IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

CASE NO.: 01-2017-CA-002426

US RIGHT TO KNOW,

Plaintiff,

vs.

THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Defendant.

and

DREW KERSHEN,

Intervener.
_____/

DEFENDANT UNIVERSITY OF FLORIDA'S BENCH BRIEF

This public records case was filed by a California nonprofit organization that publicizes its litigation against universities and governmental entities to obtain information relating to GMOs[1] and uses the information obtained to attack the

[1] *Our Litigation*, U.S. Right to Know, https://usrtk.org/our-litigation (last visited Feb. 21, 2018).

institutions and individuals that plaintiff regards as embracing beliefs contrary to those of its founder.

I. Issues Involved and Burden of Proof

The case involves two legal issues:

1) Whether AgBioChatter Yahoo Group e-mails sent or received by a UF professor, Dr. Kevin Folta, are "public records" under Florida law; and

2) Whether correspondence and documents generated by the University of Florida Foundation (a direct-support organization and the fundraising arm of UF) are exempt from production under section 1004.28, Florida Statutes.

As the Florida Supreme Court made clear in *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So. 2d 1008 (Fla. 2003) (per curiam), this determination involves a two-step analysis:

> First, we must determine whether the documents sought are, in fact, public records. Second, if the documents constitute public records, we must determine whether the documents are exempt from public disclosure as a result of a constitutional, statutory or rule-created exemption.

Id. at 1013 (citation omitted). Because the University, and the intervener, contend the AgBioChatter e-mails are **not** public records, the initial burden is on plaintiff to prove otherwise. *Times Publishing Co. v. City of Clearwater,* 830 So. 2d 844, 846 n.2 (Fla. 2d DCA 2002) ("[T]he burden rests initially with the [plaintiff] to prove that what it seeks meets the definition of a public record."), *approved by State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). Conversely, the burden is on UF to prove that the admittedly public UF Foundation records are exempt from disclosure based on the statutory exemption.

II. AgBioChatter Yahoo Group E-mails are Private or Personal Correspondence that Fall Outside the Confines of Public Records.

A. Public Record

As defined by the Florida Legislature, and as all parties appear to agree, public records are "all documents . . . 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*." § 119.011(12), Fla. Stat. (2017) (emphasis added). The Florida Supreme Court has further interpreted this definition to encompass all materials made or received by an agency in connection with official business "which is intended to perpetuate,

communicate, or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

Therefore, a document, including an e-mail, becomes a public record only when it is (1) made or received in connection with official business, ***and*** (2) intended to perpetuate, communicate, or formalize knowledge of some type. *See State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) ("Rather, the e-mails must have been prepared in connection with official agency business and be intended to perpetuate, communicate, or formalize knowledge of some type." (quoting *Shevin*, 379 So. 2d at 640) (internal quotation marks omitted)); *see also Butler v. City of Hallandale Beach*, 68 So. 3d 278, 280-81 (Fla. 4th DCA 2011) (citing *City of Clearwater*, 863 So. 2d at 154) ("The court emphasized that the mere placement of an e-mail on a government network is not controlling in determining whether it is public record, but rather, whether the e-mail is prepared in connection with the official business of an agency and is intended to perpetuate, communicate, or formalize knowledge of some type." (internal quotation marks omitted) (quoting *Shevin*, 379 So. 2d at 640)).

B. AgBioChatter Yahoo Group's Correspondence Remains Outside the Public Record's Definition.

The AgBioChatter Yahoo Group is a private online discussion board that was started by scientists of various disciplines, but includes non-scientist individuals. These individuals come from different backgrounds, varying walks of life and varying corners of the world. The AgBioChatter Yahoo Group can be accessed only by members, and members must be invited to join the group. (*See* Kershen's Am. Resp. to Pet. at 2.) These individuals have one thing in common: an interest in discussing current issues or trends in agricultural biotechnology, specifically in the social, political and business arenas.

The AgBioChatter Yahoo Group's communications reflect the individual members' personal reaction and comments regarding real world and very fervently – often viciously – debated issues. (*See*, *e.g.*, Kershen's Am. Resp. to Pet. at 4 (examples of potential prison sentences and harm levied against individuals for advocating positions similar to that of some members of the AgBioChatter Yahoo Group).) These contemporary controversial issues are ever-evolving and include topics relating to commercial uses of agricultural biotechnologies, such as Food and Drug Administration testing; negative press regarding genetically modified organisms ("GMOs"); and GMO labeling. (*See* Kershen's Am. Resp. to Pet. at 2; USRTK's Reply in Supp. of Compl. at 2.)

Taking the "common sense" approach to determine whether a document is a public record, which was noted in *City of Clearwater*, 863 So. 2d at 154, the AgBioChatter Yahoo Group's documents at issue simply elude the scoop of the public record's net.[2] Despite being housed on a UF computing system, the documents were not made or received in connection with UF's official business, and plaintiff's filings fail to transform these personal e-mails into public records. *See Times Publishing Co.*, 830 So. 2d at 846 & n.2 ("Here, the burden rests initially with the [Plaintiff] to prove that what it seeks meets the definition of a public record . . . [and it's the Plaintiff's] burden to request an in camera inspection of the e-mail designated as personal if it intended to prove that the employees' designation of each e-mail as personal was incorrect."); *see also Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3, 6 n.2 (Fla. 1st DCA 2003) ("It was the appellants' burden to request an in camera inspection of the calls designated as private if they intended to prove that the designations as private were incorrect.").

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[2] In accordance with UF procedures, UF Office of General Counsel determined that these records were outside the scope of UF's official business. However, as explained previously, UF reviewed e-mails sent by Dr. Folta to the AgBioChatter Yahoo Group and, in an abundance of caution, produced any e-mail record wherein Dr. Folta *could have been* discussing the official business of UF.

For instance, the fact that Dr. Folta "often uses his full professional title . . . when sending communications to the AgBioChatter Group" is of no relevance. (USRTK's Reply in Supp. of Compl. at 2.) Many e-mail service providers permit users to set up automatic or pre-written signatures. These signatures may provide contact information and, perhaps, a quote or disclaimer. Defendant agrees that Dr. Folta used his UF e-mail address when he was invited to personally join – and receive access to – the AgBioChatter Yahoo Group; thus, his e-mail signature, with applicable UF contact information, is sometimes included in these e-mails.

However, just as the use of a university-issued e-mail address or the use of a university-purchased pen and paper does not change a personal message into a public record, *see, e.g.*, *City of Clearwater*, 863 So. 2d at 154, a signature at the end of an e-mail does not transform a personal message into a public one. Dr. Folta did not receive or review AgBioChatter Yahoo Group posts in his official capacity as a UF professor, but as an individual interested in controversial scientific issues. Taking the converse, would a public official be able to evade Florida's public records law if he sent an e-mail from his personal e-mail account with his personal e-mail signature, yet the e-mail contained official public business and was intended to communicate knowledge?

Further, US Right to Know supposes that because Professor Folta's work may generally relate in some way to subject matters discussed by the AgBioChatter Yahoo Group, then all of AgBioChatter's discussions are public records. (USRTK's Reply in Supp. of Compl. at 2-3.) Plaintiff fails to recognize AgBioChatter Yahoo Group's main purpose – a private discussion group[3] organized to facilitate the exchange of personal views on a variety of current issues in the field of agricultural biotechnology, such as views on GMO labeling, and thoughts on political activism to promote these views, such as how to respond to the press about GMO uses. There is a clear dichotomy between Dr. Folta's work in his UF laboratory, which is focused on the *technology* behind improving Florida-specific crops (via what are not "GMO" methods), and the AgBioChatter Yahoo Group's discussions of current controversies and the political climate surrounding implementation of specific seed traits. UF also already provided any e-mail that Dr. Folta posted to the AgBioChatter Yahoo Group, which *could have* included any information relating to Dr. Folta's official business with UF.

[3] The AgBioChatter Yahoo Group, by its very terms, is a "private forum for invited members" that provides space for "brainstorming and information exchange, and provide[s] an arena whereby members can have candid and open debates without fear their conversations will become public." (Kershen's Am. Resp. to Pet. at 2.)

Dr. Folta's personal interests are in the field of science, which is also his chosen profession. However, there is a line between UF's official business and Dr. Folta's personal endeavors.[4] Surely, a UF political science professor's personal decision to join a discussion board of the local Young Democrats would not be a public record. The professor teaches politics "with the knowledge, support and backing of his public employer" (USRTK's Reply in Supp. of Compl. at 3), yet he is still permitted to have personal beliefs – and to have personal communications – on that same subject. Similarly, an American history professor's listserv communication with a group that advocates for the removal of Confederate monuments are not public records. The American history professor "researches, teaches, and advocates" (USRTK's Reply in Supp. of Compl. at 3) in the area of the Civil War, yet there should be a distinction between her official work with the university and her personal interest and activism on a certain topic therein.

US Right to Know may vehemently contest Dr. Folta's personal position on the controversial subject of GMOs; however, it may not contend that it is the University's official business and subsequently mine Dr. Folta's personal e-mails for

[4] For approximately two years, Dr. Folta has not accessed any e-mails from the AgBioChatter Yahoo Group or through its website, and his teaching, research, and administrative work at UF remains completely unaffected. There is a clear line between his responsibilities for teaching and administration in the horticultural sciences department and his personal interests in contemporary debates.

information. *See*, *e.g.*, *City of Hallandale Beach*, 68 So. 3d at 281 (finding that an e-mail sent by the City Mayor, forwarding copies of news articles to her friends and supporters, was not made in connection with City business; therefore, plaintiff was not entitled to the e-mail, the e-mail addresses or the names of the recipients); *see also Media Gen. Operation, Inc.*, 849 So. 2d at 5-6 (personal cell phone calls of legislative staff do not constitute official business of the Legislature and are not subject to public disclosure). US Right to Know is not permitted unfettered access to the private exchanges among the AgBioChatter Yahoo Group or the right to go rummaging through Dr. Folta's and the AgBioChatter Group's personal thoughts.

Additionally, Plaintiff states that the AgBioChatter Yahoo Group posts, many of which were neither sent nor even opened by Dr. Folta, "add[] to [Dr. Folta's] overall store of knowledge." (USRTK's Reply in Supp. of Compl. at 3.) This argument fails because merely adding to a public employee's knowledge base on issues of personal interest is far from the public records standard delineated *supra*.[5] Moreover, asking a public employee to gather, maintain, and produce all documents that he has reviewed, and that may lead to his "eventual use" – but were not prepared with the intent to communicate knowledge of the official business of the

[5] Under this theory, Dr. Folta would be expected to print or otherwise preserve all news articles he reads that regard science-related topics.

agency – would be an extreme interpretation of Florida's Public Records Act not reached by any court. *City of Clearwater*, 863 So. 2d at 154.

Furthermore, plaintiff asserts "[a] stack of unopened letters on a public official's desk is undeniably [a] public record." (USRTK's Reply in Supp. of Compl. at 6.) Plaintiff's position that an unopened letter is undeniably a public record would go against the progeny of cases that hold that not all documents made or received by a public agency are considered public records.[6] *See Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010) (per curiam) ("The Florida Supreme Court has repeatedly rejected the notion that almost everything generated or received by a public agency is a public record." (internal quotation marks omitted)). However, plaintiff misses the crux of UF's assertion regarding Dr. Folta's failure to open and respond to the majority of e-mails. UF does not argue that declining to open an e-mail is sufficient to preclude such an electronic document from the public record net. Rather, UF is explaining that the AgBioChatter Yahoo Group's communications were so irrelevant to and removed from UF's official business, and the

[6] The stack of unopened letters *could* include public record documents, such as an invoice from an independent contractor or an executed employment contract. It also could include documents that are not public records, such as a personal letter from a colleague expressing her view on childhood vaccinations or a birthday card from a friend.

communication of the knowledge thereof, that Dr. Folta did not even need to open or review them.[7]

US Right to Know also refers to events that transpired following UF's 2014 receipt of funds from an agricultural company to support workshops and a conference. (*See* USRTK's Reply in Supp. of Compl. at 2, 3.) These moneys were subsequently reallocated to UF's food pantry. Notably, UF has previously provided plaintiff with over 4,500 pages of records in response to a January 28, 2015 public records request, which included records regarding these funds.[8] Although plaintiff continues to discuss these events, they are not relevant to the matters being litigated before this Court.

This public records request, and resulting documents, led to an onslaught of media coverage and personal attacks on Dr. Folta. (*See*, *e.g.*, USRTK's Reply in Supp. of Compl., Ex. 4 (Dr. Folta explains that thereafter, "Social media became

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[7] The AGBioChatter Yahoo Group members receive "all list-serve emails, whether or not they are a party to the email" and "[t]he email sent by the member is sent to the Group, whether they wish to receive the email or not." (Kershen's Am. Resp. to Pet. at 8.) Like spam or bulk mail, Dr. Folta did not open or respond to most of the e-mails.

[8] Of note, since that initial request in January 2015, UF has provided plaintiff with approximately 13,000 pages of public records. Records that reflect the official business of the University and that communicate knowledge have been delivered to the plaintiff, yet plaintiff now asks for records outside the scope of the Public Records Act.

wallpapered with false claims, implied threats, my address, my salary and damaging comments that are now a permanent part of my internet history. Craigslist Gainesville featured vulgar comments about my wife, and named my deceased mother, saying I've shamed her memory.").)

In response to the negative press and attacks, Dr. Folta and the UF President defended the activities and the transparency of the gift. UF maintains its position that the public has a "right to inquire and to know about publicly-funded research at public institutions." (USRTK's Reply in Supp. of Compl. at 3.) However, the events surrounding this gift are distinct from Dr. Folta's limited interactions with the AgBioChatter Yahoo Group, which is not the University's official business. Dr. Folta does not lose the right to associate with a private Yahoo discussion group because UF previously received money from an agricultural company.

The cases cited by the plaintiff are distinguishable from our case, as the documents at issue were clearly public records. For example, in *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990), the documents under consideration surrounded contract negotiations between the City and the Chicago White Sox; in *City of Gainesville v. State*, 298 So. 2d 478 (Fla. 1st DCA 1974), the documents concerned the City of Gainesville's fire department budget; in *Morris Publishing Group, LLC v. Florida Department of Education*, 133 So. 3d 957 (Fla. 1st

DCA 2013), the issues concerned whether an exemption applied to a public record document regarding teacher ratings following the FCAT test; and in Florida Attorney General Opinion 77-141 (1977), the documents at issue were noted as received by the mayor "in his official capacity."

Plaintiff also attempts to distinguish the *City of Clearwater*, and similar cases, while advocating for the same position of the plaintiffs therein. In *City of Clearwater*, the Court held that private records do not become public records simply by their storage on public computer systems. 863 So. 2d at 154. Tellingly, the Second District, in its review, stated that "[t]his case demonstrates that the Public Records Act, chapter 119, Florida Statutes (2000), although permitting broad access to public records, is not an ideal tool for private citizens who wish to investigate the nongovernmental activities of government employees during work hours." *Times Publishing Co.*, 830 So. 2d at 845. Here, US Right to Know's public records request is not the appropriate tool to discover the conversations of the AgBioChatter Yahoo Group.

In recent answers to intervener's interrogatories, plaintiff attempts to justify its claim that Dr. Folta's e-mails with the AgBioChatter group are "public records" because members of the group discuss

> agricultural biotechnology and science communication and outreach . . . [and because] these topics are a centerpiece of Dr. Folta's employment with the University, Plaintiff contends that the communications were made in connection with official University business.

(USRTK's Answer to Kershen's Interrog. No. 1.) The same contention was made, and rejected, in *Becker v. University of Central Florida Board of Trustees,* No. 2013-CA-5265-O, 2014 WL 1499515 (Fla. 9th Cir. Ct. Apr. 17, 2014) (US Right to Know contends Judge Kest applied the wrong test there, but concedes he "reached the correct result." (USRTK's Reply in Supp. of Compl. at 8.)), *aff'd per curiam*, 181 So. 3d 504 (Fla. 5th DCA 2015). In that case, petitioner requested e-mails of Dr. James Wright, a tenured professor in UCF's Department of Sociology, related to articles published in Social Science Research, a journal owned by Elsevier, Inc., for which Dr. Wright was an editor. Dr. Wright received direct personal compensation from Elsevier for his work on the journal, published it from his office at UCF, and UCF paid his assistant, who worked on the journal. The subject matters of the journal communications centered on social sciences, the subject area in which Dr. Wright researched and taught at UCF. Nevertheless, despite UCF's support for the journal, and the fact that its contents mirrored the professor's research and teaching responsibilities, the Ninth Circuit, and the Fifth District, held petitioner had not

carried his burden of proof in showing that these records were prepared in connection with the "transaction of official business" by the university.

Similarly, in *Butler v. City of Hallandale Beach,* 68 So. 3d 278 (Fla. 4th DCA 2011), petitioner was held not to be entitled to the names and addresses of recipients of e-mails sent by the Mayor even though they included information concerning the State of the City Address and tax questions raised in a prior commission meeting. In speaking for the court in that case, Judge Hazouri held the issue for determination was "whether the email was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind." *Id.* at 281. He found that because the City played no role in identifying the topics about which the Mayor chose to write, or the persons to whom she chose to distribute the articles, the "email was not made pursuant to law or in connection with the transaction of official business by the City." *Id.* Thus, the fact that the Mayor's articles related directly to the City's business did not make them materials prepared with the intent of "perpetuating or formalizing knowledge" so as to require they be produced as "public records" under Florida law.

Contrary to plaintiff's assertion, the posts received by Dr. Folta do not pertain "directly to his work for the university." (USRTK's Reply in Supp. of

Compl. at 7.) While some posts may relate to his area of expertise, the same is true of Dr. Wright in the *Becker* case and the Mayor in *City of Hallandale Beach*.

"The determination of whether something is a public record is a question of law . . . and is determined on a case-by-case basis." *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010). UF respectfully requests this Court draw a line between Dr. Folta's association with the AgBioChatter Yahoo Group and his official position at UF. The applicable information cited by UF in its Reply as well as in this bench brief illustrates that the records of the AgBioChatter Yahoo Group fall short of being public records, and plaintiff has failed its duty to prove otherwise. Further, UF submits that the extraordinary writ of mandamus is far from appropriate in this situation, as plaintiff does not have "a *clear* legal right to the requested relief" and UF does not have "an *indisputable* legal duty to perform the requested action." *Putnam County Envtl. Council v. St. Johns River Water Mgmt. Dist.*, 168 So. 3d 296, 298 (Fla. 1st DCA 2015) (per curiam) (emphasis added) (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)).

III. UF Foundation's Correspondence Remains Confidential and Exempt Pursuant to Section 1004.28, Florida Statutes.

Pursuant to section 1004.28(5)(b), Florida Statutes, "[a]ll records of the [direct-support] organization other than the auditor's report, management letter,

and any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability *shall be confidential and exempt from s. 119.07(1)*." (Emphasis added).

UF has a duty to withhold confidential information from the public, pursuant to section 1004.28(5)(b), Florida Statutes. The listed exceptions to section 1004.28(5)(b) are as follows: (1) auditor's report, (2) management letter, and (3) any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability.

Plaintiff attempts to distinguish the requested documents from section 1004.28(5)(b)'s exemption by levying the request against UF. However, the plain meaning of section 1004.28 clearly reads that "*[a]ll* records of the organization" are confidential and exempt, and then specifically underlines when documents lose their exempt and confidential status, including, *inter alia*, data requested by the university board of trustees. § 1004.28(5)(b), Fla. Stat. (emphasis added). Therefore, documents created by the DSO and subsequently requested by the board of trustees become subject to Florida's public record laws; however, a confidential DSO document provided to a UF employee for his review does not lose its exempt and

confidential status. § 1004.28(1)(b), (2)(a), Fla. Stat. (2017) (permitting DSO to use university personnel).

The fact that UF decided to waive the DSO privilege as a strategy decision in the *Environmental Turf, Inc.* litigation does not alter the statutory protections in this case. Indeed, in *Environmental Turf, Inc.*, the First District *still* explained that "[s]ection 1004.28(5) exempts all documents that are created by a DSO except for listed exceptions." *Environmental Turf, Inc. v. University of Florida Bd. of Trs.*, 83 So. 3d 1012, 1013 (Fla. 1st DCA 2012). Therefore, UF maintains that an exemption sticks to such a document despite the review of such documents by a UF employee and again asserts that the extraordinary writ of mandamus is not warranted as plaintiff does not have "a *clear* legal right to the requested relief" and UF does not have "an *indisputable* legal duty to perform the requested action." *Putnam County Envtl. Council*, 168 So. 3d at 298 (emphasis added).

IV. Whether Plaintiff is Entitled to Attorneys' Fees.

While defendant's Response notes that it has "responded in good faith" to the requests "in accordance with Chapter 119" (UF's Resp. to Compl. at 26), there has been no contention that this precludes the award of attorneys' fees as plaintiff asserts. (USRTK's Reply in Supp. of Compl. at 10.) Rather, defendant asserted previously (UF's Resp. to Compl. at 26-27), and reasserts here, plaintiff is not entitled to

attorneys' fees because, under section 119.12, Florida Statutes, UF has not "unlawfully refused to permit a public record to be inspected or copied."

Accordingly, the Court should delay making a determination on entitlement to attorneys' fees under the statute until the parties have an opportunity for briefing after a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2018, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court by utilizing the Florida Courts E-Filing Portal, which will send a notice of electronic filing to the following:

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ATTACHMENTS TO DEFENDANT
UNIVERSITY OF FLORIDA'S BENCH BRIEF

1. Section 119.011, Florida Statutes

2. Section 1004.28, Florida Statutes

3. *Becker v. University of Central Florida Board of Trustees*, No. 2013-CA-5265-O, 2014 WL 1499515 (Fla. 9th Cir. Ct. Apr. 17, 2014)

4. *Butler v. City of Hallandale Beach*, 68 So. 3d 278 (Fla. 4th DCA 2011)

5. *Environmental Turf, Inc. v. University of Florida Board of Trustees*, 83 So. 3d 1012 (Fla. 1st DCA 2012)

6. *Media General Convergence, Inc. v. Chief Judge of Thirteenth Judicial Circuit*, 840 So. 2d 1008 (Fla. 2003)

7. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003)

8. *Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844 (Fla. 2d DCA 2002)

ATTACHMENT 1

West's Florida Statutes Annotated
Title X. Public Officers, Employees, and Records (Chapters 110-123)
Chapter 119. Public Records (Refs & Annos)

West's F.S.A. § 119.011

119.011. Definitions

Effective: July 1, 2017
Currentness

As used in this chapter, the term:

(1) “Actual cost of duplication” means the cost of the material and supplies used to duplicate the public record, but does not include labor cost or overhead cost associated with such duplication.

(2) “Agency” means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

(3)(a) “Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.

(b) “Criminal investigative information” means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

(c) “Criminal intelligence information” and “criminal investigative information” shall not include:

1. The time, date, location, and nature of a reported crime.

2. The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.071(2)(h).

3. The time, date, and location of the incident and of the arrest.

4. The crime charged.

5. Documents given or required by law or agency rule to be given to the person arrested, except as provided in s. 119.071(2)(h) or (m), and, except that the court in a criminal case may order that certain information required by law or agency rule

to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of s. 119.07(1) until released at trial if it is found that the release of such information would:

a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and

b. Impair the ability of a state attorney to locate or prosecute a codefendant.

6. Informations and indictments except as provided in s. 905.26.

(d) The word "active" shall have the following meaning:

1. Criminal intelligence information shall be considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.

2. Criminal investigative information shall be considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

In addition, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15 or other statute of limitation.

(4) "Criminal justice agency" means:

(a) Any law enforcement agency, court, or prosecutor;

(b) Any other agency charged by law with criminal law enforcement duties;

(c) Any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, [1] during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties; or

(d) The Department of Corrections.

(5) "Custodian of public records" means the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.

(6) “Data processing software” means the programs and routines used to employ and control the capabilities of data processing hardware, including, but not limited to, operating systems, compilers, assemblers, utilities, library routines, maintenance routines, applications, and computer networking programs.

(7) “Duplicated copies” means new copies produced by duplicating, as defined in s. 283.30.

(8) “Exemption” means a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the State Constitution.

(9) “Information technology resources” means data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance, and training.

(10) “Paratransit” has the same meaning as provided in s. 427.011.

(11) “Proprietary software” means data processing software that is protected by copyright or trade secret laws.

(12) “Public records” means 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.

(13) “Redact” means to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information.

(14) “Sensitive,” for purposes of defining agency-produced software that is sensitive, means only those portions of data processing software, including the specifications and documentation, which are used to:

(a) Collect, process, store, and retrieve information that is exempt from s. 119.07(1);

(b) Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or

(c) Control and direct access authorizations and security measures for automated systems.

(15) “Utility” means a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater.

Credits

Laws 1967, c. 67-125, § 1; Laws 1973, c. 73-98, § 2; Laws 1975, c. 75-225, § 3; Laws 1979, c. 79-187, § 1; Laws 1985, c. 85-53, § 8; Laws 1988, c. 88-188, § 1; Laws 1993, c. 93-404, § 5; Laws 1993, c. 93-405, § 5; Laws 1995, c. 95-207, § 5;

Laws 1995, c. 95-296, § 6; Laws 1995, c. 95-398, § 10. Amended by Laws 1996, c. 96-406, § 40, eff. July 3, 1996; Laws 1997, c. 97-90, § 2, eff. July 1, 1997; Laws 2004, c. 2004-335, § 3, eff. Oct. 1, 2004; Laws 2005, c. 2005-251, § 43, eff. Oct. 1, 2005; Laws 2008, c. 2008-57, § 1, eff. Oct. 1, 2008; Laws 2016, c. 2016-95, § 1, eff. March 24, 2016; Laws 2017, c. 2017-11, § 1, eff. July 1, 2017.

Footnotes

1 Section 895.01 et seq.

West's F. S. A. § 119.011, FL ST § 119.011

Current through the 2017 First Regular Session and Special "A" Session of the 25th Legislature

End of Document

ATTACHMENT 2

West's Florida Statutes Annotated
Title XLVIII. K-20 Education Code (Chapters 1000-1013)
Chapter 1004. Public Postsecondary Education (Refs & Annos)
Part II. State Universities
A. General Provisions

West's F.S.A. § 1004.28

1004.28. Direct-support organizations; use of property; board of directors; activities; audit; facilities

Effective: October 1, 2014
Currentness

(1) Definitions.--For the purposes of this section:

(a) "University direct-support organization" means an organization which is:

1. A Florida corporation not for profit incorporated under the provisions of chapter 617 and approved by the Department of State.

2. Organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university in Florida or for the benefit of a research and development park or research and development authority affiliated with a state university and organized under part V of chapter 159.

3. An organization that a state university board of trustees, after review, has certified to be operating in a manner consistent with the goals of the university and in the best interest of the state. Any organization that is denied certification by the board of trustees shall not use the name of the university that it serves.

(b) "Personal services" includes full-time or part-time personnel as well as payroll processing.

(c) "Property" does not include student fee revenues collected pursuant to s. 1009.24.

(2) Use of property.--

(a) Each state university board of trustees is authorized to permit the use of property, facilities, and personal services at any state university by any university direct-support organization, and, subject to the provisions of this section, direct-support organizations may establish accounts with the State Board of Administration for investment of funds pursuant to part IV of chapter 218.

(b) The board of trustees, in accordance with rules and guidelines of the Board of Governors, shall prescribe by rule conditions with which a university direct-support organization must comply in order to use property, facilities, or

personal services at any state university. Such rules shall provide for budget and audit review and oversight by the board of trustees.

(c) The board of trustees shall not permit the use of property, facilities, or personal services at any state university by any university direct-support organization that does not provide equal employment opportunities to all persons regardless of race, color, religion, gender, age, or national origin.

(3) Board of directors.--The chair of the university board of trustees may appoint a representative to the board of directors and the executive committee of any direct-support organization established under this section. The president of the university for which the direct-support organization is established, or his or her designee, shall also serve on the board of directors and the executive committee of any direct-support organization established to benefit that university.

(4) Activities; restriction.--A university direct-support organization is prohibited from giving, either directly or indirectly, any gift to a political committee as defined in s. 106.011 for any purpose other than those certified by a majority roll call vote of the governing board of the direct-support organization at a regularly scheduled meeting as being directly related to the educational mission of the university.

(5) Annual audit; public records exemption; public meetings exemption.--

(a) Each direct-support organization shall provide for an annual financial audit of its accounts and records to be conducted by an independent certified public accountant in accordance with rules adopted by the Auditor General pursuant to s. 11.45(8) and by the university board of trustees. The annual audit report shall be submitted, within 9 months after the end of the fiscal year, to the Auditor General and the Board of Governors for review. The Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability shall have the authority to require and receive from the organization or from its independent auditor any records relative to the operation of the organization. The identity of donors who desire to remain anonymous shall be protected, and that anonymity shall be maintained in the auditor's report.

(b) All records of the organization other than the auditor's report, management letter, and any supplemental data requested by the Board of Governors, the university board of trustees, the Auditor General, and the Office of Program Policy Analysis and Government Accountability shall be confidential and exempt from s. 119.07(1).

(c) Any portion of a meeting of the board of directors of the organization, or of the executive committee or other committees of such board, at which any proposal seeking research funding from the organization or a plan or program for either initiating or supporting research is discussed is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

(6) Facilities.--Each direct-support organization is authorized to enter into agreements to finance, design and construct, lease, lease-purchase, purchase, or operate facilities necessary and desirable to serve the needs and purposes of the university, as determined by the systemwide strategic plan adopted by the Board of Governors. Such agreements are subject to the provisions of ss. 1010.62 and 1013.171.

(7) Annual budgets and reports.--Each direct-support organization shall submit to the university president and the Board of Governors its federal Internal Revenue Service Application for Recognition of Exemption form (Form 1023) and its federal Internal Revenue Service Return of Organization Exempt from Income Tax form (Form 990).

Credits

Added by Laws 2002, c. 2002-387, § 172, eff. Jan. 7, 2003. Amended by Laws 2007, c 2007-5, § 173, eff. July 3, 2007; Laws 2007, c. 2007-217, § 89, eff. July 1, 2007; Laws 2013, c. 2013-37, § 31, eff. Nov. 1, 2013; Laws 2014, c. 2014-27, § 1, eff. Oct. 1, 2014.

West's F. S. A. § 1004.28, FL ST § 1004.28
Current through the 2017 First Regular Session and Special "A" Session of the 25th Legislature

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ATTACHMENT 3

2014 WL 1499515 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Ninth Judicial Circuit
Orange County

John M. BECKER, Petitioner,
v.
THE UNIVERISTY OF CENTRAL FLORIDA BOARD OF TRUSTEES, Respondent.
and
ELSEVIER, INC., Intervener.

No. 2013-CA-5265-O.
April 17, 2014.

Final Order Granting "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF"

John Marshall Kest, Judge.

***1 THIS MATTER** came before the Court upon the Fifth District Court of Appeal's Order to determine whether the trial court's [1] November 13, 2013 "Order on UCF Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013" was intended to be a final order. The Fifth District also relinquished jurisdiction to this Court to enter a final order and hold further proceedings if necessary. The Court, after considering the memoranda filed by all parties, relevant case law, the testimony and evidence presented at the evidentiary hearing on April 9-11, 2014, along with arguments from counsel, finds as follows:

FACTS AND PROCEDURAL HISTORY

Petitioner John M. Becker ("Becker") is a self-described investigative journalist and activist in the area of lesbian, gay, bisexual, and transgender rights. Becker submitted to the University of Central Florida ("UCF") a public records request for e-mails on UCF's computer servers relating to the publication of an article in the Social Science Research Journal ("SSR Journal" or "Journal").

The SSR Journal is owned and published by the private, for-profit company, Elsevier, Inc. ("Elsevier"), which publishes approximately 2, 200 journals and 25,000 book titles. The majority of the SSR Journal's business is done via cyberspace on Elsevier's servers located in Dayton, Ohio, and the physical location of most of the Journal's activities is in Chennai, India. The SSR Journal is not an independent entity in and of itself, and is instead, a privately-owned product.

Elsevier entered into personal service contracts with Dr. James Wright, wherein he would provide editorial services on the SSR Journal in exchange for direct personal compensation from Elsevier. Dr. Wright and Dr. Donley are both current faculty members with UCF's Department of Sociology.

By way of background, the SSR Journal was created in 1972 at Johns Hopkins University and was housed there until 1974. [2] In 1974, the Journal's founder joined the faculty of the University of Massachusetts and brought the Journal there. While housed at University of Massachusetts, the Journal used a university e-mail address, and Dr. Wright eventually became its co-editor. In 1988, Dr. Wright left the University of Massachusetts to join the faculty of Tulane University.

He brought the Journal there with him, and it began utilizing a Tulane e-mail address. In 2001, Dr. Wright left Tulane and joined the faculty of UCF, and the Journal followed him to UCF and began utilizing a UCF e-mail address. At present, the Journal no longer uses a UCF e-mail address.

Elsevier's contract with Dr. Wright has expired, and Elsevier is presently considering their replacements, none of whom are UCF faculty members. Once the Journal's new editor-in-chief is selected, it will no longer be housed at UCF.

***2** UCF is not a party to Elsevier's contract with Dr. Wright, did not review or approve the contracts, and receives no remuneration thereunder. Furthermore, UCF plays no role in the SSR Journal's operations, topics, article selections, peer review process, copy-editing, compiling, production, publication, advertising, subscription pricing, sales or webpage, which is maintained and controlled by Elsevier, via servers located in Dayton, Ohio.

While initially not a party to this action, Elsevier filed an "Emergency Motion of Elsevier, Inc. for Leave to Intervene, and for a Stay of Proceedings" on November 13, 2013. This Court granted that motion on March 12, 2014 and allowed Elsevier to join the litigation. On March 21, 2014, Elsevier filed "Intervenor Elsevier, Inc.'s Answer, Affirmative Defenses, and Counterclaims to Petition of John M. Becker for Writ of Mandamus."

The previous trial court rendered a November 7, 2013 "Order on Respondent's Amended Emergency Motion to Compel to Compel [sic] Return of Inadvertently Disclosed Documents," which granted Becker relief without holding a hearing and only conducted an in camera review of some of the records in question. UCF filed "UCF's Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013." The previous court granted the stay, but denied all other relief on November 13, 2013. Following the entry of that order, UCF filed a writ of certiorari to the Fifth District Court of Appeal. The previous trial judge recused himself from this case on November 15, 2013, at which point the case was assigned to the undersigned. On March 3, 2014, the Fifth District Court of Appeal issued a mandate stating that it could not determine if the November 13, 2013 order was a final order and relinquished jurisdiction to this Court to determine if the order in question was a final order, as well as to conduct further proceedings. UCF filed "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF" on March 10, 2014.

This Court held an evidentiary hearing April 9-11, 2014, wherein the Court heard testimony and admitted evidence regarding whether the records that Becker seeks are public record. At that hearing, the following witnesses testified: Dr. Wright; Ann Corney, an executive publisher at Elsevier; Dean Michael Johnson,[3] dean of UCF's College of Science; Becker; Professor Jana Jasinski, department chair of the sociology department; John M. Becker, and Dr. Amy Donley, a UCF professor who assisted Dr. Wright in his work on the SSR Journal.[4] This Order follows that hearing.

FINALITY OF THE PREVIOUS COURT'S PREVIOUS ORDER

In its mandate, the Fifth District indicated that it could not determine whether the trial court's November 13, 2013 "Order on 'UCF Board's Motion for Expedited Clarification, Enlargement of Time and Temporary Stay of Court's Order of 7 November 2013" was a final order. A final order is one that "constitutes the end to judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected." *State Farm Mut. Auto. Ins. Co*. v. *Open MRI of Orlando, Inc.*, 780 So. 2d 339 (Fla. 5th DCA 2001) (citing *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97 (Fla. 1974)). The test to determine whether an order is a final order "is whether the decree disposes of the cause on its merits leaving no questions open for judicial determination except for execution and enforcement of the decree if necessary." *Welch v. Resolution Trust Corp.*, 590 So. 2d 1098 (Fla. 5th DCA 1991).

***3** Here, UCF filed a motion requesting a stay of the court's previous order, rendered on November 7, 2013; UCF also requested that the court conduct an evidentiary hearing, decline Becker's ex parte request for rendition of a final

judgment, and grant a thirty-day enlargement of time. In the previous court's November 13, 2013 Order, the court granted a stay through November 14, 2013 and denied all other relief; however, when the court granted the stay, it did not indicate what would happen following the stay. As a result, this Court determines that the previous court's November 13, 2013 Order was a non-final order.

JURISDICTION OF THIS COURT TO RECONSIDER THE PREVIOUS COURT'S ORDER

On November 7, 2013, the previous court entered an "Order on Respondent's Amended Emergency Motion to Compel to Compel [sic] Return of Inadvertently Disclosed Documents." In that Order, the Court, without hearing, determined that almost all of the records that UCF sought to be returned were public records. On November 15, 2013, the previous judge recused himself, and this case was reassigned to the undersigned judge. The Fifth District Court of Appeal accepted UCF's petition on November 15, 2013, and it then relinquished jurisdiction back to the trial court on March 3, 2014. On March 10, 2014, UCF filed "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF." In that Motion, UCF requests that this Court vacate the previous court's November 7 and 13, 2013 Orders, apply the *Schwab* factors to the facts of the case, and hold an evidentiary hearing.

Florida Rule of Judicial Administration 2.330(h) states:

Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for delay in moving for reconsideration or other grounds for reconsideration exist.

Although an order entered by a judge who is later disqualified is subject to reconsideration by a successor judge, a party is not entitled to have the order vacated as a matter of right. *Schlesinger v. Chem. Bank*, 707 So. 2d 868, 869 (Fla. 4th DCA 1998); *see also Doe ex rel. Doe v. Publix Supermarkets*, 814 So. 2d 1249, 1251 (Fla. 2d DCA 2002) ("Orders entered by a disqualified judge are voidable not void.").

Here, UCF immediately filed its petition to the district court following the previous trial court's denial of relief for UCF, thus divesting this Court of jurisdiction. When the District Court relinquished jurisdiction on March 3, 2014, UCF filed its motion for reconsideration seven days. later. This Court finds that UCF has shown good cause for not filing its motion for reconsideration within 20 days of the previous judge's recusal and accepts UCF's motion for reconsideration as timely. *See Buckner* v. *Cowling*, 2014 WL 337417 at *1 (Fla. 5th DCA Jan. 31,2014).

ANALYSIS OF THE PUBLIC RECORDS REQUEST

Turning to the underlying issue of whether the records that petitioner seeks are public, the Court must first address the preliminary issue of which party bears the burden of proof, an issue that is in dispute. When the respondent denies that the records being sought are public records subject to disclosure, "the burden rests initially with the [petitioner] to prove that what [the petitioner] seeks meets the definition of a public record." *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002). Accordingly, the Court finds that Becker bears the burden of proof.

***4** Under Chapter 119, the term public records means "all documents ... made or received pursuant to law or ordinance or in connection with the transaction of official business by an agency." § 119.011(12), Fla. Stat. (2013). When determining whether records are private records or public records that are subject to disclosure under Chapter 119, the seminal case of *News and Sun-Sentinel v. Schwab*, 596 So. 2d 1029 (Fla. 1992), determines that it is necessary to conduct a totality of the factors test:

The[se] factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning.

Id. at 1031. Furthermore, in addition to *Schwab's* nine factors, both the Florida Supreme Court and the Fifth District Court of Appeal have considered public policy as another relevant factor under *Schwab. See Mem'I Hospital-West Volusia, Inc*. v. *News-Journal Corp.*, 729 So, 2d 373, 380 (Fla. 1999) (determining that "[a]s a matter of public policy, [the Court found] that public records access applies under the circumstances of this case"); *Stanfleld v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (noting that "[w]ere [the court] to hold that the Salvation Army is not acting on behalf of Marion County, this public policy would be circumvented"). Finally, "private documents cannot be deemed public records solely by their virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location." *State* v. *City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003). In order to determine if the records Becker seeks are public records, the Court must apply the totality of the factors test.

1) The level of public funding. While this is not an important factor under the analysis pursuant to *Schwab*, the testimony taken at the evidentiary hearing makes clear that UCF does not provide substantial funds, capital, or credit to the SSR Journal. Dr. Wright testified that because his editorship of the SSR Journal constitutes a professional service, which Ms collective bargaining agreement with UCF allows, he uses some university resources to conduct this work, which includes a UCF email address, the use of student assistants paid for by UCF, phone lines, internet access, and the like. He also indicated that his graduate assistant has a desk in a shared office space with a phone line, but that she mainly conducted her work for the Journal on her personal laptop. Furthermore, Dean Johnson indicated that professors may use university resources for outside endeavors, but they must get prior approval, which Dr. Wright had done at some point in time. It was also apparent that Dr. Wright was free to assign the student assistant to assist with any task or project upon which Dr. Wright was working, not just the SSR journal.

***5** Based on the testimony taken at the evidentiary hearing, it appears that public funding by UCF of the SSR Journal, if any, was slight. *Cf. Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So. 2d 730, 734 (Fla. 2d DCA 1991) (finding the records sought were public when the government entity provided a substantial share of the capitalization of a corporation); *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418, 421 (Fla. 5th DCA 1997) (determining records to be public subject to disclosure when there was a substantial public investment and funding).

2) Commingling funds. Based on the testimony provided at the evidentiary hearing, it does not appear as though the SSR Journal commingled funds with UCF. Dr. Wright testified that while he was paid for his editorial services in connection with the journal, UCF was not involved with those payments. In fact, he noted that the SSR Journal bank account bore his name and also indicated that he was acting as editor-in-chief of the Journal, which he did to avoid university bureaucracy. The checks that Dr. Wright received in relation to the Journal were payable to Dr. Wright himself or the Journal, not UCF. Dr. Wright did admit that he used money intended for the Journal to fund projects that were not the business of the Journal, but he also indicated that Elsevier did not reimburse UCF for any of the materials used in connection with the running of the journal. Ultimately, Dr. Wright concluded that it was not UCF's business what goes on with that account, as he indicated that it was a private account. Ms. Corney indicated that the payments from Elsevier to Dr. Wright allowed him to' choose what account in which he wanted the monies deposited; furthermore, the payments made to Dr. Wright were for services rendered. Ms. Corney stated that it was Elsevier's position that Elsevier did not care what Dr. Wright did with the money. Ms. Corney also testified that Elsevier has never made any payments to UCF, and UCF has never made any payments to Elsevier. Finally, Dean Johnson testified that the SSR Journal shared no joint bank accounts with UCF.

Based upon the aforementioned testimonies, the Court finds that commingling of funds, if any, between UCF and the SSR Journal was nominal.

3) Whether the activity was conducted on publically owned property. While some of the activity of the journal was conducted on UCF's public property, it appears as though the majority of the activity took place off of UCF's campus. Ms. Corney testified that the Journal is compiled, copy-edited, and produced in Chennai, India, and Elsevier, whose headquarters are in the Netherlands, has control over its print and online distribution.

As to the activities that were conducted on UCF's campus, Dr. Wright testified that the editing of the journal really takes place in cyberspace, as the activities can be done anywhere; he elaborated that he spent about 10% of his time during business hours at UCF performing professional service, which included work on the Journal, among other endeavors. As noted above, this was allowed pursuant to his collective bargaining agreement. Dr. Wright also testified that he worked on the Journal at home, as well as after hours. He further noted that his graduate assistant also helped with the running of the Journal, primarily in the form of clerical matters, [5] and while she did have her own desk in an editorial office at UCF, she primarily conducted the work from her private laptop.

***6** From the testimony taken at the hearing, the Court finds that substantial activities of the SSR Journal were not conducted at UCF. *Contra. News-Journal Corp.*, 729 So. 2d at 421 (finding that "[t]h activity [was] conducted on public property that has been leased to the Lessee to continue the operation of what had been a publicly operated hospital (internal quotations omitted)); *Fox v. News-Press Pub. Co., Inc.*, 545 So. 2d 941, 941 (Fla. 2d DCA 1999) (holding that the assignee of the contract was clearly performing a government function on public streets and property).

4) Whether services contracted for are an integral part of the public agency's chosen decision-making process. The testimony taken at the hearing demonstrates that UCF has no contract with Elsevier and no obligation to provide any money or resources for the SSR Journal's benefit. Dr. Wright testified that UCF has no power over Elsevier, and that if Elsevier were to stop publishing the Journal, then UCF could not then decide to continue publishing the Journal. He further indicated that UCF was not involved in deciding what articles to publish, selecting peer reviewers, the operations of the Journal, or determining the content of the SSR Journal. Dean Johnson testified that the SSR Journal is not a department of the college, UCF has no ownership interest, and UCF has no choice in selection of articles or peer reviewers. Dean Johnson also indicated that Dr. Wright's continued service to the Journal had no impact on his employment or tenure at UCF. Finally, he stated that the SSR Journal performs no public function on behalf of UCF.

Based on this testimony, the services that Elsevier contracted with Dr. Wright for were not an integral part of UCF's chosen decision-making process. *See Schwab*, 596 So. 2d at 1032 (concluding that the records sought were not public in part because there was no delegation of decision-making authority by the government agency).

5) Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform. Here, the testimony from the evidentiary hearing shows that UCF has not contracted with Elsevier for any public services, the publication of the SSR Journal is not an integral part of UCF's decision-making process, and there is no delegation of, or participation in, any aspect of UCF's decision-making process by Elsevier. Dr. Wright specifically testified that Elsevier is not providing any governmental function that UCF would otherwise provide, and UCF has not delegated any of its obligations to Elsevier. He further stated that UCF has no power over Elsevier, and Elsevier is not an agent of UCF. Ms. Corney indicated that when Elsevier owns a journal, such as the SSR Journal, it has exclusive copyright, and answers to no one on what to publish. Furthermore, Dean Johnson stated that there are very strict signatory rules about what may bind the university, and the SSR Journal is an outside activity that would not bind UCF.

Based on this testimony, the services for which Elsevier contracted with Dr. Wright were not a governmental function or a function that UCF would otherwise perform, as publishing a privately owned journal is not of the type that is typically

considered a government function. *Compare Schwab*, 596 So. 2d at 1032 (finding that with "[t]he services contracted for ... were not an integral part of the [agency's] decision-making process[, and t]here was no delegation of or participation in any aspect of the [agency's] decision-making process," and ultimately concluding that the records sought were not public) *with News-Journal Corp.*, 695 So. 2d at 421 (determining that the records at issue were public and subject to disclosure when the court found that the agency's "sole reason for existence [was] to see that its constituents have access to public ... services").

***7** *6) The extent of the public agency's involvement with, regulation of, or control over the private entity*. The evidence and testimony taken at the evidentiary hearing tended to show that UCF had no contract with Elsevier, and UCF had no obligation to provide any money or resources for the SSR Journal's benefit. Dr. Wright testified at the evidentiary hearing that UCF played no role in the Journal's operations, article selections, peer review processes, copy-editing, production, and publication. He also indicated that UCF had no authority to terminate or dissolve the SSR Journal, and that when another editor was selected for the Journal, UCF had no control over forcing the Journal to continue to be housed at UCF. Dr. Wright also indicated that his work on the Journal was confidential, and he ensured that his graduate assistant also understood that the work that she performed for the Journal was confidential. [6] Furthermore, Ms. Corney testified that when Elsevier owns a journal, such as the case here with the SSR Journal, it has exclusive copyright, and it does not have to ask permission to publish anything; in short, Elsevier answers to no one when it owns a journal.

Based on this testimony, the Court finds that UCF has no involvement with the regulation of, or control over, Elsevier and the SSR Journal. *See Schwab*, 596 So. 2d at 1032 (finding that the government agency "does not regulate or otherwise control [the private entity's] professional activity or judgment," and ultimately determining that the records at issue were not public); *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 281 (Fla. 4th DCA 2011) (holding that the records at issue were not public when the court found that the city played no role in any major decision-making process for the private entity); *contra News-Journal Corp.*, 695 So. 2d at 422 (finding the records at issue to be public when the government agency exercised real control over the private corporation's performance standards and requirements of a lease).

7) Whether the private entity was created by the public agency. UCF did not play any role in the creation of the SSR Journal. At the evidentiary hearing, Dr. Wright testified that the SSR Journal was created by Elsevier, a private, for-profit entity. He also noted that when the journal was initially created, it was housed at Johns Hopkins University. [7] Dr. Wright also indicated that any of his work product related to the journal is the property of Elsevier, and not his own or UCF's. Specifically, in the editor-in-chief agreement that Dr. Wright entered into with Elsevier it clearly states that any and all work product made in relation to the Journal is the copyright and property of Elsevier. [8] Ms. Corney elaborated in stating that Elsevier owns the work product of the SSR Journal, including emails. Dean Johnson stated that the SSR Journal is not a department of the college, and UCF has no ownership interest in the Journal.

***8** Based on the testimony presented at the evidentiary hearing, the Court determines that the SSR Journal was not publically created. *See Schwab*, 596 So. 2d at 1032 (finding that the public, government agency played no part in the creation of a private entity, and therefore the records that were created by the private entity were not public records subject to disclosure).

8) Whether the public agency has a substantial financial interest in the private entity. The testimony taken at the hearing demonstrates that UCF has no ownership or financial interest in Elsevier or the SSR Journal. Dr. Wright testified that he had a bank account that was in his own name, as editor-in-chief of the SSR Journal, where he deposited monies from Elsevier. He indicated that he did not tell UCF about the account because it was not UCF's business. Dr. Wright also noted that UCF derives no income from the Journal—the Journal may not be purchased from UCF's website. Ms. Corney elaborated when she testified that Elsevier has never made any payments to UCF, and there is no contract between Elsevier and UCF for social science research. Dean Johnson indicated that the Journal is not a product of UCF, and UCF has no ownership interest in the Journal.

As a result, the Court determines that UCF does not have a substantial financial interest in Elsevier or the SSR Journal. *Contra News-Journal Corp.*, 695 So. 2d at 421 (determining that because the government agency had contributed a high level of public funding and had a substantial financial interest in the venture, the records sought were public and subject to disclosure); *Sarasota Herald-Tribune*, 582 So. 2d at 734 (finding that because the government agency had a substantial financial interest in the private entity, this tended to show that the records sought were public and subject to disclosure).

9) For whose benefit the private entity is functioning. The testimony at the evidentiary hearing showed that Elsevier publishes the SSR Journal for its own financial benefit, and UCF receives no remuneration for the SSR Journal. Dr. Wright testified at the hearing that the contract between himself and Elsevier does not involve UCF in any way. He also elaborated that Elsevier is a private, for-profit entity. Ms. Corney echoed that Elsevier is a privately owned, for-profit entity in the business of academic publishing. As to whether UCF receives some intangible benefit as a byproduct of housing the Journal, Dean Johnson also testified that while there is some prestige associated with serving as editor-in-chief of an academic journal, that prestige is slight. Dr. Jasinski also indicated that there is minimal prestige in housing an academic journal.

The Court finds that based on this testimony, the SSR Journal does not serve as a public primary beneficiary. *See Schwab*, 596 So. 2d at 1032 (determining that while the government agency received a benefit from its contract with the private entity, the private entity's motivation was to receive compensation, and not to provide a public service, and ultimately determining that the records sought were not public).

10) Public Policy. This case involves great public policy concerns for not only UCF, but also all other public universities. Importantly, as Elsevier has noted in its materials, and as Ms. Corney testified at the evidentiary hearing, if this Court were to determine that the records sought were public and subject to disclosure, then Elsevier would seriously reconsider giving the editor position to any professor housed at a university in the United States. Furthermore, Dr. Wright, Ms. Corney, and Dean Johnson all testified to the importance of the anonymity aspect of peer reviewing articles, and how crucial peer reviewing is to the academic publishing process; to find that these records are public would contravene those endeavors. [9] The Court finds that a finding that the records sought are public records subject to disclosure would in fact disregard established public policy.

***9** While no factor should be weighed more heavily than another, an examination of these factors reveals that the records Becker seeks are not public records, as the totality of the factors demonstrates that no public function has been transferred or delegated by UCF to Elsevier, and UCF did not create the SSR Journal, does not regulate or control its options, and has no substantial financial interest in it. [10]

ANALYSIS OF ELSEVIER'S TRADE SECRET AND COPYRIGHT CLAIMS

Elsevier, the intervener, joins UCF in its claims that the records sought are private and not subject to disclosure, and adds its own, original claims that the records sought contain trade secrets, as well as are the copyright of Elsevier. The records request was directed to the public university, UCF, not the private company, Elsevier. Because the Court finds that the records that Becker seeks are private, the Court need not address these trade secret and copyright claims.

ATTORNEY'S FEES

Becker is entitled to a fee award only if the Court "determines that [UCF] unlawfully refused to permit a public record to be inspected or copied." § 119.12, Fla. Stat. (2013). The Court finds that UCF has not "unlawfully refused" Becker's inspection and copying of the SSR Journal related e-mails as those e-mails are not public records open to public inspection under Chapter 119. Alternatively, the Court finds that UCF has demonstrated a good faith and reasonable

belief in its position, thus also warranting the denial of attorney's fees to Becker. *See Stanfteld*, 695 So. 2d at 503; *Harold* v. Oawge Cowrcfy, *Fla.*, 668 So. 2d 1010, 1012 (Fla. 5th DCA 1996).

The other component of Becker's fee request relates to the non-SSR Journal related e-mails produced by UCF after the filing of this lawsuit. UCF's pre-suit communications to Becker put him on notice that UCF understood the scope of his request was limited to SSR Journal related e-mails. In response, Becker never objected to or corrected UCF's understanding and his mandamus petition and post-filing press release are both consistent with UCF's initial understanding. Once this scope issue was called to UCF's attention by Becker's court filings, UCF promptly gathered and produced to Becker more than 15,000 e-mails.

***10** Under these circumstances, the Court finds that UCF did not "unjustifiably delay" in producing the non-SSR Journal related e-mails, and therefore Becker's requested fee award in relation to those e-mails is also due to be denied. *See Office of State Attorney* v. *Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. Becker's "Emergency Petition for Writ of Mandamus For Violations of the Public Records Act" is **DENIED**.

2. "UCF's Motion for Reconsideration and Vacatur of Prior Judge's Orders of November 7 and 13, 2013, and Alternative Motion for Final Order in Favor of UCF" is **GRANTED**.

3. The records that UCF inadvertently turned over to Becker are private records that are not subject to disclosure under Chapter 119.

4. Becker is not entitled to an award of attorney's fees in this matter.

5. This is intended to be a Final Order that disposes of all issues.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this *17* day of *April*, 2014.

<<signature>>

JOHN MARSHALL KEST

Circuit Judge

Footnotes

1 Judge Donald E. Grincewicz entered the Order in question on November 13, 2013; on November 15, 2013, Judge Grincewicz *sua sponte* recused himself, and this matter was reassigned to the undersigned judge.

2 In this context, the term "housed" refers to the journal editor's current place of employment.

3 The Court makes a finding that Dean Johnson's testimony was particularly credible. He was a thoughtful and well- spoken witness with a great deal of experience in higher education and the outside activities of professors.

4 The specific testimonies of these witnesses are discussed *infra*.

5 It is important to make the distinction that Dr. Wright adamantly testified that his assistant had a very limited role in the Journal—she made no editorial decisions, did not solicit or choose articles for publication, and had duties that were limited to clerical assignments.

6 Dr. Wright's editor-in-chief agreement with Elsevier was entered into evidence at the hearing as UCF Exhibit 1. Section 8,7 of the agreement discusses the confidential nature of Dr. Wright's duties as editor-in-chief:

8.7 The Editor shall maintain all of the Confidential Information (as defined herein) in strict confidence, will not disclose any Confidential Information to any third party other than as necessary to perform the obligations set forth in this Agreement, and will protect such information with the highest degree of care. For the purposes of this Agreement, "*Confidential Information*" means any business financial, operational, customer, vendor and other information disclosed by the Publisher to the Editor and not generally known by or disclosed to the public or known to the Editor solely by reason of the negotiation or performance of this Agreement, and shall include, without limitation, the terms of this agreement, subscription figures and market positioning data.

Dr. Wright testified that he interpreted this agreement to mean that he could share confidential information with his graduate assistant and Dr. Donley, provided that they both understood that the information they had access to in connection with the Journal was confidential.

7 As mentioned in fn. 2, *supra*, Dr. Wright testified that the journal is housed wherever the editor-in-chief of the journal is employed. Ms. Corney elaborated on this point by stating that if information was discoverable simply because of where the editor-in-chief of the Journal sits, then she would seriously reconsider giving the position to any professor in the United States.

8 The relevant portion of the editor-in-chief agreement, mentioned previously in fn. 6, *supra*, can be found under Article 6 Ownership/Copyright and is reproduced in its entirety below:

6.1 As between the Editor and the Publisher, copyright and all other rights, including all electronic rights, in and to the layout, arrangement and contents of the Journal and the trademarks associated with the Journal vest in the Publisher. The Editor acknowledges the Publisher's ownership of the Journal, including without limitation the business records, work in process, inventory, trademarks and copyright in the material contained therein and agree that it shall not claim any rights in respect thereof.

6.2 All work produced by the Editor in relation to the Journal and/or for the Publisher pursuant to this Agreement, including without limitation to the selection, compilation and/or editing of the material published in the Journal, shall be work-made-for-hire of which the Publisher is the Author-at-law, and accordingly all rights comprised in the copyright in such work shall belong entirely to the Publisher. To the extent that any such work is determined not to be work-made-for-hire, the Editor also hereby assigns and transfers to the Publisher, to the maximum extent possible, all such right, title and interest as he/she may have in and to any of such work, the Journal and to any other material produced by the Editor for the Publisher pursuant to this Agreement.

6.3 The Editor authorizes use of his/her name, biography, image, and professional affiliations (at the Publisher's discretion) for purposes of promoting the Journal.

6.4 All editorial materials received by the Editor in his/her capacity as Editor of the Journal during the term of this Agreement, is intended for and is the property of the Publisher, and if requested by the Publisher, shall be immediately forwarded by the Editor to the Publisher, whether or not such material has been previously reviewed by the Editor.

9 The Court also points out that the standard set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995), which Florida has recently adopted, places emphasis on the importance of peer review. ("One means of showing [that scientific evidence is based on scientifically valid principles] is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication.... That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science.")

10 It is worth mentioning that in Becker's closing argument, he relied on *National Collegiate Athletic Ass'n* v.. *Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009) and *Booksmart Enterprises, Inc*. v. *Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227 (Fla. 3d DCA 1998). In *National Collegiate Athletic Ass'n*, the court found that the records sought were public records subject to disclosure, and noted that the public records law should be liberally construed in favor of an open government, and if there is in any doubt in favor of disclosure, that doubt should be in favor of disclosing the records. 18 So. 3d at 1206. Here, the Court finds that it has liberally construed the public records law, and it still determines that the records sought are not public subject to disclosure, as Becker fails to meet any of the *Schwab* factors.

In *Booksmart Enterprises*, the court determined the records sought were public where a privately owned on-campus bookstore kept course book, list forms that had been completed by instructors. 718 So. 2d at 229. The court determined that the private bookstore then became a custodian of those public records and thus could not deny anyone access to the forms. *Id.* Here, the Court again determines that simply because a professor employed by a public agency has kept separate records for a private entity does not render those records public; this again is evidenced by Becker's failure to meet any of the *Schwab* factors. Accordingly, the Court is not persuaded by Becker's reliance on these cases.

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ATTACHMENT 4

68 So.3d 278
District Court of Appeal of Florida,
Fourth District.

Michael BUTLER, Appellant,
v.
CITY OF HALLANDALE BEACH,
a Florida Municipality, Appellee.

No. 4D10–197.
|
July 20, 2011.
|
Rehearing Denied Sept. 21, 2011.

Synopsis

Background: City filed action seeking a declaration that a list of recipients of a certain e-mail sent by mayor was not a public record. The Seventeenth Judicial Circuit Court, Broward County, Patti Englander Henning, J., found that requester was not entitled to disclosure of recipient's list. Requester appealed.

[Holding:] The District Court of Appeal, Hazouri, J., held that list of recipients of a personal e-mail sent by mayor, containing three articles that mayor wrote as a contributor to local newspaper, was not a public record.

Affirmed.

West Headnotes (4)

[1] Records
Agencies or custodians affected

City mayor, as a municipal officer acting on behalf of the municipality, qualifies as an "agency" for purposes of statute governing disclosure of public records. West's F.S.A. § 119.011(2, 12).

Cases that cite this headnote

[2] Appeal and Error
Cases Triable in Appellate Court

The determination of what constitutes a public record is a question of law entitled to de novo review.

1 Cases that cite this headnote

[3] Records
Matters Subject to Disclosure; Exemptions

Mere fact that city mayor's e-mail was sent from her private e-mail account on her own personal computer was not the determining factor as to whether the e-mail was a public record; the determining factor would be whether the e-mail was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind. West's F.S.A. Const. Art. 1, § 24(a); West's F.S.A. § 119.011(12).

Cases that cite this headnote

[4] Records
Matters Subject to Disclosure; Exemptions

List of recipients of a certain e-mail sent by mayor was not a public record; e-mail, which contained three articles that mayor wrote as a contributor to local newspaper, was sent from mayor's private e-mail account on her own personal computer, city played no role in identifying the topics and exercised no control over the content of the articles, city played no role in mayor's decision to distribute the articles, city played no role in deciding to whom mayor chose to distribute the articles, mayor decided to distribute the articles to select personal friends and supporters at her own discretion, e-mail was not intended to perpetuate, communicate, or formalize city's business, and e-mail was not made pursuant to law or in connection with the transaction of official business. West's F.S.A. Const. Art. 1, § 24(a); West's F.S.A. § 119.011(12).

Cases that cite this headnote

Attorneys and Law Firms

***279** Edward F. Holodak of Edward F. Holodak, P.A., and Louis C. Arslanian, Hollywood, for appellant.

Andrea Flynn Mogensen of The Law Office of Andrea Flynn Mogensen, P.A., Sarasota, for Amicus Curiae First Amendment Foundation, Inc., a not-for-profit corporation.

Daniel L. Abbott and Jamie A. Cole of Weiss, Serota, Helfman, Pastoriza, Cole & Boniske, P.L., Fort Lauderdale, for appellee.

Opinion

HAZOURI, J.

Michael Butler appeals from a final judgment in a declaratory action filed by The City of Hallandale Beach (the City), which sought a declaration that a list of recipients of a personal email sent by Hallandale Beach Mayor, Joy Cooper, was not sent in connection with the discharge of any municipal duty and, therefore, is not a public record under Florida's Public Records Law, Chapter 119, Florida Statutes (2009).

The email in question was sent by Cooper from her personal email account, using her personal computer, and was blind carbon copied to friends and supporters. The email itself was very brief, and contained three articles that Cooper wrote as a contributor to the South Florida Sun Times (Times) as an attachment. Cooper has been a weekly columnist for the Times for more than four years. The three articles included as an attachment to the email were: (1) a transcript of the 2009 State of the City Address; (2) a transcript of Part Two of the State of the City Address; and (3) an article about tax questions raised at prior commission meetings.

The trial court found that Cooper was under no obligation pursuant to the statute or ordinance to notify her friends and supporters that a column had been published, and further that the City played no role in Cooper's decision to send the email to friends. Therefore, Butler was not entitled to the names and email addresses of the recipients of the email. We agree and affirm.

Public access to records and meetings of public officials is established by ***280** Article I, section 24(a) of the Florida Constitution, which states, "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any ... officer, or employee of the state ... except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Section 24(c) provides that the state legislature, by a two-thirds vote of each house of the legislature, has the power to enact exemptions to section 24(a)'s disclosure requirements. Art. I, § 24(c), Fla. Const.

[1] Section 119.011(12) defines a "public record" as:

> [A]ll 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 an agency.

§ 119.011(12), Fla. Stat. (2009). And section 119.011(2) defines "agency" as:

> [A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

§ 119.011(2), Fla. Stat. (2009). Cooper qualifies as an "agency" as set forth in section 119.011(2), since the Mayor is a municipal officer acting on behalf of the municipality and is thus subject to the directives of this section.

[2] "The determination of what constitutes a public record is a question of law entitled to de novo review." *State v. City of Clearwater,* 863 So.2d 149, 151 (Fla.2003) (quoting *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So.2d 1008, 1013 (Fla.2003)).

In *City of Clearwater,* the Florida Supreme Court analyzed the issue of whether e-mails are considered public records. In that case, a reporter requested that the city provide copies of all e-mails either sent from or received by two city employees over the city's computer network. *Id.* at 150. At issue was whether the e-mails, by virtue of the city's possession on their network, were public records. *Id.* at 151. The court concluded that the definition of public records is limited to public information related to records, and further defined the term "records" as those materials that have been prepared with the intent of perpetuating or formalizing knowledge. *Id.* at 154 (quoting *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.,* 379 So.2d 633, 640 (Fla.1980)). The court emphasized that the mere placement of an e-mail on a government network is not controlling in determining whether it is public record, but rather, whether the e-mail is prepared in connection with the official business of an agency and is "intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* (quoting *Shevin,* 379 So.2d at 640).

[3] The court in *City of Clearwater* also emphasized that a common sense approach should be used in determining whether a communication is public record, and further emphasized that "[t]he determining factor is the nature of the record, not its physical location." *Id.* Just as the supreme court concluded that the mere fact that the email was a product of the City's computer network did not automatically ***281** make it a public record, the City concedes that the mere fact that Cooper's email was sent from her private email on her own personal computer is not the determining factor as to whether the email was a public record. Once again, it is whether the email was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind. *See id.*

[4] The City played no role in Cooper's decision to write articles for the Times. The City played no role in identifying the topics about which Cooper chose to write and exercised no control over the content of the articles. The City played no role in Cooper's decision to distribute or not to distribute her Times articles, or the means by which she chose to do so. The City played no role in deciding to whom Cooper chose to distribute the copies of her articles; Cooper herself decided to distribute the articles to select personal friends and supporters at her own discretion. The email that Cooper sent was not intended to perpetuate, communicate, or formalize the City's business; it was simply to provide a copy of the articles to Cooper's friends and supporters. The email was not made pursuant to law or in connection with the transaction of official business by the City, or Cooper in her capacity as Mayor.

As previously noted, Chapter 119 is a legislative clarification of Article I, section 24(a) of the Florida Constitution, which provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." The articles had been previously published where anyone could inspect or copy them and the email forwarding copies of the articles was not prepared in connection with the official business of the Mayor or the City.

We, therefore, affirm the trial court's determination that these articles, the email, email addresses, and names of its recipients were not public records under Chapter 119.

Affirmed.

WARNER, J., and MONACO, TOBY S., Associate Judge, concur.

All Citations

68 So.3d 278, 36 Fla. L. Weekly D1547

ATTACHMENT 5

83 So.3d 1012 (Mem)
District Court of Appeal of Florida,
First District.

ENVIRONMENTAL TURF, INC.,
a Florida corporation, Appellant,
v.
UNIVERSITY OF FLORIDA BOARD OF TRUSTEES, Institute of Food & Agricultural Sciences, an agency of the State of Florida, and Florida Foundation Seed Producers, Inc., a not-for-profit corporation chartered by the State of Florida, Appellees.

No. 1D11–2121.
|
April 2, 2012.

An appeal from the Circuit Court for Alachua County. Hon. Robert E. Roundtree, Jr., Judge.

Attorneys and Law Firms

Hank B. Campbell of Valenti Campbell Trohn Tamayo & Aranda, P.A., Lakeland; Jonathan W. Stidham of Stidham & Stidham, P.A., Bartow, for Appellant.

John A. DeVault, III and Courtney K. Grimm of Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville, for Appellees.

Opinion

WOLF, J.

Appellant challenges the trial court's denial of its request for disclosure of public records. Appellees assert, here and below, that the requested documents were exempt from disclosure because they were ***1013** either (1) created and maintained by a direct-support organization (DSO), citing section 1004.28(5), Florida Statutes (2006); (2) compiled during university research, citing section 1004.22(2), Florida Statutes (2006); or (3) prepared in anticipation of litigation, citing section 119.071(1)(d)(1), Florida Statutes (2006).

The trial court denied relief based on these three asserted exemptions without inspecting the records at issue. We affirm the trial court's ruling that the documents prepared by Florida Foundation Seed Producers, Inc. are exempt from disclosure because these documents were prepared and disseminated by a DSO. Section 1004.28(5) exempts all documents that are created by a DSO except for listed exceptions which are not present in this case. *See Palm Beach Cmty. Coll. Found., Inc. v. WFTV, Inc.,* 611 So.2d 588 (Fla. 4th DCA 1993).

However, as to the remaining documents, an in-camera inspection is "generally the only way for a trial court to determine whether or not a claim of exemption applies." *Garrison v. Bailey,* 4 So.3d 683, 684 (Fla. 1st DCA 2009) (citing *Weeks v. Golden,* 764 So.2d 633, 635 (Fla. 1st DCA 2000)); *see also Lopez v. Singletary,* 634 So.2d 1054, 1058 (Fla.1993) (remarking that "it is for a judge to determine, in an in camera inspection, whether particular documents must be disclosed").

Accordingly, we REVERSE and REMAND for the trial court to conduct an in-camera inspection of the remaining records to determine if they are exempt from disclosure under the alleged exemptions to the Public Records Act.

BENTON, C.J., and VAN NORTWICK, J., concur.

All Citations

83 So.3d 1012 (Mem), 37 Fla. L. Weekly D775

ATTACHMENT 6

840 So.2d 1008
Supreme Court of Florida.

MEDIA GENERAL CONVERGENCE, INC., et al., Petitioners,
v.
CHIEF JUDGE OF the THIRTEENTH JUDICIAL CIRCUIT, Respondent.
Charles J. Crist, Jr., et al., Petitioners,
v.
Chief Judge of the Thirteenth Judicial Circuit, Respondent.

Nos. SC01-1396, SC01-1398.
|
Feb. 13, 2003.

Television station and newspaper petitioned for writ of mandamus directing chief judge of Thirteenth Judicial Circuit to grant access to materials related to conduct of judges. The District Court of Appeal, 794 So.2d 631, denied petition and certified question. The Supreme Court held that: (1) records made or received by the chief judge in regard to complaint about judicial misconduct involving sexual harassment or sexually inappropriate behavior constitute public records, and (2) the complaint and the records associated with it are confidential until the Judicial Qualifications Commission (JQC) finds probable cause believe that the circuit judge behaved inappropriately.

Certified question answered.

Anstead, C.J., Lewis, J., and Shaw, Senior Justice, concurred in result only.

Pariente, J., concurred and filed opinion.

West Headnotes (5)

[1] Records
Access to Records or Files in General

The determination of what constitutes a public record is a question of law entitled to de novo review.

3 Cases that cite this headnote

[2] Records
Matters Subject to Disclosure; Exemptions

When an individual complains to a chief judge about judicial misconduct involving sexual harassment or sexually inappropriate behavior, any records made or received by the chief judge constitute public records; any action taken by the chief judge in regard to such complaints is "in connection with" the transaction of official business and is intended to "perpetuate, communicate, or formalize knowledge of some type." West's F.S.A. Const. Art. 1, § 24; West's F.S.A. § 119.011(1).

4 Cases that cite this headnote

[3] Records
Exemptions or Prohibitions Under Other Laws

The Supreme Court Civil Rights Complaint Procedures could not serve as a basis to exempt from public disclosure any records involving information about complaints of sexually inappropriate comments or behavior made against a circuit judge, given that no one involved in case, who could have invoked the procedures or the adopted complaint procedures, attempted to do so. West's F.S.A. R.Jud.Admin.Rule 2.051(c)(8).

1 Cases that cite this headnote

[4] Records
Personal Privacy Considerations in General;Personnel Matters

When a complaint of sexual harassment and/or sexually inappropriate comments or behavior made against a circuit judge is sent to the Judicial Qualifications Commission (JQC), the complaint and the records associated with the complaint are confidential until the JQC finds probable cause to believe that the circuit judge behaved inappropriately;

once the JQC finds probable cause, the records in the possession of the chief judge are no longer exempt and become fully available to the public. West's F.S.A. R.Jud.Admin.Rule 2.051(c)(3)(A).

1 Cases that cite this headnote

[5] Records

Personal Privacy Considerations in General;Personnel Matters

Complaints of sexual harassment and/or sexually inappropriate comments or behavior made against a circuit judge and related records became exempt from public disclosure when the chief judge received them, and thus, the records were exempt from disclosure before the Judicial Qualifications Commission (JQC) began its investigation. West's F.S.A. R.Jud.Admin.Rule 2.051(c)(3)(A).

1 Cases that cite this headnote

Attorneys and Law Firms

***1009** Gregg D. Thomas, Carol Jean LoCicero and James J. McGuire of Holland & Knight LLP, Tampa, FL; Thomas E. Warner, Solicitor General, and T. Kent Wetherell, II, Richard A. Hixson, and Matthew J. Conigliaro, Deputy Solicitors General, Tallahassee, FL; and Patricia R. Gleason, General Counsel, Office of the Attorney General, Tallahassee, FL, for Petitioners.

***1010** C. Steven Yerrid and Richard C. Alvarez of the Yerrid Law Firm, Special Counsel to the Office of the Chief Judge, Tampa, FL, for Respondent.

W. Robert Vezina, III, Mary Piccard Vance, and Frederick J. Springer of Vezina, Lawrence & Piscitelli, P.A., Tallahassee, FL; and W. Dexter Douglass and Thomas P. Crapps of the Douglass Law Firm, P.A., Tallahassee, FL, for the Florida Conference of Circuit Court Judges, Amicus Curiae.

Opinion

PER CURIAM.

We have for review a decision of the Second District Court of Appeal, which certified a question to be of great public importance. *See Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 794 So.2d 631, 636 (Fla. 2d DCA 2001). [1] We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. Because the Second District's certified question is broader than the actual dispute in this case, we rephrase and divide the question to address the documents that were the subject of the dispute in this case:

I. WHETHER DOCUMENTS RECEIVED OR MADE BY THE CHIEF JUDGE REGARDING COMPLAINTS OF SEXUAL HARASSMENT OR SEXUALLY INAPPROPRIATE BEHAVIOR BY A JUDGE CONSTITUTE PUBLIC RECORDS?

II. IF THE DOCUMENTS DO CONSTITUTE PUBLIC RECORDS, ARE THE DOCUMENTS OTHERWISE EXEMPT FROM DISCLOSURE AFTER THE JUDICIAL QUALIFICATIONS COMMISSION DETERMINES THAT PROBABLE CAUSE EXISTS?

For the reasons that follow, we answer the first rephrased certified question in the affirmative, and the second rephrased certified question in the negative. Accordingly, for the reasons stated in this opinion, we quash the Second District's decision and remand for further proceedings consistent with this opinion.

I.

Petitioners Media General Convergence, Inc., and Media General Operations, Inc., were, respectively, the owner of television station NewsChannel 8/WFLA-TV ("WFLA") and the publisher of *The Tampa Tribune* newspaper ("the Tribune"). [2] This review proceeding involves requests WFLA and the Tribune made to Judge F. Dennis Alvarez, Chief Judge of the Thirteenth Judicial Circuit, [3] for access to records involving "information about complaints of sexual harassment and/or sexually inappropriate comments or behavior made against Hillsborough Circuit Judge Edward Ward." These records requests will be referred to as the "Judge Ward records."

Although Chief Judge Alvarez did not produce any records to the petitioners and ***1011** no records were produced under seal to the Second District, we are able to determine additional material facts based on the appendices filed by both parties before the Second District and made a part of the record in this case. These appendices include records supplied by the Judicial Qualifications Commission ("JQC") to the petitioners.

The records released by the JQC indicate that Chief Judge Alvarez learned of complaints regarding Judge Ward's behavior toward other circuit court judges and judicial assistants, and received information regarding this behavior. The records received or generated by Chief Judge Alvarez include affidavits executed by two judicial assistants regarding behavior by Judge Ward that the judicial assistants considered inappropriate; [4] e-mails between Judge Ward and one of the judicial assistants, as well as e-mails between Judge Ward and another circuit judge; and memoranda by Chief Judge Alvarez's employee memorializing Chief Judge Alvarez's discussions during a meeting with Judge Ward involving the complaints against him and the follow-up meeting with the judicial assistant and the judge for whom she worked.

Some time after the petitioners' initial request for the Judge Ward records, the JQC found probable cause to believe that Judge Ward had sent sexually explicit e-mails and made inappropriate overtures to two female Hillsborough County Circuit Judges and two female judicial assistants. The JQC filed formal charges against Judge Ward on March 1, 2000, and on that same day, the Tribune renewed its request in writing to Chief Judge Alvarez for "any and all documents and materials relating to complaints and/or allegations of inappropriate conduct" concerning Judge Ward. However, the Tribune did not indicate in its request that the JQC had found probable cause in the Judge Ward case. On March 2, 2000, WFLA requested the Judge Ward records telephonically.

Responding to the requests by separate letters dated March 6, 2000, Chief Judge Alvarez stated that "any records in my custody pertaining to your request have already been furnished to the [JQC] pursuant to its request." Furthermore, Chief Justice Alvarez explained: "It is my understanding that such records will only become public upon their admission into evidence at a subsequent JQC proceeding. It is also my understanding that until such public proceeding, JQC investigatory records remain confidential."

On March 8, 2000, WFLA and the Tribune again wrote to Chief Judge Alvarez, requesting access to

> any records, including e-mail correspondence, you, your staff, the Court Administrator, his staff, or Court Communications & Technology Services personnel obtained, received or reviewed *and* that contain or refer to the text of any e-mail messages among Judge Edward Ward and any of the [people who made complaints regarding Judge Ward's behavior]. Access is also requested to any records, including e-mail messages, between you (or your staff) and any other Hillsborough County Circuit Court Judge, County Court Judge, or court staff member concerning Judge Ward. [5]

***1012** Furthermore, WFLA and the Tribune requested that Chief Judge Alvarez retrieve or make copies of the records for review to the extent that he had transferred the records to the JQC.

On that same day, WFLA and the Tribune made a second request for access to the following documents:

> any correspondence, electronic correspondence, documents or other records made or received by the Chief Judge's Office or the Court Administrator's Office concerning fraternization, romantic relationships or sexual contact between any Hillsborough County Circuit Court or County Court Judge, and any personnel assigned to any courthouse located in Hillsborough County, whether such personnel are employed by the state of Florida, Hillsborough County, the Hillsborough County Sheriff's

> Office, or some other private or governmental entity.

These records will be referred to as the "fraternization records." Chief Judge Alvarez denied the request for the fraternization records, explaining that "[t]o the extent that any judicial records you have requested exist, please be advised that such records would be confidential and exempt from public accessibility under Florida Rule of Judicial Administration 2.051(c)(3)(A)." [6]

After Judge Alvarez denied access to both sets of records, WFLA and the Tribune filed a petition for a writ of mandamus in the Second District, seeking an order compelling Chief Judge Alvarez to disclose the requested records. [7] The Second District denied the petition but certified a question of great public importance. *See Media Gen. Convergence,* 794 So.2d at 636. The Second District majority first explained that whether the documents at issue were public depended on "whether they are 'judicial records' within the meaning of Florida Rule of Judicial Procedure 2.051." *Id.* at 633. The Second District concluded as follows:

> By and large, none of the documents requested by the petitioners is a "judicial record" as defined in the rule. The reason has to do with the purely administrative nature of the office of the chief judge. The Florida Constitution, article V, section 2(d), states that the chief judge "shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit." Florida Rule of Judicial Administration 2.050 details the administrative duties of a circuit chief judge. Neither the constitution nor the rule imbues him with authority to supervise the social, romantic or sexual behavior of other judges or, for that matter, of anyone else. Indeed, a chief judge, as such, has no official role in investigating judicial misconduct of any kind. That duty is vested in the Judicial Qualifications Commission, and the chief judge plays no part in its investigative or adjudicatory process. Art. V, § 12, Fla. Const.; Fla. Jud. Qual. ***1013** Comm'n R. For the most part, then, the documents requested of Judge Alvarez could not have been made or received by him in his capacity as chief judge pursuant to court rule, law or ordinance, or in connection with the transaction of official business. Simply put, they are not judicial records subject to compulsory public access. Fla. R. Jud. Admin. 2.051(b). *Id.* Furthermore, the Second District concluded that to the extent the requested documents constituted public records, the documents would be exempt from disclosure under rule 2.051(c)(8), which exempts from public disclosure records "deemed to be confidential by court rule." *Id.* at 635.

In a dissenting opinion, Acting Chief Judge Fulmer concluded that the records at issue constituted judicial records subject to public disclosure. *See id.* at 636 (Fulmer, A.C.J., dissenting). Judge Fulmer explained that the majority construed the public records provisions too narrowly, and that "[t]he administrative responsibilities of a chief judge are not so rigid as to enable this court to predetermine exactly what documents could have been generated by him in all transactions of official business." *Id.* at 637. Judge Fulmer noted that the majority ignored the established facts in the record that Chief Judge Alvarez did make and receive records while investigating alleged misconduct in his capacity as chief judge. *See id.* In Judge Fulmer's view, any action that relates to the day-to-day functioning of the courts constitutes the transaction of official business, "whether or not the action taken is expressly listed as a duty in Florida Rule of Judicial Administration 2.050." *Id.* Further, Judge Fulmer concluded that no exemption applied to render the records in this case confidential. *See id.* at 637-38.

II.

[1] In answering the rephrased certified questions in this case, we must engage in a two-step analysis. First, we must determine whether the documents sought are, in fact, public records. *See Hill v. Prudential Ins. Co.,* 701 So.2d 1218, 1219 (Fla. 1st DCA 1997). Second, if the documents constitute public records, we must determine whether the documents are exempt from public disclosure as a result of a constitutional, statutory or rule-created exemption. [8] *See id.* The determination of what constitutes a public record is a question of law entitled to de novo review. *See Amos v. Gunn,* 84 Fla. 285, 94 So. 615, 634 (1922).

Article I, section 24 of the Florida Constitution, entitled "Access to public records and meetings," provides in pertinent part:

> (a) Every person has the right to inspect or copy any *public record made or received in connection with*

> *the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.* This section specifically includes the legislative, executive and judicial branches of government....

(Emphasis supplied.) Therefore, pursuant to article I, section 24(a), a document constitutes a public record if it is "made or ***1014** received in connection with the official business" of a public employee.

In 1992, this Court adopted rule 2.051 pursuant to the provisions of article I, section 24(d), of the Florida Constitution. *See generally In re Amendments to the Fla. Rules of Jud. Admin.-Public Access to Jud. Records,* 608 So.2d 472 (Fla.1992); art. 1, § 24(d), Fla. Const. The Court explained in adopting rule 2.051:

> The amendments to the Florida Rules of Judicial Administration are, in part, designed to clarify the rules on public access to the records of the judicial branch of government and its agencies. *In light of Florida's strong public policy in favor of open government, the public is entitled to inspect the records of the judiciary, with certain exemptions.*
>
> ... In its administrative role, the judiciary is a governmental branch expending public funds and employing government personnel. Thus, records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government.

In re Amendments to the Fla. Rules of Jud. Admin., 608 So.2d at 472-73 (emphasis supplied and footnote omitted).

At the time the petitioners in this case filed their requests, rule 2.051 defined "judicial records" as

> documents, exhibits in the custody of the clerk, papers, letters, maps, books, tapes, photographs, films, recordings, data processing software or other material created by any entity within the judicial branch, regardless of physical form, characteristics, or means of transmission, that are *made or received* pursuant to court rule, law or ordinance, *or in connection with the transaction of official business by any court or court agency.*

Fla. R. Jud. Admin. 2.051(b) (1995) (emphasis supplied). [9] This definition of "judicial records" is virtually identical to the legislative definition of "public records" contained in section 119.011(1), Florida Statutes (2001), insofar as section 119.011(1) defines "public records" as "all documents ... *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.*" (Emphasis supplied.) [10]

This Court has never considered the scope of "official business" with regard to members of the judiciary. However, this Court has considered "official business" with regard to public records requests under chapter 119. For example, in the landmark decision *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,* 379 So.2d 633, 640 (Fla.1980), this Court held "that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Furthermore, this Court has held that personnel records may constitute public ***1015** records under chapter 119, and that "[w]hat is kept in personnel files is largely a matter of judgment of the employer, but whatever is so kept is a public record and subject to being published." *Michel v. Douglas,* 464 So.2d 545, 547 (Fla.1985); *see also Mills v. Doyle,* 407 So.2d 348, 350 (Fla. 4th DCA 1981) (holding that grievance records of teachers employed by county school board are "public records" under chapter 119).

III.

[2] With these general principles in mind, we analyze the request for records directed to Chief Judge Alvarez regarding "complaints of sexual harassment and/or sexually inappropriate comments or behavior made against Hillsborough Circuit Judge Edward Ward," which we have referred to as the Judge Ward records. As noted above, the threshold question is whether the Judge Ward records were public records, that is, records made or

received by Chief Judge Alvarez "in connection with the transaction of official business" under rule 2.051. [11]

Although Chief Judge Alvarez, in his responses to the petitioners, claimed that the requested records were exempt from disclosure, he never contended that the requested records in this case did not constitute public records. The Second District majority, however, determined that the Judge Ward records did not constitute public records. *See Media Gen. Convergence,* 794 So.2d at 633. The Second District reasoned that Chief Judge Alvarez could not have received the records at issue in connection with the transaction of official business because neither the Florida Constitution nor Florida Rule of Judicial Administration 2.050 explicitly imbues the chief judge with the authority to supervise the social, romantic, or sexual behavior of other judges, or for that matter, anyone else, and further, because the JQC has the exclusive duty to investigate judicial misconduct. *See id.* In reaching this conclusion, however, the Second District majority too narrowly interpreted when a record is either received or made in connection with the official business of the judiciary.

Article V, section 2(d), of the Florida Constitution provides that "[t]he chief judge [in each circuit] shall be responsible for the *administrative supervision* of the circuit courts and county courts in his circuit." (Emphasis supplied.) These administrative supervision duties are implemented by rule 2.050. *See* Fla. R. Jud. Admin. 2.050. This administrative responsibility includes exercising "administrative supervision over all courts within the judicial circuit in the exercise of judicial powers and over the judges and officers of the courts." Fla. R. Jud. Admin. 2.050(b)(2). As the chief judicial officer of the circuit, the chief judge has the responsibility to develop an administrative plan for the "efficient and proper administration of all courts within that circuit." Fla. R. Jud. Admin. 2.050(b)(3). This administrative plan includes "an administrative organization ***1016** capable of effecting the prompt resolution of cases; assignment of judges, other court officers, and executive assistants; control of dockets; regulation and use of courtrooms; and mandatory periodic review of the status of inmates of the county jail." *Id.* Moreover, the chief judge is responsible for assigning judges to the courts and divisions, and may designate a judge in any court or court division of circuit or county courts as an "administrative judge" of any court or division to assist with the administrative supervision of the court or division. *See* Fla. R. Jud. Admin. 2.050(b)(4)-(5).

In discussing the importance of the chief judge's administrative duties, this Court has explained:

> The position of Chief Judge is especially important, for the Chief Judge serves as both the chief administrative officer and chief judicial officer within the circuit. In this capacity, he or she must work effectively with the judiciary, court employees, and the community at large. In his or her dealings with the public in particular, the Chief Judge is perceived as a prime representative of not only the judiciary but the entire system of justice. The position thus is a highly responsible one, requiring the utmost in sensitivity and discretion in the conduct of those who hold it. The actions of the Chief Judge, both professional and personal, must be consistent with the highest ideals embodied by law.

In re Removal of a Chief Judge, 592 So.2d 671, 672 (Fla.1992) (citation omitted). Indeed, this Court has stressed the importance of the chief judge in ensuring the effective operation of the court system:

> This Court recognizes that it is imperative that the court system be managed efficiently and that available judicial time be well utilized. The primary responsibility for this lies in the hands of the respective chief judges.

In re Certificate of Judicial Manpower, 503 So.2d 323, 325 (Fla.1987).

As noted above, the records released by the JQC in this case indicate that the complaints concerning Judge Ward's behavior towards other circuit court judges and judicial assistants were directed to Chief Judge Alvarez because he was chief judge, and thus the records generated by him and received by him were in his capacity as

chief judge. He received affidavits from the two judicial assistants that detailed their allegations concerning Judge Ward's conduct. Further, one of Chief Judge Alvarez's employees drafted two memoranda detailing the steps Chief Judge Alvarez took in handling these complaints against Judge Ward. We thus conclude that Chief Judge Alvarez conducted his review of the Judge Ward records "in connection with" the transaction of official business, and that Chief Judge Alvarez intended to "perpetuate, communicate, or formalize knowledge of some type." *Shevin,* 379 So.2d at 640. Therefore, the Judge Ward records constitute "judicial records" subject to public disclosure absent an applicable exemption. This interpretation is consistent with Acting Chief Judge Fulmer's observation in her dissenting opinion in this case, where she explained: "[A]ny action taken by a chief judge that relates to the day-to-day functioning of the courts constitutes the transaction of official business, whether or not the action taken is expressly listed as a duty in Florida Rule of Judicial Administration 2.050." *Media Gen. Convergence,* 794 So.2d at 637 (Fulmer, A.C.J., dissenting).

IV.

Having concluded that the Judge Ward records constitute public records, we now ***1017** address whether these records are subject to an exemption from disclosure. Rule 2.051(c), adopted in 1992, provides the exemptions applicable to judicial records. Rule 2.051(c) provides in pertinent part:

> The following records of the judicial branch and its agencies shall be confidential:
>
> (3)(A) Complaints alleging misconduct against judges, until probable cause is established;
>
> ....
>
> (8) All court records presently deemed to be confidential by court rule, including the Rules of Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission....

A.

[3] The Second District in this case concluded that the requested records were exempt from disclosure pursuant to rule 2.051(c)(8), which prohibits disclosure of records "deemed to be confidential by court rule." *See Media Gen. Convergence,* 794 So.2d at 634-35. In particular, the Second District relied on the administrative order this Court promulgated on September 23, 1993, which adopted and incorporated a uniform policy and procedure addressing, among other things, complaints of sexual harassment by or against employees of the State Courts System, and ordered that the procedure be incorporated in the State Courts System personnel rules and regulations. *See id.* at 635. The "Policy Statement" of the complaint procedure provides that "all complaints of discrimination [are to] be treated seriously and acted upon promptly in accordance with procedures approved and adopted by the Supreme Court *or local procedures approved and adopted by the Chief Judge of the district or circuit court.*" *In re Personnel Rules and Regulations,* Fla. Admin. Order, (Sept. 23, 1993) (on file with Clerk, Fla. Sup.Ct.) (attached Policy Statement at 2) (emphasis supplied). Moreover, this Court's administrative order provides that complaints made under the Supreme Court Civil Rights Complaint Procedure are deemed confidential. *See id.* (attached Supreme Court Civil Rights Complaint Procedure at 2). The Thirteenth Judicial Circuit, in accordance with this Court's administrative order, adopted an almost identical procedure for complaints of sexual misconduct by its own personnel. Consequently, the Second District concluded that this Court's 1993 administrative order constitutes a "court rule" granting confidentiality to all sexual harassment investigations conducted in the State's court system. *See Media Gen. Convergence,* 794 So.2d at 635.

Even if the Supreme Court Civil Rights Complaint Procedures could provide a basis for triggering the exemption from public disclosure under rule 2.051(c)(8), no one involved in this case who could have invoked these procedures or the complaint procedures adopted by the Thirteenth Judicial Circuit attempted to do so. As Acting Chief Judge Fulmer explained in her dissenting opinion:

> In this case, those persons who could be protected by the confidentiality provisions have expressly stated that they do not wish to initiate any complaints. Their decision not to invoke the complaint procedures in no way affects the rights of those

> who do invoke the procedures to receive the protections afforded by the confidentiality provisions.

Id. at 638 (Fulmer, A.C.J., dissenting). Therefore, we conclude that the Supreme Court Civil Rights Complaint Procedures may not form the basis of an exemption from public disclosure under rule 2.051(c)(8) in this case.

***1018** B.

[4] Although we conclude that the Supreme Court Civil Rights Complaint Procedures may not form the basis of an exemption from public disclosure under rule 2.051(c)(8) in this case, we reach a different conclusion regarding the applicability of rule 2.051(c)(3)(A), which exempts from disclosure "complaints alleging misconduct against judges, until probable cause is established." Chief Judge Alvarez contends that the records in this case were exempt under rule 2.051(c)(3)(A) until the JQC found probable cause on March 1, 2000. However, Chief Judge Alvarez concedes that once the JQC found probable cause, he was obligated to release the records in his possession to the petitioners. In contrast, the petitioners contend that because the victims in this case never filed a formal complaint, rule 2.051(c)(3)(A) is inapplicable.

We conclude that rule 2.051(c)(3)(A) is applicable under the circumstances of this case, and that it exempted the Judge Ward records from public disclosure until the JQC found probable cause on March 1, 2000. The plain language of rule 2.051(c)(3)(A) refers only to "complaints," and does not distinguish between "formal" and "informal" complaints. Construing rule 2.051(c)(3)(A) in the manner urged by the petitioners would require this Court to read language into the rule that otherwise does not exist. This we decline to do.

Moreover, we conclude that the plain language of section 2.051(c)(3)(A), as well as the relevant constitutional provisions, dictate that the complaints in this case remained confidential until the JQC determined probable cause. The Florida Constitution confers upon the JQC jurisdiction to investigate and make recommendations to this Court regarding the discipline of judges. *See* art. V, § 12(a)(1), Fla. Const. Furthermore, article V, section 12(a)(4), of the Florida Constitution expressly provides that JQC proceedings are confidential until the JQC has found probable cause and the investigative panel of the JQC files formal charges with the clerk of this Court. In addition, Florida Judicial Qualifications Commission Rule 23 effectuates this constitutional mandate of confidentiality, extending it to all records received by the JQC before a finding of probable cause. Rule 2.051(c)(8) exempts from public disclosure "[a]ll court records presently deemed to be confidential by ... the rules of the Judicial Qualifications Commission."

Rule 2.051(c)(3)(A) works in conjunction with the constitutional mandate of confidentiality by exempting from disclosure all complaints alleging misconduct by a judge until probable cause is established. Because both the Florida Constitution and rule 2.051(c)(8) specifically address records in the possession of the JQC, we conclude that rule 2.051(c)(3)(A) refers to records other than those in the possession of the JQC. Indeed, whereas rule 2.051(c)(8) covers exemptions for records in the possession of the JQC before probable cause is determined, rule 2.051(c)(3)(A) covers exemptions for records other than those in the possession of the JQC, received or made by the chief judge in connection with a complaint of misconduct against a judge before there is a determination of probable cause.

Although complaints to the JQC can be initiated by any individual, it is appropriate and reasonable that the initial complaints about a judge, especially made by an employee, would be directed to the chief judge prior to any referral to the JQC. [12] ***1019** Thus, we conclude that the records associated with the complaints are exempt from disclosure until the JQC determines probable cause.

[5] The petitioners maintain, however, that the records received by Judge Alvarez should have been subject to public disclosure *before* the JQC began its investigation because, by its own terms, rule 2.051(c)(8) applies only to JQC proceedings. Although we agree that rule 2.051(c)(8) refers only to JQC proceedings, we have concluded that rule 2.051(c)(3)(A) refers to records other than those in the JQC's possession. Indeed, it would be illogical to conclude that the records in this case were subject to public disclosure until the JQC began its investigation, and then became exempt from disclosure after the JQC began its investigation and until it found probable cause. The constitutionally mandated confidentiality of JQC proceedings would be rendered meaningless under such a construction. Therefore, we conclude that when Chief Judge Alvarez received the complaints against

Judge Ward, the complaints and the related records became exempt from disclosure. Moreover, these records remained exempt until the JQC determined that probable cause existed. However, once the JQC found probable cause in this case on March 1, 2000, Chief Judge Alvarez was required to turn over the Judge Ward records in his possession to the petitioners.

V.

The Second District did not specifically discuss the content of the second set of records, referred to as the "fraternization records." The petitioners conceded at oral argument before this Court that the request seeking "any correspondence, electronic correspondence, documents or other records made or received by the Chief Judge's Office or the Court Administrator's Office concerning fraternization, romantic relationships or sexual contact between any Hillsborough County Circuit Court or County Court Judge and any personnel assigned to any courthouse located in Hillsborough County" was a "broad request." The petitioners admitted that this request was really an attempt to cover matters that Chief Judge Alvarez was handling regarding the Judge Ward complaint, and does not concern "idle conversation between members of the Court and other personnel." The petitioners also conceded that this request was not seeking to obtain notes, general e-mails, or invitations to social gatherings or lunch dates between two judicial employees. We accept this concession because general e-mails, notes or invitations regarding social gatherings most likely would not constitute documents made or received in connection with official court business. Of course, it is another matter where, as in the case of the Judge Ward records, the requested records relate to complaints of sexual harassment or sexually inappropriate comments made at the courthouse by a judge to a court employee.

Thus, because the petitioners have conceded that their request was overly broad ***1020** and designed to further explore the allegations of sexual harassment by Judge Ward, and because no records were ever transmitted to the Second District for in-camera inspection, we do not decide whether the fraternization records constitute public records, and if so, whether they are otherwise exempt. We decline to review this aspect of the petitioners' request without prejudice to the petitioners' further pursuit of this matter.

VI.

The requests for the records in this case demonstrate a deficiency in the present procedure for public records requests that are overly broad or that seek records claimed to be exempt. The rules currently do not set forth a specific procedure for the appellate courts, who are responsible for review of records requests made of the circuit court, to engage in an in-camera inspection. Therefore, in this case, the requested records were never subject to an in-camera inspection.

Consequently, the petitioners assert that this Court should fashion new procedures for challenging the denial of access to public records. The petitioners contend that, despite the requirement in rule 2.051(d)(1)[13] that this type of challenge be brought as an original action in the district courts, the district courts are not well equipped to oversee the litigation of original actions. Further, the petitioners maintain that the district courts are not capable of overseeing the use of interrogatories, requests for admissions, requests for production, or depositions. Therefore, the petitioners suggest that this Court sua sponte adopt a new procedure for challenging the denial of access to judicial records.

We agree with the petitioners that the current rule does not provide sufficient guidance both to members of the judiciary and to members of the public for resolving disputes concerning access to judicial records. However, we decline to adopt new rules for challenges to denials of judicial records requests on our own motion. Therefore, we refer this issue to the Rules of Judicial Administration Committee[14] to study this issue and provide a recommendation to this Court.

VII

This Court has repeatedly acknowledged the strong public policy in this State that allows members of the public to have access to public records. Indeed, the Florida Constitution demands no less. However, the Florida Constitution also expressly recognizes that proceedings

before the JQC are confidential until the JQC finds probable cause. Therefore, this Court must balance these competing constitutional dictates in resolving the dispute in this case.

***1021** This opinion does not seek to shield members of the judiciary from public scrutiny. All we hold today is that when an individual complains to a chief judge about judicial misconduct involving sexual harassment or sexually inappropriate behavior, any records made or received by the chief judge constitute public records. However, when that complaint is sent to the JQC, the complaint and the records associated with the complaint are confidential until the JQC finds probable cause. Once the JQC finds probable cause, the records in the possession of the chief judge are no longer exempt and become fully available to the public.

Accordingly, we answer the first rephrased certified question in the affirmative, and answer the second certified question in the negative. Further, we quash the Second District's decision on the grounds stated in this opinion, and we remand for further proceedings consistent with this opinion.

It is so ordered.

WELLS, PARIENTE, and QUINCE, JJ., and HARDING, Senior Justice, concur.

PARIENTE, J., concurs with an opinion.

ANSTEAD, C.J., LEWIS, J., and SHAW, Senior Justice, concur in result only.

PARIENTE, J., concurring.

Based on the breadth of the question certified by the Second District in this case, I concur in the majority's decision to rephrase and divide the certified question. I also concur in the majority's answer to the rephrased certified questions. However, I write separately to express concerns not addressed by the majority opinion involving the status of public records made or received by the chief judge regarding complaints of misconduct about another judge by a court employee.

Part of the problem with public records concerning members of the judiciary is that although the chief judge may be the recipient of complaints about a judge, the Florida Constitution designates the JQC as the entity charged with investigating complaints regarding violations of the Florida Code of Judicial Conduct. Further, because the JQC may be investigating the same conduct independently (and perhaps unknown to the chief judge), there is a potential uncertainty as to when and under what other circumstances the exemptions from public disclosure could be claimed.

In this case, we know that Chief Judge Alvarez received complaints and other related documents concerning Judge Ward before the JQC began its investigation of Judge Ward and that Chief Judge Alvarez conducted a limited investigation into the complaints by court employees. Although apparently Chief Judge Alvarez was not the source of the referral to the JQC, the JQC did investigate and determine probable cause in this case.

However, an unresolved issue is the status of records made or received by the chief judge if the complaint to the chief judge does not result in a referral to the JQC, so that the JQC never makes a probable cause determination. This could occur under several possible circumstances. For example, the chief judge could receive complaints concerning another judge and simply do nothing in terms of investigation. Alternatively, the chief judge could receive a complaint concerning another judge, conduct an investigation, and conclude that the complaint has no merit or validity. Finally, the chief judge could receive a complaint concerning another judge and determine that the complaint has validity, but decide that the better ***1022** course in resolving the situation is to handle the matter internally, without referral to the JQC.

I would conclude that if the chief judge does not initiate an inquiry into the validity of the complaint, then the records made or received by the chief judge would not be exempt from disclosure under rule 2.051(c)(3)(A) or any other rule. Conversely, if the chief judge, upon investigation, determines that the complaint does not have any validity, those records would be exempt under rule 2.051(c)(3)(A). Lastly, if the chief judge determines the complaint has validity and the alleged conduct rises to the level of a violation of the Code of Judicial Conduct, then referral to the JQC is appropriate and the records remain exempt until the JQC issues its probable cause determination. Indeed, canon 3(D)(1) of the Florida Code of Judicial Conduct is instructive and expressly

provides: "A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action." [15] Therefore, it would seem that a chief judge has an obligation to direct all complaints of sexual misconduct to the JQC whenever he or she concludes that the complaint has validity. [16] Yet, I acknowledge that because of the variety of complaints that might come to the chief judge, the chief judge should have some discretion in handling complaints that fall short of a potential violation of the Code of Judicial Conduct. [17] Accordingly, there are a variety of circumstances in which a complaint may not go beyond the chief judge and the status of these records remains uncertain.

Because the public records issue is intertwined with the independent but parallel responsibilities of the chief judge and the JQC, I concur with this Court's referral of this complex matter to the Conference of Circuit Court Judges for study and recommendations regarding procedures a chief judge should follow when presented with complaints of misconduct regarding another judge. *See* majority op. at 1018-19 n. 12.

This case also highlights the necessity for rules of procedure to govern in-camera inspections of records claimed to be exempt. Thus, I also concur with the majority's referral to the Rules of Judicial Administration Committee for development of recommended procedures for the handling of public records requests. *See* majority op. at 1020.

All Citations

840 So.2d 1008, 28 Fla. L. Weekly S147, 28 Fla. L. Weekly S129, 31 Media L. Rep. 2270

Footnotes

1 The Second District framed the certified question as follows:

> UNDER WHAT CIRCUMSTANCES ARE DOCUMENTS REFLECTING SOCIAL, ROMANTIC, OR SEXUAL RELATIONSHIPS OF JUDGES DEEMED TO BE JUDICIAL RECORDS SUBJECT TO PUBLIC DISCLOSURE UNDER FLORIDA RULE OF JUDICIAL PROCEDURE 2.051?

Media Gen. Convergence, 794 So.2d at 636.

2 Media General Convergence, Inc., no longer exists. WFLA-TV/News Channel 8 is now owned by petitioner Media General Operations, Inc.

3 Although Chief Judge Alvarez was chief judge of the Thirteenth Judicial Circuit for all pertinent times involved in this case, he retired as a circuit judge on June 30, 2001.

4 In one case, the complained-of conduct was "unwelcomed e-mail messages of a sexual nature" toward one of the judicial assistants. In the other case, the complained-of conduct involved Judge Ward coming into the other judicial assistant's office on a Friday afternoon wearing shorts, a t-shirt and a baseball cap, and asking if the judicial assistant would join him in drinking beer.

5 Although this request appears broader than previous requests, for purposes of discussion, the records sought in this request shall be considered part of the Judge Ward records.

6 Rule 2.051(c)(3)(A) exempts from disclosure "[c]omplaints alleging misconduct against judges, until probable cause is established."

7 Initially, the petitioners filed the petition for a writ of mandamus in the Thirteenth Judicial Circuit on March 16, 2000. Chief Judge Alvarez moved to dismiss the petition because the trial court lacked jurisdiction under rule 2.051(d)(1), which provides that jurisdiction regarding access to records lies in the court with appellate authority to review the decision of the judge who denied access to the records. However, before the circuit court ruled on Chief Judge Alvarez's motion to dismiss, the petitioners filed the petition for writ of mandamus in the Second District. On August 8, 2000, the circuit court dismissed the petition for lack of jurisdiction.

8 Article I, section 24(d), of the Florida Constitution provides:

> All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. *Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.*

(Emphasis supplied.) Therefore, any rule-created exemption had to be in effect prior to July 1, 1993.

9 In *Report of the Supreme Court Workgroup on Public Records,* 825 So.2d 889, 896 (Fla.2002), the Court adopted a slightly modified definition of "judicial records," making a distinction between "court records" and "administrative records."

The modified rule defines "administrative records" as "all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity." This modification does not affect the issues in this case.

10 Chapter 119, Florida Statutes (2001), concerns "public records" of agencies, which include "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law." § 119.01(1)-(2).

11 Although the Attorney General's arguments in this proceeding generally mirror the arguments of WFLA and the Tribune, the Attorney General also argues that the Second District erred in analyzing the public records issue under Florida Rule of Judicial Administration 2.051, rather than under the Florida Constitution. Because this Court's definition of "judicial record" contained in the 1995 amendment to rule 2.051 is identical to the definition of "public records" contained in article 1, section 24(a), of the Florida Constitution insofar as both define public records as those records made or received in connection with official business, we reject the Attorney General's argument that the Second District somehow erred in relying upon rule 2.051, rather than article 1, section 24(a), in determining whether the records at issue constituted public records subject to disclosure.

12 We do not decide the question of whether the records in the chief judge's possession are exempt from disclosure if no JQC investigation is pending, because those facts are not before us. However, because it is unclear as to what procedures a chief judge should follow when presented with complaints of sexual harassment involving a judge, we refer this important matter to the Conference of Circuit Judges for recommended guidelines consistent with this Court's stated concern, as articulated in the policy statement of our complaint procedure, that "all complaints of discrimination [are to] be treated seriously and acted upon promptly in accordance with procedures approved and adopted by the Supreme Court or local procedures approved and adopted by the Chief Judge of the district or circuit court." *In re Personnel Rules and Regulations,* Fla. Admin. Order (Sept. 23, 1993) (attached Policy Statement at 2).

13 Rule 2.051(d) provides in full:

> (d) Review of Denial of Access Request. Expedited review of denials of access to judicial records or to the records of judicial agencies shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:
>
> (1) Where a judge has denied a request for access to records in the judge's possession or custody, the action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access.
>
> (2) All other actions under this rule shall be filed in the circuit court of the circuit in which such denial of access occurs. Requests and responses to requests for access to public records under this rule shall be made in a reasonable manner.

14 We suggest that the Rules of Judicial Administration Committee consult with the former members of the Supreme Court Public Records Workgroup regarding this issue.

15 The commentary to this rule explains:

> Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. *A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office ... is required under this Canon to inform the appropriate authority.* While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

(Emphasis supplied.)

16 Further complicating the public records procedure is the fact that although this Court has adopted a uniform policy and procedure addressing, among other things, complaints of sexual harassment by or against employees of the State Courts System, it is not clear whether this procedure applies to complaints of sexual harassment against judges.

17 Further complicating the scenario is the fact that the two complainants in this case specifically requested that Chief Judge Alvarez not refer their complaints to the JQC.

ATTACHMENT 7

863 So.2d 149
Supreme Court of Florida.

STATE of Florida, Petitioner,
v.
CITY OF CLEARWATER, Respondent.
Times Publishing Company, Petitioner,
v.
City of Clearwater, Respondent.

Nos. SC02–1694, SC02–1753.
|
Sept. 11, 2003.

Synopsis
Newspaper petitioned for mandamus and permanent injunctive relief, seeking order compelling city to release all e-mail sent from or received by two city employees who used government-owned computers for communication. The Circuit Court, Pinellas County, Anthony Rondolino, J., denied petition. Newspaper appealed. The Second District Court of Appeal, 830 So.2d 844, affirmed and certified the question as one of great public importance. The Supreme Court, Pariente, J., held that personal e-mails did not fall within the definition of public records subject to disclosure by virtue of their placement on a government-owned computer system.

Approved.

West Headnotes (7)

[1] Records
Judicial enforcement in general

The determination of what constitutes a public record is a question of law entitled to de novo review.

6 Cases that cite this headnote

[2] Statutes
Plain Language;Plain, Ordinary, or Common Meaning

In construing a statute, courts look first to the statute's plain meaning.

Cases that cite this headnote

[3] Records
Court records

Judicial records subject to public disclosure are limited to those made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business. West's F.S.A. R.Jud.Admin.Rule 2.051(b)(1)(A, B).

1 Cases that cite this headnote

[4] Records
Matters Subject to Disclosure; Exemptions

The determining factor of whether a document is a public record subject to disclosure is the nature of the record, not its physical location. West's F.S.A. Const. Art. 1, § 24; West's F.S.A. § 119.011(1).

6 Cases that cite this headnote

[5] Records
Matters Subject to Disclosure; Exemptions

City's policy that its computer resources were city property and that users had no expectation of privacy did not expand the definition of public records subject to disclosure to include personal e-mail communication between city employees on city-owned computers. West's F.S.A. Const. Art. 1, § 24; West's F.S.A. § 119.011(1).

4 Cases that cite this headnote

[6] Records
Matters Subject to Disclosure; Exemptions

E-mail system's automatic creation of a header for each article of correspondence generated or received on a city computer did not make individual headers or attached e-mails public records subject to disclosure, regardless of their content or intended

purpose, absent any evidence that headers were prepared with the intent to perpetuate, communicate, or formalize knowledge of some type. West's F.S.A. Const. Art. 1, § 24; West's F.S.A. § 119.011(1).

5 Cases that cite this headnote

[7] Records
Matters Subject to Disclosure; Exemptions

Personal e-mails are not "made or received pursuant to law or ordinance or in connection with the transaction of official business" and, therefore, do not fall within the definition of "public records" that are subject to disclosure by virtue of their placement on a government-owned computer system. West's F.S.A. § 119.011.

13 Cases that cite this headnote

Attorneys and Law Firms

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George K. Rahdert, Alison M. Steele, Penelope T. Bryan, and Thomas E. Reynolds of Rahdert, Steele, Bryan & Bole, P.A., St. Petersburg, Florida, for Petitioners, Times Publishing Company.

Opinion

PARIENTE, J.

We have for review a decision of the Second District Court of Appeal, which certified the following question of great public importance:

> WHETHER ALL E–MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2000), AND ARTICLE I, SECTION 24(A), OF THE FLORIDA CONSTITUTION BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT–OWNED COMPUTER SYSTEM IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS THE EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E–MAILS?

Times Publishing Co. v. City of Clearwater, 830 So.2d 844, 848–49 (Fla. 2d DCA 2002). We have jurisdiction, *see* art. V, § 3(b)(4), Fla. Const, and rephrase the certified question as follows:

> WHETHER ALL E–MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2000), AND ARTICLE I, SECTION 24(A) OF THE FLORIDA CONSTITUTION BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT–OWNED COMPUTER SYSTEM.

For the reasons stated below, we answer the rephrased question in the negative and approve the Second District's decision.

FACTS

The facts of this case are straightforward. In October 2000, a Times Publishing Company reporter requested that the City of Clearwater provide copies of all e-mails either sent from or received by two city employees over the City's computer network between October 1, 1999, and October 6, 2000. Pursuant to the City's procedures, the employees reviewed their e-mails and sorted them into two categories, personal and public. No one else reviewed ***151** the e-mails deemed by the employees to be personal. The City copied the public e-mails and provided them to Times Publishing.

Times Publishing filed an action in the circuit court to obtain the e-mails the employees had designated as private. Times Publishing asserted that it was entitled to all the e-mails generated by and stored on the City's computers. The circuit court granted Times Publishing's request for a temporary injunction and ordered the City to "make every reasonable effort to retrieve, preserve and secure from destruction" all e-mails sent or received by the employees in question between October 1, 1999, and October 6, 2000.

After a final hearing at which three of the City's employees testified, the trial court issued a detailed and thorough order denying Times Publishing's request for a writ of mandamus and permanent injunctive relief. The Second District affirmed the trial court's order without prejudice to Times Publishing seeking an *in camera* review of the disputed e-mails. *See Times Publishing,* 830 So.2d at 848. The Second District concluded that "private" or "personal" e-mails fall outside the current definition of public records because they are neither "made or received pursuant to law or ordinance" nor "created or received 'in connection with official business' of the City or 'in connection with the transaction of official business' by the City." *Id.* at 847. Because its decision affects how every state agency and municipality maintains its electronic records and the public's access to those records, the Second District certified the question of great public importance to this Court. *See id.* at 848–49. [1]

ANALYSIS

[1] This case involves the narrow legal issue of whether personal e-mails are considered public records by virtue of their placement on a government-owned computer system. [2] "The determination of what constitutes a public record is a question of law entitled to de novo review." *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So.2d 1008, 1013 (Fla.2003).

Times Publishing argues that the placement of e-mails on the City's computer system makes the e-mails public records, regardless of their content or intended purpose. The State contends that the headers created by e-mails when they are sent are akin to phone records or mail logs, which the State asserts are clearly public records. We conclude that both of these arguments are without merit.

Access to public records is currently guaranteed by article I, section 24 of the Florida Constitution, and chapter 119 Florida Statutes (2002). Article I, section 24 provides in pertinent part:

> (a) Every person has the right to inspect or copy any *public record made or received in connection with the official business* of any public body, officer, or employee of the state, or persons acting ***152** on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive and judicial branches of government....

(Emphasis supplied.) Chapter 119 defines public records 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.*

§ 119.011(1), Fla. Stat. (2002) (emphasis supplied). Thus, both article I, section 24 and chapter 119 specify that public records are those records that are in some way connected to "official business."

A review of the history of Florida's public records law indicates that the connection between public records and official business was established well before the Legislature enacted the first public records statute. In *Bell v. Kendrick,* 25 Fla. 778, 6 So. 868 (1889), this Court considered whether evidence of a certificate of a deed was admissible in an action for ejectment when the deed was lost and had never been recorded. The Court noted that records kept by persons in public office are generally admissible, and explained:

> [W]henever a written record of the transactions of a public officer is a convenient and appropriate mode of *discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial,* ... and, when kept, it becomes a public document—a public record—belonging to the office, and not to the officer.

Id. at 869 (emphasis supplied). The Court concluded that because "[i]t was clearly the duty of the register of state lands to keep in his office a register of sales and conveyances of land," a certified transcript of these entries was admissible as evidence of the execution of the conveyance. *Id.* at 870.

Twenty years after *Bell,* the Legislature enacted Florida's first public records statute, which mandated that "all State, county and municipal records" be open "for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen." Ch. 5942, Laws of Fla. (1909). The statute did not provide a definition of public records and this Court continued to apply the "discharge of duty" analysis established in *Bell. See Amos v. Gunn,* 84 Fla. 285, 94 So. 615, 634 (1922) ("A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done.").

In 1967 the Legislature first defined the term "public records":

> "Public Records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.*

Ch. 67–125, § 1(a) at 254, Laws of Fla. (emphasis supplied). This definition, codified in section 119.011(1), has remained essentially unchanged. The most significant change to section 119.011(1) occurred in 1995 when the Legislature amended the definition of "public records" to include "data processing software" and information regardless of "means of transmission." *See* ch. 95–296, § 6 at 2727, Laws of Fla. Thus, electronic documents stored in a ***153** computer can be public records provided they are "made or received pursuant to law or ordinance or in connection with the transaction of official business." § 119.011(1), Fla. Stat. (2002).

[2] "In construing a statute, we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley,* 666 So.2d 898, 900 (Fla.1996). Based on the plain language of section 119.011(1), we agree with the Second District's conclusion that "private" or "personal" e-mails "simply fall[] outside the current definition of public records." *Times Publishing,* 830 So.2d at 847. As the Second District explained:

> Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.

Id. This conclusion is supported by this Court's decision in *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records,* 651 So.2d 1185 (Fla.1995), in which we discussed the public's right of access to the judicial branch's official business e-mail:

> Official business e-mail transmissions must be treated just like any other type of official communication received and filed by the judicial branch.... *E-mail may include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record.*

Id. at 1187 (emphasis supplied).

[3] Although public access to records of the judicial branch is governed by court rule rather than by chapter 119, [3] we recently acknowledged that the definition of "judicial records" contained in Florida Rule of Judicial Administration 2.051 "is virtually identical to the legislative definition of 'public records' contained in section 119.011(1) ... insofar as section 119.011(1) defines 'public records' as 'all documents ... *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.*' " *Media Gen. Convergence,* 840 So.2d at 1014. Thus, this Court's determination that judicial e-mails that are not made or received in connection with official business are not required to be recorded as public records also applies to agency e-mails governed by chapter 119. [4]

***154** Further, Times Publishing's argument that the placement of e-mails on the City's computer network automatically makes them public records is contrary to this Court's decision in *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.,* 379 So.2d 633 (Fla.1980). In *Shevin,* this Court rejected the First District's conclusion that "section 119.011(1) applies to almost everything generated or received by a public agency." *Id.* at 640. Although this Court acknowledged that the Legislature broadened the class of public records in enacting section 119.011(1), this Court concluded that the definition of the term "public records" limited "public information to those materials which constitute *records*—that is, materials that have been prepared *with the intent* of perpetuating or formalizing knowledge." *Id.* (second emphasis supplied). Thus, it cannot merely be the placement of the e-mails on the City's computer system that makes the e-mails public records. Rather, the e-mails must have been prepared "in connection with official agency business" and be "intended to perpetuate, communicate, or formalize knowledge of some type." *Id.*

[4] We agree with the trial court's observation that "[c]ommon sense ... opposes a mere possession rule." The trial court explained:

> This court noted several times during hearings on this case the absurd consequences of such an application of the law. If the Attorney General brings his household bills to the office to work on during lunch, do they become public record if he temporarily puts them in his desk drawer? If a Senator writes a note to herself while speaking with her husband on the phone does it become public record because she used a state note pad and pen? The Sheriff's secretary, proud of her children, brings her Mother's Day cards to the office to show her friends. Do they become public records if she keeps them in the filing cabinet?

Times Publishing Co. v. City of Clearwater, No. 00–8232–CI–13 at 10 (6th Cir Ct. order filed May 21, 2001). Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of "public records," *see Wisner v. City of Tampa Police Dep't,* 601 So.2d 296, 298 (Fla. 2d DCA 1992), private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location.

[5] Moreover, we agree with the City that its "Computer Resources Use Policy," which states that the City's computer resources are the property of the City and that users have no expectation of privacy, cannot be construed as expanding the constitutional or statutory definition of public records to include "personal" documents. Times Publishing conceded at oral argument that its position —that all e-mails on the City's computer should be considered public record—does not hinge on the City's Computer Resources Use Policy. Further, as noted by the Second District, "[a]lthough the City's policy may

prevent the employees from asserting a privacy right to contest disclosure, the policy did not and could not alter the statutory definition of public records for purposes of chapter 119." *Times Publishing,* 830 So.2d at 846. *Cf. Tribune Co. v. Cannella,* 458 So.2d 1075, 1077 (Fla.1984) (stating ***155** that it is a "fundamental principle that a municipality may not act in an area preempted by the legislature" and holding that the Public Records Act preempted the City of Tampa's regulation that delayed the production of requested personnel records).

[6] Finally, we disagree with the narrower view asserted by the Attorney General that the creation of an e-mail "header" makes all e-mails, regardless of their content or intended purpose, public records. Relying on the Department of State's public records retention schedule, the Attorney General describes the header information of an e-mail as "including all date/time stamps, routing information, etc." [5] The Attorney General asserts that the e-mail system's creation of this header information distinguishes e-mails from paper documents and makes all e-mails generated on or received by a City computer subject to disclosure under chapter 119. The Attorney General supports this assertion by comparing the creation of e-mail headers to the creation of mail logs or phone records, which the Attorney General maintains are clearly public records even if they contain information that is personal.

Assuming *arguendo* that an agency's mail logs or phone records are public records, [6] we cannot equate the automatic creation of a header for each article of correspondence by an e-mail program with a log. The Attorney General contends that the only difference between phone records or traditional mail logs and the e-mail header information is that traditional logs are contained as one single document, not as multiple, independent entries. We conclude that this is an essential difference.

In this case, there is no evidence in the record that the City maintains or generates, in its normal course of operations, a list of e-mail headers created by its employees' use of the computer network. The fact that mail logs and phone records are *purposely compiled and maintained* by an agency distinguishes them from e-mail headers, which are by-products of the employee's use of the agency's e-mail system, and are neither *purposely* compiled nor maintained in the course of an agency's operations. Simply stated, e-mail headers are not "prepared" with the intent to "perpetuate, communicate, or formalize knowledge of some type." *Shevin,* 379 So.2d at 640. Therefore, neither the individual header nor the attached e-mail is a "public record" subject to disclosure under chapter 119.

[7] Based on the foregoing, we conclude that "personal" e-mails are not "made or received pursuant to law or ordinance or in connection with the transaction of official business" and, therefore, do not fall within the definition of public records in section 119.011(1) by virtue of their placement on a government-owned computer system. Accordingly, we answer the rephrased question in the negative and approve the Second District's decision. [7]

It is so ordered.

***156** ANSTEAD, C.J., and WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

863 So.2d 149, 149 Lab.Cas. P 59,783, 20 IER Cases 641, 28 Fla. L. Weekly S682, 31 Media L. Rep. 2240

Footnotes

1 After the Second District released its initial decision in this case, the State, through the Attorney General, filed a motion to intervene in support of Times Publishing's motion for certification of a question of great public importance. The Second District withdrew its initial decision and reissued its opinion, granting the Attorney General's motion and certifying the question of great public importance to this Court.

2 As noted by the Second District, this case does not involve: (1) "e-mail[s] that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers"; (2) "a balancing of the public's interest in open public records and an individual's right to privacy"; or (3) "an in camera inspection of records." *Times Publishing,* 830 So.2d at 845–46.

3 Chapter 119 applies only to "agency" records. "Agency" is defined as:

> [A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

§ 119.011(2), Fla. Stat. (2002).

4 In *Report of the Supreme Court Workgroup on Public Records,* 825 So.2d 889, 896 (Fla.2002), the Court amended rule 2.051, replacing the term "judicial records" with the term "records of the judicial branch," which includes both "court records" and "administrative records." "Records of the judicial branch" are defined as "all records, regardless of physical form, characteristics, or means of transmission, *made or received in connection with the transaction of official business* by any judicial branch entity." Fla. R. Jud. Admin. 2.051(b)(1) (emphasis supplied). "Court records" are the contents of the court file and "administrative records" are "all other records *made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business* by any judicial entity." Fla. R. Jud. Admin 2.051(b)(1)(A)-(B) (emphasis supplied). Thus, judicial records subject to public disclosure are still limited to those "made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business."

5 *See* Division of Library and Information Services, Department of State, *General Records Schedule GS1–L for Local Government Agencies* ii (2001) *available at* http:// dlis.dos.state.fl.us/barm/genschedules/gensched.htm.

6 *Compare* Op. Att'y Gen. Fla. 99–74 (1999) (advising a school board that its phone records were public records even if the calls indicated were personal and paid for by the employee) *with Media Gen. Operation, Inc. v. Feeney,* 849 So.2d 3, 6 (Fla. 1st DCA 2003) (holding that records of personal phone calls made by staff employees of the House of Representatives "fall outside the current definition of public records and were properly redacted").

7 We decline to address the remaining issue raised by the parties because it is beyond the scope of the certified question. *See Crocker v. Pleasant,* 778 So.2d 978, 990–91 (Fla.2001).

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ATTACHMENT 8

830 So.2d 844
District Court of Appeal of Florida,
Second District.

TIMES PUBLISHING COMPANY, Appellant,
v.
CITY OF CLEARWATER, Florida, Appellee.

No. 2D01-3055.
|
July 3, 2002.

Synopsis

Newspaper petitioned for mandamus, declaratory judgment, and injunctive relief, seeking order compelling city to release all e-mail sent from or received by two city employees who used government-owned computers for communication. The Circuit Court, Pinellas County, Anthony Rondolino, J., denied petition. Newspaper appealed. The District Court of Appeal, Altenbernd, J., held that personal e-mail of city employees did not qualify as public records subject to disclosure under public records statute.

Affirmed; question certified.

West Headnotes (5)

[1] Records
Matters Subject to Disclosure; Exemptions

Government agency's official information stored on a computer is as much a "public record" as written documents in official files. West's F.S.A. § 119.011(1).

2 Cases that cite this headnote

[2] Records
In General;Freedom of Information Laws in General

Since state public records law established a state public policy of open records, the public records law must be construed liberally in favor of openness. West's F.S.A. § 119.01.

Cases that cite this headnote

[3] Records
Matters Subject to Disclosure; Exemptions

Personal e-mails of city employees, which were not created or received in connection with the official business of the city or in connection with the transaction of city's official business, did not qualify as "public records" subject to disclosure under public records statute. West's F.S.A. § 119.011(1).

3 Cases that cite this headnote

[4] Records
In General;Request and Compliance

City did not violate its obligation as custodian, under state public records disclosure law, by failing to designate an official records custodian and allowing individual employees, without oversight, to review e-mails to determine whether communications were nonpublic records, where statute defined official records custodian as elected officer or officer's designee, state did not limit who records custodian could designate to review communications, and law provided no specific procedure for determining whether a record was "public." West's F.S.A. § 119.021.

2 Cases that cite this headnote

[5] Records
Judicial Enforcement in General

At least in the absence of an in camera review, neither an appellate court nor a trial court is in a position to engraft specific requirements on individual governmental entities reviewing public records requests when those requirements are not provided for by state public records law. West's F.S.A. § 119.021.

Cases that cite this headnote

Attorneys and Law Firms

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Pam Akin, City Attorney, and Leslie K. Dougall-Sides, Assistant City Attorney, Clearwater, for Appellee.

***845** Robert A. Butterworth, Attorney General, and Thomas E. Warner, Solicitor General, Tallahassee, Intervenor/Appellant.

Opinion

ALTENBERND, Judge.

Times Publishing Company (the Times) appeals a circuit court order denying its petition for mandamus, declaratory judgment, and injunctive relief. In the petition, the Times sought an order compelling the City of Clearwater (the City) to release as public record all e-mail sent from or received by two city employees who used government-owned computers for communication. We conclude that e-mail stored in government computers does not automatically become public records by virtue of that storage. We affirm the well-reasoned opinion of the trial court. This case demonstrates that the Public Records Act, chapter 119, Florida Statutes (2000), although permitting broad access to public records, is not an ideal tool for private citizens who wish to investigate the nongovernmental activities of government employees during work hours.

In October 2000, the Times' reporter, Christina Headrick, requested that the City provide her copies of all e-mail sent from, or received by, the government-owned computers used by two City employees, Garrison Brumback and John Asmar. Pursuant to the City's procedures, Mr. Brumback and Mr. Asmar were permitted to review their e-mail and to sort that e-mail into two categories, personal and public. No other person examined the content of the e-mail the employees deemed to be personal. The City copied the e-mail these employees identified as public e-mail onto a CD-ROM and provided it to the Times.

The Times maintained that it was entitled to all of the e-mail that these employees stored on the City's computers and filed an action in circuit court to obtain the e-mail that the employees designated as "private." By temporary injunction, the City was ordered to make every reasonable effort to secure and preserve the e-mail at issue. [1] The trial court conducted a hearing on March 1, 2001, to obtain the necessary evidence to rule on the Times' request for the e-mail. On May 17, 2001, the trial court issued a well-written, detailed order denying that request.

At the outset, it is important to note what this case does not involve. First, this case does not involve e-mail that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers. *See, e.g., Hill v. Prudential Ins. Co. of Am.,* 701 So.2d 1218 (Fla. 1st DCA 1997) (involving otherwise privileged documents that were lawfully obtained by agency during official investigation and placed in agency files). The e-mail sought by the Times is apparently not located in any City file investigating employee misconduct. Rather, this case involves a request to the City for e-mail directly from the computers utilized by the City's employees as the sender or the receiver.

Second, this case does not involve a balancing of the public's interest in open public records and an individual's right to privacy. *See, e.g., Post-Newsweek Stations, Fla. Inc. v. Doe,* 612 So.2d 549 (Fla.1992) (balancing privacy interests of persons ***846** named on prostitute's "client list" with public's interest in open inspection of public records). The two employees involved in this case have not asserted a right of privacy in their e-mail. In fact, the City had a published "Computer Resources Use Policy," which generally stated that the City's computer resources belong to the City and that users have no expectation of privacy as to documents created, stored, sent, or received on the City's computers. Although the City's policy may prevent the employees from asserting a privacy right to contest disclosure, the policy did not and could not alter the statutory definition of public records for purposes of chapter 119. *Cf. Browning v. Walton,* 351 So.2d 380 (Fla. 4th DCA 1977) (holding that city could not "self-impose" public records exemption for city employee personnel records by way of form requesting files be kept confidential).

Finally, this case does not involve an in camera inspection of records. The primary issue preserved for appeal in this case is whether all e-mail stored on a public entity's computer system is public record simply by virtue of its placement on a public resource. Once the City responded

to the Times' request and identified certain e-mail as not within the definition of "public record," the Times did not request an in camera review of the disputed e-mails, although such a review might have been a possible way to resolve the dispute. *See Woolling v. Lamar,* 764 So.2d 765 (Fla. 5th DCA 2000) (requiring in camera inspection of public records claimed to be exempt, even though such inspection was not required by section 119.07). [2] *See also Tribune Co. v. Pub. Records,* 493 So.2d 480 (Fla. 2d DCA 1986). Instead, the Times sought a bright-line ruling that all e-mail on the City's computer system was "public record."

Thus, the dispositive issue in this case centers on the definition of a "public record." Section 119.011(1), Florida Statutes (2000), provides:

> "Public records" means 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. [3]

Chapter 119 is a legislative codification of article I, section 24(a) of the Florida Constitution, which provides:

> Every person has the right to inspect or copy any public record made or received *in connection with the official business* of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

(Emphasis added.) Article I, section 24, allows the legislature to provide exemptions for certain public records, but "such law shall state with specificity the public necessity justifying the exemption and ***847** shall be no broader than necessary to accomplish the stated purpose of the law."

[1] **[2]** Information stored on a computer is as much a public record as written documents in official files. *See Seigle v. Barry,* 422 So.2d 63 (Fla. 4th DCA 1982). Moreover, because section 119.01, Florida Statutes (2000), established a state public policy of open records, the public records law must be construed liberally in favor of openness. *City of St. Petersburg v. Romine,* 719 So.2d 19 (Fla. 2d DCA 1998).

[3] In this case, however, "private" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.

Moreover, the supreme court has rejected a similar argument that the mere placement of a document in a public official's file makes the document a public record. In *Shevin v. Byron, Harless, Schaffer, Reid & Associates,* 379 So.2d 633 (Fla.1980), the supreme court rejected the decision of the district court of appeal that "in effect said that section 119.011(1) applies to almost everything generated or received by a public agency." *Id.* at 640. Instead, the supreme court held that only materials prepared "with the intent of perpetuating and formalizing knowledge" fit the definition of a public record. *Id.* The court specifically recognized:

> It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the 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.

Id. See also Lopez v. State, 696 So.2d 725 (Fla.1997) (holding handwritten notes of state attorney, although not exempt from disclosure, were not "public record" by definition); *Hill,* 701 So.2d 1218, 1220 (recognizing

generally that private party's privileged documents do not become public record simply by virtue of fact they are in government's possession); *News & Sun-Sentinel, Co. v. Modesitt,* 466 So.2d 1164 (Fla. 1st DCA 1985) (holding that records held by commissioner of agriculture as custodian of funds for group of private citizens were not public records).

As discussed by Judge Rondolino in his order denying the Times' claim, the courts themselves have struggled with the rules that should govern public access to and retention of such e-mail. The supreme court has recognized that judicial e-mail "may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as public record." *In re Amendments to Rule of Judicial Administration 2.051-Public Access to Judicial Records,* 651 So.2d 1185, 1190 (Fla.1995). The Times' request would require a definition of public record that is broader than the definition provided by the supreme court for use by this court. *See Report of the Supreme Court Workgroup on Public Records,* 825 So.2d 889(Fla. 2002) (amending Florida Rule of Judicial Administration 2.051(b) to define records of judicial branch). Neither the statute nor the case law supports such a broad interpretation of the term "public record."

The Times also takes issue with the City's procedure in this case. The Times ***848** argues that the official records custodian designated by section 119.021, Florida Statutes (2000), was required to review each e-mail to determine whether the employee properly designated it as "nonpublic record." Because the City allowed the individual employees to perform this function without any oversight, the Times maintains that it "failed to fulfill its obligations as custodian." We disagree.

[4] **[5]** Section 119.021 provides that the "custodian" is the elected officer "or his or her designee." Nothing in this provision limits who the elected officer may designate in order to delegate the task to review requested records. Moreover, chapter 119 provides no specific procedure for a government entity to follow in determining whether a record is "public," and if so, whether it is otherwise exempt from disclosure. At least in the absence of an in camera review, neither an appellate court nor a trial court is in a position to engraft specific requirements on individual governmental entities reviewing public records requests when those requirements are not provided for by statute. *See Lorei v. Smith,* 464 So.2d 1330 (Fla. 2d DCA 1985).

Our rapidly expanding digital world has created many opportunities for immediate public access to government records and governmental activities. At the same time, it has made accessible some types of information that blur the lines between public and private information. There is little question that our policies and procedures surrounding public records, and perhaps our entire concept of public records, need constant review to maintain a proper balance between the public's right to know about the operation of its democratic government and other competing interests.

The record suggests that at least part of the reason for the Times' request was a concern that the City employees whose e-mail the Times requested were utilizing their public time and resources for their personal benefit. This case demonstrates that the current definition of public records limits the ability of chapter 119 to serve as a tool to ferret out government workers who spend much of their time on private matters while on the public payroll. We make no assumptions about the specific government employees who were the target of the Times' investigation. However, a government employee who spends most of the day working on private matters and personal correspondence or viewing websites for personal entertainment can currently respond to a public records request by declaring that the records of it are not "public." It may be difficult to find a solution to this problem that balances individual privacy and the public's right of access, but the current approach is troublesome. This issue, however, is a matter that must be addressed by the legislature. At least in this context, it is not a matter for this court to resolve.

We affirm the decision of the circuit court. This affirmance is without prejudice to the Times seeking an in camera inspection of the disputed documents to attempt to establish that some or all meet the definition of a public record. However, because this ruling affects how every state agency and municipality maintain their records and the public's access to those records, we certify the following question as a matter of great public importance:

> WHETHER ALL E-MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE

PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2000), AND ARTICLE I, SECTION 24(A), OF THE FLORIDA CONSTITUTION BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT-OWNED COMPUTER ***849** SYSTEM IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS THE EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E-MAILS?

FULMER and SILBERMAN, JJ., concur.

All Citations

830 So.2d 844, 27 Fla. L. Weekly D1544, 30 Media L. Rep. 2202

Footnotes

1 The City apparently has placed the “personal” e-mail on a separate CD-ROM awaiting a final decision in this suit. Because the Times has brought an action seeking disclosure, the City may not destroy this disk absent an appropriate circuit court order pursuant to section 119.07(2)(c), Florida Statutes (2000). The circuit court should not enter an order permitting the destruction of the records until the time for review in the supreme court expires or until the supreme court denies review or issues its opinion in this case.

2 In *Woolling v. Lamar,* 764 So.2d 765 (Fla. 5th DCA 2000), the burden was on the public official to prove an exemption from the public records, and therefore, the order granting such an exemption without an in camera inspection was reversed because it could not be supported absent such an inspection. Here, the burden rests initially with the Times to prove that what it seeks meets the definition of a public record. Thus it was the Times' burden to request an in camera inspection of the e-mail designated as personal if it intended to prove that the employees' designation of each e-mail as personal was incorrect.

3 The definition of “agency” in section 119.011(2), Florida Statutes (2000), includes municipalities and municipal officers.