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IN THE FLORIDA SUPREME COURT

In re: Amendments to the Rule of Judicial Administration 2.051 - Public Access to Judicial Records

Case No. 83,927

TIMES PUBLISHING COMPANY'S COMMENTS ON THE PROPOSED RULE

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INTRODUCTION

The Times Publishing Company ("the Times") is the publisher of the St. Petersburg Times, a daily newspaper of general circulation on the Central West Coast of Florida, and its Tampa edition, The Times. As a member of the news media, the Times relies heavily on access to government records, including those of the court system, to report to Times readers news and information about the operation of their government.

The Times wishes to draw to this Court's attention two new provisions of Proposed Rule 2.051 on public access to judicial records and asks this Court to modify the proposal to more fully protect the public's access to judicial records and minimize the opportunity for misunderstandings or errors by the lower courts.

COMMENTS

I. Subsection (c)(9)(D) of Rule 2.051 appears to contravene the United States Constitution and Florida common law.

Proposed Rule 2.051's subsection (c)(9)(D), an addition to the existing rule, provides:

> [E]xcept as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record or proceeding.

The First Amendment to the United States Constitution protects the public's rights of access to judicial records and proceedings as does the Florida Constitution and this State's settled common law. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735 (1986); Barron v. Florida Freedom Newspapers, Inc., 531 So.2d

113 (Fla. 1988). If a court considers abridging those rights for any reason, it must, under well-established Florida law, accord to the public notice of its consideration of such an order and an opportunity be heard. Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 7 (Fla. 1982).

Subsection (c)(9)(D) appears to be a backward step in the public access jurisprudence of this State, in that the proposed subsection only requires notice of closure after a closure order is entered. The rule does not include any provision for notice and opportunity to be heard before such an order is entered. It is entirely silent on this point. The Times respectfully suggests that this Court should revise subsection (c)(9)(D) to state explicitly that advance notice and an opportunity to be heard is required, or make clear in commentary to the new rule that no abridgement of this long-standing requirement is intended.

II. The proposed rule is unclear to the extent it addresses public access to computerized dockets and other computerized records.

The proposed rule incorporates a new subsection, (b), which sets forth the following (emphasis added and discussed below):

> Definition. Judicial records for this rule refer to 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.

The underlined language in this proposed new subsection presents an opportunity for confusion and doubt about the definition's intention as it relates to computerized judicial records, most especially with regard to computerized dockets. The Times suggests that this Court be more explicit with regard to the judicial system's obligation to permit inspection and copying of data -- such as dockets or statistical information -- contained on computer-readable magnetic tape, floppy disks, or computer hard drives.[1]

It is the Times' experience that, as the Clerks of Court install more sophisticated computer hardware, they are increasingly turning to private vendors to obtain software, as opposed to creating it themselves or obtaining it from another government agency. The proposed definition, and specifically the language underlined above, appears to exempt software used by the Clerks of Court or other judicial branch employees but created by someone other than a public employee. While clearly providing for public inspection and copying of computer software created by public employees, the proposed definition leaves problematic room for dispute as to the court system's obligation to provide access to data computerized using software purchased from private vendors. A lack of clarity in adopting this definition may spawn confusion and litigation over the issue.

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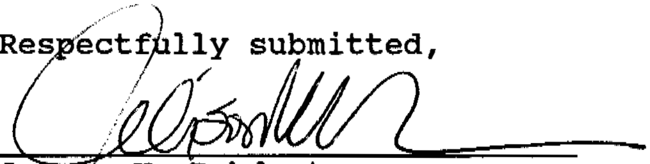
[1]At least one dispute over public access to computerized data involving a Clerk of Court in his capacity as the custodian of computerized criminal and civil dockets has already resulted in litigation. See Times Publishing Co. v. Ake, 19 Fla. L. Weekly D1407 (Fla. 2d DCA June 29, 1994)(motion for rehearing pending).

If the Court intends to parallel or adopt Florida Statutes section 119.07(3)(q)'s exemption from copying of copyrighted software obtained from a private vendor, the Court should take care to ensure that the public's access to the data stored within the software is not abridged. As the judicial system becomes increasingly "computerized," the public reasonably may be expected to request data in computerized form, and disputes concerning public access and the right to obtain copies of the data in a computerized format may arise more frequently.

To some extent, the anticipated problem may be resolved by this Court's explicit citation to Seigle v. Barry, 422 So.2d 63 (Fla. 4th DCA 1982), which sets forth circumstances under which a public entity may be obligated to "reformat" or otherwise facilitate and permit complete and meaningful public access to computerized data when either a public entity's software or exemptions applicable to it are not conducive to such access.[2]

Respectfully submitted,



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[2]A copy of the decision is attached to these Comments for the Court's ease of reference.

Issue two lacks merit on its face since the amounts due under the continuing writ of garnishment pertain only to the amounts accruing subsequent to the final judgment entered on September 21, 1978. The appeal of that judgment in *Schwarz v. Schwarz,* 395 So.2d 607 (Fla. 4th DCA 1981), could in no way affect the jurisdiction of the lower court to determine arrearages accruing subsequent to September 21st.

[2-4] Last and foremost, relator urges us to apply the law of contempt to the law of garnishment. Contempt does not lie to enforce the payment of support arrearages once a child has attained the age of majority. *Gersten v. Gersten,* 281 So.2d 607 (Fla. 3d DCA 1973). *See generally* Annot., 32 A.L.R.3d 855 (1970), and cases cited therein. Generally speaking, contempt is not available as a means of enforcing money judgments due to the constitutional prohibition against imprisonment for debt;[3] therefore, in support cases, it is an extraordinary remedy justified by a parent's duty to provide for his minor children and society's interest in protecting the welfare of dependents.

Garnishment, on the other hand, is an ordinary civil proceeding to enforce an order of the court for payment of money. The Legislature, in enacting section 61.12, recognized that orders entered in domestic matters should be treated differently, but it in no way indicated an intent to limit available remedies. On the contrary, it created an exception to the general exemption from garnishment that may be asserted under section 222.11, Florida Statutes (1979), when money is due the head of a family for personal services and labor, thus enlarging the source of funds available for support orders.

[5] In declining to adopt relator's third argument, we note the First District Court of Appeal rejected the same in *Sokolsky v. Kuhn,* 386 So.2d 806 (Fla. 1st DCA 1980). Although the supreme court reversed *Sokolsky* on other grounds,[4] we believe its decision did not affect the validity of the district court of appeal's opinion on this issue. Moreover, we find support for our conclusion in other jurisdictions. *See, e.g., Dawson v. Dawson,* 71 Wash.2d 66, 426 P.2d 614 (1967).

Finding no departure from the essential requirements of law and inappropriate grounds for a writ of prohibition, we deny relator's petition.

DOWNEY and ANSTEAD, JJ., concur.

Mark S. SEIGLE, personally and as Director, Employee Relations, William T. McFatter, as Superintendent of Schools, and Benjamin F. Stephenson, as Associate Superintendent for Personnel, of the Broward County School Board, Appellants,

v.

Dr. D. Marshall BARRY and Lawrence E. Jessup, Jr., Appellees.

No. 81-2046.

District Court of Appeal of Florida, Fourth District.

Nov. 17, 1982.

As Corrected on Denial of Rehearing Dec. 14, 1982.

Professional economists who had been retained by the bargaining unit for school district to prepare for and engage in collective bargaining sought access to public records maintained on a computer. The Circuit Court, Broward County, John A. Miller, J., issued mandatory injunction and school district appealed. The District Court of Appeal, Hersey, J., held that access to com-

3. Article I, section 10 of the Florida Constitution provides that "[n]o person shall be imprisoned for debt, except in cases of fraud."

4. 405 So.2d 975 (Fla.1981).

puterized records is to be given through use of programs currently in use by the public official responsible for maintaining the public records and there is no requirement that a special program designed at the expense of the applicant be used to provide the information in any particular format absent special circumstances.

Reversed and remanded.

1. Appeal and Error ⚡78(3)

Order denying motion to dismiss complaint was not appealable until after final judgment.

2. Stipulations ⚡14(11)

Where parties had stipulated that issue of whether school board was in violation of open records statute would be heard and decided at a hearing subsequent to that on the motion for preliminary injunction, trial court erred in resolving that issue at the priority hearing. West's F.S.A. §§ 119.10, 119.11(1).

3. Records ⚡30

Information stored on a computer is as much a public record as the written page in a book or tabulation on a file stored in a filing cabinet. West's F.S.A. § 119.011(1).

4. Records ⚡53

All of the information in the computer, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right-to-know statutes. West's F.S.A. § 119.011(1).

5. Records ⚡62

With respect to records which are not kept by computer, public may not require that information contained in public records be made available for inspection and copying in a particular format. West's F.S.A. § 119.011(1).

6. Records ⚡62

Access to computerized public records is given through the use of programs currently in use by the public official responsible for maintaining the public records; access by the use of a specially designed program prepared by or at the expense of the applicant may be permitted in the discretion of the public official but is not required except where available programs do not access all of the public records stored in the computer's data banks or where the information in the computer which is accessible by the use of available programs would include exempt information or where the form in which the information is proffered does not fairly and meaningfully represent the records or where there are other special circumstances. West's F.S.A. § 119.07(1).

Edward J. Marko of Marko, Stephany & Lyons, Fort Lauderdale, for appellants.

Joseph H. Kaplan of Kaplan, Sicking, Hessen, Sugarman, Rosenthal & De Castro, P.A., and Joseph C. Segor, Miami, for appellees.

HERSEY, Judge.

[1] This is an appeal from a non-final order in the nature of a mandatory injunction. We have jurisdiction under Rule 9.130(a)(3)(B), Florida Rules of Appellate Procedure. At the same time appellants seek review of an order denying their motion to dismiss the complaint. That order is not properly appealable until after final judgment. *Habelow v. Travelers Ins. Co.*, 389 So.2d 218 (Fla. 5th DCA 1980); *Peavy v. Parrish*, 385 So.2d 1034 (Fla. 4th DCA 1980). *See* Rule 9.130, Florida Rules of Appellate Procedure.

This action was commenced to enforce certain rights under Florida's Public Records Act, Chapter 119, Florida Statutes (1981). Appellees, professional economists, are retained by the bargaining unit for several hundred employees of the Broward County School Board to prepare for and engage in collective bargaining negotiations with the School Board. Appellees sought access to certain public records maintained on a computer. The parties stipulated that, without admitting fault under Section 119.-10, appellants would permit appellees access to the computer records including copies of computer tapes. None of the 800 programs

maintained by appellants could provide the information in the format desired by appellees. To remedy that problem, appellees offered to design and pay for a program that would produce the desired printout or to reimburse appellants for obtaining such a program and running it for appellees. Appellants refused, resulting in this litigation. The issues were presented to the court at a priority hearing provided for by Section 119.11(1). The circuit court ordered appellant to run a new program designed at appellees' expense which would access the computer data banks resulting in a printout of the public records in appellees' desired format. Furthermore, the order determined that appellants were in violation of the statute, despite the stipulation of the parties that fault (violation of the statute, Section 119.10) would be heard and decided at a subsequent hearing.

[2] We reverse that portion of the order finding a violation of the statute because the parties stipulated that this issue would be tried later. We also determine that finding is not supported by substantial competent evidence.

The remaining question is whether there is a right under the Public Records Act to obtain information in a particular format. This is a question of first impression in this as well as any other jurisdiction. That being so, we begin with a short explanation of the computer terminology and principles involved.

A computer is an electronic device consisting of a finite number of on-off switches having the capability of storing vast amounts of information fed into it in a random fashion and is referred to in computer jargon as hardware. A computer program, known as software, is a means of retrieving that information in a specified format and at high speed. When a program is run, the computer produces the information in printed form termed a computer print-out.

[3,4] Turning to the Public Records Act, we note it is sometimes referred to as a "right to know" law. The Act provides access to any information that is a matter of public record with certain specific and very limited exceptions. The statute defines public records as follows:

> [A]ll documents, papers, letters, maps, books, tapes, photographs, films, sound recording 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.

§ 119.011(1), Fla.Stat. (1979). There can be no doubt that information stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet. Precedent is scant but supportive. *See, e.g., Long v. U.S. Internal Revenue Service,* 596 F.2d 362 (9th Cir.1979); *Menge v. City of Manchester,* 113 N.H. 533, 311 A.2d 116 (1973); *Minnesota Medical Ass'n v. State,* 274 N.W.2d 84 (Minn.1978). It is also apparent that all of the information in the computer, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right to know statutes.

[5] We now confront the more insidious question of whether the public may require information contained in public records to be made available for inspection and copying *in a particular format.* In the context of pre-computer public records we perceive the answer to this question to be in the negative. If the health department maintains a chronological list of dog-bite incidents with rabies implications the putative plaintiff, bitten by a suspect dog, may not require the health department to reorder that list and furnish a record of incidents segregated by geographical areas. Nothing in the statute, case law or public policy imposes such a burden upon our public officials. Nor may the plaintiff prevail by offering to pay the cost, thus eliminating the objection that the taxpayers money is being spent for individual gain. It would be ludicrous to require public officials to provide such a service when it can be as easily obtained by paying an expert in the private sector to reclassify the information. A contrary rule would not only impose on-

erous and unnecessary burdens on public officials but would also place them in competition with private enterprise. Suffice it to say the answer seems clear and the policy unassailable.

When confronted with computerized records we are asked to apply a different rule. Appellees make a cogent and telling argument for the proposition that within reasonable bounds information in a computer should be accessible through a program designed for a particular output format at the expense of the applicant.

The information in a computer is analogous to information recorded in code. Where a public record is maintained in such a manner that it can only be interpreted by the use of a code then the code book must be furnished to the applicant. *State ex rel. Davidson v. Couch,* 117 Fla. 609, 158 So. 103 (1934). In *Kryston v. Board of Education,* 430 N.Y.S.2d 688, 77 A.D. 896 (N.Y.App.Div. 1980), test scores were a matter of public record but the identity of the persons tested were confidential. There, the agency was required to reorder or scramble the test scores making it impossible to correlate scores with the names of persons tested before furnishing the recompiled list to the applicant. At least one court has previously approved an agency agreement to provide data in a certain form when the applicant supplied the program. *Minnesota Medical Ass'n v. State,* 274 N.W.2d 84 (Minn.1978).

Appellees, relying on these precedents and other authority, argue that refusal to allow an applicant to access the computer with a specially designed program will have an "adverse effect on the people's right to know about the inside activities of their government." They quote a Massachusetts case in support of that argument as follows:

> The manner in which data are collected and stored in a carefully programmed computer has major implications for the manner in which they can later be used. Control over the collection, processing, and dissemination of data is thus at least indirect control over the information processed and the activities of personnel engaged in its collection and use.

Opinion of the Justices, 365 Mass. 639, 309 N.E.2d 476, 481 (1974).

While we do not disagree with the underlying policy espoused by appellees and alluded to by the Massachusetts court, we recognize that there are competing interests that deserve consideration. The adversaries are not always David and Goliath or the embattled taxpayer against the omnipotent bureaucracy. There will be those with an ax to grind, a personal grudge or some other single interest to advance, making their demands for access to public records. In such cases access remains mandated by law as well as by sound public policy. An absolute rule permitting access to computerized records by a specially designed program could well result in a tremendous expenditure of time and effort for the mere sake of translating information readily and inexpensively available in one format into another format more suitable to the applicant's particular purposes. Simply requiring that the applicant pay the direct costs involved in the process does not recoup the wasted time or complete the other tasks that could have been accomplished but for the special project. It is not the intent of the law to put public officials in the business of compiling charts and preparing documentary evidence. The intent is rather to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers.

[6] We, therefore, adopt the rule that access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records. Access by the use of a specially designed program prepared by or at the expense of the applicant may obviously be permitted in the discretion of the public official and pursuant to Section 119.07(1). In the event of refusal of the public official to permit access in this manner, the circuit court may permit access pursuant to the same statutory restraints where:

(1) available programs do not access *all* of the public records stored in the computer's data banks; or

(2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or

(3) for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or

(4) the court determines other exceptional circumstances exist warranting this special remedy.

We therefore reverse that portion of the order finding appellants at fault as being premature and not supported by the record. We also reverse the mandatory injunction and remand for rehearing of the evidence on that issue and the entry of an order, if appropriate, based upon findings consonant with the factors outlined in our opinion. No other issues are ripe for decision at this time.

REVERSED AND REMANDED.

DOWNEY and DELL, JJ., concur.

Roger VICTORY, Appellant,

v.

STATE of Florida, Appellee.

No. 81-1608.

District Court of Appeal of Florida, Second District.

Nov. 17, 1982.

After the defendant was convicted in one county of grand theft, he was charged in a second county with dealing in stolen property and grand theft. The defendant entered a plea of nolo contendre in the Circuit Court, Manatee County, Harry C. Parham, J., reserving his right to appeal the denial of a motion to dismiss. The District Court of Appeal, Danahy, J., held that the defendant could not be convicted of the offense of dealing in the property stolen when he had already been convicted of grand theft in another county arising out of the same incident, but that did not preclude a second conviction for grand theft based on the fact that the defendant obtained a victim's money and note by falsely representing that he had clear title to stolen trailers.

Reversed in part and affirmed in part.

1. Receiving Stolen Goods ⚿6

Once defendant was convicted of grand theft in one county, he could not also be convicted in another county for offense of dealing in the property stolen in the first county. West's F.S.A. § 812.025.

2. Larceny ⚿27

Although defendant could not be convicted in second county for offense of dealing in property stolen in first county after defendant had been convicted of grand theft in first county, defendant could be convicted in second county for grand theft based upon fact that defendant obtained victim's money in that county by falsely representing that he had clear title to trailers stolen in first county. West's F.S.A. §§ 775.021(4), 812.025.

Jerry Hill, Public Defender, and Paul C. Helm, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Michael A. Palecki, Asst. Atty. Gen., Tampa, for appellee.

DANAHY, Judge.

The defendant stole some tractor-trailers in Pasco County. On the same date, he took the trailers to Manatee County and sold them to Ramon Garcia for $4,500 in cash and a $3,000 note. The defendant was convicted of grand theft in Pasco County.