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**MIAMI-DADE  
COMMISSION ON ETHICS & PUBLIC TRUST**

**In re:  
Leary v. Flinn**

**C 15-29**

**PUBLIC REPORT AND FINAL ORDER**

Jeffery Leary (Leary), a private citizen, filed the above-referenced complaint against Respondent, Eugene Flinn (Flinn), the Mayor of the Village of Palmetto Bay. Leary alleged that Flinn refused to provide Palmetto Bay Vice-Mayor John Dubois (Dubois) with a draft copy of Flinn's State of the Village Speech in violation of Section 3 of the Citizens' Bill of Rights.<sup>1</sup> Investigation determined that Flinn, in refusing Dubois' request, reasonably relied on the advice of the Village Attorney who opined that "drafts" were "precursors" of public records and were not deemed public records under Chapter 119, Fla. Stats.

On February 10, 2016, in closed session, the Ethics Commission's Advocate recommended that the case be dismissed and that a Letter of Instruction be issued to the Village clarifying that drafts that are circulated for review or comment, as was done in this case, are public records.

In open session, the Ethics Commission voted unanimously to find No Probable Cause and dismissed the case.

Wherefore it is:

**ORDERED AND ADJUDGED** that COMPLAINT C15-29 against Respondent, Eugene Flinn, is hereby dismissed and a Letter of Instruction will be issued to the Village of Palmetto Bay.

<sup>1</sup> Leary also alleged that Flinn violated the Village Charter by giving an "order" to the Village Manager to destroy all drafts of the speech. The Ethics Commission dismissed that allegation since it does not have jurisdiction to enforce the Village Charter.

**DONE AND ORDERED** by the Miami-Dade County Commission on Ethics & Public Trust in public session on February 10, 2016.

MIAMI-DADE COUNTY COMMISSION ON ETHICS &  
PUBLIC TRUST

By:



Judge Lawrence Schwartz  
Chair

Signed on this date: 3-8-2016

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**APPROVED**  
*[Handwritten Signature]*

**MIAMI-DADE  
COMMISSION ON ETHICS & PUBLIC TRUST**

**LETTER OF INSTRUCTION**

To: The Village of Palmetto Bay

From: The Miami-Dade County Commission on Ethics and Public Trust

Re: Jeffrey Leary v. Mayor Eugene Flinn C15-29

Date: March 2016

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An ethics complaint was filed by Jeffrey Leary (Leary) against the Mayor of the Village of Palmetto Bay, Eugene Flinn (Flinn), alleging that Flinn instructed Village staff to destroy public records, specifically, draft copies of a State of the Village Address, in violation of the Miami-Dade County Citizens' Bill of Rights.

Village Vice-Mayor John DuBois (Dubois) had been advised by a Village resident, that he had seen a draft version of the Mayor's State of the Village speech and that there were things in it Dubois would find objectionable.<sup>1</sup> Subsequently, Dubois made a public records request at about 1:46 p.m. on October 13, 2015, the day before Flinn was to deliver the State of the Village Address, and was advised by the Village Attorney, through the Village Clerk, that draft copies of the speech were not considered public record and therefore not available.

In February 2016, the Miami-Dade County Commission on Ethics and Public Trust found that there was No Probable Cause to sustain the complaint against Mayor Flinn. The Ethics Commission determined that Mayor Flinn's refusal to provide Vice-Mayor Dubois (Dubois) with a copy of the "draft" version of his State of the Village speech was based on the Mayor's reasonable reliance on the advice of the Village Attorney. However, the Ethics Commission ordered that a Letter of Instruction be issued to the Village to address any confusion about the requirements of the Miami-Dade Citizens' Bill of Rights and the Florida Public Records Act.

WHEREFORE, The Commission on Ethics and Public Trust issues this Letter of Instruction:

Section (a) (3) of the Miami-Dade County Citizens' Bill of Rights ensures the right to inspect all public records "at reasonable times and places convenient to the public."

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<sup>1</sup> Subsequently, the resident advised a COE investigator that he had never seen a draft version of the speech and was just playing a practical joke on Dubois; that Dubois took the whole thing too seriously.

The Public Records Act requires that “every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions and under supervision by the custodian of public records.” Section 119.07 Florida Statutes.

Investigation revealed that the Village Clerk drafted the first copy of the State of the Village speech, and that she and the Mayor exchanged revised drafts several times. The Clerk advised that this year, the Village’s Public Information-Officer (PIO) also assisted in the preparation of the Village Address. The Village Manager was also copied on a draft version. Drafts of the speech were then e-mailed back and forth between the Clerk and the Mayor. While she destroyed paper copies of earlier versions in order to avoid confusion with newer drafts, she kept all electronic copies as well as a copy of each rendition containing various additions and changes made by the Mayor and the PIO.

The Clerk confirmed that upon receiving the public record request from Dubois, she contacted the Village Attorney for a legal opinion as to whether she should release draft versions of the speech. The Village Attorney, relying on *Shevin v. Byron, et. al.*, 379 So.2d 633 (Fla. 1980), advised Mayor Flinn and the Clerk that “preliminary drafts of speeches are not public records... [because they] do not perpetuate, communicate or formalize knowledge and therefore, they may be considered mere precursors of public records if they are not intended to be final evidence of the matter.” The Village Attorney was referring to the statement from *Shevin* that, “[t]o be contrasted with ‘public records’ are materials prepared as drafts or notes, which constitute mere precursors of governmental ‘records’ and are not, in themselves, intended as final evidence of the knowledge to be recorded.” *Id.* at 640.

The Attorney recommended that the drafts not be destroyed in order that they become available in the event of later dispute or litigation. No drafts were destroyed based on his advice. The Village Attorney also relied on *Scott v. Butterworth*, 734 So. 2d 391 (Fla.1999), for the proposition that drafts retain their character as drafts, as long as they are not circulated outside the group which is creating the drafts (i.e. the drafting team).

In general, “[Notes] taken in the course of conducting official business by a public employee, are not public records...if the notes have not been transcribed or shown to others...” (Florida Attorney General Opinion 10-55). While some opinions seem to indicate that drafts can be viewed or read by those in the drafting team without losing their character as drafts, circulation outside the drafting team likely converts the drafts to public records. “[A]ny agency document, however it may be prepared, if it is circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked “preliminary” or “working draft” or similar label.” *See* AGO1997-23; *See also* Government in the Sunshine Manual, Volume 36, 2014 Edition, pg. 53. Consequently, it is the opinion of the Ethics Commission that violations of the Public Records Act and the Citizens’ Bill of Rights may have occurred in that draft copies of the speech were exchanged between the Village Clerk, PIO, Village Manager and the Mayor on at least two occasions, and that each time such an exchange occurred, a new version of that speech was created that could be considered a public record.

In fairness to the Village Attorney, the *Shevin* case also notes that “It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the [Public Records] Act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case- by-case basis.” Our investigation determined that the working draft of the Mayor’s speech falls into the category of a public record which should have been provided. We issue this non-penal Letter of Instruction to the Village pursuant to Section 2-11.1(y) of the Miami-Dade County Conflict of Interest and Code of Ethics ordinance

with the hope that it will provide Village officials with guidance and instruction in the future.

