

2-F-2 | COPYRIGHTED RECORDS**a. Copyrights Held by Agencies**

In the absence of statutory authorization, a public official is not empowered to obtain a copyright for material produced by his or her office in connection with the transaction of official business. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), review denied, 902 So. 2d 791 (Fla. 2005), cert. denied, 126 S.Ct. 746 (2005) (property appraiser not authorized to assert copyright protection for the Geographic Information System maps created by his office). Accord AGOs 03-42, 88-23, and 86-94. Cf. AGO 00-13 (in the absence of express statutory authority, state agency not authorized to secure a trademark).

Section 119.084(2), F.S., however, specifically authorizes agencies to hold a copyright for data processing software created by the agency. The agency may sell the copyrighted software to public or private entities or may establish a license fee for its use. See also s. 24.105(10), F.S., authorizing the Department of the Lottery to hold patents, copyrights, trademarks and service marks; and see ss. 286.021 and 286.031, F.S., prescribing duties of the Department of State with respect to authorized copyrights obtained by state agencies.

b. Copyrighted Material Obtained by Agencies

The federal copyright law vests in the owner of a copyright, subject to certain limitations, the exclusive right to do or to authorize, among other things, the reproduction of the copyrighted work and the distribution of the copyrighted work to the public by sale or other transfer of ownership. See AGO 97-84, citing to pertinent federal law and interpretive cases. However, the Attorney General's Office has concluded that the fact that material received by a state agency may be copyrighted does not preclude the material from constituting a public record. For example, AGO 90-102 advised that copyrighted data processing software which was not specifically designed or created for the county but was being used by the county in its official capacity for official county business fell within the definition of "public record."



Moreover, in *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382-1383 (Fla. 1st DCA 1994), the court rejected a state agency's argument that a transcript of a hearing that had been copyrighted by the court reporter and filed with the agency should not be copied without the copyright holder's permission. The court stated that the agency was under a statutory obligation to preserve all testimony in the proceeding and make a transcript available in accordance with the fees set forth in Ch. 119, F.S. And see AGO 75-304 (agency may not enter into agreement with court reporter to refer all requests for copies of agency proceedings to court reporter who originally transcribed proceedings; agency must provide copies of transcripts in accordance with charges set forth in Public Records Act).

The federal copyright law, when read together with Ch. 119, F.S., authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to that agency pursuant to law, available for examination and inspection purposes. AGO 03-26. "With regard to reproducing, copying, and distributing copies of these maintenance manuals which are protected under the federal copyright law, state law must yield to the federal law on the subject." *Id.* The custodian should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice that the making of a copy may be subject to the copyright law. AGOs 03-26 and 97-84. However, it is advisable for the custodian to refrain from copying such records himself or herself. AGO 03-26. But see *State v. Allen*, 14 F.L.W. Supp. 172a (Fla. 7th Cir. Ct. November 2, 2006), in which the court found that the defendant was entitled to inspect and copy copyrighted operating manual for the radar unit used by the police "pursuant to Florida Constitution, Article I section 24 and/or Defendant's fundamental right to due process of law." The court noted that if the police department declined to make copies, the defendant or his representative should be allowed reasonable access to the documents and a copy machine to make copies.

Moreover, as noted by the court in *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, *supra*, once a transcript of an administrative hearing conducted by or on behalf of an agency has been filed with the agency, the



transcript becomes a public record, without regard to who ordered the transcription or bore its expense. The agency which is under a statutory obligation to preserve all testimony can charge neither the parties nor the public more than the charges authorized by Ch. 119, F.S., regardless of the fact that the court reporter may have copyrighted the transcript.

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