IN THE SUPREME COURT OF FLORIDA

TIMES PUBLISHING COMPANY,
a Florida corporation d/b/a,
THE ST. PETERSBURG TIMES,

Petitioner,

CASE NO.: 84,513

v.

RICHARD AKE, as CLERK OF THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
OF FLORIDA

RESPONDENT'S ANSWER BRIEF

Leslie E. Joughin, III
Florida Bar No. 339385
John W. Bakas, Jr.
Florida Bar No. 171905
John W. McWhirter, Jr.
Florida Bar No. 053905
McWhirter, Reeves, McGlothlin
Davidson & Bakas, P.A.
100 N. Tampa St., Suite 2800
Post Office Box 3350
Tampa, Florida 33601-3350
Telephone (813) 224-0866

Karen E. Minton
Legal Adviser to the Clerk
Clerk of the Circuit Court
419 Pierce Street, Room 114
Post Office Box 1110
Tampa, Florida 33601-1110
Florida Bar No. 477303

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

CONSTITUTIONS

OTHER AUTHORITIES

INTRODUCTION

This Brief responds to the Initial Brief filed by Times Publishing Company (the "Times"). We added a Background section to the beginning of the Statement of the Case and Facts and a Copying Charges section at the end of our Argument; otherwise, we use the same subject matter headings as the Times did.

The Second District Court of Appeal certified the following question of law:

> Are the court records maintained by the Clerk of the Circuit Court subject to the inspection and copying requirements of Chapter 119 of the Florida Statutes?[1]

The Times appeals the denial of its motion to dismiss the Clerk's complaint and the denial of its motion for attorney's fees and costs under Section 119.12, Florida Statutes.

STATEMENT OF THE CASE AND FACTS

Background

The Clerk of the Circuit Court (the "Clerk") is custodian of court records for the Thirteenth Judicial Circuit.[2] The Probate, Guardianship, Mental Health and Trust Court Division ("Probate") and the Circuit Criminal Court Division ("Criminal") are served by

---

[1] Times Publishing Co. v. Ake, 19 Fla. L. Weekly D1407 (Fla. 2d DCA, September 23, 1994), 19 Fla. L. Weekly D2024 (Fla. 2d DCA 1994).

[2] "Court records" means those records maintained pursuant to Article V, Section 16, Fla. Const. ("Article V"). He also serves as ex officio clerk of the Hillsborough County Board of County Commissioners. Article VIII, Section 1, Fla. Const. ("Article VIII").

Clerk employees in the Probate and Criminal Departments, which maintain circuit court cases filed in each Division.

Each department has an online system (the "System") into which employees enter information from documents filed in court cases. (R. 322). The documents themselves are filed in court files but are not "entered" into the System. (R. 263). Employees use the System computers to view court case data, enter or update data or print hard-copy reports (e.g., court calendars) for the judiciary and the department. (R. 320, 321).

The public has access to the court files and to the System, to view screens or obtain copies of "screens" or copies of reports.

Mainframe computers which operate the Systems are located in the Clerk's Data Processing Center ("MIS").[3] (R. 205). MIS develops department software applications, programs reports for printing, installs security measures, ensures backup tapes are made, and handles technical problems. (R. 226).

Standard industry practice known to most users is "backup." Disaster backup tapes for Systems are made daily. (R. 268). Their sole function is to restore an entire online System if it fails. (R. 268).

The Criminal System uses the IBM mainframe; the Probate System uses the Hewlett-Packard (HP) mainframe. (R. 222). Both Systems operate according to American National Standards Institute (ANSI)

---

[3]MIS provides data processing services to the Board of Commissioners, Tax Collector, Sheriff, and Supervisor of Elections, among others. Standard rates cover annual operating expenses; in FY 92-93, the budget was approximately $10.4 million. (R. 198-214). "MIS" also refers to employees who work in MIS.

standards.[4] (R. 318). This case requires understanding the differences between old and modern technology. (R. 245).

The Criminal System uses software developed in the early 1970's, a "flat file" system. (R. 245, 246, 295). Each "file" contains all the data pertaining to one court case. (R. 326, 327). Each "file" represents a different case. Data is stored within a file in assigned places; i.e., the name of the assigned judge can be found in the same place in each file. (R. 295, 324, 326). A "copy" of a flat file tape is meaningful because all the data appears in assigned places. (R. 326, 327).

A Criminal backup tape does not contain data processing software; it only contains court case data. (R. 331). When a court case is sealed or expunged, the software reads the backup tape, file after file, until it finds the right case. (R. 306). Sealing a court case is like removing a file folder from a filing cabinet. All other "files" remain intact. Thus, it is physically possible to remove a file and still make a meaningful copy of the remaining files. (R. 326).

In contrast, the Probate System uses modern "database management" software that stores data not by court case but by category files. (R. 324). All judges who are assigned cases in that division appear in a "judge" file, all plaintiffs in a "plaintiff" file, etc. (R. 324). A judge's name that has been

---

[4]HP compatible systems use ASCII; IBM compatible systems use EBCDIC. One system is unable to "read" the other's tape without specialized "conversion" programming. (R. 248, 286)

entered as the assigned judge will appear only once in the "judge" file even though that judge may be assigned many cases. (R. 308).

When a court case is ordered by the Department, the database management software retrieves all the relevant data and organizes the data for System viewing, updating, or printing. (R. 325). The data is stored "randomly", in contrast to the flat file system which stores it in a "structured" layout. (R. 324, 325). The software organizes the data meaningfully by use of the proprietary file structure for that System. (R. 308, 325).

A "copy" of the Probate backup tapes is meaningless because MIS does not know -- and does not need to know -- how the backup software program stores the data processing software, the proprietary file structure, and court case data on tape; nor has the court case data been organized by the proprietary file structure. (R. 296, 308, 330, 331).

Unlike the Criminal backup tapes, the Probate backup tapes include (1) data processing software; (2) the proprietary file structure; and (3) security measures (e.g., user authorizations and passwords). (R. 272, 296, 313). Removal of the data processing software from the Probate backup tapes renders the computer incapable of meaningfully organizing the data. (R. 327, 331). Disclosure of the data processing software increases computer security risks, making it more susceptible to "hackers." (R. 296, 297). Removal of confidential data would mean data from "public" court cases would be removed as well because data is stored just

once in a "file". Security measures cannot be deleted from the Backup Tapes. (R. 331).

A. The Requests for Records. and B. The Clerk's Response.

Times' staff writer David Barstow requested copies of all bond estreature cards in February, 1992. The Clerk provided copies of all cards except those that were part of sealed or expunged court cases. (R. 17). Mr. Barstow sent a letter about the cards; the Clerk responded in writing that he was providing access to all the cards except those that were part of sealed or expunged court files. (R. 19). In late February, Times' staff writer Bob Port requested copies of the Probate and Criminal Systems backup tapes. (R. 12, 15, 104).

Discussions between Mr. Port and Clerk staff were held. (R. 12, 15, 17, 256). The Clerk advised him that the Criminal backup tapes would be available after deletion of sealed or expunged court cases. (R. 16). The Clerk subsequently declined the Times' offer to delete the confidential cases using their computer under Clerk supervision.[5]

On March 12, 1992 the Times delivered three letters requesting (a) copies of magnetic computer backup tapes for the Hillsborough County Criminal Justice Information System (the "Criminal Tapes") (R. 15); (b) copies of magnetic computer backup tapes of the Probate, Guardianship, Trust and Mental Health Court System (the

[5]In Mr. Port's March 12, 1992 letter (R. 15), he notes there was no law on the issue whether the Times had the right to bring their equipment in to a public official's office to perform the copying.

"Backup Tapes")[6] (R. 12); and (c) copies of bond estreature cards from court cases already sealed or expunged[7] "with the non-public information redacted from the card" (the "Cards") (R. 17), all based on Chapter 119.

The Times calls its requests a "data dump"; its Answer calls for copies of the Backup Tapes themselves. (R. 104).

For the first time in this case, the Times describes the Backup Tapes as "the Clerk's docket information," "computerized dockets," and "electronic dockets". Nothing in the record suggests that the Backup Tapes only have docket data; the record shows the Tapes contain data processing software, security measures, the proprietary file structure, and all court case data used for all reports.[8]

The Times' Brief at page 2 alleged the Backup Tapes used a "non-standard" format; MIS uses ANSI standard formats.[9] The Times says it requested conversion of the Backup Tapes to "a standard computer format readable by the Times and the general public", suggesting "the public" only uses IBM compatible computers. What the Times wanted were tapes readable by its computer. (R. 6, 12, 106).

The Clerk thus faced the following dilemma:

---

[6]Fla. Stat. Chs. 394, 396 and 397 limit access to some cases.

[7]See Rule 3.692, Fla. R. Crim. P.

[8]See earlier discussion at p. 4-5.

[9](R. 318) and f.n. 5 in our Brief.

(1) a "simple" copy of the Backup Tapes would include the data processing software, the security measures, and the proprietary file structure (R. 272, 296, 313);

(2) it is physically impossible to remove the data processing software, the security measures, and the proprietary file structure and then make a meaningful "copy" of the Backup Tapes (R. 327, 331);

(3) removing court case data from confidential files would remove any data common to the files which were open to the public;

(4) the public resources required to produce even a tape without confidential matter would be substantial; this was the first request ever received for copies of backup tapes that used database management software (R. 256); and

(5) even if the public resources required to produce an ASCII tape were not substantial, the Times insisted on use of public resources for conversion to EBCDIC, so its computer could read them even though the Times could have taken ASCII tapes to a computer service bureau for conversion.

The Times says the Clerk creates programs to extract information for governmental agencies but does not do so for the public. The Clerk has discretionary authority to do specialized programming for the public; he has declined to do so. MIS exists to conserve public resources, computer equipment and data processing expertise.

The Times says its request for the Cards has "never been of central concern in this case", yet it was the last request the Times withdrew just before Final Hearing. (R. 136).

The issues presented would affect any governmental records custodian using computers and other judicial entities maintaining court records. The Clerk and his employees communicated with the Times to ensure there were no misunderstandings.

C. The Ensuing Litigation.

The Clerk filed a declaratory judgment action raising six issues on March 20, 1992. The Complaint identified the Clerk's dual role as an Article V officer and as an Article VIII officer[10], and that the records requested were court records maintained by the Clerk in his Article V role. (R. 3). The Times' description of the issues is misleading, e.g., the Times characterizes Count I as "whether Chapter 119 applied to the Clerk of Court ..." implying its requests extended to Article VIII county records.

The Times inaccurately says the Clerk questioned whether he "must accelerate ... his ... project [the remote electronic access system] to reformat the data so it could be read and used by the general public."[11] The "reformatting" issue was whether the Clerk had to convert the Backup Tapes from ASCII to EBCDIC as the Times

---

[10]Times Admitted, Answer, Paragraph 15. (R. 105). See also Times' Motion for Reassignment of Case, paragraph 3. (R. 32).

[11]The Times was one of six pilot users before the Clerk's Public Access Network became available in April, 1992, providing access to Civil, Criminal, and Traffic Courts data (R. 234, 235); Probate data became available in August, 1992. (R. 234, 259, 323). The online court systems are the data sources for the Network. (R. 230).

wanted. The Clerk questioned whether he had to accelerate completion of the Public Access Network if he was not required to convert. (R. 7).

The Complaint sought a determination:

> Whether Chapter 119 is applicable to records of the Court maintained by the Clerk (Count I);
>
> Whether the Clerk is required to release to the public the proprietary file structure in which the data is stored on the magnetic tapes, the disclosure of which would make it easier for the information to be electronically modified, damaged, or destroyed (Count II);
>
> Whether the Clerk was required to convert the raw data on the magnetic tapes so that it could be read by the Times' IBM compatible computer utilizing public personnel and equipment (Count III);
>
> Whether converting the raw data on the tapes to suit the Times' business needs utilizing public personnel and equipment and furnishing space and electricity to the Times on an ongoing basis would violate Article VII, Section 10 of the Florida Constitution (Count IV);
>
> Whether the raw data on the tapes in fact constituted a public record (Count V); and
>
> Whether the Clerk was authorized to produce the bond estreature cards that were part of sealed or expunged court files (Count VI). (R. 1).

The Clerk requested expedited hearings on these issues. Shortly after the Complaint was filed, the Clerk completed the deletion of sealed or expunged cases from the Criminal Tapes and allowed the Times to copy them as the Clerk had previously advised the Times.

On March 26, 1992, the Times filed a Motion to Dismiss the Complaint. (R. 20). Times' counsel requested the Clerk not to schedule the Motion for personal reasons. (R. 358). On April 7, 1992, the Times filed a Motion for Reassignment of Case, citing Rule 2.050(b)(4), Fla. R. Jud. Adm. (R. 31).

The Clerk noticed it and the Court denied it on July 1, 1992. (R. 40, 71). The Clerk noticed the Times' Motion to Dismiss Complaint and the Court denied it on August 14, 1992. (R. 69, 81).

The Times moved for an extension of time to file an Answer (R. 83); it filed the Answer and a Counterclaim on September 8, 1992, and served discovery (R. 86, 103). On October 14, 1992, the Clerk set his Motion to Dismiss and Motion for More Definite Statement for November 24, 1992 hearing.

On October 29, 1992, the Florida Supreme Court adopted Rule 2.051, Fla. R. Jud. Adm., 608 So. 2d 472 (the "Rule"). Entitled "Public Access to Judicial Records", the Rule governs "public access to the records of the judicial branch of government and its agencies." Paragraph (a)(8) describes confidential records, including, inter alia,

> All court records presently deemed to be confidential by court rule, ... by Florida Statutes, by prior case law of the State of Florida...

MIS created a software program, using different vendor programs, to implement the capability of producing computer tapes (the "New Tapes") which would be in ASCII and which would not

contain any confidential matter.[12] (R. 141, 163). The Clerk decided not to expend additional nonrecoverable public resources for EBCDIC conversion.

The Clerk advised Times' counsel of the Clerk's actions in mid-November (R. 141) and inquired whether the Times would be interested in purchasing the New Tapes. On January 8, 1993, Times' counsel asked what information would be available on them, what information the Clerk alleged was confidential, and what the charges would be. (R. 163).

By letter dated January 20, 1993, the Clerk advised the Times of the legal basis for the estimated charges and inquired again whether the Times wanted to purchase the New Tapes or still insisted on copies of the Backup Tapes themselves. (R. 163). By letter dated February 1, 1993, the Clerk provided written confirmation about what information would be on the New Tapes. (R. 175). By letter dated February 10, 1993, the Clerk sought a response. (R. 184). The Clerk finally noticed a status conference which was held on March 23, 1993. (R. 127).

There, Clerk counsel advised the Court that Rule 2.051 had answered Count I in the negative. (T. 4). Clerk counsel also advised that (1) at nonrecoverable public expense, MIS had created a software program and had implemented the capability of producing copies of the New Tapes without confidential matter; (2) if the

---

[12]These tapes could not also serve as Backup Tapes. Charges for the New Tapes would be MIS standard rates which were conceptually consistent with the cost methodology of "extensive use" under Section 119.07(1)(b), Fla. Stat.

Times withdrew its original request for copies of the Backup Tapes themselves, Counts II - V of the Complaint would not need to be litigated but that if the Times still insisted on the Backup Tapes themselves, litigation was still necessary (T. 5); and (3) the Clerk did not know if the Times still wanted copies of the Cards. (T. 6).

Times' counsel advised the trial court that it (1) did not insist on receiving copies of the Backup Tapes themselves, (2) would not withdraw its request for the Cards, (3) wished to litigate the reasonableness of the charges for the New Tapes, and (4) would file a motion for attorney's fees and costs. (T. 6, 8).

The Consent Order Following Case Status Conference reflected the Times' decisions, describing pending issues as:

> 1. whether the Clerk should produce "the bond estreature cards that are part of sealed or expunged court files" (original Count VI);
>
> 2. the reasonableness of the Clerk's charges for a copy of the New Tapes; and
>
> 3. the Times' request for attorney's fees and costs. (R. 133).

On April 20, 1993, the Times advised the Clerk that it no longer objected to the charges for the New Tapes[13], and withdrew its request for the Cards. (R. 136).

---

[13]The parties "reached agreement" about the "proposed" service charge only in the sense that the Times paid standard MIS rates. (R. 141, 163).

The only "issue" now was the Times' motion for attorney's fees and costs. The trial court had never ruled on any issues raised by the Complaint or by the Counterclaim.

On April 20, 1993, the Times moved to postpone Final Hearing scheduled for April 22, 1993 (R. 129). At Final Hearing on May 18, 1993, the parties presented legal argument based on one deposition[14] filed by the Times; no other evidence was introduced or other witnesses heard. (T. 18).

The Court denied the Times' motion for attorney's fees and costs, ruling that the Clerk had not acted unlawfully under Fla. Stat. Section 119.12. (R. 373).

Notwithstanding the Times' repeated assertions that it received all the records requested, the record is absolutely clear that the Clerk did not make copies of the Backup Tapes, did not convert them to be readable by the Times' IBM computer, and did not produce copies of the sealed or expunged bond estreature cards.

D. The Appellate Proceedings Below

The Times appealed two issues, the Clerk's standing to bring the declaratory judgment action and the denial of the Times' motion for attorney's fees and costs. The Second District affirmed the trial court decision, doing so on the ground that the judicial branch is not subject to Chapter 119, citing Locke v. Hawkes, 595 So.2d 32 (Fla. 1992) and Johnson v. State, 336 So.2d 93 (Fla 1976). The Court noted the Clerk's dual role as both an Article V officer

[14]Three Clerk employees were deposed on October 7, 1992; the deposition filed was that of Hughey F. McLeod, MIS Chief Deputy Clerk.

and an Article VIII officer and held that Chapter 119 does not apply to judicial records or the clerk in his capacity as the court's record keeper. The Second District did not address the standing issue because it said the issue was not properly before the court.

The Times filed a Motion for Rehearing, for Rehearing En Banc, and for Certification of Questions of Great Public Importance, proposing three certified questions. The Clerk agreed the case raised questions of great importance and proposed two, more narrowly drawn, questions.

The Second District granted the Times' motion for rehearing only to clarify that the certified question was limited to "court records" maintained by the Clerk.

SUMMARY OF ARGUMENT

> Certified Question: Are the court records maintained by the Clerk of the Circuit Court subject to the inspection and copying requirements of Chapter 119 of the Florida Statutes?

The Times never responds to the certified question. Instead, it asks the Court to change the certified question to delete the reference to court records and then argues alternatively:

1. The "computerized records"[15] are not court records but Clerk records; the Clerk is an "agency" subject to Chapter 119; and he acted unlawfully; or

2. The "computerized records" are judicial records subject to public inspection under Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and

[15]The Times does not discuss the Cards.

Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

1. The Probate Backup Tapes are court records. The definition of "judicial records" includes records "in the custody of the Clerk," "created by an entity within the judicial branch," "made pursuant to court rule, law or ordinance," and "in connection with the transaction of official business by any court or court agency."[16] Rule 2.051 clarified public access to judicial records. If court records were already subject to Chapter 119, Rule 2.051 was unnecessary. The Second District limited the certified question to "court records." The Section 119.011 definition of "agency" does not include the judicial branch. Because Chapter 119 does not apply, the Times has no basis for attorney's fees.

The standard for appellate review is that the appellant must establish either (1) the trial court was clearly erroneous in its ruling or (2) there was no basis in the record to support its ruling. The trial court ruled that the Clerk did not unlawfully withhold public records under Chapter 119 and denied the motion for fees. The Times failed to meet the standard necessary to reverse the trial court's finding.

Facts supporting the trial court's finding are: (1) the Clerk's understandable doubt whether Chapter 119 applied to court records following Locke; (2) Rule 2.051 confirmed that Chapter 119 did not apply to court records; the Second District so held; (3)

---

[16]In Re: Amendments to Rule of Judicial Administration 2.051, Case No. 83,927 (Fla. October 14, 1994) ("Rule 2.051 Proposed Amendments").

the Backup Tapes are not designed for copying; (4) court orders required the Clerk to keep the Cards confidential; (5) the law does not require the Clerk to convert the Backup Tapes to suit the Times' needs, Seigle v. Barry, 422 So.2d 63 (Fla. 4th DCA 1982); (6) the Times withdrew two of its original requests; (7) delays in the litigation were attributable to the Times; and (8) the court never heard argument on Counts II-VI.

2. The cases cited by the Times in its alternative argument, Miami Herald and Barron, provide no guidance on the technical complexities of producing the Backup Tapes; do not authorize disclosure of the Cards; nor do they provide a legal basis for attorney's fees. The Times never explains what the basis is for its claim for fees if court records are not subject to Chapter 119.

The Times says public officials do not have standing to bring declaratory actions especially with respect to "records" issues. Case law does not support that statement. Actions must present a "present controversy" for adjudication, and the public official cannot be questioning the validity or wisdom of a clear statutory duty. The present controversy here was whether the Clerk had the authority to produce the Backup Tapes and the Cards as the Times insisted; the Clerk had declined to produce them and explained his legal rationale. Therefore, the trial court distinguished Askew v. City of Ocala, 348 So. 2d 308 (Fla. 1977). (T. 99).

The Clerk did not challenge the validity or wisdom of a clear statutory duty. He had doubt about Chapter 119's applicability to court records. Given the Clerk's duty to maintain the integrity of

court records, he had doubt whether he was required to disclose confidential data processing software which would make it easier for case data in the System to be altered or destroyed. (R. 296, 297). He also had doubt whether, under Seigle, he was required to convert the Backup Tapes to suit the Times' specific needs. (R. 13). He had doubt whether "non-public information" could be redacted from "sealed or expunged" court records as the Times insisted. Therefore, the trial court distinguished Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981) and Graham v. Swift, 480 So. 2d 124 (Fla. 3rd DCA 1985). (T. 99).

The Times says again it received the Backup Tapes and the Cards; however, it cannot refute the record.

"Counsel for the Times advised the Court that the Times did not insist on receiving the backup tapes themselves." (Consent Order, R. 133). "The Times withdraws its request that the Clerk produce copies of bond estreature cards that are part of sealed or expunged court files." (Stipulation, R. 136).

ARGUMENT

The Times never answers the certified question. It spends most of its brief arguing why the Clerk should have produced the Backup Tapes and claiming that it received the original records it requested, rather than presenting legal argument on the certified question. The Times must first overcome the Second District's holding that Chapter 119 does not apply to court records which removes the only basis for attorney's fees and costs. The Times

must then overcome two trial court findings: (1) the Clerk had standing and (2) the Clerk did not act unlawfully under Chapter 119.

The Times says the question certified by the Second District does not take into account the "actual records involved in this case -- the electronic dockets created by the Clerk ... ." This description (1) was not presented to either court below, (2) was not the subject of any finding by the trial court; (3) is not supported by the record; and (4) is inaccurate.

The Times implies the Legislature thought up "dockets", requires clerks of circuit court to maintain electronic dockets citing Chapter 28, and that these are separate "clerk" records[17], not court records.[18] Section 28.211 does require the Clerk to keep a progress docket, but no statute or Rule requires him to use computers.

The Times argues public policy prohibits the Clerk from filing a declaratory action against the Times and not reimbursing the Times for its attorney's fees when the Clerk ultimately provided the records it requested. The Times' argument is fallacious because public officials have standing if they meet the requirements of May v. Holly, 59 So.2d 636 (Fla. 1952); the record is clear that the Clerk did not unlawfully withhold public records

---

[17]See f.n. 1 in the Times' Comments on Rule 2.051 Proposed Amendments.

[18]Rules 2.050, 2.060, 2.075, and 2.080, Jud. Adm. (which govern circuit and county courts and their clerks). Cf. Rules 2.030 and 2.040, Jud. Adm., which require appellate clerks to maintain electronic dockets.

and will not provide the records requested unless directed to do so by a court; and therefore, the Times should not be reimbursed for its fees.

I. Were the Disputed Backup Tapes and estreature cards open to public inspection and copying?

The Times makes two arguments:

> 1. The records at issue were not judicial branch records but Chapter 119 records and the Clerk's response was unlawful (Times' Brief, pp. 12-17); and
>
> 2. The records are judicial branch records and the Clerk's response was unlawful (Times' Brief, pp. 17-21).

The Times first argues the records at issue are the Clerk's electronic dockets[19], not court records. The Times has no record cite to support its description. The trial court never ruled on this issue because the Times never argued about the actual content of the Backup Tapes or that they were "just dockets".[20] This new[21] argument is contrary to the facts, the law, the record and its recent arguments to this court in the Times' Comments to Rule 2.051 Proposed Amendments. Under the holding of Perkins v. Scott, 554 So.2d 1220 (Fla. 2d DCA 1990), this court should not consider such

---

[19]The Times does not discuss whether the Cards are court records.

[20]At Final Hearing, the Times did argue the Legislature has control over the Clerk, citing Chapter 28.

[21]The Times does not cite to Section 28.211 until its Motion for Rehearing.

a new contention. The certified question identifies the records at issue as "court records."

Contrary to what the Times argues in its Brief now, in its Comments on Rule 2.051 Proposed Amendments, it argued the court should amend the proposed definition of "judicial records" in Rule 2.051 to clarify that it includes the very "electronic dockets" it argues here are not judicial records. Id., p. 3.

The Times argues the Clerk is a local constitutional officer as provided in Article VIII and subject to legislative control. It quotes Locke

> the definition [of agency] applies particularly to those entities over which the legislature has some means of legislative control ... Id. at 37.

Since the legislature requires Clerks to keep dockets in Chapter 28, the Times, without analysis, summarily concludes the "clerk" falls within the Section 119.011(2) definition of "agency", thereby subjecting these records maintained by the Clerk to Chapter 119. (See Times Brief, p. 14).

The Times now ignores that the Clerk is an Article V officer.[22] In its Comments to Rule 2.051 Proposed Amendments, the Times admits the Clerk is within the judicial branch. The Times admits the Clerk's dual role in its Answer and Motion for Reassignment of Case.

> The Clerk is both a court officer, pursuant to Article V ... and an officer of the County pursuant to Article VIII, ... [R]ecords of the Clerk ... as an officer of the County are

[22]See Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977).

> subject to Chapter 119 ... and ... court records are subject to the Court's authority ... (R. 105).

Thus, the court records maintained by the Clerk as an Article V officer are subject to judicial authority. The court has the inherent and exclusive constitutional authority over its agencies. Corbin v. State ex rel Slaughter, 324 So. 2d 203 (Fla. 1st DCA 1975).

The Clerk's Complaint cited Locke which held that Chapter 119 did not apply to the Legislature, thereby raising doubts as to whether it applied to the judicial branch. The House of Representatives argued that the plain language of Chapter 119 showed it was not intended to apply to the legislative branch and that the phrase "created or established by law" in the Section 119.011 definition of "agency" no more applied to the legislature than to the judiciary. Id. at 35.

This Court held that

> Section 119.011's definition of 'agency' does not, by its terms, include the legislature or its members. In common usage, 'agency' is not understood to include a basic branch of government ... We find that, if the legislature and its members were intended to be covered, it would have said so. *Expressio unius est exclusio alterius*. 'Where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. Id. at 36.

In common usage, then, "agency" should not be understood to include the judicial branch of government.[23] Locke, as understood by the Second District, means that Chapter 119 does not apply to the judicial branch or its records either. This confirmed the reasonableness of Count I of the Clerk's Complaint.

Both the legislature and the judiciary govern the Clerk's duties with respect to court records. Parties may seek to close presumptively open court records. Barron. It is not the Clerk who establishes the status of records as either "public" or "confidential." The Clerk is a ministerial officer carrying out legislative or judicial directives.

The Times' alternative argument is that if the computer backup tapes are court records, then

> This court's decisions in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) (as to civil court records) and Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) (as to criminal court records) clearly hold all court records are presumed open to the public unless sealed by court order upon specific findings meeting the tests set forth in those cases. (emphasis added) Brief at p. 17.

This is precisely why the Clerk declined to produce copies of the Cards.

Barron recognizes that the law has established many exceptions. The Court said:

> While a strong presumption of openness in judicial proceedings exists, the law has

---

[23]The legislature has included the judicial branch within some definitions of "agency." See Fla. Stat. Section 112.312(2). In other definitions, it has not. See Fla. Stat., Section 120.52(1).

> established numerous exceptions to protect competing interests. Barron, p. 117.
>
> ... Florida, as a matter of public policy, has expressly made certain civil proceedings confidential (adoptions, §63.162, Fla. Stat. (1987); paternity, §742.031, Fla. Stat. (1987); juvenile proceedings, §39.09 and 39.408, Fla. Stat. (1987). Id., p. 119.

In this case, the Times had access to all open court files not otherwise already confidential by law.

Barron did not deal with the issues here, a request for copies of disaster recovery backup tapes containing data processing software, security measures, proprietary file structures, and confidential court case data which could not be deleted, and for the tapes to be converted to suit the Times' needs. Barron does not discuss computers, confidential records, a records custodian's legal duty to convert, or attorney's fees and costs. Miami Herald, dealing with closure of criminal court proceedings to protect a defendant's right to a fair trial, is not on point.

The Times says the Clerk produced copies of computer tapes of the Probate database with confidential data processing software and confidential data "masked". The Times wanted copies of the Backup Tapes converted so that the Times' IBM computer could read them. Clerk MIS staff created new software to implement the capability of producing HP compatible tapes which were then available to the public. If the tapes were "maskings" of the Backup Tapes requested by the Times, it took the Times a long time to withdraw its request for the Backup Tapes themselves and decide to purchase the New

Tapes. The Backup Tapes have not and will not be made available in the absence of a court order.

The Times implies the Clerk used Rule 2.051 as a pretext to do what he should have done in March, 1992. From March, 1992 to October 29, 1992, the only case or Attorney General Opinion that provided any guidance with regard to the circumstances faced by the Clerk was Seigle. Under Seigle, records custodian have discretionary authority to perform specialized programming, or a court may require a records custodian to do so after fact-finding. The Clerk declined to perform specialized programming and sought guidance in accordance with Seigle. No court rulings about the Backup Tapes had been made before adoption of the Rule.

In adopting the Rule[24], the Supreme Court said:

> The amendments to the Florida Rules of Judicial Administration are, in part, designed to clarify the rules on public access to the records of the judicial branch of government and its agencies.

The Rule clarified that (1) "court records" are judicial records, not Chapter 119 records; (2) the Clerk in his Article V role as a judicial officer; and (3) the Rule governs access to judicial records on all media.

If the judicial branch were an "agency" within the meaning of Chapter 119 and subject to Chapter 119, then there was no need for Rule 2.051. Chapter 119 must have been inapplicable to the judicial branch and its records. The Clerk's doubt that the

---

[24]The Rule was promulgated pursuant to Article V, Section 2; it would govern even if the constitutional amendment had not been approved.

judicial branch and its records were within the Section 119.011(2) definition of "agency" proved not only reasonable, but correct.

The Times says the Clerk produced the Criminal Tapes before adoption of the Rule. As discussed earlier[25], the Criminal Tapes were produced for copying shortly after the Complaint was filed, without specialized programming and without a court order.

The Times says that the Rule's definition of "judicial records" tracks that of "public records" in Chapter 119, concluding that the electronic dockets are certainly subject to inspection and copying under this rule.[26] The definitions are similar; however, Rule 2.051's definition expressly mentions the judicial branch, court records, court rule, and the Clerk. Chapter 119 expressly does not.

A copy of the Backup Tapes still cannot be produced because it is impossible to delete the data processing software, security measures and confidential court case data from them and have a copy be meaningful; moreover, Seigle does not impose an absolute rule permitting access.

The Times says it is ironical that the Clerk suggested Chapter 119 did not apply to the Backup Tapes yet he asserted Chapter 119 sensitive software exemptions and relied on Section 119.085 to implement the Public Access Network. The Clerk had doubts about the applicability of Chapter 119 to court records

---

[25]See earlier discussion, page 10.

[26]We agree, though this argument seems to contradict the Times' argument in the Summary on page 10, and pages 13 and 14.

and security concerns about providing the proprietary file structure, whether they were court records or Chapter 119 records. If the Court had ruled Chapter 119 applied to the Backup Tapes, security concerns would still exist.

The Times concludes by arguing that the amendment and Rule 2.051 leave no doubt that the Clerk never should have filed the Complaint. The amendment and the Rule confirm that Chapter 119 does not apply to the judicial branch. Neither the amendment nor the Rule address whether the Clerk had to reveal the proprietary file structure, had to reformat to suit the Times' computer, and had to produce sealed or expunged estreature cards.

A. All computer records are not public, any more than all paper records are public.

The Times' entire argument in this section assumes Chapter 119 applies to judicial records. Because judicial records are subject to Rule 2.051, not Chapter 119, the cases and Attorney General Opinions cited by the Times are not on point.

The Times alleges the Clerk exploited technology to keep the Backup Tapes confidential as if the Clerk had an improper motive in preserving the security of all records, protecting confidential records as required by law, and using modern software.[27] The Times cites attorney general opinions to prove information on magnetic tape is public. That data is on magnetic tape does not necessarily mean the data is public any more than that information is on paper

[27]Times' counsel had praised the Clerk for his commitment to public access to public records. (R. 173).

necessarily means the information is public. Content, not form, is determinative. Barron.

Backup tapes are prepared to "perpetuate knowledge" not for public access, as the Times argues, but for the limited purpose of restoring the online System. Because of their nature, purpose and content, they cannot be produced, nor can they be purged of their confidential matter.

The Times cites Seigle arguing that the Clerk's selection of software meant he was legally obligated to convert the Backup Tapes to make them readable by the Times' different software, especially since the Times "offered" to pay the costs. Seigle held

> 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. Id. at 66-67.

In this case, the Clerk declined to do the specialized programming requested by the Times. The Clerk, aware of Seigle

(R. 7), sought a court determination whether specialized programming was required. Even if the court had required the Clerk to convert the Backup Tapes from one ANSI standard format to another, the Clerk's actions would still not have been per se unlawful. The trial court never ruled whether conversion was required because the Times withdrew its request.

The Times says the Backup Tapes are in "Swahili" and "in code" because the Times' IBM computer cannot read HP tapes. (R. 13, 106). The record shows they are not in code, they are in an ANSI standard format. The Clerk was not and still is not under any legal duty to perform conversion which would have required additional specialized programming even after the New Tapes were prepared.

The problem is not the HP software that the Clerk selected. Even if the Clerk fortuitously used IBM compatible database management software, the Clerk still could not have copied the Backup Tapes because they still would have contained confidential data processing software, security measures and confidential court case data.[28]

The Times alleges the Clerk created "an entire records system" without providing public access. The Times cites no case in support of its claim that the Constitution or common law require access to the Backup Tapes. Public access to these court records is provided through the court files themselves, computer screens, hard copy reports, and the Public Access Network. Had the Times

---

[28]R. 305, 332.

not withdrawn its request for the Backup Tapes, this issue would still be in dispute.

B. The Clerk was not required to produce the Backup Tapes themselves.

The Times says the "questions of what an agency must do when asked for copies of computerized records infused with sensitive software already had been answered when the Clerk filed suit." The Times cites Sections 119.07(2)(a), 119.07(3)(q), 119.085, Op. Att'y. Gen. Fla. 84-3 and 91-74, and Seigle in support.

The Times' argument focuses on Chapter 119. However, it argued in its Brief at page 20 that the Backup Tapes are governed by Rule 2.051. It argued they were judicial records in its Comments to Rule 2.051 Proposed Amendments.[29]

The Backup Tapes contain data processing software, security measures, and the proprietary file structure that organizes the data. The security measures cannot be deleted from the Backup Tapes. Thus, the law was not clear whether the Clerk was obligated to produce the Backup Tapes which contain the proprietary file structure.

Seigle says a records custodian may decline to do specialized programming; however, a court may require a records custodian to do so when other exceptional circumstances warrant a special remedy. The Clerk acted lawfully in declining to produce the Backup Tapes and in seeking judicial guidance.

---

[29]See footnote 17.

The Times says the Clerk was instituting "a remote electronic access system [the Public Access Network] to make the computerized records at issue available for public inspection" and that he was converting his records to the Network to avoid the Times' request.

The argument is incorrect and misleading. Section 119.085 permits remote electronic access as an additional means of inspection and copying. The Clerk has never suggested that the Public Access Network is the only means of access to court records. The Clerk questioned whether he was required to expedite adding Probate court case data to the Network if the court found specialized programming was not required under Seigle.

The Public Access Network manifests the Clerk's intent to promote public access by using public resources judiciously. The "records at issue" were copies of the Backup Tapes and the Cards. The online Systems are the source of data for the Network. The Online System does not provide "access" to data processing software, security measures or proprietary file structures, although it uses them. The Clerk instituted the Network to provide the public an additional means of obtaining information.

The Times argues the Clerk produced the Criminal Tapes and did not claim its software was sensitive or exempt. He did not because the Criminal tapes are in a flat file format, do not contain sensitive software and therefore could be copied, after deletion of confidential cases and data[30], without specialized programming.

---

[30]See Rule 3.140(l).

II. Public Officials Have Standing to Bring Declaratory Actions.

The Second District said the Times' standing issue was not properly before it, because the parties "settled"[31] all issues except the Times' demand for attorneys fees. The Times argues that this court should consider the standing issue because it is capable of repetition, yet evading review. The Clerk agrees but objects to the conclusory statements that it did "obtain the data it had requested" and that the records were "divulged mid-litigation." Public officials need to know whether they can file declaratory actions.

The Times cites Askew v. City of Ocala, 348 So. 2d 308 (Fla. 1977) for the proposition that declaratory judgment actions filed by public officials seeking guidance as to their statutory duties fail to state justiciable controversies. That is not the holding of Askew. Askew requires that a "present controversy" be presented for adjudication, one of the requisite elements in every declaratory action, as set out in May v. Holly, 59 So.2d 636 (Fla. 1952).

In Askew, the Ocala City Council had met privately with its attorney to discuss pending litigation. The State Attorney warned the Council such private meetings violated the Sunshine Law, and though he would not prosecute prior violations he would prosecute

---

[31]The issues were "settled" because the Times withdrew its requests for the Backup Tapes and the Cards and decided to pay the standard MIS charges for the New Tapes. Those issues no longer required judicial resolution. If the Times had not withdrawn its requests for the Backup Tapes, Counts II through V would still have been in dispute, as the Clerk explicitly stated at the Case Status Conference. (T. 5).

the Council if it met privately with its attorney again. The Council filed a declaratory action asking whether it would be violating the Sunshine Law if it did meet privately in the future.

The Florida Supreme Court held the Council lacked standing because there was no pending dispute between the parties; the threat of a future controversy does not meet the "present controversy" requirement.

> The courts have no power to entertain a declaratory judgment action which involves no present controversy as to the violation of the Statute and where the judgment sought will not constitute a binding adjudication of the rights of the parties. ... [T]he absence of a present controversy is fatal to a declaratory action seeking to adjudicate possible violations of a law. Id at 310.

The fact that the plaintiff was a public official was irrelevant in Askew. Nor does Askew mean public officials never have standing to bring declaratory actions; it means a public official who does so must present a "present controversy" for adjudication.[32]

There was an actual, present dispute between the Clerk and the Times. The Times had not just said it would or might make requests for the Backup Tapes and Cards; it had delivered written requests. The Clerk had declined to produce them. The trial court held the Clerk met the "present controversy" distinguishing Askew. (T. 99).

---

[32]Robinson v. Town of Palm Beach Shores, 388 So.2d 314 (Fla 4th DCA 1980), did not involve a public official. Robinson was given a warning for violating an ordinance; he filed a declaratory action challenging the ordinance. The action was dismissed because there was no present controversy, only the possibility of a future citation. Robinson had no present adverse interest.

The Clerk's Memorandum of Law in Opposition to Motion to Dismiss stated that if the Times agreed that the Clerk had fulfilled his lawful responsibilities by producing all public records and by protecting confidential records, then there would be no dispute and the Clerk would dismiss his Complaint. (R. 74). The Times not only declined to withdraw its requests for the Backup Tapes and the Cards, but after its motion was denied, it filed a Counterclaim requesting the Backup Tapes and the Cards. (R. 86).

Public officials cannot challenge the constitutionality or wisdom of a statute, but public officials may present controversies regarding statutory duties or obligations. The Clerk did not challenge the constitutionality or wisdom of Chapter 119; Count I sought a determination as to whether courts are "agencies" under Chapter 119 and whether Chapter 119 applied to the court records in question.[33]

The Times cites Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981) for the proposition that public officials do not have standing to bring a declaratory judgment action to question a law they are duty bound to obey. Markham is distinguishable because the facts of this case do not "mirror" the facts in Markham, as the Times contends. The Fourth District found Markham had standing. Dept. of Revenue v. Markham, 381 So.2d 1101 (Fla. 1st DCA 1979). Judge Ervin dissented and focused on the issue raised. He said

---

[33]The Times does not address standing with respect to the other five issues in the Complaint.

> the tax assessor here does not claim that DOR's rule is unclear concerning his duties. Instead he disagrees with DOR's construction of the Statute under which the rule was promulgated, arguing the Statute's economic merits.

Markham thought the cost of collecting the taxes in question exceeded the potential revenues and argued against the Department of Revenue's rule. He did not allege his duties under the Rule were unclear or that he was in doubt whether the Rule applied to him.

The Florida Supreme Court expressly agreed with the dissenting analysis:

> For important policy reasons, courts have developed special rules concerning the standing of governmental officials to bring a declaratory judgment action questioning a law those officials are duty bound to apply. As a general rule, a public official may only seek a declaratory judgment when he is "willing to perform his duties, but ... [sic] prevented from doing so by others." Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy ... Id. at 1121.

Markham prohibits public officials from filing declaratory judgment actions challenging clear statutory duties because the public official disagrees with the wisdom or cost-benefit analysis of such duties. Public officials may not question a law they are duty bound to apply.

In this case, the Clerk alleged that following the Florida Supreme Court's opinion in Locke v. Hawkes, 16 F.L.W. S176 (Fla. 1991), opinion vacated and substituted, 595 So. 2d 32 (Fla. 1992), he was unclear whether Chapter 119 applied to court records in his

custody. Locke held that the legislative branch was not an "agency" within the meaning of Section 119.011(2), and thus Chapter 119 did not apply to its records. Based on the reasoning of Locke, it was unclear whether Chapter 119 applied to the judicial branch and its records and to the Clerk maintaining court records.

The Times' description of the other issues raised by the Complaint is misleading. The Clerk was in doubt as to his obligation to divulge the confidential data processing software on the Backup Tapes, to perform conversion from one standard format to another to suit the Times' private needs, and to provide any information from the Cards in sealed or expunged court cases.

The leading case on the requirements of standing for declaratory judgment actions is May. The requirements are:

> Before any proceeding for declaratory relief should be entertained, it should be clearly made to appear that there is a bona fide, actual present practical need for the declaration; that the declaration should deal with a present ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual present adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the Court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the

> constitutional powers of the courts. Id. at 639.

In "X" Corporation v. "Y" Person, 622 So.2d 1098 (Fla. 2d DCA 1993), the Second District applied the May requirements in a declaratory action brought by public officials. "X" Corporation, now publicly identified as the City of Longboat Key, filed a declaratory judgment action against one of its employees alleging doubt as to its duties under Fla. Stat., Section 760.50 (1991) which prohibits discrimination by an employer on the basis of AIDS. The Second District upheld standing:

> the Declaratory Judgment Act should be liberally construed. ... Upon a motion to dismiss based on insufficiency to state a cause of action for declaratory relief, all well pleaded allegations must be taken as true. ... [T]he plaintiff must show a bona fide, actual, present, and practical need for the declaration [citing May]. The object of the instant action is to resolve the uncertainty of [the City's] duty to "Y" person under section 760.50. Id. at 1100, 1101.

Just as the City had standing to resolve the uncertainty of its duties to "Y" Person under Section 760.50, all of the Clerk's well pleaded allegations must be taken as true, and showed a present need to resolve the uncertainty of his duties to the Times concerning court records. See also Alsop v. Pierce, 19 So.2d 799 (Fla. 1944).

Numerous Florida cases involve declaratory judgment actions brought by public officials seeking determinations of their obligations and duties.[34]

The Times says public policy should prohibit public officials from being able to file declaratory actions, especially on public records issues. It argues that providing access to records is part of the job of the Clerk, as though the Clerk's duties to safeguard court records and to preserve the confidentiality of records which are not public are "lesser" duties.

If the Legislature had wanted to prohibit public officials from filing declaratory actions on any issue, it could have done so in Fla. Stat. Ch. 86; it has not done so. Chapter 86 allows "any person" to bring a declaratory action; it does not exclude public officials from that definition. No court case holds that public officials are generally prohibited from filing declaratory judgment actions. The "sword and shield" argument of the Times at page 38 of its Brief alleging that a "war chest of tax dollars" is available to fund such actions ignores the presumption of good faith of public officials and this Plaintiff.[35] The Clerk has no taxing authority like the Legislature or a county. The Legislature determines what services are to be provided and what public

---

[34] See also Florida Department of Education v. Glasser, 622 So.2d 944 (Fla. 1993); Alachua County v. Powers, 351 So.2d 32 (Fla. 1977); Branca v. City of Miramar, 602 So.2d 1374 (Fla. 4th DCA 1992) reversed on other grounds 634 So. 2d 604 (Fla. 1994); and City of Hollywood v. Florida Power and Light Company, 624 So.2d 285 (Fla. 4th DCA 1993); Alsop.

[35] Alsop, "X" Corporation.

entities may charge for such services. This Clerk has no interest in pursuing or prolonging any litigation other than that which is absolutely necessary to faithfully discharge his legal duties.

There is no "sword" that the Times will be liable for the Clerk's attorney's fees and costs, and there is no way for the Clerk to recover the lost opportunities noted in Seigle. Id. at p. 66. The Times took five months to decide it would withdraw its Backup Tapes request and purchase the New Tapes and one year to withdraw its request for the Cards.

Requesters have a remedy for the unlawful denial of access to records which are public if the public official or agency is governed by Chapter 119. Section 119.12 authorizes the award of attorney's fees and costs to enforce a right of access if a court rules that an agency unlawfully refused to permit access to public records. The Times withdrew its requests. The trial court ruled that the Clerk did not act unlawfully under that Section.

The Times at page 39 of its Brief argues that if Chapter 119 did not apply because the Clerk was a "judicial officer" and the records sought were "judicial records," then "those records were subject to public inspection" under the First Amendment to the United States Constitution and Florida common law, citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735 (1986), Barron, and Miami Herald.[36]

The issue raised by the Motion to Dismiss and in this portion of the brief is standing. Press-Enterprise, Barron, and Miami

---

[36]See earlier discussion, page 22.

Herald have nothing to do with whether public officials have met the May requirements and therefore may bring declaratory judgment actions. Press-Enterprise addressed whether the public and the press had the right to be present at California criminal preliminary hearings; Barron addressed whether Dempsey Barron's civil divorce proceedings should be sealed in the first place; Miami Herald addressed whether a trial court in a criminal proceeding could exclude the public and press from a pre-trial suppression hearing.

These cases all deal with access to court records or proceedings conducted by the judiciary, not with the May requirements of standing or the Clerk's legal duties as court records custodian. They do not address the complexities of database management software with respect to the Backup Tapes. They do not provide the Clerk with authority to unseal or unexpunge sealed or expunged court records.

The judiciary and the legislature determine which records are public or confidential. The Clerk should not substitute his judgment for that of the judiciary or the legislature. The Clerk properly presented the disagreement over the Times' rights and the Clerk's obligations about access to these court records to a court.

The Times argues the Clerk could not have any doubt about how to respond to the Times' requests; Chapter 119 requires the Clerk to redact, produce and state exemptions. The argument assumes Chapter 119 applies to court records. The very fact that the Times argues in the alternative, i.e. if Chapter 119 does or does not

apply, suggests the Clerk's doubt was reasonable. The Florida Supreme Court's adoption of Rule 2.051 and the Second District Court of Appeal opinion confirm the Clerk's doubt.

In sum, the holdings of Alsop and "X" Corporation unequivocally provide that public officials in Florida have standing to bring declaratory actions with respect to their statutory duties as long as there is a present controversy and as long as they are not challenging the validity or wisdom of clear statutory duties. The allegations of the Complaint, which must be taken as true for purposes of a motion to dismiss, Alsop, meet both requirements. No law required the Clerk to seek an attorney general opinion; indeed, Seigle suggested otherwise. The issues raised affected government records custodians using computers and potentially any judicial entity maintaining court records.

III. The Times is Not Entitled to Attorney's Fees.

First, it claims the Clerk is within the definition of "agency" in Section 119.011(2), meaning Section 119.12 applies, and the Clerk acted unlawfully in not producing the Backup Tapes and the Cards. The Times alternatively argues the Clerk is a judicial officer and should have produced them pursuant to Press-Enterprise, Miami Herald, and Barron.

The Backup Tapes and the Cards are judicial records. All the data on the Backup Tapes was extracted from documents filed in court cases. The Backup Tapes are prepared to support the operation of the courts. They fall expressly within the definition of "judicial records" in Rule 2.051. They are "created by [an]

entity within the judicial branch", the Clerk in his Article V role as record keeper for circuit and county courts. They are "made ... pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency."[37]

Locke held that the legislative branch and its records are not subject to Chapter 119; neither is the judicial branch or its records. The Clerk as an Article V officer maintaining judicial records does not fall within the Section 119.011(2) "agency" definition. If this were not true, the Florida Supreme Court did not need to adopt Rule 2.051. See Johnson v. State, 336 So.2d 93 (Fla. 1976). Therefore, Section 119.12 is not applicable and there is no basis for an award of attorney's fees and costs to the Times in this case.

Even if Chapter 119 applied to the Backup Tapes and the Cards, the Times is not entitled to fees unless the Clerk has acted "unlawfully."[38] The trial court expressly ruled that the Clerk did not act unlawfully under Section 119.12.

---

[37]The Backup Tapes contain judicial records, including docket information, historically maintained by clerks of circuit court. They were made pursuant to "law" in connection with the transaction of court business.

[38]Section 119.12 was amended in 1984 to change the standard for an award of fees from "unreasonable" to "unlawful". Section 119.07(3)(n), relating only to a claim of work product exemption, authorizes an award of attorney's fees when an agency has "improperly" withheld public records. The Times carried a greater burden at the trial court to show the Clerk's actions were "unlawful" as contrasted with "unreasonable" or "improper". See e.g. Smith & Williams, P.A. v. West Coast Regional Water Supply Authority, 640 So. 2d 216 (Fla. 2d DCA 1994).

The Florida Supreme Court in The New York Times v. PHH Mental Health Services, 616 So.2d 27 (Fla. 1993), held there can be no award of fees without a finding that the records custodian acted unlawfully under Chapter 119. The Times quotes from PHH as follows:

> The purpose of the statute is served in decisions like Brunson v. Dade County School Board, 525 So. 2d 933 (Fla. 3d DCA 1988) and News & Sun-Sentinel Co. v. School Board, 517 So. 2d 743 (Fla. 4th DCA 1987) in which a unit of government that unquestionably meets the statutory definition of an agency refuses to allow the inspection of its records. (emphasis supplied)

The Court continued:

> ... to the extent that either Brunson or Sun Sentinel would permit the award of attorney's fees under Section 119.12(1) without a determination that a refusal was unlawful, we disapprove those cases. Id. at 30.

PHH involved the question of whether a private entity acting on behalf of a public agency is responsible for attorney's fees under Section 119.12,

> when that entity reasonably and in good faith denies a Chapter 119 request to inspect records because the private entity's status as an agency under the meaning of Chapter 119 is unclear. We find that under such circumstances the private entity's denial of the request does not constitute an unlawful refusal under Section 119.12(1) and an award of attorney's fees is not appropriate. (emphasis added)

The Florida Supreme Court held

> If it is unclear whether an entity is an agency within the meaning of Chapter 119, it is not unlawful for that entity to refuse access to its records. Conversely, refusal by

> an entity that is clearly an agency within the meaning of Chapter 119 will always constitute unlawful refusal. (emphasis supplied)

This Court noted (1) statutory and case law were vague as to when a private entity acts on behalf of an agency, (2) PHH's uncertainty was reasonable and understandable, and (3) PHH quickly filed a declaratory judgment action as to its obligations under Chapter 119.

The PHH factors were present in this case. Locke, issued in the month preceding the Times' written requests, raised the question as to whether the Clerk, acting as an Article V records custodian for the courts, was an "agency" within the meaning of Chapter 119; this was reasonable and understandable in light of this Court's holding that the legislative branch was not an "agency" subject to Chapter 119. Given the Second District's holding in this case, the Clerk is not "unquestionably" an "agency." Just as in PHH, the Clerk quickly filed a declaratory action to determine his obligations. Under PHH and Alsop, he did not act unlawfully.[39]

The Times does not address the standard for appellate review. In Helman v. Seaboard Coast Line Railroad Co., 349 So. 2d 1187 (Fla. 1977), this Court held that "it is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the [trial court]". See also Taylor Creek

---

[39]The Times again alleges it received the records piecemeal over the litigation. That is not true. See discussion at p. 17. Wisner v. City of Tampa Police Department, 601 So.2d 296 (Fla. 2d DCA 1992) is not applicable.

Village Association v. Houghton, 349 So. 2d 1219 (Fla. 3rd DCA 1977).

The burden is on the Times to establish that either (1) the trial court's rulings were clearly erroneous or (2) the trial court had no basis in the record to support its ruling that the Clerk acted lawfully. The Times' conclusory statements unsupported by the record, the facts, and the law with respect to these records, are inadequate to overcome the presumption of correctness of the trial court's rulings. The record clearly provided a basis for the trial court to reach the findings it did. Therefore, even if the court concludes that (1) these were not court records and (2) the Clerk is within the definition of "agency", the Times has not met its burden to overcome the presumption of correctness and the trial court's ruling should be affirmed.

The Times' alternative argument is that the Clerk is liable for attorney's fees because he is a judicial officer and should have produced the Backup Tapes and the Cards. The Times cites Press-Enterprise, Miami Herald and Barron. None of those cases deal with the complex issues presented here. None of those cases provide a basis for an award of attorney's fees.

IV. Copying Charges.

The Times perceives possible "disastrous consequences" if the Court's answer to the certified question is in the affirmative. [sic] (Times' Brief at pp. 20-21). The Court has an opportunity to clarify what has recently been an unsettled area of the law.

The Times alleges Clerks will be freed from the

> "reasonable [sic] service charges provision ... [citing to 119.07(1)(a)] ... of not more than $.15 per one-sided copy of a public record ...[40]

The Record does not contain discussion of "paper" copying charges. The Record does reflect that the Times decided not to contest the reasonableness of the Clerk's charges for the New Tapes. (R. 136). The charges for copying judicial records were provided long before Chapter 119 was enacted. The statutory history demonstrates that the charges apply to Article V records.

A. Duties. The clerks of circuit courts ("clerks") have long been Article V officers within the judicial branch.[41] The Clerk is elected in each county and serves as:

> (1) Clerk of the Circuit Court; (also serves as clerk of the county court, except in counties where criminal courts exist); ("clerk of court");
>
> (2) Clerk of the Board of County Commissioners ("clerk of board");
>
> (3) Recorder; and
>
> (4) ex officio Auditor of the County.[42]

County officers are to keep their "official books and records" at the county seat.[43]

His basic duty, as both clerk of court and as recorder, was to "keep all papers filed in his office with the utmost care and

---

[40]"Reasonable" does not appear in the cited sentence.

[41]See Article V, Section 15, Fla. Const., (1885). It names officers to be elected in each county.

[42]Id.

[43]Article XVI, Section 4, Fla. Const., (1885).

security, arranged in appropriate files ... and ... each description shall be kept on file with other papers of the same class ...[44]

His duties as clerk of court have historically been set out in one section; his duties as recorder in another.[45]

B. Funding. Clerks have been considered "fee" officers because the fees collected for performing duties as clerk of court and as recorder[46] were the sole source of funding those functions (hereinafter "fee schedule").

The concept that parties instituting actions should pay a "flat filing fee" for "all services by clerk of court in civil actions, suits, or proceedings" had been introduced by 1969.[47] This "flat fee" combined some of the duties (and associated fees) performed in every civil proceeding which had previously been listed in the "fee schedule".

The Clerk was still a "fee" officer relying on "filing fees" and the fee schedule as the sole source of funding for his clerk of court and recorder duties.[48] The language in the relevant sections

---

[44]See 1906, Gen. Stat., Section 1830; 1971, Fla. Stat., Section 28.13; and 1993, Fla. Stat., Section 28.13.

[45]For clerk of court, see 1906, Fla. Stat., Section 1831 and 1969, Fla. Stat., Section 28.21. For recorder, see 1906, Fla. Stat. Section 1832 and 1969, Fla. Stat., Section 28.22.

[46]See 1906, Fla. Stat., Section 1839 and 1969, Fla. Stat., Section 28.24.

[47]See 1969, Fla. Stat., Section 28.241.

[48]See Section 1969, Fla. Stat., 28.24(1), and the express language both in Section 28.24(2) and 28.241(5).

expressly indicate that his duty to copy "records and papers" was not included in the "flat filing fee" and still applied to his duties as clerk of court and as recorder.

Funding sources for the Clerk as an Article V officer and an Article VIII officer are found in Section 218.35, Fla. Stat., which states:

> (2) The clerk of the circuit court, functioning in his capacity as clerk of the circuit and county courts and as clerk of the board of county commissioners, shall prepare his budget in two parts:
>
> (a) The budget relating to the state courts system, including recording, which shall be filed with the State Courts Administrator as well as with the board of county commissioners; and
>
> (b) The budget relating to the requirements of the clerk as clerk of the board of county commissioners, county auditor, and custodian or treasurer of all county funds and other county-related duties.[49] (emphasis supplied).

The Legislature eventually placed many provisions governing the clerks of circuit court in Chapter 28. His duties as an Article V officer, as recorder, and as an Article VIII officer are described in this Chapter[50], as are the fee schedule and "filing fee" sections.

General duties and the corresponding fees as clerk of court and as recorder are in Section 28.24 as they were in the

---

[49]Section 218.35, Fla. Stat., 1993. The board provided the clerk compensation earlier, 1927 Fla. Stat., Section 48.68. The Legislature does so today. Section 145.051, Fla. Stat. (1993).

[50]See, e.g., Sections 28.212, 28.222, and 28.33.

forerunners of Section 28.24.[51] These duties included "copying" "records or papers." There can be no doubt that "copying" refers both to "records of courts" maintained as clerk of court and to "record books" maintained as recorder.

Thus, provisions of Section 28.24[52] that mandate fees for services, such as certifying copies or copying records or papers, apply to the clerk as clerk of court and as recorder.[53] The duty of the clerk, as clerk of court or recorder, to copy and to charge a fee were law before the enactment of the Florida Public Records Law in 1909.

In sum, if the court answers the certified question in the negative, clerks have and should continue to rely on Chapter 28, specifically Section 28.24, for "copying" records as clerk of court, i.e. copying court records.

Should the Legislature determine that the duties or corresponding fees are inappropriate, the Legislature may amend Section 28.24 or other provisions of Chapter 28 accordingly.

CONCLUSION

The Clerk requests the Court to:

1. Reaffirm well-settled doctrine that public officials have standing to bring declaratory actions if they meet the requirements

---

[51]See footnote 47 of our Brief.

[52]See 28.24(5), (8), (9), and (10), all referring to "public records." Note that some services apply only to the clerk of court, e.g. (1), (2), and (30), and some apply only to the clerk as recorder, e.g. (14), (15), and (26).

[53]Cf. Sections 28.231, 25.241 and 35.22, Fla. Stat. (1993).

of May, present a "present controversy", and do not challenge clear statutory duties, even as to records issues.

2. Answer the Certified Question in the negative. Court records are not subject to Chapter 119. The definition of "agency" does not include the judicial branch, nor does it include the Clerk maintaining court records as an Article V officer. Judicial records, including court records, are subject to Rule 2.051.

3. Clarify that Section 28.24 applies to services performed by clerks of the circuit court as Article V officers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and true and correct copy of the Appellee's Answer Brief has been furnished by regular U. S. Mail to ALISON M. STEELE, ESQUIRE, Rahdert & Anderson, 535 Central Avenue, St. Petersburg, Florida 33701, this 9th day of December, 1994.

Leslie E. Joughin, III
Florida Bar No. 339385
McWhirter, Reeves, McGlothlin,
Davidson & Bakas, P.A.
100 North Tampa Street, Suite 2800
Post Office Box 3350
Tampa, Florida 33601-3350
(813) 224-0866
Attorneys for Respondent