IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs. Case No. 84,513

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

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
OF FLORIDA

PETITIONER'S INITIAL BRIEF

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INTRODUCTION

Petitioner Times Publishing Company has invoked this Court's jurisdiction based on a question certified by the Second District Court of Appeal of Florida as one of great public importance. This case centers on the proper course of action to be taken by a public official who is presented with a request to inspect and copy records in his custody.[1]

STATEMENT OF THE CASE AND FACTS

The litigation below began when the Times requested the Clerk's cooperation, pursuant to Chapter 119 of the Florida Statutes (commonly known as the Florida Public Records Act), in its inspection and copying of certain records created and maintained by the Clerk's office. The records were not court files. The content of the records was, for the most part, docket information concerning criminal and probate division cases in the Thirteenth Judicial Circuit. The majority of the records were contained on magnetic computer tape.

A. The Requests for Records.

On or about March 12, 1992, the Times staff writer Bob Port delivered to the Clerk three written requests to inspect and copy certain records prepared and maintained by his office for the most

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[1]The Times Publishing Company, publisher of the St. Petersburg Times, and its Tampa edition, The Times, is referred to in this Brief as "the Times." Respondent Richard Ake, Clerk of the Circuit Court of Hillsborough County, Florida, is referred to herein as "the Clerk." "R. __" designates a reference to the Record on Appeal. "T. __" designates a reference to transcripts of hearing within the Record on Appeal, which are indexed separately from the other Record papers.

part on computer-readable magnetic tape. (R. 12-19). The first request sought:

> the electronic records which comprise [the Clerk's] probate, guardianship, trust and mental health database [,including] all records, all tables and all files from this database for all the years since it was created.

(R. 12-14).[2] The Times informed the Clerk that it desired to inspect and copy the records by obtaining a "data dump" of the raw data comprising the records into a portable computer with a nine-track magnetic tape drive. As the Times explained in its request, an employee of the Clerk's office had previously informed the Times that the records were stored in a "proprietary," "non-standard" and "unique" format. Accordingly, the Times requested that the records be "reformatted," using the Clerk's Hewlett Packard "utility package," into a standard computer format readable by the Times and general public. (The Times believed the "utility package" had been purchased by the Clerk along with the software which had created the record-storage format in the first place.) The Times agreed to pay a "reasonable, pre-determined charge for this service," and specifically excluded from its request the data processing software and security codes. (R.13).

The Times' second request to inspect records sought:

> [the Clerk's] magnetic tapes containing the most recent computer back-up of all files that comprise the Hillsborough County Criminal Justice Information System

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[2]These records became commonly referred to by the parties as "the Probate Database."

since the system was established in August 1988, but not records of earlier systems. (R. 15-16). The request specifically exempted from its scope the records of outstanding capiases, made confidential by an order of the Thirteenth Judicial Circuit's Chief Judge. (R. 15).

The Hillsborough County Criminal Justice Information System was created a number of years ago using a computer program originated by other counties' clerks of court which was not copyrighted or proprietary. A relatively simple computer program, the Criminal Justice System program organized its data using a "flat file structure," meaning the data is organized and sorted within the computer program by case, each case having its own file within the program, (not unlike the way files are stored in folders in a file cabinet, each file containing all the information relating to a specific case). It is different from the computer program utilized for the other database the Times requested, the "Probate Database."

The computer program used by the Clerk in creating the Probate Database was created by Hewlett Packard. The program was a newer, more sophisticated software technology, which stored its data by category, for example, "judges," or "attorneys." When the program was asked to bring forth the docket information concerning a particular case, the program would cause the computer to reach into each category of information (judges, case numbers, attorneys, styles, etc.) and pull out the data relating to that case.

Prior to the Times requests for "data dumps," the Clerk

created computer programs for the extraction of information in the forms requested by various branches of Hillsborough County's government, but had a policy against doing so for members of the public.

The Times' third request of March 12, 1992, was for certain bond estreature cards kept by the Clerk's criminal division. The request specifically sought in redacted form only, those cards which the Clerk was withholding in their entirety based on a sealing or expunction order entered by the court in the particular criminal case involved. The Times simply requested that the Clerk excise from the cards the information deemed exempt by the Clerk and deliver the remainder of the cards to the Times. (R. 17-19). The number of records called for by this request was minuscule, none were computerized, and they have never been of central concern in this case. This case centers on the computerized criminal and probate databases.

B. The Clerk's Response.

Instead of supplying the records requested or informing the Times what charges he would seek for providing the data, the Clerk responded to the Times' requests by suing the Times. Filed on March 20, 1992, the Clerk's Complaint for Declaratory Judgment sought a judicial pronouncement of the Clerk's obligations under the Florida Public Records Act. (R.1-19). In six counts, alleging he was "in doubt" about his duties under Chapter 119, the Clerk sought judicial direction concerning:

> - whether Chapter 119 applied to the Clerk of Court given this Court's opinion in Locke v.

Hawkes, 595 So.2d 32 (Fla. 1992);

- whether the Clerk was "required" to supply the "proprietary file structure" organizing the raw data contained in the computer tapes;[3]

- whether the Clerk must "reformat" his computer-tape contained data at the Times' request, and whether he must accelerate the completion date of his then-ongoing project to reformat the data so it could be read and used by the general public, instead of just the Clerk;

- whether the Times "had agreed" to pay the "full expense" of this "reformatting" and whether the Clerk was required to reassign his employees to this project in order to accomplish it;[4]

- whether the Clerk was "authorized" to convert his computer data using his personnel and equipment and to permit the Times to use "public" space and electricity to obtain the data;

- whether raw data stored by the Clerk on magnetic computer tape is a "public record" within the terms of Chapter 119;

- whether the Clerk was "authorized" to produce bond estreature cards which related to court records that had been sealed or expunged pursuant to section 943.058, Fla. Stat. (1991).[5]

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[3]The "proprietary file structure" had not been requested. (R. 12-17).

[4]The Times had already agreed to pay a reasonable, pre-determined charge (R. 12-17), but the Clerk never indicated any amount before filing suit.

[5]In March 1992, shortly after filing the Complaint for Declaratory Judgment, the Clerk provided to the Times, at no charge the 11 volumes of magnetic computer tapes comprising the criminal justice database. (T-44; R. 265-67; R.288-290). Nevertheless, the Clerk neither withdrew any portion of his Complaint nor informed the court that he had resolved any of the "doubts" asserted in his complaint as grounds for relief, not even at the hearing on the Times' motion to dismiss, where the Times asserted there was no

C. The Ensuing Litigation

Citing, inter alia, Rule 2.050(b)(4) of the Florida Rules of Judicial Administration, the Times moved the court to request the Chief Judge of the Thirteenth Judicial Circuit to seek the Florida Supreme Court Chief Justice's transfer and reassignment of the case to a judge outside of the Thirteenth Circuit, in light of the Plaintiff-Clerk's responsibilities to the Thirteenth Judicial Circuit's judges, his on-going contact with them as a necessity of his job, and the Florida Bar Code of Judicial Conduct's admonitions against appearances of impropriety.[6] (R. 31-39). The Clerk opposed the motion and it was denied. (R. 42-47; 71).

The Times also moved to dismiss the Clerk's complaint on the ground that it failed to present a justiciable controversy, citing Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981), and Askew v. City of Ocala, 348 So.2d 308 (Fla 1977). (R. 20-30). The Clerk opposed the motion, and the motion was denied in an order rendered August 14, 1992. (R. 72-80; 81-82).

Thereafter the Times filed its Answer and Affirmative Defenses (R. 103-109) and its Counter-Complaint against the Clerk, asserting that the records at issue were subject to inspection under the

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justiciable controversy between the parties. (T. 18-68).

[6]Among the circumstances which may have given rise to appearances of impropriety or which may have disrupted collegial relations among the judges of the Thirteenth Judicial Circuit, the Times cited its multi-part series of news stories appearing in late 1991 and February 1992 focusing on Florida's sealing and expuction law and the judges of the Thirteenth Judicial Circuit and the responses engendered by that reporting. (R. 35, 38).

Florida Public Records Act, but that if for some reason, either the Clerk or the subject records were not governed by Chapter 119, then the records were judicial records which could only be withheld from public inspection based on a court order or orders consistent with Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988). (R. 86-102). The Clerk answered and discovery ensued.[7] (R. 110; 111-115; 116-119; 120-126).

On March 23, 1993, the trial court held a case management conference. (R. 127-128; 133-137). The Clerk advised the court that in his view, October 29, 1992 amendments to the Florida Rules of Judicial Administration "resolved the issues raised by Count I of [his] Complaint." (R. 133). In addition, the Clerk advised the Court that he had written a software program enabling him to make available to the Times and the public the computerized information contained in the Probate Database without revealing the "proprietary file structure and security information." (R. 133-34). At the conclusion of the status conference, the court entered its order reciting that the issues remaining for determination were (1) whether the Clerk "is authorized" to produce bond estreature cards that "are part of sealed or expunged court files"; (2) whether the Clerk was entitled to impose a service charge for producing the Probate Database, and if so, whether his proposed charge was "reasonable" pursuant to section 119.07(1)(b) of the

[7]The Clerk's Motion to Dismiss and Motion for More Definite Statement were never heard by the Court.

Florida Statutes; and (3) whether the Times was entitled to an award of attorney's fees. (R. 133-137).

Subsequently, the Times withdrew its request for disputed bond estreature cards and the parties reached agreement concerning the Clerk's proposed service charge. (R. 136-37). On May 18, 1993 the case proceeded to final hearing on the Times' request for attorneys' fees and costs pursuant to section 119.12 of the Florida Statutes (1991). (R. 138; T-18-68).

On June 17, 1993, the trial court rendered its order denying the Times' request, finding that "the Clerk's denial of the Times' request [for records] pursuant to ... Chapter 119 did not constitute an unlawful refusal under ... §119.12." (R. 373-374).

D. The appellate proceedings below.

On July 15, 1993, the Times filed its notice of appeal to the Second District Court of Appeal of Florida. (R. 375).[8]

On June 29, 1994, the Second District Court of Appeal issued its opinion[9] affirming the trial court's decision. The District Court reasoned that "the judiciary, as a co-equal branch of government, is not an 'agency' subject to the supervision or control by another co-equal branch of government" and, therefore, Chapter 119 did not apply to it. Slip Op. at 3. The court further stated: "The clerk, when acting in the exercise of his duties derived from article V [of the Florida Constitution], is acting as

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[8]The trial court entered its final order removing the case from "pending status" on July 15, 1993.

[9]Times Publishing Co. v. Ake, 19 Fla. L. Weekly D1407 (Fla. 2d DCA June 29, 1994).

an arm of the court and, as such, is immune from the supervisory authority of the legislature." Op. at 5. The court concluded that, "because chapter 119 does not apply to judicial records nor to the clerk of the circuit court in his capacity as the court's record keeper" the trial court did not err in denying the Times' request for attorneys' fees below. (Slip Op. at 1-2, 5).

On July 13, 1994, the Times filed its Motion for Rehearing, for Rehearing En Banc, and for Certification of Questions of Great Public Importance. Among other authorities, the Times pointed out Article I, section 24 of the Florida Constitution, which the district court did not appear to have considered in reaching its decision. In addition, the Times sought, inter alia, certification of the following questions:

> (a) Are the records maintained by the Clerk of Court subject to the inspection and copying requirements of Chapter 119 of the Florida Statutes?
>
> (b) Is a member of the public entitled to recover attorneys' fees pursuant to section 119.12 of the Florida Statutes (1993) when a public official institutes litigation pursuant to Chapter 119 and the member of the public ultimately obtains the records?
>
> (c) Does a public official of this State, such as the Clerk of Court, have standing to file a declaratory judgment action as a response to a request to inspect records by a member of the public?

The Clerk opposed the Motion. On September 23, 1994, the District Court filed its Opinion on Motion for Rehearing,[10] denying the

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

Times' motion in part, but granting it to certify the following question as one of great public importance:

> 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?

On October 7, 1994, the Times filed its Notice to Invoke the Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

At the time this litigation began, Article I, section 24 of the Florida Constitution had not been adopted and this Court had not promulgated Rule 2.051, Fla.R.Jud.Admin. However, neither the constitutional amendment nor Rule 2.051 established a new category of records subject to public inspection. Rather, they formalized and rendered less vulnerable to erosion Florida's long-standing policy of open government. In March 1992 -- as today -- the computerized records requested by the Times were and are either records of an agency subject to inspection and copying under Chapter 119 or were and are judicial records, and therefore subject to inspection and copying under the open records mandates of Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988). There was and is no third category into which the records could have fallen rendering them secret and exempt from disclosure to the public. In the face of only two categories of precedent to choose from, both of which rendered the computerized records at issue open and available to the public, the Clerk, whose duties by law are ministerial and not discretionary, sued the member of the

public who requested the records.

This Court should reframe the question certified by the Second District Court of Appeal to reflect the nature of the actual records at issue in this case -- computerized dockets created and maintained by the Clerk -- and should answer it affirmatively: such records are subject to Chapter 119.

However, if this Court holds that computerized dockets are judicial records not subject to inspection under Chapter 119, the Court should still examine the consequences of a public official's failure to permit inspection of records which are nevertheless open to the public. The Court should reaffirm its earlier decisions in Dep't. of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981), and Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977), and hold that a public official does not have standing to file a declaratory judgment action when presented with a citizen's request for access to records. The Court should also hold that in this case, because the Clerk filed his declaratory judgment action questioning the applicability of Chapter 119 and seeking to withhold the requested records based on exemptions from and interpretations of Chapter 119, and because the Times filed its countersuit and eventually obtained the records it requested, the Clerk should pay the Times attorneys' fees and costs pursuant to section 119.12, Fla. Stat. (1991).

ARGUMENT

The question framed by the district court below does not take into account the actual records involved in this case -- the

electronic dockets created by the Clerk of Court, which he is directed to create and maintain by Chapter 28 of the Florida Statutes. This case does not involve court files or access to court files, contrary to the certified question's implications.

This Court is respectfully requested to consider the actual records at issue below, the method the Clerk adopted for addressing a member of the public's requests for copies of the records, and the implications of endorsing a public policy permitting a government official to sue a citizen who has requested copies of government records and, then avoid reimbursing the citizen for the expenses of the litigation when the official ultimately furnishes the records requested.

I. The Clerk's dockets were properly open to public inspection and copying when the Times requested them, and the Clerk was not entitled to withhold them.

The principle that citizens in a self-governing, democratic society should have access to the records and proceedings of its courts and the other branches of government has long been endorsed and protected by this Court. The principle finds expression and protection in history and tradition,[11] in the First Amendment to the United States Constitution,[12] in the long-standing common law of

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[11] See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814 (1980).

[12] Press-Enterprise Co. v. Superior Court, 478 U.S. 1,10 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613 (1982).

this State,[13] and in Florida's century-old Sunshine Laws.[14]

Of course, citizens' access to court files and courtroom proceedings has long been protected from legislative or other abridgment in Florida by the principles enunciated in such cases as State ex rel. Miami Herald Publishing Co. v. McIntosh, Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982), and Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988). These cases make clear that before access to court records or proceedings is denied, there must be a specific order meeting the terms of a three-part test, which the proponent of closure must satisfy.

Were court files -- indictments, pleadings, motions, orders and the like -- at issue in this case, the discussion would end with these principles. However, the records at issue below were not court files and did not fall within the definition of "court records" existing in the court rules in effect in March 1992. See Rule 2.075, Fla.R.Jud.Admin. ("the contents of the court file, depositions filed with the clerk, transcripts, exhibits in the custody of the clerk, and electronic, video tape and stenographic tapes of depositions or other proceedings").[15] In fact, the records at issue were those the legislature had directed the Clerk to

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[13]State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976), and cases cited therein.

[14]Chapters 119 and 286 of the Florida Statutes.

[15]The rule did not and does not address public access to the records, but instead the clerk of court's retention and destruction of the records.

create and maintain. See section 28.211, Fla. Stat. (1991)(Clerk of Court to keep docket and index).[16]

As this Court has recognized,[17]

> "It is the policy of this state that all state, county and municipal records shall at all times be open for personal inspection by any person."

Section 119.01, Fla. Stat. (1991). The term "public records" as defined by the Legislature, means:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, 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.

Section 119.011(1), Fla. Stat. (1991). The persons and entities who must comply with Chapter 119 are:

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Section 119.011(2), Fla. Stat. (1991).

The Clerk clearly falls within this definition. The first question apparent then, when the Clerk was asked to produce his electronic dockets, was whether the records were "court records,"

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[16]Although the statutory direction to the Clerk was long-existing, advances in technology over the decades have enabled the Clerk to create and maintain the records using computers and magnetic tape.

[17]See In re Amendments to the Florida Rules of Judicial Administration, 608 So.2d 472 n.1 (Fla. 1992).

and therefore subject to this Court's long-standing rules on access, or whether they were records the Clerk created and maintained as an administrative official of the county, and therefore subject to Chapter 119. The question was not, as the Clerk tried to frame it below, whether he had to produce the records at all.

However, the Clerk overlooked or ignored the access-to-court-records authorities entirely by framing Count I of his complaint to invoke the "separation of powers doctrine" as a reason Chapter 119 was not applicable to him, suggesting he did not have to furnish any records. In Count I, the Clerk alleged he was "uncertain" whether he was required to produce the requested records in light of Locke v. Hawkes, 595 So.2d 32 (Fla. 1992).

As defined by this Court, the questions presented in Locke were:

> First, does the separation of powers doctrine of the Florida Constitution prohibit the judicial branch [of government] from construing chapter 119 to apply to the legislature, and second, was chapter 119 intended to apply to the legislature and its members?

595 So.2d at 36. This Court answered "no" to both questions. Obviously, neither question addressed the Clerk. Moreover, as this Court explained:

> [the] separation of powers provision was not intended to apply to local government entities and officials, such as those identified in articles VIII and IX [of the Florida Constitution] and controlled in part by legislative acts. ... We find that the

> definition of agency in section 119.011, while not intended to apply to the legislature, was intended to apply to executive branch agencies and their officers; the definition applies particularly to those entities over which the legislature has some means of legislative control, including counties, municipalities, and school boards, and state agencies, bureaus, and commissions, and private business entities working for any of these public entities and officials.

Id. at 36-37 (emphasis added).

Locke placed the Clerk squarely within the group of government officials subject to Chapter 119. The only other alternative was that the records were subject to inspection under Lewis and Barron. Thus, Locke could not have created legitimate "doubts" about whether the records requested by the Times were subject to inspection and copying. The true basis for the Clerk's lawsuit had to lie elsewhere, as the "question presented" by the Clerk in Count I of the Clerk's lawsuit -- "Are Courts Chapter 119 Agencies?" -- overlooked entirely the fact that the Clerk, a local government officer provided for by Article VIII of the constitution, is not a "court" and that even if the records requested were "court records" they were subject to inspection and copying.

The district court below took much the same tack in framing the question it certified to this Court. However, because access to court records and proceedings is founded on the federal constitution's First Amendment, is presumed, and is subject to abridgment only on satisfaction of a three-part constitutional test, a state statute standing alone could no more declare court records open than it could declare court records closed. The issue

in this case is not whether judicial records are subject to Chapter 119, but whether the Clerk properly refused to permit inspection and copying of his electronic dockets based on the existence of Chapter 119 and various exemptions to it and Attorney General Opinions interpreting it.

Even if the Clerk were a "court," and even if the computer-contained records at issued were deemed "court records," instead of records of the Clerk of or the County, the Clerk's response to the Times' request still was neither justified nor lawful. The Clerk stated in Count I, "The Clerk is in doubt as to whether he should produce the Court's records to the Times if Chapter 119 is inapplicable to the Courts, absent an Order Authorizing him to do so." See Complaint, paragraph 19 (R. 4). He alleged, inter alia, he was "in doubt as to whether he should produce" the records requested, and "in doubt as to whether he is required by law to supply electronic file structures" of the Probate database (when, in fact, the Times' request specifically stated it was not requesting such material). (R.13)(emphasis added). The well established law of this State is exactly to the contrary of the proposition advanced by the Clerk. 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 that 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. Accordingly, in absence of a court

order sealing the records requested, the Clerk's obligation was to produce them to the Times.[18]

Since March 1992, there have been additions to and amplifications of Florida access law which this Court should keep in mind in addressing this case. Specifically, in November 1992, Floridians amended the Florida Constitution to include a substantive right of access to government records and limitations on the adoption of exceptions to the general rule of openness. Pursuant to the Amendment, all judicial records are open to inspection except those specifically exempted by court rule in effect on the date of the adoption of the amendment.

Accordingly, on October 29, 1992,[19] this Court adopted new Florida Rule of Judicial Administration 2.051, providing that the public "shall have access to all records of the judicial branch of

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[18]The Court should ignore entirely the Clerk's allegations in his complaint below that the Times intends to maintain a database of records paralleling the Clerk's database, that the Times intends to sell "information services" for "private gain," and that the Times intends to "go into the information system business." Complaint paragraph 17, 35 (R. 4, 8). The intent of a person who requests records is irrelevant and immaterial to any obligation of the records custodian, even if the intent of the requestor is to resell the records to the public. Davis v. McMillan, 38 So. 666 (Fla. 1905)(use to be made of copies of public records irrelevant to whether right to inspect and copy exists); Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So.2d 695 (Fla. 1985)("The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to obtain access to government records. The purpose for such inquiry is immaterial"); Warden v. Bennett, 340 So.2d 977 (Fla. 2d DCA 1977)(requestor need not show special interest or "proper motive" to exercise rights); Op. Atty. Gen. Fla. 91-61 (city's concern that information supplied on computer disk could be altered is irrelevant).

[19]608 So.2d 472 (Fla. 1992).

government and its agencies except" ten categories of records, none of which are implicated in this case. Justice Overton wrote a concurring opinion upon the adoption of this rule, emphasizing,

> (1) there is no change regarding the presumption of openness of court records, as set forth in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988); and (2) the judicial branches administrative documents, including personnel and finance records, are being treated the same as similar records in the executive and legislative branches.

608 So.2d at 473.

Only upon adoption of the constitutional amendment and this rule did the Clerk in this case take steps to produce magnetic tapes of the Probate Database with confidential portions (including data processing software, security codes and proprietary file structure, never requested by the Times in any event) masked. See Clerk's Brief at 7-8. But the constitutional amendment did not specifically address electronic dockets, nor did any portion of Rule 2.051. And this Court made clear in adopting Rule 2.051 that it was not effecting changes in the traditional principles of access to judicial records. Nevertheless, in order to escape the consequences of having sued the Times over its records requests, the Clerk in this case relied on the new rule to state that the law had become clear to him.

The Clerk's change of heart concerning the Times' request for the Criminal Justice System Database occurred well before the constitutional amendment and the adoption of Rule 2.051, Fla.R.Jud.Admin. The Clerk's change of heart concerning the

Probate database occurred after the adoption of the amendment and the Rule, but nearly two years before this Court adopted the current version of Rule 2.051, which includes a definition of "judicial records." See In re Amendments to Rule of Judicial Administration 2.051, Case No. 83-927 (Fla. October 14, 1994). The definition tracks that of "public records" contained in Chapter 119:

> 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.

Slip Op. at 3. Whether or not the Clerk's electronic dockets are subject to Chapter 119, they are certainly subject to inspection and copying under this rule.

The irony of all of this is that, while suggesting that Chapter 119 does not apply to his records, the Clerk at the same time asserted exemptions from Chapter 119 as reasons why he could not produce the records when they were requested, notably, the exemption for "sensitive" software, and relied on another of the provisions of Chapter 119 as authorization to create his Remote Electronic Public Access System for the electronic dockets at issue in this case. Moreover, the Clerks of Court around the state are watching this case closely because they believe this Court's affirmative answer to the Second District's certified question will

free them from the "reasonable service charges" provision of Chapter 119 (see section 119.07(1)(a), Fla. Stat. (1993)), authorizing a fee of not more than $.15 per one-sided copy of a public record (with some exceptions), and will permit them to charge $1.00 per page for all records in their custody pursuant to section 28.24(8)(a) of the Florida Statutes (enacted by Ch. 94-348, section 1, Laws of Florida).[20] Accordingly, this Court should consider the possible disastrous consequences to the citizens of this State of addressing this case as the District Court has framed it.

In sum, the Second District Court's certified question should be reframed to reflect the actual records involved in this case -- not court files, but the Clerk's dockets, which the Legislature directed him to keep in Chapter 28 of the Florida Statutes. Such records were subject either to Chapter 119 or to Barron and Lewis and were thus open and available for copying in March 1992, and the Clerk below should have furnished them to the Times without a lawsuit. Since March 1992, the amendments to the Florida Constitution and the Rules of Judicial Administration leave no doubt that the electronic records requested should have been made available to the Times.

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[20]The Clerks of Pinellas County and Palm Beach County are currently involved in trial court level litigation instituted by citizens who have objected to the across-the-board $1.00 per page charge for all clerk's office records, not just "instruments," to which the section 28.24 charge applies by the terms of the statute. The Clerks' decisions to charge the inflated amount are in spite of the Florida Attorney General's opinion that the $1.00 per page charge only applies to "instruments." See Op. Atty. Gen. Fla. 94-60 (1994).

A. Court decisions and Attorney General Opinions support the view that the Clerk's computerized records were open to the public at the time the Clerk filed suit in this case.

This Court has cited various provisions of Chapter 119 and its exemptions as expressions of the public policy of this State on many occasions. Moreover, the Clerk himself sought to rely on Attorney General Opinions interpreting Chapter 119 and exemptions from Chapter 119 to withhold records and to justify "doubts" about his duties with regard to the records the Times requested, it is useful to examine the body of law interpreting Chapter 119 to discern the public policy at issue in this case.

The case law and opinions of the Attorney General of the State of Florida have long treated government records contained on computer disk or tape the same as those kept on paper. The Clerk should not have been permitted to exploit advancing technology for the purpose of withholding copies of electronically kept records.

In Chapter 119, the term "public records" is defined to mean:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, 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.

Section 119.011(1), Fla. Stat. (1991). This Court long ago amplified the definition as including:

> any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.

Shevin v. Byron, Harless, Schaffer, Reid & Asso., 379 So.2d 633,

640 (Fla. 1980). Clearly, the Clerk's magnetic tapes containing information from the computer databases maintained by his office fit this definition. Back-up tapes serving a data recovery function in the event of disaster or damage affecting the Clerk's computer system are obviously prepared in connection with official agency business and intended to perpetuate or formalize the knowledge contained on them.

As the Attorney General has observed, "The term 'public record' is not limited to traditional written documents. ... [A]s technology changes the means by which government agencies communicate, manage, and store information, public records will take on increasingly different forms. Yet, the comprehensive scope of the term 'public records' will continue to make the information open to inspection, unless exempted by law." Government in the Sunshine Manual, p. 75 (1993 ed.)

The Attorney General has long recognized that information in computers and on magnetic tape constitute public records. See Op. Att'y. Gen. Fla. 91-61 (city must provide copy of computer disk even though transcript of material on disk could be made available instead); Op. Att'y. Gen. Fla. 89-39 (Board of County Commissioners may use computer network in course of official business but information stored in computer would be public); Op. Att'y. Gen. Fla. 87-11 (county tax assessor's tax rolls on computer tape are public); Op. Att'y. Gen. Fla. 85-3 (Game and Freshwater Fish Commission's computer tapes containing magazine subscribers' names and addresses are available to public); Op. Att'y. Gen. Fla. 77-125

(records maintained in FDLE computer are public).

Thus, as these opinions indicate, data maintained by the government in computerized form on disks and magnetic tapes has been available for public inspection and copying for years, even if it has also been available from other sources or in other forms.

Courts in other states have likewise concluded that electronically stored information is subject to public access laws. Associated Tax Service v. Fitzpatrick, 372 S.E.2d 625 (Va. 1988)(agency required to furnish computer tape even though same information available on paper); Minnesota Medical Ass'n v. Minnesota, 274 N.W.2d 84 (Minn.1978)(fact that data was stored on computer tape rather than print out or microfiche irrelevant so long as the requestor pays cost); Menge v. City of Manchester, 311 A.2d 116 (N.H. 1973)(court ordered agency to provide information on computer tape even though it could be gathered from paper); Brownstone Publishers v. New York City Dept. of Buildings, 550 N.Y.S.2d 564 (N.Y. Sup. Ct. 1990)(court ordered City to provide computer tape instead of print-out as preferred by City).

Contrary to his suggestion in his Complaint (R. 9-10), the Clerk could not have relied on Florida Attorney General Opinion 85-87 to withhold his computer back-up tapes or computer databases and the opinion could not have created "doubts" concerning his responsibilities to allow the public to inspect and copy his records. In Op. Att'y Gen. Fla. 85-87, the Attorney General was addressing "machine readable intermediate files which are generated when a computer manipulates data" and which "may occasionally exist

for only a few seconds as magnetic code on the hard disk of a large computer installation or on the floppy disk of a personal computer or word processor and their contents are rarely if ever reviewed by any person." Op. Att'y. Gen. Fla. 85-87. The transitory nature of the intermediate files -- the fact that they were generated by the computer in the process of manipulating data and were not intended to perpetuate, communicate or formalize knowledge except within the data processing equipment itself -- renders them completely different from the magnetic tapes and databases at issue in this case.

In addition, the Clerk disregarded significant portions of the court's opinion in Seigle v. Barry, 422 So.2d 63 (Fla. 4th DCA 1982), in his quest to convince the trial court that he doubted his obligations to fulfill the Times' requests for electronic records. In Seigle, professional economists retained by the bargaining unit for employees of the Broward County School Board sought access to records contained on a School Board computer for the purpose of preparing for and engaging in collective bargaining negotiations with the School Board. However, the economists wanted the records in a particular format which none of the programs maintained by the School Board could provide. In deciding that the computer contained records were public records, the court examined the statutory definition of "public record" and stated:

> 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. 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.

Id. at 65.

Significant is the court's reasoning in rejecting the economists' argument that they were entitled to the information in a "special format." The court reasoned that if a health department maintains a chronological list of dog-bite incidents with rabies implications, the dog bite victim may not require the health department to reorder the list and furnish a record of incidents segregated by geographical areas. Such a requirement would result in tremendous expenditures purely for the purpose of "translating information readily and inexpensively available in one format into another format more suitable to the applicant's particular purposes. ... The intent [of the public records law] is [] to make available to the public information which is a matter of public record, in some meaningful form []." Id. at 66. This reasoning is significant because the Times' request for a "reordering" of the Clerk's computer-contained information -- if the Times' request can be classified as such -- was occasioned by the records custodian's choice of computer software, and his claim that the software itself was exempt from Chapter 119 and could not be copied. Thus, a copy of the data alone would have been useless and unintelligible. This problem was of the Clerk's own making. He simply failed to take into account his obligations to the public when he chose his software. He should have recognized, as had already been decided, that a custodian maintaining records in "code" cannot frustrate or

circumvent the right of inspection by withholding the "code book." State ex rel. Davidson v. Couch, 158 So. 103 (Fla. 1934).

A Michigan court addressing an analogous situation has reasoned:

> A public body should not be allowed to thwart legitimate uses of public information by releasing the information in a format difficult or expensive to use. ... Following that rationale would encourage a public body to meet its FOIA requests with the response that the actual public document or "writing" cannot be copied, but the agency will gladly produce the same "information" in a "less intrusive" form such as a foreign language, Morse Code, or hieroglyphics.

Kestenbaum v. Michigan State University, 414 Mich 510, 327 N.W.2d 783, 802 (1982).

The Seigle court held that 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 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, the records custodian can be required to provide access by means of a specially designed program.

These were the circumstances facing the Clerk when the Times asked to copy his criminal justice system and probate database back-up tapes. The second option provided by Seigle was clearly applicable to the Criminal Justice System database, which the Clerk claimed contained information subject to exemption from Chapter

119, but not "sensitive" software. Within days of filing his Complaint below, the Clerk created a program to redact the exempt information and permitted the Times to make copies of the Criminal Justice Database. The third option discussed in Seigle was clearly implicated by the Clerk's assertion of the "sensitive software" exemption from Chapter 119: if the data were copied without the software surrounding it and providing organization to it, the data would be an entirely random and meaningless collection of symbols and would not fairly represent the records requested.

The Times offered to provide the equipment and software needed to copy the databases, deleting material the Clerk claimed was exempt, or to pay for such copying to be done by another entity. This offer was fully in accord with the options under Seigle. (A person seeking to inspect records is not required to rely on the custodian for copying. See Op. Att'y. Gen. Fla. 88-26 (county contracted with private company to store microfilm of county records, and company would not permit requestor of records to perform copying; finding that records were subject to Chapter 119, Attorney General stated that company, as county's custodian designee, must permit requestor to copy microfilm under its supervision)). However, the Clerk simply sued the Times instead of permitting access to his records.

A custodian of records is not permitted to impose upon a requestor conditions, rules, or regulations which abridge or circumvent a person's right to inspect and copy the records. State ex rel. Davidson v. Couch, 156 So. 29 (Fla. 1934). This is because

the language directing a custodian to allow inspection and copying of public records "under reasonable conditions" refers not to conditions which must be fulfilled before inspection and copying is allowed, but to conditions which ensure the safety of the record but which do not constitute limitations designed to preclude the exercise of Chapter 119 rights. Wait v. Florida Power & Light Co., 372 So.2d 420, 425 (Fla. 1979). Here, the Clerk created at least one entire records system making absolutely no provision for fulfilling his obligations to permit public access, obligations that existed whether the records were subject to Chapter 119 or to the constitutional and common law access-to-court-records principles. Unfortunately, the Clerk was not amenable to any lawful solution to his self-created dilemma and instead precipitated litigation over it. The Clerk had put in place a records system that was not accessible to the public in any meaningful form. The Times offered to pay a pre-determined cost for having the Clerk's computerized records converted to a generally understandable format, and offered,as another alternative, a software program and equipment to be used under the Clerk's supervision to copy the records. However, instead of pursuing one of these options, the Clerk filed suit asking such questions as whether he could permit the Times to use electricity in the Clerk's office. All he had to do was comply with existing law. This unlawful decision should not be sanctioned by this Court.

B. The Clerk was obligated to produce all non-exempt portions of the records requested.

In his lawsuit, the Clerk asserted that the computer software used to store and manipulate the records of the Probate Database was "sensitive" and exempt from inspection and copying pursuant to section 119.07(3)(q), Fla. Stat. (1991).[21] The question 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 against the Times. The existence of this exemption or this concern on the part of the Clerk gave him no legitimate reason to doubt his obligations, given the law he was citing to support his case.

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[21]Section 119.07(3)(q), Fla. Stat. (1991), a part of the Florida Public Records Act, states in pertinent part:

> (q) Data processing software obtained by an agency under a licensing agreement which prohibits its disclosure and which software is a trade secret, as defined in s.812.081, and agency-produced data processing software which is sensitive are exempt from the [inspection and copying requirements]. The designation of agency-produced software as sensitive shall not prohibit an agency from sharing or exchanging such software with another public agency. As used in this paragraph:
> 1. "Data processing software" has the same meaning as in s.282.303(8).
> 2. "Sensitive" means only those portions of the data processing software, including specifications and documentation used to:
> a. Collect, process, store, and retrieve information
> b. Collect, process, sort, and retrieve financial management information of the agency, such as payroll and accounting records; or
> c. Control and direct access authorizations and security measures for automated systems.

Under Chapter 119, when a custodian claims that a portion of a record is exempt from the statute's requirements, he is obligated to redact the exempt portion and make the remainder of the record available for inspection and copying. See §119.07(2)(a), Fla. Stat. (1991); Op. Att'y Gen. Fla. 91-74 (exempt information must be excised and remainder of document disclosed); Cerabino v. Bludworth, Case No. CL-90-6594-AF (Fla. 15th Cir. Nov. 30, 1990)(where sheriff "inexplicably failed" to provide portions of public records for which no exemption asserted, he wrongfully refused to release public records and was assessed attorneys' fees and costs). In other words, by the express terms of the statute, the existence of exempt information in a record does not give the custodian authority to withhold the entire record, as the Clerk sought to do in this case. See also Seigle v. Barry, supra.

Moreover, at the time the Clerk filed suit against the Times, he was in the process of instituting a remote electronic access system to make the computerized records at issue available for public inspection. Remote Electronic access systems are specifically authorized by section 119.085, Fla. Stat. (1991), "as an additional means of inspecting, examining, and copying public records of the executive branch, judicial branch, or any political subdivision of the state" (emphasis added) (Prior to the enactment of section 119.085, custodians could not operate such systems because the law did not authorize the imposition of the concomitant service charges. See Op. Att'y Gen. Fla. 84-3.)

The language underlined above is obviously significant in this

case. The Clerk here sought to rely on his on-going efforts to convert his computerized records so that they could be inspected, examined and copied by remote electronic means as a shield of some sort against the Times' request to copy the records. However, the statute is clear that remote electronic access is an additional means of providing public access to government records. It cannot have been the exclusive means of complying at the time the Clerk filed suit and he should not be permitted to rely on his remote electronic access system project to avoid liability for refusing to allow copying of public records under reasonable conditions as the Times had requested.

The precipitousness of the Clerk's lawsuit is underscored by events subsequent to its filing. Months prior to the "change in the law" which the Clerk states resolved the doubts he had about his obligations to make his records accessible to the public, the Clerk made available to the Times copies of its Criminal Justice System database. (The Clerk referred to Rule 2.051, Fla.R.Jud.Admin., adopted October 29, 1992. See In re Amendments to the Florida Rules of Judicial Administration, 608 So.2d 472 (Fla. 1992)). The Clerk has never claimed that the software used in this system was "sensitive" and exempt from Chapter 119 or subject to some other confidentiality provision. See R. 222, 239. As the law required the Clerk to do, he simply wrote a program to excise or redact that substantive information he claimed was exempt from inspection and copying and permitted the Times to copy the magnetic tapes containing the database using its own equipment.

II. The trial court erred in denying the Times' Motion to Dismiss the Clerk's Complaint for Declaratory Judgment.

The Clerk's six-count Complaint for Declaratory Judgment, filed a mere eight days after the Times submitted written requests for certain records stored on magnetic computer tape, sought judicial advice and direction concerning his obligations under the Florida Public Records Act. This Court should address this issue because the trial court's decision to permit the Clerk's complaint to stand departs materially from this Court's prior opinions on the subject and because the issue whether a public official has standing to sue a citizen who has made a request under the Sunshine Laws is capable of repetition, yet evading review.

Although, in the course of the litigation, the Times did eventually obtain the data it had requested from the Clerk, and although the District Court said that the issue presented by the Times' Motion to Dismiss the Clerk's complaint was not properly before it, the Times specifically invoked the exception to the mootness doctrine exemplified in, inter alia, Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), quashing Tribune v. Cannella, 438 So.2d 516 (Fla. 2d DCA 1983). There, the Tribune had sought to inspect and copy government records, sparking state and federal court litigation between itself and the City of Tampa. The substantive issues in the case subsequently were decided by the appellate courts even though the City had already furnished the requested records.

As underscored by Cannella, the events in the instant case are capable of repetition yet evading review, especially given the lack of any adverse consequences to the public official who withholds government records in favor of self-initiated litigation. The Times could again request the Clerk to provide a "data dump" of his computerized dockets and could be subject to either a denial of access or another lawsuit, only to have the records finally divulged mid-litigation, the Clerk again relieved of any supervisory critique or responsibility for having failed to furnish the records initially. This Court has recognized the "capable of repetition, yet evading review" exception to the mootness doctrine as particularly applicable to cases involving requests for access to government records and proceedings. See State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976); WFTV, Inc. v. Robbins, 625 So.2d 941 (Fla. 4th DCA 1993)(reversing trial court order denying award of attorney's fees under §119.12, Fla. Stat.; amendment to court order unsealing court records did not render citizen's suit for access moot); Rea v. Sansbury, 504 So.2d 1315 (Fla. 4th DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987); Palm Beach Newspapers v. Cook, 434 So.2d 355 (Fla. 4th DCA 1983).

Declaratory judgment actions filed by public officials seeking judicial guidance as to the officials' duties under the Florida Statutes, and particularly Florida's Sunshine Laws, fail to state controversies justiciable by the courts of this State. In Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977), Ocala's elected city counsel filed a declaratory judgment action against Florida's

Governor and Attorney General and the local State Attorney, alleging -- like the Clerk in this case -- that it was in doubt about its "rights and obligations" under Florida's Open Meetings Law, section 286.011, Fla. Stat. (1975). Ocala's city council apparently had held private meetings with its attorney to discuss other litigation in which the city was a defendant. Upon learning of the secret meetings, the Marion County State Attorney advised the council that these secret meetings violated Chapter 286 and warned that future private meetings would result in criminal prosecution of those involved. The trial court dismissed the city council's complaint for declaratory relief.

Reversing the First District Court of Appeal's holding, this Court affirmed the trial court's order of dismissal, holding that the council lacked standing to bring an action for declaratory judgment because the threat of a controversy under Florida's Open Meetings Law does not rise to the level of a "present controversy" justiciable by the courts. This Court viewed the council's lawsuit -- indistinguishable in this respect from the Clerk's lawsuit in this case -- as nothing more than an attempt to obtain "judicial advice."

Citing Askew, this Court again upheld the dismissal of another public official's declaratory judgment action in Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981), reversing the First District Court of Appeal's decision to the contrary.[22] William Markham, as property appraiser for Broward County (later joined by

[22]381 S.2d. 1101 (Fla. 1st DCA 1979).

another appraiser), sued the Department of Revenue "seeking a declaratory judgment as to whether or not household goods and personal effects of nonresidents [were] subject to ad valorem taxation." 381 So.2d at 1103. Based on certain Attorney General opinions and provisions of the Florida Administrative Code, the property appraisers, like the Clerk in this case, "alleged uncertainty as to the existence or nonexistence of certain rights, status, immunities, power or privileges" concerning the taxability of household goods. Id.

The facts of Markham contained in the district court's opinion reflect an obvious parallel between Markham's suit and the Clerk's in this case. Markham's complaint for declaratory judgment raised "doubt concerning the Department of Revenue's failure to distribute forms for the purpose of making application for exemptions of household goods, if taxable"; "questioned whether Florida residents must annually apply for exemption of such goods"; raised "doubts concerning whether a return of such property is required to be filed by the taxpayer"; and questioned "whether property owned by a condominium association is entitled to exemption as to such property." 381 So.2d at 1103. Moreover, the central feature of the Clerk's and Markham's "doubts" -- insufficient to create standing in the judgment of this Court -- are exactly the same:

> In addition to the doubts and uncertainties created by the conflicting interpretations of the statutes, Markham's affidavit in support of his motion for summary judgment discloses another and most practical reason for his concern. That is, in order to properly assess the household goods and personal effects of nonresidents, Markham estimated the addition

> of approximately 12 people to his staff would be required, and he further determined that the estimated revenues to be received from taxation of such property of nonresidents would be far outweighed by the costs of administration and assessment.

Id.

Although a majority of the First District Court of Appeal had concluded summarily that the appraisers had standing to maintain the action for declaratory judgment, this Court disagreed, and explained:

> 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 ... 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 or provide an occasion to give an advisory opinion.

Markham, 396 So.2d at 1121 (citations omitted).

Mirroring the Clerk's allegations in this case -- inter alia that he was in doubt about whether Chapter 119 applied to him, whether he was required to reassign employees to reformat his computer-contained data so that the general public could have meaningful access to it, and whether he could permit the Times to use the electrical outlets and space in his office to copy the magnetic tapes -- the property appraiser "claimed to be in doubt as to the law, or unable to apply it, with respect to taxation of household goods." 396 So.2d at 1121. As the property appraiser was not, the Clerk here should not have been permitted to

manufacture standing out of his lack of a desire to go to the trouble of complying with the Times' request for access to his computer tapes or his inability to understand how he should logistically facilitate that access. When the trial court here ruled to the contrary, it departed without reason from Askew and Markham.

Moreover, the policies underlying Florida's open government laws and rules weigh entirely against permitting public officials to file declaratory judgment actions against citizens who seek to inspect government records. Easily, as in this case, such actions become swords in the hands of public officials who do not wish to be bothered by citizens or subject to the administrative inconvenience of providing information and records to citizens. Providing access to records is part of the job of the Clerk and other public officials. If sanctioned as an offensive weapon, declaratory judgment actions will become effective barriers to access, as few members of the public an afford to fight in court for their access rights when sued by a public official backed by an war chest of tax dollars. Conversion of laws enacted for the benefit of the public -- now elevated to state constitutional stature -- into shields for public officials who do not wish their offices and records scrutinized or copied would be the lamentable but obvious and unavoidable outcome were the trial court's decision in this case the law of Florida.

The Clerk's efforts to use his lawsuit in this fashion have been underscored by his arguments in this case. Below, the Clerk

emphasized the Times' "failure" to withdraw its requests for records (see, e.g., Clerks' Brief at 5, 18) as a ground in support of his own standing to sue, suggesting that if the Times would just withdraw its requests, the Times would not have to defend the Clerk's lawsuit. It would not have received the records, either. This Court should expressly disapprove of government officials' use of declaratory judgment actions to ward off requests for records in this fashion.

In sum, the allegations of the Clerk's complaint for declaratory judgment on their face, sought merely an advisory opinion from the court as to how the Clerk should go about the business of operating his office in compliance with Florida law. The Clerk's effort to obtain a judicial declaration that the separation of powers doctrine precluded Chapter 119's application to him -- as part of the judicial branch of government -- did nothing to confer standing. See Graham v. Swift, 480 So.2d 124 (Fla. 3d DCA 1985)(public official has no standing to bring declaratory judgment action for purposes of determining invalid statute imposing duties on him). In addition, if, in fact, the Clerk was not subject to Chapter 119 because he was a "judicial" officer and the records the Times sought were "judicial" records, then the Clerk and those records were subject to public inspection pursuant to the rights of public access to judicial records protected by the First Amendment to the United States Constitution and Florida common law at the point in time -- March 1992 -- when they were requested. Press-Enterprise Co. v. Superior Court, 478

U.S. 1, 106, S.Ct. 2735 (1986); Barron v. Florida Freedom Newspapers, Inc., supra, Miami Herald Publishing Co. v. Lewis, supra.

Chapter 119 itself sets forth duties and the course of action to be followed by a records custodian, such as the Clerk, confronted with a request for inspection of records. When presented with the request, the custodian either produces the records or states his reasons, including any statutory exemptions he believes apply, for withholding the records. Where he believes part, but not all, of a record is exempt from Chapter 119, he must redact the information he believes exempt and produce the remainder of the record for inspection. See section 119.07(1)(a) and (2)(a), Fla Stat. (1991). The requestor of the record may be asked to pay for copies, and when the nature or volume of the records requested requires "extensive use of information technology resources or extensive clerical or supervisory assistance," or both, the custodian may impose a reasonable "special service charge." See section 119.07(1)(b), Fla. Stat. (1991). A justiciable controversy is not presented by a public official's doubts concerning what the requestor is required to pay, especially where, as here, the custodian never proposed or demanded any dollar amount, or whether the records are subject to inspection under Chapter 119, especially where, as here, if not subject to Chapter 119 the records are subject to inspection under the only other possibly applicable provisions of law (Press-Enterprise, Barron and Lewis). Neither Chapter 119 nor the case law of this State

contemplates invocation of a court's jurisdiction for the purposes of obtaining advice about whether the law is constitutional or how to comply with it. Had the Clerk truly desired advice, he could easily have turned to the Florida Attorney General for a formal or informal opinion. The trial court's order declining to dismiss the Clerk's declaratory judgment action in this case should not be permitted to stand.

III. The trial court erred in denying the Times' request for attorneys' fees and costs.

Section 119.12(1) of the Florida Statutes (1991) states:

> If a civil action is filed against an agency to enforce the provisions of [Chapter 119 of the Florida Statutes] and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined, or copies, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

The Times was entitled to recover its attorneys' fees and costs from the Clerk because the Clerk was at all material times the custodian of the records of an "agency" (as defined in Chapter 119) required to permit inspection and copying of all non-exempt portions of his computerized records pursuant to Chapter 119, or was a judicial officer bound to permit inspection of judicial records pursuant to Press-Enterprise, Miami Herald Publishing Co. v. Lewis, and Barron v. Florida Freedom Newspapers. Under either scenario, the Clerk unlawfully withheld from the Times his computerized records: instead of permitting the Times to inspect and copy the records without litigation, the Clerk filed an unnecessary and wasteful declaratory judgment action which he had

no standing to bring, asserting exemptions from Chapter 119 and Florida Attorney General Opinions interpreting Chapter 119's provisions as reasons for his uncertainty about furnishing the records requested. He filed a Chapter 119 lawsuit. The Times counterclaimed to enforce its access rights. An official's failure or refusal to provide records in absence of a court's interpretation of Chapter 119 should render the official subject to section 119.12.

The Florida Public Records Act is to be liberally construed in favor of open government. Downs v. Austin, 522 So.2d 931, 933 (Fla. 1st DCA 1988). Section 119.12, part of the Act and intended to be a tool for its enforcement,[23] is also liberally construed "so as to best enforce the promotion of access to public records." Downs v. Austin, 559 So.2d 246, 247 (Fla. 1st DCA 1990). Accordingly, in Wisner v. City of Tampa Police Dept., 601 So.2d 296 (Fla. 2d DCA 1992), the court held that the plaintiff requesting to inspect and copy public records should have been awarded his costs pursuant to section 119.12(1) even though during the litigation the city provided him with copies of the records he sought. A similar situation is presented by this case. Here, the Clerk withheld public records and filed suit against the Times, then provided the Times with the records piecemeal over the course of the litigation. The Clerk should have simply given the Times the computerized records it had requested, at the outset.

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[23]See Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 n.4 (Fla. 1985).

The fact that the Clerk sought judicial relief not relieve him of liability for costs and attorneys' fees under section 119.12(1). Chapter 119 contemplates that an enforcement action may be brought by complaint, counterclaim or cross-claim in any civil action. See section 119.11(4), Fla. Stat. (1991)(prohibiting transfer, alteration destruction or to disposition of records when civil action to enforce Chapter 119 is served). Moreover, attorneys' fees and costs may be recovered under section 119.12 where an agency invokes wholly or partly inapplicable Public Records Act exemptions to seal court records, causing a party wishing to inspect them to incur attorneys' fees and costs. State Dept. of HRS v. R&R Guest Home, Inc., 20 Med.L.Rptr. (BNA) 2288 (Fla. 17th Cir. Ct. 1993), aff'd per curiam, 22 Med.L.Rptr. (BNA) 1672 (Fla. 4th DCA 1994).

As this Court explained in New York Times Co. v. PHH Mental Health Services, Inc., 616 So.2d 27 (Fla. 1993):

> Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general [open records] policy is followed. If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency. 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.

New York Times Co. v. PHH, 616 So.2d at 29 (footnote omitted).[24] See also R&R Guest Home, supra. Accordingly, while a private company unsure whether it is an "agency" within the definition set forth in Chapter 119 may escape liability for attorneys' fees where it acts quickly to determine its uncertain status by filing a declaratory judgment action, this Court's decision indicates that a "public" agency, such as the Clerk, cannot do so.

In light of the wealth of guidance already available to the Clerk when he filed suit, the conclusion is inescapable that he unlawfully withheld public records and should be required to pay attorneys' fees and costs.

CONCLUSION

Whether the computerized dockets created and maintained by the Clerk are subject to Chapter 119 or, in the alternative, are subject to the open records mandate of Miami Herald Publishing Co. v. Lewis, and Barron v. Florida Freedom Newspapers, Inc., it is inescapable that the records are open for public inspection and copying. This conclusion was inescapable in March 1992 when the Times requested copies of the Clerk's electronic dockets. The Clerk should not have withheld the records and sued the Times. That having occurred, the Times should have recovered its attorneys' fees and costs.

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[24]Brunson and Sun-Sentinel held that where an agency withholds records which are public even if it does so under the good faith but mistaken impression that the records are exempt from inspection, the agency is obligated to pay attorneys' fees and costs under section 119.12(1).

The Times respectfully requests that this Honorable Court reframe the certified question, answer it by stating the Clerk's records were and are open to public inspection and copying, disapprove the Clerk's filing of a declaratory judgment action against the Times, and award the Times its attorneys' fees and costs incurred in connection with the case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the forgoing has been furnished by U.S. Mail to LESLIE E. JOUGHIN, III, Esquire, P. O. Box 3350, Tampa, FL 33601 and LORENCE JON BIELBY, ESQ., P. O. Drawer 1838, Tallahassee, FL 32302, this 14th day of November, 1994.

Alison M. Steele