CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: William W. Bryson, Fire Chief

FROM: *Alejandro Vilarello, City Attorney*

DATE: September 19, 2003

RE: Request for Legal Opinion dated June 23, 2003
"Accident Review Committee's Determinations of Fault" MIA NO. 03-016

Your memorandum dated June 23, 2003, requested a legal opinion on two related questions that we have restated, as follows, for purposes of this opinion:

QUESTION NO. 1: IS A FIRE-RESCUE ACCIDENT REVIEW COMMITTEE DETERMINATION THAT A CITY EMPLOYEE DRIVER WAS AT FAULT IN AN ACCIDENT ADMISSIBLE AGAINST THE **CITY OF MIAMI** AS EVIDENCE OF NEGLIGENCE IN A LATER-FILED LAWSUIT?

QUESTION NO. 2: IS A FIRE-RESCUE ACCIDENT REVIEW COMMITTEE *DETERMINATION THAT A CITY EMPLOYEE DRIVER WAS AT FAULT* IN AN ACCIDENT ADMISSIBLE AGAINST THE **CITY EMPLOYEE DRIVER** AS EVIDENCE OF NEGLIGENCE IN A LATER-FILED LAWSUIT?

SUMMARY

Question No. 1: An Accident Review Committee determination of fault **could** be used in a later-filed lawsuit against the City of Miami as evidence of negligence. In addition, statements made by any City employee, including the driver or an investigator, **could** be used against the City of Miami as evidence of negligence in such a lawsuit as admissions against interest.

Question No. 2: An Accident Review Committee determination of fault **could not** be used in a later-filed lawsuit against the City Employee Driver as evidence of negligence. However, statements made by the City Employee Driver **could** be used against the City Employee Driver as evidence of negligence in such a lawsuit as admissions against interest. Nevertheless, statements by other City employees, although possibly admissible for other reasons, **would not** be admissible as admissions against interest in a later-filed lawsuit against the City Employee Driver.

DISCUSSION

The circumstances under which a City Employee Driver could be held liable as a result of an automobile accident are limited. Under Section 768.28(6), F.S., a municipal employee is immune from suit, and cannot even be named as a party therein, for damages resulting from acts of negligence committed by the municipal employee within the course and scope of municipal

employment, where such acts are committed by the employee without malice, bad faith or willful wanton conduct. Therefore, from a practical standpoint, a municipal employee will rarely, if ever, be liable as a party in a lawsuit involving an automobile accident in which the employee was acting within the course and scope of employment, e.g., driving a Rescue Truck to the scene of an emergency.

However, there are limited circumstances where a City Employee Driver is exposed to liability. That would be in the case of a take-home car. If an City Employee Driver is involved in an automobile accident off duty, under circumstances where he/she is not acting within the course and scope of employment, e.g., on the way home, under the law the City is not vicariously liable for the acts of the City Employee Driver, the City is not liable under the Dangerous Instrumentality Doctrine merely by virtue of its ownership of the vehicle involved in the accident, and the immunity provided in Section 768.28(6), F.S., would likely not apply.

In addition, the Accident Review Committee's determination of fault must be distinguished from any statements (or admissions) made by City employees that may be contained in the Committee's Report. To the extent that such statements were made within the scope of the City employee's authority, or in connection with the employee's duties, such statements are admissible in a later-filed lawsuit filed against the City as admissions against interest. In a lawsuit filed against the City Employee Driver, only his/her statements, not those of other City employees, are admissible as admissions against interest.

The Florida Supreme Court addressed these issues several years ago in Lee v Department of Health and Rehabilitative Services, 698 So.2d 1194 (Fla. 1997). In that case, a mentally disabled woman was found to be pregnant in a facility run by H.R.S. An internal investigation was conducted and admitted into evidence, over the objections of H.R.S., in a lawsuit by the woman's guardian. The Court found the report and all statements made therein made by employees of H.R.S., acting within the course and scope of their employment, were admissible against H.R.S. as admissions against interest. However, other statements in the investigation report, made by non-employees, including the victim and other patients, were excluded as inadmissible hearsay.

The Third District Court of Appeal has also addressed these issues. In Metropolitan Dade County v. Yearby, 580 So.2d 186 (Fla. 3rd DCA 1991), the County was sued because an accident resulted from a downed stop sign. The Court held that the statements in the Traffic Accident Report made by the County Public Service Aid who investigated the accident, to the effect that the stop sign was knocked down several days earlier, was admissible against the County in a later-filed negligence suit against the County as an admission against interest.

CONCLUSION

Under the existing case law, a determination by the Fire-Rescue Accident Review Committee determining that a City employee was at fault for causing a vehicle accident would

be admissible against the City to prove negligence in a later-filed lawsuit against the City. Such a finding would **not** be admissible in a lawsuit filed against the City Employee Driver. In addition, any statements made by the City Employee Driver, or other City employees, would be admissible against the City as admissions against interest. However, in a lawsuit filed against the City Employee Driver, only the statements of the City Employee Driver would be admissible as admissions against interest.

To the extent that this Office's July 19, 1994 Memorandum to the City Manager on this topic (attached) could be construed to conclude to the contrary, it is hereby superceded.

PREPARED BY:

HENRY J. HUNNEFELD
Assistant City Attorney

REVIEWED AND APPROVED BY:

WARREN BITTNER
Assistant City Attorney

AV:HJH:ir

Attachment(s)

c: Captain John Carlton, Safety Officer (with attachment)
Chief John Timoney (without attachment)
Clarence Patterson, Director, Department of Solid Waste (without attachment)

CITY OF MIAMI, FLORIDA

INTER-OFFICE MEMORANDUM

JUL 21 1994

FIRE TRAINING & SAFETY DIVISION

TO: Cesar H. Odio
City Manager

DATE: July 19, 1994 FILE: A-94-864

SUBJECT: Fire Department's Accident Review Committee

FROM: A. Quinn Jones, III
City Attorney

REFERENCES: Your Request of July 1, 1994

ENCLOSURES:

Your memorandum of July 1, 1994, requested a legal opinion on essentially the following question:

> WHETHER THE CITY OF MIAMI WILL BE EXPOSED TO LIABILITY IN THE EVENT THE FIRE-RESCUE DEPARTMENT'S ACCIDENT REVIEW COMMITTEE CONCLUDES THAT ONE OF ITS OFFICERS IS AT FAULT IN CAUSING AN ACCIDENT.

The answer to the question is in the negative.

The disclosure of documents to another party to a civil lawsuit is controlled by the Florida Rules of Civil Procedure. Rule 1.280(b) of the Florida Rules of Civil Procedure exempts a party from disclosing materials which are privileged or which were prepared by the party's attorney or agent in anticipation of litigation. The only exception is when the party requesting the materials can demonstrate to the court a need for the materials and is unable, without undue hardship, to obtain the substantial equivalent of the same. Even when disclosure is required, the court is obliged to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of the party's attorney or other representative.

The documents that will be generated by the Fire Department's Accident Review Committee are no different from investigative reports and insurance claims files and, therefore, are not subject to disclosure absent the heavy burden that the requesting party must demonstrate. See, e.g., Kujama v. Manhattan National Life Insurance, Co., 541 So. 2d 1168 (Fla. 1989) (files prepared by an insurance company in preparation for litigation protected from disclosure).

CONCLUSION

Based on the investigative purposes of the Fire Department's Accident Review Committee, the documents generated thereby are not generally discoverable.

Prepared by:

Charles C. Mays
Chief Assistant City Attorney

Reviewed by:

Rafael O. Diaz
Deputy City Attorney

AQJ:CCM:bf:M732
cc: Steve Abraira
Chief of Training and Safety
Fire-Rescue Department