IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,450

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CLERK SUPREME COURT
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Chief Deputy Clerk

THE TRIBUNE COMPANY,

Petitioner,

v.

NORMAN CANNELLA, Chief Assistant State Attorney, CYNTHIA SONTAG, Director of Administration of the City of Tampa, and the Honorable DANIEL E. GALLAGHER,

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE
STATE OF FLORIDA

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INTEREST OF THE AMICUS CURIAE

The Attorney General of the State of Florida, pursuant to Rule 9.370, Florida Rules of Appellate Procedure, respectfully submits this brief on behalf of the State of Florida as Amicus Curiae.

The interest of the State of Florida arises from its citizens desire for open government. It is they who want to protect their right to attend meetings of the officials who govern them and the right of access to the public documents created by all officials who conduct the State's business.

Amicus urges that the decision in this case, which was based upon the rule set down in Roberts v. News-Press Pub. Co., Inc., 409 So.2d 1089 (Fla. 2d DCA 1980), permitting an automatic delay of up to forty-eight (48) hours before a public record has to be released to the public, be overturned because the decision of the District Court of Appeal for the Second District is not in accord with the wording and intent of Chapter 119, Florida Statutes.

It is for this reason that the State of Florida supports the Petitioner, the Tribune Company.

ARGUMENT

NO AUTOMATIC DELAY IN RELEASING NON-EXEMPT PUBLIC RECORDS PURSUANT TO THE PUBLIC RECORDS ACT, CHAPTER 119, FLORIDA STATUTES, IS REASONABLE OR PERMISSIBLE UNLESS THE ACT SPECIFICALLY PERMITS SUCH AN AUTOMATIC DELAY.

On September 30, 1983, the District Court of Appeal for the Second District published its decision in this case. At that time it certified to this Court the following questions of great public importance:

1. MAY DISCLOSURE OF NONEXEMPT PUBLIC RECORDS AUTOMATICALLY BE DELAYED FOR A SPECIFIC PERIOD OF TIME FOR ANY REASON?

2. IF THE ANSWER TO THE FIRST QUESTION IS YES, WHAT IS THE MAXIMUM PERMISSIBLE DELAY PERIOD, AND FOR WHAT PURPOSE OR PURPOSES MAY THE DELAY PERIOD BE INVOKED?

The Amicus takes the position that the first question must be answered in the negative. First, the Public Records Act (Act) does not authorize an automatic or set time delay before a public record has to be released. Secondly, state law has preempted in this area and local jurisdictions may not legislate their own rules or regulations on access to public records. Because the decision in this case is contrary to Chapter 119, it must be overturned.

I.

THE PUBLIC RECORDS ACT, CHAPTER 119, FLORIDA STATUTES, DOES NOT AUTHORIZE ANY AUTOMATIC OR SPECIFIC TIME DELAY BEFORE A PUBLIC RECORD MUST BE RELEASED.

Under Chapter 119, the only permissible delay must be directly tied to the time that it takes to locate, retrieve and review a public record. Any condition that creates a delay that is not related to the actual time necessary under the circumstances to retrieve and review a record is impermissible and illegal under the Act.

The definition of a public record can be found in Section 119.011(1):

> "Public records" means 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.

There can be no doubt today that a personnel file is a public record, see Douglas v. Michel, 410 So.2d 936 (Fla. 2d DCA 1982), (A decision in Douglas v. Michel is currently pending in this Court); Op. Atty. Gen., 75-8; or that a personnel file is not exempt by policy from public inspection, see Gadd v. News-Press Pub. Co., Inc., 412 So.2d 894 (Fla. 2d DCA 1982). Chapter 119 contains no authority for generally affording personnel files treatment different from that afforded any other public record.

If public records are statutorily made confidential or exempt from Chapter 119, then they must be made available for public inspection. See, Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979).

Section 119.07, F.S., specifies how and when public records may be examined. Section 119.07(1)(a), F.S., states in part:

> Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee . . . . (e.s.)

Section 119.07(1)(b) is as follows:

> In the case of records produced under this act, when the nature or volume of records is such as to require extensive clerical or supervisory assistance by personnel of the agency involved, the agency may charge, in addition to the actual cost of duplication, a reasonable charge, which shall be based on the actual salary rate of such personnel providing the service.

Section 119.07(2)(a) provides as follows:

> Any person who has custody of public records and who asserts that an exemption provided in subsection (3) or in general or special law applies to a particular record shall produce for inspection and examination the remainder of such record.

Under Section 119.07(1)(a), the records are to be examined at reasonable times and under reasonable conditions. The custodian may not impose an arbitrary viewing time or waiting period upon the citizens of this state before they may view the public record. Any specified waiting period, whether for one day or one week, would impermissibly hamper access to public records.

In this case, the City of Tampa has a policy that delays disclosure of a personnel record to the public for seven (now three) days after the affected employee is notified of the request. Such a delay bears no reasonable relation to the time needed for the retrieval and review of the particular personnel file. Such a specific waiting period is arbitrary and frustrates the public's right of access to records. Even if the waiting period were only 24 hours, it still would be impermissible. The delay can only be for as long as it reasonably takes to retrieve the file and review it for any exempt information.

Furthermore, since Chapter 119 does not say that the employee must be notified, any delay imposed while the person is so notified is unreasonable and improper. Employees have no right of privacy in their personnel files. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980); Douglas v. Michel, supra, nor does Chapter 119 provide that an employee may be present when his filed is examined.

Chapter 119 does not permit such a condition as imposed by the City of Tampa and thus that condition is impermissible. Amicus does not argue, however, that any condition on viewing public records would be, per se, unreasonable. Nor does Amicus argue that in order to comply with a Chapter 119 request, a public official or agency must abandon the performance of other statutory duties. The reasonableness of any delay in responding

to a public records request must be evaluated in light of the circumstances surrounding each request. The custodian will be required to balance the public records request against the requirement to concurrently perform other duties and, in doing so, should be mindful of the public policy considerations favoring access to public records.

Once a request is made the material must be located. For those agencies that maintain both exempt and nonexempt records, the records must be reviewed for those portions that must by law be removed from public exposure. Some of these requests may involve a great volume of material and such review would take some time.

While there is a duty upon the custodian to retrieve the records within his control, that does not mean he must drop all other work in order to comply with the request. Agencies are under a statutory duty to do many tasks, some of which are limited by time, such as court filings, and an agency must be free to operate as efficiently and as quickly as possible. While an agency may not use its operation as an excuse to delay its response to a Chapter 119 request, a requester may not expect or require that his request automatically take precedence over the other statutorily imposed duties of the public agency. While public officials should attempt to promptly respond to a request to view and copy public records, the duties and responsibilities

imposed by Chapter 119 must co-exist with the other responsibilities and duties of the public agency or officer.

Not all records are kept in the office where they may be requested. Some records are located in other offices and some are in storage because they are no longer presently active or needed. It may take time to retrieve them. It may take additional time, depending on the size and complexity of the material, to review the material to see if there is any information that must be exempted from disclosure due to the statute rendering such information confidential. In most cases it may be unreasonable to spend more than a few minutes reviewing a record, in other cases it might take days or weeks for a qualified employee to review large, technical files for the purpose of separating exempt from nonexempt information.

A delay in the disclosure of public records is reasonable and permissible only when the time is used to locate and retrieve a record, to examine the materials for exempt information, to ensure that the records are not damaged or destroyed during viewing, or to perform such duties during the agency's normal working hours. The amount of such delay depends on the particular facts of the request or records in light of the above factors. Government officials can not, however, impose arbitrary terms or conditions upon the public's right to view public documents, and whatever delays that do take place must be kept to

a minimum and be reasonable in light of the circumstances of each request.

The City of Tampa created a condition and a waiting period that bore no relation to the actual time that would have been required to retrieve and review the requested personnel files. Therefore, the condition and waiting period is an arbitrary impediment to the public's right of access to inspect and copy public records. Accordingly, it must be struck down as impermissible under Chapter 119.

II.

THE STATE HAS PREEMPTED THE FIELD OF REGULATING PUBLIC RECORDS.

The City of Tampa adopted a policy of delaying compliance with the Public Records Act for seven days (now three days) pending notification of the employee whose records had been requested. Such a policy by the City of Tampa is an impermissible attempt to limit the effects of Chapter 119, Florida Statutes, as the State of Florida has preempted the field of management of all public records.

Chapter 119 represents a legislative scheme which, in its operation and effect, seeks to control and regulate the subject of public records at all levels of government. The requirements imposed by the Legislature in Chapter 119 are mandatory and require the custodian of public records to act in conformity with the chapter.

From a reading of Chapter 267, Florida Statutes, in conjunction with Chapter 119, it is clear that the Legislature intended that the State exclusively control access, maintenance, management, retention, preservation and disposal of public records and that these areas are not proper subjects of attempted local regulation. *See* Section 267.051, Florida Statutes, which creates in the Division of Archives, History and Records Management, Department of State, the duty to establish a records management program using management methods for the creation,

maintenance, retention, preservation, and disposal of public records. Their control of records affects all "agencies," including county and municipal governments. See Section 267.021(3), Florida Statutes. The right of the Legislature to place limitations on the powers exercised by municipalities has been recognized on numerous occasions by the courts of this state. As the Florida Supreme Court stated in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801, 804 (Fla. 1972), "[l]ocal governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Florida Constitution." The Fleetwood court went to state that:

> Municipal ordinances are inferior in status and subordinate to the laws of the state and must not conflict therewith. If doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute.

261 So.2d 806.

In City of Miami Beach v. Rocio Corporation, 404 So.2d 1066, 1069 (Fla. 3d DCA 1981), petition for review denied, 408 So.2d 1092 (Fla. 1981), the Third District Court of Appeal recognized that "[o]ne impediment to constitutionally derived legislative powers of municipalities occurs when the municipality enacts ordinances which conflict with state law." Therefore, while municipalities have been granted the authority to conduct municipal government, perform municipal functions and render municipal services, the legislative statutes are relevant in

determining the limitations of, and on, municipal authority. See, State v. City of Sunrise, 334 So.2d 1206, 1209 (Fla. 1978). Chapter 119, Fla. Stat. (1981), constitutes one such limitation or restriction on municipal authority.

The important public purpose of the Public Records Law makes it a matter that is inherently reserved for the State alone and not a proper subject for local treatment. As Art. VIII, §2(b), Fla. Const., states, municipalities may exercise the powers extended to them by the Constitution "except as otherwise provided by law." The conflict which is clearly evident in the policy of the City of Tampa and Ch. 119, Fla. Stat. (1981), should be resolved in favor of the statute and the public interest which it serves. For as this Court stated in Rinzler v. Carson, 262 So.2d 661 (Fla. 1972), "[a] municipality cannot forbid what the Legislature has expressly licensed, authorized, or required, nor may it authorize what the Legislature has expressly forbidden."

Since the City of Tampa's policy is an attempt to regulate access to public records, that policy must be considered void since the City has no power to regulate in the field of public records. Only the State, through Chapter 119, may legislate any limitation on the access to public records. Hence, the District Court had no power to determine the "reasonableness" of a fixed time delay, established by local regulation, that was void from its inception.

CONCLUSION

The Amicus submits the Public Records Act, Chapter 119, Florida Statutes, does not authorize an automatic delay in releasing nonexempt public records. It is not, however, the position of the Amicus Curiae that any delay in releasing public records would be, per se, unreasonable or that a public official, in complying with a Chapter 119 request, must abandon the performance of his other statutorily imposed duties or responsibilities. Rather, the custodian will be required to comply with the duty imposed by the public records request in light of the requirement to concurrently perform his other duties, keeping in mind the clear public policy favoring prompt access to public records. A mandated fixed time delay, however, is an arbitrary and unauthorized impediment to the public's right of access to inspect and copy public records and, accordingly, must be struck down as impermissible under Chapter 119.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae has been furnished by United States Mail to GREGG D. THOMAS, ESQUIRE, and STEVEN L. BRANNOCK, ESQUIRE, Holland and Knight, Post Office Box 1288, Tampa, Florida 33601; EDWINA J. DURYEA, ESQUIRE, Stull & Heidt, 602 South Boulevard, Tampa, Florida 33606; LUIS G. FIGUEROA, Assistant City Attorney, 5th Floor, City Hall, 315 East Kennedy Boulevard, Tampa, Florida 33602; FRANKLIN G. BURT, ESQUIRE, Paul & Burt, 1300 Southeast Bank Building, Miami, Florida 33131; GEORGE K. RAHDERT, ESQUIRE, 33 North 4th Street, St. Petersburg, Florida 33731; and SANFORD L. BOHRER, ESQUIRE, Thomson & Zeder, 1000 Southeast Bank Building, Miami Florida 33131, this 21st day of November, 1983.

ERIC J. TAYLOR