintained for internal purposes only. The name of the individual or organization requesting the public record may also be requested).

Response Time:

Normally, County staff should respond at the time the request is made. Since access to public records is a statutory right, the custodian of the public record is without authority to limit access to them by claiming interference with the day to day conduct of public business. This is not to say that in some circumstances, County staff is not justified in a slight delay because of the pressing needs of public business or office procedure, but, generally, the staff should respond at the time the request is made.

NOTE: A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.

Coordination with County Attorney:

Routine public records requests do not require clearance or advice from the County Attorney's Office. All public records requests pertaining to any matter for which litigation is pending must be referred to the County Attorney's Office. Division and department heads must determine whether the agency involved is in litigation before releasing records involved in the litigation; employees should coordinate with their division or department administrative office to determine if the subject of the public records request is a matter in litigation. County staff should also contact the County Attorney's Office if they cannot determine if a matter is in litigation or if they are genuinely uncertain as to whether a particular record is or is not a public record. In all cases where a determination is made not to release a document, the County Attorney's Office must be consulted prior to a final denial of a request.

1. Upon Receipt of a Request for Public Records, determine the following information:
 - a. exactly what the person is requesting including what records he/she is looking for and whether he/she wants to view the records or wants a copy of the records. If it is not clear what is being requested, contact the person by phone, or send the person a letter requesting clarification or asking him/her to contact you.
 - b. whether the documents requested are public records, and if so, whether any or all of the information is exempt or confidential.
 - c. who has custody of the records, i.e., whether they are under the control of BOCC departments or agencies as opposed to another County office (Sheriff, Clerk, Court Administrator, Tax Collector, etc...)
 - d. the location of records, e.g., in this office, in a department located in County Center, at an off-site County facility, or in the possession of a private entity.
 - e. the format in which the requester wants the records.*

f. the time you estimate it will take to retrieve the documents and whether it will require excess clerical work. If so, estimate the cost.

2. Review the requested records for any confidential or exempt information.

a. Be particularly aware of social security numbers, medical information, certain addresses and other personal information on protected persons and their family members (e.g., current or former law enforcement officers, judges, elected officials, state or assistant state attorneys, and others specifically exempted in Chapter 119 or elsewhere in Florida Statutes).

b. Redact and cite any exempt or confidential information.

*Florida law requires agencies to furnish public records in the format requested if they already exist in that format. If not, the law does not require agencies to convert them to another format to fulfill a public records request. For example, if the records exist only on paper and you are requested to e-mail them, you are not required to scan them in order to e-mail them. Conversely, if they exist only in electronic format and photocopies are requested, you are not required to print them in order to copy them.

Notice to Employees:

Upon receipt of a public records request for personnel records, e-mails or other records relating to a commissioner, constitutional officer or county employee, the commissioner, constitutional officer or county employee will be notified that such a request was received. Such person may review the records compiled in response to the request, or the employee may request a copy of the records produced, which will be provided upon payment of the statutory copying charge. However, this notice and opportunity to review said records can not unreasonably delay responding to the public records request.

Safety of Records:

The custodian of public records has the duty to insure that public records under his or her supervision are safely kept. This does not mean that the custodian is required to be constantly looking over the shoulder or standing next to the person inspecting public records; only such general supervision by the custodian or his designee as will insure that the records are not altered, destroyed, or stolen, is required.

Regardless of whether or not the designated custodian was served with a records request, section 119.07(1)(a), Florida Statutes, imposes a duty of disclosure upon "*every person* who has custody of a public record."

Exemptions :

Certain public documents are exempt from the public records law and, are therefore, not subject to public inspection. The legislature has often amended the public records law, making some materials exempt from public inspection that were not exempt previously, and removing the exempt status from certain materials that were previously considered

exempt. Therefore, when in doubt as to what is or what is not exempt, check with your department supervisor or the County Attorney's Office.

Fees:

The fees that may be charged for the copying of public records are in some cases provided by Statute. If a fee is prescribed by law, or Board of County Commissioners Ordinance, or Resolution, the custodian of the record must charge that fee. If no fee is prescribed by law, then the custodian of the public record may charge the actual cost of duplication of the records. The following charges that are deemed to represent the actual cost of material, supplies, and equipment involved, shall be charged for County Public records:

- a. Fifteen (15) cents for each copy of each page of the public record. Cost of reproducing microfilm is two dollars (\$2.00) per page. Cost of reproducing microfiche is one dollar (\$1.00) per page.
- b. If materials are to be mailed, the actual cost of postage shall be added to other charges indicated in the preceding paragraph.
- c. Purchasers must pay for copies prior to receiving the copies. A receipt can be obtained from any authorized collection point of the Board of County Commissioners. Before being given the copies, the purchaser should show his paid receipt. If the request is by mail or telephone, the monies should be received prior to mailing the copies. Purchasers may pay by check or money order made payable to Board of County Commissioners, or cash. The fee for duplicating County maps or aerial photographs may also include a reasonable charge for the labor and overhead associated with the duplication. Where fees have been established by Board of County Commissioners' Resolution, such fee shall be charged.

Also, if the nature or volume of public records requested to be inspected, examined, or copied is such as to require extensive use of information, technology, resources, or extensive clerical or supervisory assistance by personnel of a County department, the department may charge, in addition to the actual cost of duplication, a special service charge which is to be reasonable and is to be based on the cost incurred for the extensive use of such resources or labor in furnishing or copying the information requested. The provisions of this paragraph do not apply to materials routinely exchanged within the County or between governmental agencies, officers or persons in the performance of assigned duties or normally provided by the County, in carrying out its statutory responsibilities.

Collection Procedures:

The divisions, offices and departments under the County Administrator which do not have a money collection system, may issue a memo to the requesting party for the number of copies to be obtained including the total amount, and retaining an office copy, which will be taken to a cash collection point to be paid and receipted with the receipt to be returned to the originating office for release of documents.

Penalties:

The law provides that if a civil action is filed against a public agency to compel compliance with the public records law and the court determines that the agency unlawfully refused to permit a public record to be inspected, examined, or copied, the court shall assess an award against the agency responsible, plus the reasonable cost of enforcement including reasonable attorney's fees. Moreover, any person willfully and knowingly violating any provisions of the Public Records Law, is guilty of a misdemeanor of the first degree, punishable by one year in prison and/ or a fine not to exceed \$1,000.00.

Responsible Custodian:

The custodian of the document, or his or her designee, is responsible for responding to the request to examine public records. In the County, there are numerous custodians of documents. Who is the custodian of a particular document depends on the document involved.

Regardless of whether or not the designated custodian was served with a records request, section 119.07(1)(a), Florida Statutes, imposes a duty of disclosure upon *"every person who has custody of a public record."*

Procedure When Custodian is not in Possession of Documents:

The custodian of a document must make reasonable steps to locate the requested documents. If the document requested of a particular staff member is not in the possession of that staff member nor is it normally in the possession of that staff member, then that staff member should direct the requesting person to the appropriate custodian of that particular document.

Requests Involving Great Periods of Time:

As written, the law gives little leeway to public officials who are confronted with public record requests for all records from the beginning of time on a given subject. Nevertheless, there are certain practical ways to handle these matters. First, a very old public record that the County has lawfully destroyed pursuant to state statute, obviously cannot be provided. Second, it is not unreasonable to query the person and ask what in particular is being sought so that the person may be directed to the correct record, thus saving the person and the County a lot of time and trouble in needlessly searching through immaterial matters. Third, if the individual wants voluminous records copied, even at the nominal rate as provided by statute, the cost will soon mount up to quite a sum and the County can request payment in advance before any reproduction is undertaken. In this same regard, if an inordinate amount of resources and staff assistants are required to produce the records requested, the requesting individual may be charged pursuant to statute, a special service charge which shall be reasonable and based on the actual cost incurred in obtaining the individual's records request.

