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IN THE SUPREME COURT OF FLORIDA

THE NEW YORK TIMES COMPANY d/b/a THE LEDGER, and LAKELAND LEDGER PUBLISHING CORP., a Florida corporation, d/b/a THE LEDGER,

Appellants,

vs.

PHH MENTAL HEALTH SERVICES, INC., a Florida nonprofit corporation, and CARL STRANG, as the Records Custodian of PHH Mental Health Services, Inc.,

Appellees.
_____/

Case No. 78,559

District Court of Appeal
Second District Nos:
89-02892
90-00405
90-01489

ON REVIEW FROM THE DIBTRICT COURT OF APPEAL
SECOND DISTRICT OF APPEAL

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

The Appellees, PHH MENTAL HEALTH SERVICES, INC., a Florida nonprofit corporation, and CARL STRANG, as Records Custodian of PHH Mental Health Services, Inc., will be referred to herein as either "PHH Mental Health Services, Inc." or "PHH." The Appellants, THE NEW YORK TIMES COMPANY, d/b/a THE LEDGER and LAKELAND LEDGER PUBLISHING CORP., d/b/a THE LEDGER, will be referred to herein as "The Ledger."

References to the papers and pleadings contained in the original record will be noted by the letter "R" followed by the appropriate page number. References to the papers and pleadings in the original record of the case on attorney's fees and costs will be noted by the letters "RF" followed by the appropriate page number. References to the exhibits which are part of the Record on Appeal will be noted by the letters "PX" for Plaintiffs' exhibits and the letters "DX" for Defendants' exhibits, followed by the appropriate exhibit numbers. References to the transcript of the trial proceedings herein will be noted by the letter "T" followed by the appropriate page number. Citations to the Appendix attached to Appellee's Answer Brief are indicated by the letter "A" followed by the appropriate page number.

STATEMENT OF THE CASE

This is an appeal from the Opinion of the Second District Court of Appeal reversing the trial court's Order that PHH pay attorney's fees and costs incurred by The Ledger in litigation involving a determination of whether PHH was an "agency" as defined by Chapter 119, Florida Statutes (1987).

On February 4, 1992, this Court entered its Order accepting jurisdiction of this case based upon The Ledger's September 3, 1991 Notice to Invoke Discretionary Jurisdiction, subsequent to the Second Court of Appeal's Order Denying (The Ledger's) Motion for Rehearing, Motion for Rehearing En Banc and Motion for Certification.

In a letter of July 27, 1988, Chuck Murphy, a staff writer with The Ledger, demanded that PHH give The Ledger immediate access to inspect and copy numerous corporate records of PHH, grounding his request on the authority of Chapter 119, Florida Statutes (1987). A copy of the letter received by Carl Strang is attached hereto as Appendix #1.

Upon receipt of this letter, Carl Strang immediately sought the assistance of J. Hal Connor, Jr., Esquire, attorney for PHH, who responded on its behalf the very next day, July 29, 1988. (A-2)

It was not until September 6, 1988 that Mr. Connor received a response to his letter of July 29, 1988, signed by Mr. Richieri of the Legal Department of the New York Times Company, on behalf of The Ledger. (A-3)

Once again, PHH responded the very next day, in a letter to Mr. Richieri, in which Mr. Connor stated that he would research the applicability of Chapter 119 to PHH, since in his opinion the law was by no means clear in its application to PHH. (A-4)

To answer the question of whether it was subject to the reporting requirements imposed by Chapter 119, one week later PHH commenced a suit for Declaratory Judgment asking judicial assistance in determining the scope of its obligation under Chapter 119. (A-5) (R-1-9)

The Ledger answered the Complaint for Declaratory Relief, denying the pertinent allegations of PHH's suit and asserted a Counterclaim for injunction to compel the disclosure of certain records. Two weeks later, The Ledger filed a separate Complaint for Injunction and Writ of Mandamus. (R-28-37, 10-25) Upon motion by PHH, The Ledger's Complaint for Injunction and Writ of Mandamus was consolidated into the Declaratory Judgment action originally commenced by PHH. (R-45-47)

Throughout the underlying litigation, the trial court considered various motions by both parties to compel or protect inspection of PHH's documents. On January 24, 1989, the trial court entered an Order Partially Granting and Partially Denying PHH's Motion for Protective Order from Discovery Propounded by The Ledger and Objection to The Ledger's Motion for Expedited Discovery. (R-95-97) The Order provided for the production of certain materials only if those documents were already a matter of public record and could be obtained without the consent or approval

of PHH (emphasis added). **(R-95-97)** The trial court provided additional protection to PHH by limiting inspection of certain documents by providing for in-camera review prior to their production should there have been any questions as to whether the particular documents were considered matters of public record. **(R-95-97)**

The trial court entered another Order restricting The Ledger's inspection of PHH records on May 26, **1989,** partially granting and partially denying PHH's Motion for Protective Order and Motion to Quash Subpoenaes. **(R-156-157)** In its Order, the trial court provided that certain financial documents of **PHH** be protected from discovery and that certain other financial documents be discoverable only to the extent that those documents had been previously provided to the third party specified in the production request. (Emphasis added.) **(R-156-157)**

On each occasion, The Ledger objected to the trial court's limitations upon its inspection to the extent of filing Motions for Rehearing and a Motion to Vacate that Order, which motions were denied. **(R-167-170)**

On September **12, 1989,** the trial court entered a Final Judgment answering the initial inquiry of PHH, holding that PHH acted **"as** a public agency" and ordering PHH to make those records not already provided by PHH accessible to the public. (R-203-208) The trial court also granted The Ledger's Counterclaim for Injunctive Relief to Compel Disclosure of Records, and denied The Ledger's Writ of Mandamus, stating it was moot. **(R-203-208)**

Significantly, Judge Beach included a statement in Paragraph Θ of the Final Judgment stating as follows:

> Θ. The fact that this court has found that PHH Mental (Health agency, Inc.) is a public agency subject to the Florida Public Records Act is not to be construed in any way as any indication of wrongdoing on the part of any individual or corporation.

(Emphasis added.) **(R-208)**

The Final Judgment of September **12, 1989** made no reference to attorney's fees and costs and contained no reservation of jurisdiction to consider a future award of attorney's fees and costs. **(R-203-208)** Nonetheless, on January 2, 1990, the trial court entered an Order awarding to The Ledger attorney's fees and costs in the amount of $45,000 against PHH Mental Health Services, Inc. (RF-76-77) On January 26, **1990,** The Ledger filed a Motion to Correct Order Entered January **2, 1990** to Include Costs pursuant to Rule 1.540(a) of the Florida Rules of Civil Procedure. (RF-67-70) On or about February 20, **1990,** The Ledger filed a Renewed Motion to Correct Order to Include Costs, also predicated upon Rule **1.540(a).** (RF-226-227)

The trial court granted The Ledger's Renewed Motion to Correct Order to Include Costs on April **19, 1990** and amended its Order of January 2, 1990 by providing that the $45,000 award was to be for attorney's fees (only) and, thereupon, entered a separate Order on costs based upon a stipulated amount. (RF-230-232, **228-229)**

A Notice of Appeal of this Court's Order of Attorney's Fees was filed by PHH on January 31, **1990.** (RF-88-89) Thereafter, a

Motion to Consolidate was granted, consolidating the attorney's fee appeal and the public records appeal.

On May **21, 1990,** a Notice of Appeal of the trial court's Order granting The Ledger's Renewed Motion to Correct Order to Include **Costs** and **of the** Order awarding costs in favor of The Ledger was timely filed. **(RF-250-251)** Thereafter, the **costs** appeal was consolidated with the attorney's fee appeal and the public records appeal.

On May **24, 1991,** the Second District Court of Appeal affirmed the trial court's determination that PHH was an entity subject to the Public Records Act, but reversed the Order requiring PHH to pay the attorney's fees and costs incurred by The Ledger. The Honorable Acting Chief Judge Richard H. Frank described the basis **upon which it reversed the trial** court's **Order of** Attorney's Fees **as follows:**

> We recognize that there are cases from this court and others which hold that attorneys' fees under Chapter **119** are awardable even if the agency's refusal to allow inspection of the records was the result of a good faith belief that it was not required to do so. **See** Times Publishing **Co. v. City** of St. Petersburg, **558** So.2d **487** (Fla. 2d DCA **1990);** News and Sun-Sentinel Co. v. **Palm** Beach County;, **517** So.2d **743** (Fla. 4th DCA **1987).** Here, however, **PHH** instituted a declaratory action immediately after receiving the records request in order to determine its susceptibility to Chapter **119.** PHH was confronted with the problem of simply not knowing whether the law was applicable to it because PHH was not denominated a public agency by law

> and its status - i.e., whether it was acting on behalf of a public agency - was in doubt requiring judicial clarification. Although the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc., as is noted above, that conclusion was not so readily apparent that we can say with any degree of certainty that PHH's initial refusal to hand over its records was unlawful. We are guided in our conclusion by our opinion in Fox V. News-Press Publishing Co., Inc., 545 So.2d 941 (Fla. 2d DCA 1989), in which the entity's unclear status and its swift action seeking judicial resolution of whether it acted on behalf of public agency were significant factors in the decision to reverse the trial court's award of attorney's fees.

Thereafter, on August 6, 1991, the Second District denied The Ledger's Motion for Rehearing, Rehearing En Banc and for Certification, whereupon The Ledger petitioned this Court for review, citing conflict among the district courts on the issue of attorney's fees and Public Records Act cases and conflict with various Supreme Court cases. This Court granted review on February 4, 1992.

C. All provider functions previously performed by Tri-County Mental Health Board, Inc. were transferred to Tri-County Alcohol Rehabilitative Services, Inc., (TCARS), not to PHH. (DX-20)

D. All planning and coordination functions previously performed by Tri-County Mental Health Board, Inc. were transferred to Tri-County Mental Health Board, District VIII-A, Inc., not to PHH. (DX-20)

On December 30, 1983, Tri-County Mental Health Board, District VIII-A changed its name to Tri-County Mental Health Board, District VI-B, Inc., which agency continued to perform all functions theretofore performed by Tri-County Mental Health Board, District VIII-A. Several months later, Chapter 84-825 of the Laws of the State of Florida was enacted, transferring the coordinating and planning duties of Tri-County Mental Health Board, District VI-B, Inc. and other mental health boards to the State Department of Health and Rehabilitative Services ("HRS"). (DX-27) Accordingly, Tri-County Mental Health Board, District VI-B, Inc. was dissolved after its functions had been delegated to HRS. The statutory change had no effect on PHH since it was not an agency over which any governmental agency or body had control.

No change was made to the provider function performed by agencies such as the Tri-County Alcohol Rehabilitative Services, Inc.

To this day, PHH is a tax exempt private nonprofit corporation whose purpose is to provide assistance and coordination to mental

health related agencies in the three county area, reporting to no authority other than its own Board of Directors.

The history of PHH is important as it explains the state of mind of its Board upon receiving the public records request.

In his letter to Carl Strang of July 27, 1988, Chuck Murphy, a staff writer with The Ledger, demanded immediate access to inspect and copy numerous corporate records of PHH. (A-1) Although the letter stated that it was a demand pursuant to Chapter 119, Florida Statutes (1987), the letter was not addressed to PHH, but, rather, to Carl Strang "as Mayor of Winter Haven," and merely referred to PHH in the list of documents that it was requesting. (A-1) At no time did the letter state that The Ledger believed PHH Mental Health Services, Inc. was an agency as defined by Chapter 119, or was a public agency, or was an agency acting on behalf of a public agency. (A-1)

Notwithstanding The Ledger's confusing salutation and failure to establish a basis for its demand, The Ledger requested numerous documents, including 13 Years of tax returns, board minutes and correspondence between PHH and "state funding agencies." (A-1)

A copy of the actual letter received by Carl Strang is attached hereto as Appendix #1 because the somewhat informal appearance and language of the letter is significant: this letter is the "public records request" allegedly "unlawfully refused" by PHH. (A-2)

Not only did The Ledger fail to demonstrate in its initial letter the authority upon which it based the request of countless

documents, but it also demanded the inspection and duplication of 13 years of documents within 48 hours. In its letter, The Ledger warned:

> Failure to permit the requested inspection and copying within 48 hours from the delivery of this demand shall be considered a refusal of this demand. If you deny this demand, in whole or in part, please "state in writing and with particularity the reasons for your conclusion that this record is exempt," as the statute requires.

(Emphasis added.) (A-1)

The Ledger ended its letter of July 27, 1988 on an unusual note:

> Because this information is of a timely nature and will be used for a newspaper article, I request that the requested documents be made available at your office and not mailed to the Ledger.

(Emphasis added.)

Upon receipt of this letter, Carl Strang immediately sought the assistance of J. Hal Connor, Jr., Esquire, who responded on behalf of PHH the very next day, July 29, 1988. (A-2) In his letter, Mr. Connor asserted that PHH was not an agency as defined by the Public Records Act since it was neither a public agency nor a private corporation acting on behalf of a public agency and, accordingly, was not subject to the operation of the Public Records Act. (A-2, T-85)

The Ledger now contends that any response other than immediate compliance is "an unlawful refusal" under Chapter 119.12, an

unlawful refusal which subjects **PHH** to liability **for** attorney's fees incurred by The Ledger from that point forward.

It was not until **September 6,** 1988 that Mr. Connor received a response to his letter of July **29, 1988, from** the Legal Department of the New York Times Company, on behalf of The Ledger. In his letter, Mr. Kenneth Richieri explained the basis upon which the initial request was made, that is, an 11-year-old statement of in futuro intent made by **PHH** to the **IRS** in its Form **1023,** initial "Application **for** Recognition of Exemption." Then, Mr. Richieri added:

> To the extent that **PHH** receives funds from State agencies, it would fall squarely within the definition of **"agency"** found at Chapter 119.011(2) as **"any** other public or private agency, person, partnership, corporation or business entity acting on behalf of any public agency."

(Emphasis added.) **(A-3)**

Since **PHH** was not receiving any **"funds"** of any nature from "state **agencies,"** the request appeared facially to be ill-founded. Nevertheless, and once again, **PHH** responded the very next day. In his letter to Mr. Richieri, Mr. Connor committed to researching the applicability of the public records statute to **PHH,** since the law was by no means clear in its application to **PHH. (A-4) Mr.** Connor also referred the practical problems associated with producing the numerous documents of **PHH** in storage; accordingly, Mr. Connor requested greater specificity in The Ledger's description of the documents in which it was interested.

Instead of providing greater clarity, Mr. Connor's subsequent research provided greater confusion as to whether PHH was subject to the disclosure requirements of Chapter 119. To dispel any doubt as to whether it was subject to the reporting requirements imposed by the Public Records Act, one week later, PHN commenced a suit for Declaratory Judgment asking the Court's assistance in determining its rights or obligations under the Public Records Act of the laws of the State of Florida. (A-5) (R-1-9)

SUMMARY OF THE ARGUMENT

Chapter 119 (Fla. Stat. 1989) provides three prerequisites to an award of attorney's fees. Each of these elements require separate and distinct factual determinations by the ultimate finder of fact, the trial court.

The first of such requirements is a determination that the records recipient is "an agency" as defined by Chapter 119. Second, the trial court must determine that it was necessary to file a civil action to enforce the provisions of Chapter 119. Third, a trial court must determine whether the underlying facts support a conclusion that a recipient's initial response was an "unlawful refusal" of the public records request.

The Second District Court of Appeal affirmed the trial court's conclusion that PHH fell within the definition of "an agency." However, the Second District Court of Appeal reversed the trial court's award of attorney's fees to The Ledger, finding that the trial judge's conclusion that PHH was acting on behalf of Tri-County Mental Health, Inc.". . .was not so readily apparent that we can say with any degree of certainty that PHH's initial refusal to hand over records was unlawful."

The Second District Court of Appeal has not created an exemption from Chapter 119, but has instead applied the factual determination required by Chapter 119.

Allowing a factual determination of "unlawful refusal" does not take away from the force of the Public Records Act, since records recipients who question their obligation under Chapter 119

must incur the costs associated with that inquiry. The decision of the Second District Court of Appeal is consistent with other factual determinations of "unlawful refusal" and supports the policy of open government, while protecting from punishment those individuals and entities whase initial questioning of their obligations under Chapter 119 is reasonable and understandable.

To award attorney's fees in every case where the records recipient is found to be "an agency" as defined by Chapter 119 would create an indiscriminate punitive measure not intended by this Legislature. The Public Records Act of Chapter 119 is intended to be an enforcement mechanism, not a cost-shifting weapon of the newspaper industry.

ARGUMENT I

THE DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO THE LEDGER SINCE PHH DID NOT "UNLAWFULLY REFUSE" DISCLOSURE.

A. PHH DID NOT "UNLAWFULLY REFUSE" THE PUBLIC RECORDS REQUEST SINCE ITS UNCERTAINTY OVER ITS OBLIGATION TO RESPOND TO THE PUBLIC RECORDS REQUEST WAS UNDERSTANDABLE AND REASONABLE, AND THERE WAS NO UNDUE DELAY OR ATTEMPT TO EVADE RESPONSIBILITY UNDER CHAPTER 119.

The Legislature provided a second test before a court could invoke its discretion to award attorney's fees in a public records action:

> ...and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined or copied,...

Section 119.12(1), Florida Statutes (1987).

So, in addition to determining (1) whether the recipient is "an agency" and (2) whether civil action was filed to enforce Chapter 119, the court must determine that an agency unlawfully refused a public records request before it can assess an award of attorney's fees and costs under the Public Records Act.

The Second District Court of Appeal recognized these three prerequisites to an award of attorney's fees and costs and determined that only one of the three tests had been satisfied by the facts surrounding this Public Records Act litigation. The Second District Court of Appeal affirmed the trial court's finding that PHH was "an agency" subject to the requirements of Chapter 119. However, it reversed the trial court's award of

attorney's fees based on PHH's "unclear status and..." its "swift action seeking judicial resolution of whether it acted on behalf of a public agency," and, thus, the other test of Chapter 119.12(1) were not satisfied. The interpretation and construction upon which the Second District Court of Appeal based its reversal is consistent with the legislative intent and language, and is consistent with the policy supporting the enactment of Chapter 119. The language of the statute mandates this factual analysis, and a decision consistent with this analysis is correct.

PHH never refused the public records request.

PHH responded rapidly to each letter from The Ledger, setting forth its uncertainty over its obligation, welcoming further inquiry and, ultimately, requesting the court's assistance in determining its correct response. (A-2, 4) (R-3-9) This conduct of PHH cannot be considered a refusal.

If one accepts The Ledger's interpretation that any action other than immediate inspection and delivery is a refusal, then the Court must make the next factual determination; that is, whether PHH "unlawfully" refused the record request.

There is no question that the Board of Directors of PHH did not consider itself a "public agency," as defined by Chapter 119. The District Court of Appeal emphasized the reasonableness of uncertainty, stating:

> ...PHH was confronted with the problem of simply not knowing whether the law was applicable to it because PHH was not denominated a public agency by law and its status - i.e., whether it was acting on behalf of a public agency - was in doubt requiring judicial clarification. Although the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc., as is noted above, that conclusion was not so readily apparent that we can say with any degree of certainty that PHH's initial refusal to hand over its records was unlawful.

(Appendix - order of Second District of Appeal)

When Carl Strang received the public records request, he and the other members of the Board of Directors were charged with making an immediate determination of whether PHH was an "agency" as defined by §119.011 Fla. Stat. (1989).

Carl Strang and the other members of the Board of Directors asked its counsel:

(A) Is PHH a separate unit of government created or established by law?

(B) Is PHH a private corporation "acting on behalf of any public agency"?

PHH was certainly not an agency which was a unit of government.

However, the answers to the second question, that is, whether PHH was acting on behalf of a public agency, was not so clear and clarification of that answer became the reason for the declaratory action filed by PHH. The Board of Directors of PHH did not

consider itself as acting on behalf of a public agency. (T-165)

Although the Second District eventually agreed with the decision of the trial judge's conclusion that there was sufficient evidence to support a finding that PHH was "acting on behalf of Tri-County Mental Health, Inc. and its successors,..." it disagreed that the evidence established that the Board of PHH had or should have had this "public agency" self concept based upon 13-year-old statements of initial intent and excerpts from two sets of monthly minutes generated during the 13 year history of PHH. These historical statements may have provided enough evidence for the trial court to make its "agency" determination, but they certainly did impute to the Board of Directors of PHH an awareness of its status as a private corporation acting on behalf of a public agency at the time it received its public records request. Instead, the evidence and testimony establishes that PHH was not a "true" or "pure" agency such that would warrant a present sense of its public nature to render its action in seeking declaratory relief, evasive or a frivolous attempt to delay.

Consistent with this Court's framework and points of emphasis in News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 17 FLW S156 (Case 77,131 March 5, 1992), the following relevant factors support the determination that PHH did not "unlawfully refuse" The Ledger's public record request:

Creation:

There was no evidence presented to the trial court that PHH was a "...state, county, district, authority, or municipal officer,

department, division, board, bureau, commission or other **separate** unit of government created or established by law. Indeed, the testimony before the trial court was that PHH was created by citizens who realized that a private, nonprofit, independent entity was necessary to mental health services in Polk, Highlands and Hardee counties in light of the enactment of Chapter 76-394, Laws of Florida. (T-58, 160)

Funding:

The trial judge determined that the source of the money for the purchase and improvement of PHH's building and the cash transferred to PHH initially, were public monies collected directly or indirectly by Tri-County Mental Health Board pursuant to local government authority. (R-206) These transfers occurred in 1977, and were transferred pursuant to an Order of the Tenth Judicial Circuit of the State of Florida, dated May 2, 1977, which provided as follows:

> B. All non-governmental assets of Tri-County Mental Health Board, Inc. were transferred to PHH Mental Health Services, Inc.

(DX-20)

The Board of PHH considered at all times that its initial funding as well as its building were non-governmental. The Ledger's own witness, Orville Roark, Operations Manager of the H.R.S. Audit Agency of the State of Florida, testified that his agency had never performed an audit of PHH, that he knew of no public funds being contributed to PHH, and that had PHH received government funding, an audit would have been performed. (T-35, 37)

Don Harrison, the C.P.A. for PHH, along with several Board members of PHH, testified that the funding was from private funds, and not government funds. **(T-257,** 279, 284-285)

The Ledger argued that **the 1988 PHH** Board of Directors should have known of its "public status" since its **1976 I.R.S.** Form **1023** for tax exemption provided that 90% of the financial support for PHH would be from local government. (PX-5, **DX-28** (Comp)) Both Don Harrison and Orville Roark testified **that** the originally contemplated governmental funding did not occur. **(T-35,** 37, 257, **279, 284-285)** And, even if the initial source of funds from PHH was perceived as governmental in nature, the important inquiry is whether or not the agency acted on behalf of any public agency. Atty. Gen. Opinion 080-45, May **14, 1980 and Atty.** Gen. Opinion 076-**194,** September **22, 1976;** Shands Teaching Hosp. and Clinics v. **Lee,** 478 So.2d 77 (Fla. 1st DCA 1985).

Regulation:

PHH is not controlled by any public agency, does not control any public agency, and does not report to any public agency. **(T-181-183)** PHH **did** not (knowingly) act on behalf of any public agency. **(T-1265, 192-183, 256-257)** All **members of** PHH recognized and acted upon the distinction between itself and any of the Tri-County Boards or successors. **(T165, 181-183,** 308) In fact, the Board members took specific actions through the development, and continuation of PHH to separate itself, its funding and its reporting from Tri-County or any other public or quasi-public agency. John **"Bubba"** Smith, Chairman of the Board, County

Commissioner and PHH Board member, testified that PHH acted at all times independently of the County Commissioners, and at no time served in an advisory capacity to the County Commissions or any other public entity. (T-165) Likewise, the County Commissions of the three counties never appointed members of the Board of **PHH**, but, instead, **PHH** had complete control over the appointment of its own members. (T-81, 165, 181)

Pat Turnival, Executive Director of TCARS, testified that while she always went to the Tri-County Mental Health Board, Inc. meetings, as part of its staff, she never went to the Board meetings of PHH. (T-308) Furthermore, she testified that she did not know from one year to the next whether **PHH** would decide to provide its building to TCARS. (T-305)

PHH sent no program or financial reports to the H.R.S., and Orville Roark, of H.R.S. Audit Agency, never requested such reports or audits, although it always performed audits of Tri-County Mental Health Board, Inc., but never of PHH. (T-35, 37) Lisa Stone, a Human Services Program Director for H.R.S. Alcohol, Drug Abuse and Mental Health programs in the Polk, Hardee, Highlands, Hillsborough and Manatee counties, testified that PHH received no government funding and was not subject to any direction by her H.R.S. office. (T-188) Roark and Stone emphasized that had a corporation been receiving state funds for public health purposes in those counties, it would have been subject to an audit by H.R.S. and to his and her control. (T-188) PHH was not. (T-188)

In light of these factors, PHH's belief in its private, not public, nature is not only comprehensible, but, absent the decision of the trial judge, is reasonable.

Decision-Making Process:

PHH delegated to no one, other than to its own Board of Directors, the decision-making authority for PHH. All members of PHH recognized and acted upon the distinction between itself and any of the Tri-County Boards or successors. (T-165, 181-183, 308) PHH took no part in Tri-County's decision-making, or any decision-making of the three-county County Commissions, or any other public entity. (T-165, 181-183, 308) The Board meetings of Tri-County Mental Health Board and of PHH, while held at the same location, were held at different times, with the exception of the one joint meeting over its 13-year history, highlighted by The Ledger. (T-167, 182, 259, 308)

Governmental Function:

PHH did not act as the sole steward of mental health services in the three-county area. (T-165, 181-183, 308) PHH did not act for the benefit of Tri-County or any of its successors, but instead provided assistance of any type it chose, to individuals requiring mental health assistance. (T-58, 160) The Ledger exalts form over substance in pointing to 1977 Articles of Incorporation, statements of in futuro intent, that PHH's purpose was to "promote health care through public funding." (DX-13(A))

PHH never promoted health care through public funding. Hal Connor, attorney for PHH, testifiedthathe prepared PHH's Articles

of Incorporation by using the same form he had used for Tri-County Mental Health Board, Inc., since he wantedto provide authorization for any activity that the corporation might later decide to provide. (T-136) There was no testimony or evidence before the trial court that the assistance provided to mental health services by PHH was that which Tri-County would otherwise have assumed or which had been delegated to PHH by Tri-County: that was not the case.

Goals:

Judge Beach was correct in finding that the purpose of PHH was to be a "repository" of the non-government assets "to avoid the estreature of this property to the State of Florida as a result of legislative changes in the mental health care law." (T-161) (R-207) Certainly this is not a goal consistent with that of a "public agency"!

The Ledger presented no testimony that PHH was controlled by, or acted at the direction of, Tri-County Mental Health Board, Inc. or any of its successors. The Ledger's argument that PHH "unreasonably refused" the public records request is based upon old statements and old documents: not upon the testimony of any individual who had a present connection with PHH or Tri-County Mental Health Board, Inc. In fact, The Ledger's own witness, Orville Roark, of H.R.S., gave testimony in support of the private nonprofit nature of PHH as distinguished from the public agencies subject to his review. (T-35, 37)

This Court has recognized previously in Shevin V. Byron, Harliss, Schaffer, Reid and Assoc., Inc., 379 So.2d 633 (Fla. 1980) that the application of the Public Records Act, including §119.12 (1), to a particular organization must be made on a case-by-case basis.

Based upon the totality of factors relevant in this case, PHH did not "unlawfully refuse!! the public records request since its response was prompt and its doubt as to its "agency status!! truly understandable. (See Schwartzman V. Merritt Island Vol. Fire Dept., 352 So.2d 1230 (Fla. 4th DCA 1977.)

Schwartzmann was an appeal from a declaratory judgment holding that the nonprofit volunteer fire department was not "an agency!! and its records not "public records." There was no issue of attorney's fees since there was no civil action to "enforce" the provisions of Chapter 119. Schwartzmann, ibid.

The Second District Court of Appeal previously considered this attorney fees issue in a case with facts similar to those heretofore presented. In Glen Fox and Alligator Towing and Recovery, Inc. v. News-Press Publishing Co., Inc. d/b/a Ft. Myers News-Press, 545 So.2d 941 (Fla. 2nd DCA 1989), like this case, the Appellate Court confirmed the lower court's finding that Alligator Towing and Recovery, Inc., (hereinafter "Alligator Towing,!!) was an agency as defined by Chapter 119.011(2) but reversed the award of attorney's fees against Alligator Towing since it could not find that (1)Alligator Towing unlawfully refused the records inspection (emphasis added); and that (2) civil action was required to be

filed by News-Press Publishing Co., Inc. to permit the inspection. Ibid. at 944.

The Second District Court of Appeal distinguished the "good-faith-doesn't-matter" cases, Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3d DCA 1988), and News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987), in that those public records requests were made to "pure" or "true" public agencies: the Palm Beach Fire and Rescue Department and the Dade County School Board. Fox at 944. Furthermore, in each of those cases, the "pure public" agencies blatantly refused to comply with the public records requests, requiring in each instance the filing of a lawsuit by the parties seeking inspection.

As in Glen Fox and Alligator Towing and Recovery, Inc. v. News-Press Publishins Co., Inc., supra, PHH did not "unlawfully refuse" the records request, did not require a civil action to be filed to require the inspection, and is not a "pure public agency."

The facts of Glen Fox v. News-Press Publishins Co., Inc., supra, are virtually identical to the facts of this appeal. Like Alligator Towing, Inc., PHH filed a suit for declaratory judgment stating its uncertainty as to whether it should or should not produce the records requested by The Ledger. (R 1-15) Both Alligator Towing and PHH thought they were private entities outside of the scope of the Public Records Act. Alligator Towing did not know whether its contract with the city of Ft. Myers ("the city") under which it acted as the exclusive towing company for the city, had placed it under the aegis of the Public Records Act. Fox at

942. News-Press Publishing Co., Inc., like The Ledger, responded to the declaratory action filed by Alligator Towing with a counterclaim for writ of mandamus. Ibid. at 942. But unlike the case before this Court, in **Fox** no testimony was taken and no exhibits were submitted into evidence at the hearing to show cause why the alternative writ of mandamus should not be issued. Ibid. at 942.

Notwithstanding the lack of testimony and evidence, the lower court found that Alligator Towing was an agency based on the following:

a. a "totality of factors" indicating a significant level of involvement by a public entity, the City of Ft. Myers. **Fox** at 943, citing Schwartzman v. Merritt Island Voluntary Fire Department, 352 So.2d 1230 (Fla. 4th DCA 1977);

b. the contract between the City of Ft. Myers and Alligator Towing required substantial ongoing written and verbal communication with the City, **Fox** at 943; and

c. Alligator Towing was performing essentially a governmental function, the function of removing wrecked and abandoned automobiles from public streets, incorporated within the general police powers codified in the city ordinances. **Fox** at 943.

As in this case, the lower court's finding that Alligator Towing was an agency subject to the Public Records Act was the only criteria satisfied under the attorney's fees provision of Chapter 119. And like this case, the award of attorney's fees against Alligator Towing was reversed by the Second District Court

of Appeal, holding that Alligator Towing did not "unlawfully refuse" the public records request, since Alligator Towing should not have been held to the same level of knowledge as such "pure public agencies" as the Palm Beach Fire Rescue Department and the Dade County School Board. Fox at 943. The understandable uncertainty of Alligator Towing prevented any finding of unlawful refusal of a records inspection.

PHH, like Alligator Towing, is not a "pure public agency." It has far fewer contacts with any public entity or public agency than those of Alligator Towing, has no contract for services with any public agency or entity, and has no ongoing communication with any government entity. (T-35, 37, 165, 181-183, 256,-257, 308)

The Second District Court of Appeal was correct in reversing the attorney's fee awards against Alligator Towing and PHH since in both cases the underlying facts did not support a finding of "unlawful refusal" as used in Chapter 119.

B. THE LANGUAGE OF CHAPTER 119 MANDATES THAT THE TRIAL COURT MAKE A SEPARATE FACTUAL DETERMINATION WHETHER A RECIPIENT'S RESPONSE WAS AN "UNLAWFUL REFUSAL" AS THAT PHRASE IS USED IN CHAPTER 119 BEFORE IT CAN CONSIDER AN AWARD OF ATTORNEY'S FEES.

The Second District Court of Appeal's reversal of the award of attorney's fees to The Ledger is not a departure from this Court's direction in Wait v. Florida Power & Light, 372 So.2d 420 (Fla. 1979). The language of the statute mandates the trial court's specific finding of "unlawful refusal"; a factual determination separate and distinct from whether the recipient is an "agency" subject to the requirements of Chapter 119. Acceptance of The Ledger's argument that "the language of the statute mandates that attorney's fees be granted for any violation of the public records law" would encourage a departure from Wait v. Florida Power & Light since to do so would create a "judicially-legislated" exception to the actual language and intent of the statute. To allow this analysis not only subverts the intent of the Legislature, ignoring the specific prerequisites provided by the Legislature, but it indiscriminately punishes those whose behavior was not wrongful.

Florida courts have consistently determined that the words "unlawful refusal" require a factual analysis apart from the determination of whether the recipient of a records request was an "agency" as defined by Chapter 119. The words "unlawful refusal" have been given subjective interpretations such as "wrongful," "unjustified," "unreasonable" and "evasive" by courts in similar public records act cases. See, News-Press Publishing Co., Inc. v. Gadd, 432 So.2d 689 (Fla. 2d DCA 1983); Brunson v. Dade County

School Board, 525 So.2d 933 (Fla. 3d DCA 1988); Glen Fox and Alligator Towing v. News-Press Publishing Co., Inc., 545 So.2d 941 (2nd DCA 1989); Times Pub. Co. v. City of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990); and Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3d DCA 1988).

In Brunson v. Dade County School Board, the Third District Court of Appeal held that the School Board's "unjustified delay" amounted to "unlawful refusal." Brunson, supra, at 934.

In News-Press Publishins Co., Inc. v. Gadd, the Second District Court of Appeal stated:

> Obviously, there were such legitimate differences of opinion as to the lawfulness of the refusal of appellee to allow inspection of some of the documents sought so as to support the trial court in its refusal to find appellee acted unreasonably.

(Emphasis added.) News-Press Publishing Co., supra, at 432. The News-Press Publishing Co. case was decided immediately before the legislative revision of the language from "unreasonable refusal" to "unlawful refusal," but, as can be seen, "lawfulness" and "reasonableness" have been interchangeably.

More recently, in Times Pub. Co. v. City of St. Petersburg, the Second District Court of Appeal granted an attorney's fees request against the City of St. Petersburg specifically affirming the trial court's construction of the words "unlawful refusal." In that case, the trial court found:

> The White Sox had "formulated" and orchestrated, with no voluntary aid, counsel or assistance from the City, a scheme, plan and design not merely to avoid the Public Records Act of this State, but in fact to evade it.

(Emphasis added.) Times Pub. Co., supra, at 491. "Unlawful refusal" was therefore equated with purposeful avoidance or evasion of the Public Records Act; unlike this case, where PHH's response was found by the trial court to be a circumstance of "no wrongful conduct" of PHH. Confirming the trial court's findings, the Second District Court of Appeal stated:

> We think the intent of the statute is to reimburse the party who incurs legal expenses when seeking permission to view records wrongfully withheld, even if access is denied based on a good faith but mistaken belief that the documents are exempt.

Times Pub. Co., supra, at 495.

Once again, "unlawful" was construed to mean "wrongful," and was based upon a factual determination by the trial court into the intent and nature of a recipient's initial resistance to a public records request.

PHH does not disagree with the purposes of the Act, that is, to preserve basic freedom of open government. However, the purpose of the statute is not to punish fair-minded citizens like the members of the Board of PHH who dedicate themselves to the improvement and benefit of the community without remuneration other than the satisfaction of giving back to the community. The Legislature did not intend to champion public disclosure at the

cost of fairness and decency under the law. While punishment may be appropriate or intended by the Legislature for blatant, unjustified, wrongful, evasive disregard for the law, it is not intended to punish those like PHH, whose "agency status" was not clearly delineated, and who, at all times, responded immediately to the requests of The Ledger eventually seeking, in good faith, declaratory relief from the Court.

Had the Legislature intended attorney's fees to be awarded upon each finding of "agency status" under Chapter 119, it would not have included in its specific statutory language the two requisites to an award of attorney's fees, that is: (1) the filing of a civil action to enforce the provisions of Chapter 119; and (2) a specific determination by the Court that the agency "unlawfully refused" to permit inspection, examination and the copying of its records. §119.12(1) In fact, when the Legislature revised the statute in 1984, changing the language from "unreasonable" to "unlawful," it had every opportunity to delete that prerequisite before attorney's fees could be awarded. Accordingly, had the Legislature intended attorney's fees to be awarded upon each finding of "agency status," it could have included "prevailing party" language. It did not. Nor did it delete the two prerequisites to attorney's fees awards, since it intended the statute to enforce public disclosure, but allow for fairness and decency under the law.

The Ledger chooses a "prevailing party" "strict liability analysis" of the statute, ignoring the actual language of the

statute requiring a factual determination of "unlawful refusal," stating that allowing this factual determination would provide incentive for a "race to the courthouse." The Legislature ignores the expense of litigation to the public records recipient for its own attorney's fees and costs which it incurs in determining whether it is subject to the requirements of the Act. Certainly, the expense of the declaratory relief sought, as well as the substantial expense in defending itself from the unnecessary Complaint for Writ of Mandamus and Injunctive Relief of The Ledger is disincentive enough to unjustified and frivolous resistance to a public records request. There is no relief afforded by the statute against frivolous public records requests or for those public records requests where courts determine the recipient is not an "agency under Chapter 119."

Interestingly, the Federal Freedom of Information Act, in cases construing that Act, discourages an attorney's fee award in belated litigation against an agency which had a reasonable basis for withholding the disputed, requested materials. LaSalle Extension University v. Federal Trade Commission, 627 F.2d 481 (D.C. Cir. 1980); Kaye v. Burns, 411 F.Supp 897 (D.C. Ny. 1987).

Under the Federal Freedom of Information Act, the court must decide whether the plaintiff has "substantially prevailed" before it can award attorney's fees and costs. 5 U.S.C.S. §552(a)(4)(E). In doing so, the court must make a factual determination considering:

1. Benefit to public, if any, deriving from case;

2. Commercial benefit to complainant;

3. Nature of complainant's interest in records sought; and

4. Whether government's withholding of records sought had a reasonable basis of law.

Where the court determined that the cause of action was brought to advance private commercial interests of a complainant and found no improper behavior by government, the court would decline to award attorney's fees and costs. Pope v. United States, 459 F.Supp 426 (D.C. Tex. 1977).

Certainly, The Ledger's interest in requesting disclosure from PHH was not altruistic. In fact, had The Ledger been able to show some type of "improper behavior" by PHH, its newspapers articles may have increased its circulation and, therefore, would have provided a commercial benefit to The Ledger, or, perhaps, to its parent company, The New York Times Holding Company. The Ledger would assert that the "improper behavior of PHH was its "unlawful refusal" to respond to its public records request. It found no other improper behavior unless The Ledger would assert that having a "public nature" was improper.

In fact, the trial court specifically included in its findings in support of its Order:

> **Θ.** The fact that this Court has found that PHH Mental Health Agency, Inc. is a public agency subject to the Florida Public Records Act is not to be construed in any way as an indication of wrongdoing on the part of any individual or corporation.

(Emphasis added.) (R-208)

Likewise, the Legislature did not intend the Public Records Act to punish a records recipient from expressing a timely response of justified doubt as to its obligations under Chapter 119.

ARGUMENT II

IN ANY EVENT, THE DISTRICT COURT OF APPEAL WAS CORRECT IN REVERSING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO THE LEDGER BECAUSE THE SEPARATE ENFORCEMENT ACTION COMMENCED BY THE LEDGER WAS UNNECESSARY.

A. THE RESPONSE BY PHH TO THE REQUEST FOR INFORMATION BY THE LEDGER WAS SWIFT, IN GOOD FAITH AND DID NOT CONSTITUTE A REFUSAL TO DISCLOSE.

When Carl Strang received a letter from Chuck Murphy, a staff writer with The Ledger, demanding immediate access and copying of 13 years of documents within 48 hours, based upon an assertion that PHH was a public agency, Mr. Strang was understandably confused. Mr. Strang assumed that there must have been some mistake: he and the other Board members of PHH Mental Health Services had never thought of PHH as a public agency, and, in fact, had taken pains from its inception to insure its private, non-profit status.

As a public official, he also felt somewhat threatened, since The Ledger added in its last paragraph that the 13-year-old information demanded for inspection and copying was "timely" and would be used for a newspaper article.

Notwithstanding his belief that the letter must have been sent in error, he sought the advice of his counsel, J. Hal Connor, Esquire, who sent The Ledger a letter in response the very next day. At no time in its initial response did PHH refuse to provide the documents requested, but, instead, provided specific factual support for its sincere belief that PHH was a private group, not a public agency, and, therefore, not subject to the provisions of

Chapter 119. He also explained the practical problems confronting PHH in providing all the requested documentation since PHH had no staff of its own, the records were stored in numerous boxes, and scattered in various locations. (A-2) In fact, in the initial response, Attorney Connor offered to present any particular concerns or specific questions of The Ledger to the Board of Directors, adding that he would be "happy to talk with The Ledger's lawyer about this matter." (A-2)

This response was not a refusal; never mind a red flag warning of obstinate delay.

Thirty-five days later, The Ledger, through its New York counsel, Kenneth Richieri, responded to Mr. Connor's offer to discuss the issue, and, once again, Mr. Connor, on behalf of PHH, responded immediately, stating that he would like to do some research on the issue since his initial conclusion after looking at the public records statute was that the law was by no means clear as to whether PHH was subject to the disclosure requirements of the statute. Mr. Connor again requested that The Lakeland Ledger submit any "specific interests" that it had in PHH. **(A-3) (A-4)**

The several responses of PHH to The Ledger's records request were not refusals, but were reasonable assertions of PHH's uncertainty and an invitation to further inquiry with an expression of a desire to cooperate.

The Appellate Court was correct in considering the nature of PHH's initial responses when it correctly held the trial court

should not have imposed attorneys's fees under the statute upon PHH under the factual circumstances of this case.

B. THE SUIT FOR DECLARATORY JUDGMENT RELIEF FILED BY PHH ELIMINATED THE NEED OF A SEPARATE CIVIL ACTION TO ENFORCE THE PROVISIONS OF CHAPTER 119.

The District Court of Appeal was correct in reversing the award of attorney's fees and costs against PHH since it was unnecessary for The Ledger to file a civil action to require PHH to produce its records. Because PHH was in doubt as to the scope of the Public Records Act, it commenced by suit for declaratory relief to resolve that doubt. (A-5) (R-1-9) There is nothing to suggest that PHH would have refused the court's direction upon receiving the results of the Declaratory Judgment action. Had PHH refused to follow the court's declared direction, a civil action by The Ledger for injunctive relief would then have been warranted.

The Florida Legislature established certain prerequisites necessary for an award of attorney's fees in a public records case. The first of this criteria is set forth in Chapter 119.12(1) as follows:

> (1) If a civil action is filed against an agency to enforce the provisions of this chapter....

The initial civil action filed with the trial court was a Complaint for Declaratory Judgment filed by PHH. In its Complaint, PHH prayed that the court would determine its rights and obligations under the Public Records Act and thus determine its proper response to the records request of The Ledger (R-1-9) The Complaint for Writ of Mandamus and for Injunctive Relief was filed by The Ledger in response to the declaratory action of PHH and not until Some two and a half weeks after the declaratory action

initiated by PHH. Accordingly, no civil action by The Ledger was necessary to obtain relief under the Public Records Act since PHH had already requested a judicial determination of whether it was an agency was subject to the Public Records Act.

Declaratory relief was provided to all parties by the trial court in its Order of September 12, 1989. Documents were provided immediately thereafter. No additional relief was provided as a result of The Ledger's Counterclaim for Injunction or its Complaint for Injunction and Writ of Mandamus...other than the trial court's award of its attorney's fees ($45,000) and costs ($2,136.32). **(RF-76-77, 233-234)**

It is obvious that the real motivation for The Ledger's subsequent Counterclaim and Complaint was not to enforce the provisions of Chapter 119, but, instead, to shift the cost of the newspaper's investigative activities to the public under the guise of Chapter 119.12. Since The Ledger was already committed to some type of investigation and newspaper article (see Chuck Murphy's letter of July 27, 1988), (A-1) it was already committed to spending the funds necessary to obtain and review the requested documents. The Ledger was in a "no lose" situation. Why not shift the cost of the investigation from its shareholders to the public, even though the documents would have been provided by PHH after the court clarified its obligation to do so?

The Ledger's Counterclaim for Injunction, as well as its Complaint for Injunction and Writ of Mandamus, were filed unnecessarily since an adequate remedy was available by way of the

declaratory judgment action initially filed by **PHH**. In State ex rel. Fraternal Order of Police, Orlando Lodge No. **25 v. City of** Orlando, **269 So.2d 402** (Fla. 4th **DCA 1972)**, the District **Court** of Appeal denied the petitioners' writ of mandamus since the petitioners were using the writ of mandamus to establish a legal right rather than to enforce a clear legal duty already established and, thus, an improper function of the writ of mandamus. The District Court of Appeal emphasized that a writ of mandamus would not issue since the petitioners already had an adequate remedy under the Declaratory Judgment Act, following E. G. Reese v. Golden, **209** So.2d 490 (Fla. **App.** 1968), holding that a writ will not issue where there is another adequate remedy available.

PHH immediately filed in good faith its declaratory judgment action as its timely response to the public records request to determine its legal duty under Chapter 119, **and** to provide direction in its response to The Ledger's public records request. **(A-5)** (R-1-9) The Complaint for Declaratory Action **was** not an attempt to evade the principals of or the obligations under the Public Records Act. Nor was it a frivolous attempt to delay The Ledger. Instead, **PHH's** action was an appropriate and adequate response to The Ledger's request. The Ledger's Complaint for Writ of Mandamus was unnecessary and should never have been granted by the trial court when an adequate remedy and, thus, the same relief were available by way of the initial action taken by **PHH**. E. G. Reese V. Golden, 209 So.2d 490 (Fla. App. **1968)**. Like the cases cited herein, The Ledger's Writ of Mandamus was an improper use of

that extraordinary relief since at that time there was no clear legal duty established as there had been no judicial determination that **PHH** was "an agency" subject to Chapter 119. See, In State ex rel. Fraternal Order of Police, supra.

Unlike the cases cited by The Ledger in its Initial Brief, **PHH** did not file its declaratory judgment action because it disagreed with the validity of Chapter 119 or the means by which that law is carried out. Moreover, PHH clearly had standing to bring a declaratory suit since it satisfied all prerequisites for a declaratory suit previously set forth by this Court and cases construing this Court's directive:

> 1. **PHH** had a "bona fide, actual, present practical need for the declaration";
>
> 2. The declaration requested dealt with a present controversy as to a state of facts, that is, whether PHH was a public agency subject to the requirements of Chapter 119;
>
> 3. The immunity of PHH, or right not to provide access to The Ledger, was dependent upon the facts or the law applicable to those facts or that controversy;
>
> 4. PHW and its entire Board of Directors had an "actual, present, adverse and antagonistic interest in the subject matter";
>
> 5. The adverse interest was before the Court by proper process in a form and procedures satisfied by the declaratory complaint of **PHH;** and

> 6. The relief sought by PHH in its declaratory suit was "not merely the giving of legal advice by the Court or answers to questions propounded from mere curiosity."

May V. Holley, 59 So.2d 636 at 639 (Fla. 1952); Williams v. Howard, 329 So.2d 277 (Fla. 1976).

PHH's difficulty in determining whether it was subject to the Chapter 119 disclosure request is exemplified by the trial court's several Orders partially granting PHH's Motions for Protective Order and Objections to Expedited Discovery. (R-95-97, 156-157) In each instance, the trial court recognized that the issue of whether PHH was an agency subject to the provisions of Chapter 119 was, at best, opaque, and that until all relevant facts had been presented to the court, PHH was protected frompremature disclosure of its records.

In a case with background facts such as those presented to the District Court of Appeal, where an entity has understandable questions as to whether it falls under the aegis of the Public Records Act, a doubt which was immediately, consistently and accurately expressed in response to a public records request, and where that doubt culminated in the immediate filing of a Complaint for Declaratory Relief, a finding of "unlawful refusal" is erroneous. To hold otherwise would be to punish PHH for its exercise of due process rights to question and to seek the court's assistance. The Florida Legislature provided such a mechanism under Chapter 86, the Declaratory Relief Statute, and its proper use should not be punished.

CONCLUSION

The Order of the Second District Court of Appeal reversing the award of attorney's fees to The Ledger should be affirmed. Chapter 119 requires that the trial court make a separate factual determination that the initial response by a recipient of a Chapter 119 public records request equates to an "unlawful refusal." Chapter 119 also mandates that the trial court determine whether a civil action was necessary to enforce the provisions of Chapter 119. The Second District Court of Appeal was correct in determining that there was no factual basis for an award of legal fees to The Ledger since PHH did not "unlawfully refuse" the public records request and its swift and adequate request of declaratory relief eliminated any need for a separate civil action to enforce the provisions of Chapter 119.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by hand delivery, to GEORGE K. RAHDERT, ESQUIRE and KENNETH A. GUCKENBERGER, ESQUIRE, 535 Central Avenue, St. Petersburg, Florida 33701, this 17th day of April, 1992.

Attorney

APPENDIX

1. Letter from Chuck Murphy, of The Ledger, dated July 27, 1988, to Carl Strang, demanding access to inspect and copy corporate records of PHH.

2. Letter from J. Hal Connor, Jr., Esquire, dated July 29, 2988, responding on behalf of PHH to Chuck Murphy's letter of July 27, 1988.

3. Letter from Kenneth A. Richieri, of the Legal Department of New York Times Company, dated September 2, 1988, responding to Mr. Connor's letter of July 29, 1988.

4. Letter from J. Hal Connor, Jr., Esquire, dated September 7, 1988, responding on behalf of PHH, to Mr. Richieri's letter of September 2, 1988.

5. Complaint for Declaratory Judgment filed by PHH Mental Health Services, Inc. on September 15, 1988 with the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida.