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IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC13-1315
L.T. Case No. 1D12-587, 16-2010-CA-000667

BOARD OF TRUSTEES, JACKSONVILLE POLICE AND FIRE PENSION FUND,

Petitioner,

vs.

CURTIS W. LEE,

Respondent.

BRIEF OF AMICI CURIAE FIRST AMENDMENT FOUNDATION, FLORIDA PRESS ASSOCIATION, FLORIDA SCHOLASTIC PRESS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, DR. SANDRA F. CHANCE, J.D., AS EXECUTIVE DIRECTOR OF BRECHNER CENTER FOR FREEDOM OF INFORMATION, CREATIVE LOAFING TAMPA, LLC, TIMES PUBLISHING COMPANY, MEDIA GENERAL OPERATIONS, INC. D/B/A WFLA-TV, DENNIS A. RIBAYA, WLPG-TV, COX MEDIA AND PATRICK LYNCH IN SUPPORT OF RESPONDENT CURTIS W. LEE

TO BE FILED IF CONCURRENT UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IS GRANTED

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The First Amendment Foundation, Inc. ("Foundation') is a Florida corporation not-for-profit qualified as a public charity under Section 501(c)(3) of the Internal Revenue Code of 1986. It was founded in 1984 for the purpose of protecting and advancing the public's constitutional right to open government by providing education and training, advocating open government before the courts of Florida, and disseminating public information on the public's right of access to records and meetings of government. The Foundation represents more than 200 members including most of Florida's daily newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens and public interest organizations.

The Florida Press Association was founded in 1879 as a nonprofit corporation to protect the freedoms and advance the professional standards of the press of Florida. It's purpose includes the promotion and encouragement of higher standards of journalism to the benefit of the industry and the public; the aid and advancement of the study of journalism; the encouragement of a better understanding between the public and the press; the encouragement of better business methods and practices within the industry; the encouragement of positive fraternal relations within the press, and the representation of the common interests of the press on issues of general welfare and mutual concern. The Florida Press

Association includes all of the daily and most of the weekly newspapers in the state in its membership.

Florida Scholastic Press Association. Founded in 1946, the Florida Scholastic Press Association represents more than 300 student publications, online media teams and broadcast programs throughout the state. The primary aim of this organization is to educate, train and support scholastic journalists and their advisers.

Society of Professional Journalists. The Society of Professional Journalists is a national organization of journalists dedicated to the perpetuation of a free press as the cornerstone of our nation and our liberty. To ensure that the concept of self-government outlined by the U.S. Constitution remains a reality into future centuries, the American people must be well informed in order to make decisions regarding their lives, and their local and national communities.

The Brechner Center For Freedom of Information. The Brechner Center is a non-profit educational center, which answers queries about media law from journalists, attorneys, and other members of the public. The Center is prepared to explain issues relating to media law, provide educational and training materials, react to current developments, and offer speakers for meetings and conferences.

Sandra F. Chance, J.D. is the executive director of the Brechner Center for Freedom of Information and McClatchey Professor of Freedom of Information in

the Department of Journalism and Freedom of Information at the University of Florida.

Creative Loafing Tampa, LLC, is a foreign, for-profit limited liability company that publishes CL Tampa, a weekly, alternative, print and online newspaper that reports on government, public affairs, arts and entertainment in Tampa, Hillsborough County, Florida.

Times Publishing Company is a Florida corporation that publishes the daily print newspaper the "*Tampa Bay Times*" and the news website www.tampabay.com. It regularly relies on timely access to public records to provide its readers with news of government activities and public affairs, access it has increasingly required the assistance of lawyers to obtain.

Media General Operations, Inc. d/b/a WFLA-TV is a Delaware corporation and a subsidiary of Medial General, Inc., an independent, publicly-owned communications company. Media General's Florida properties include WFLA-TV/NewsChannel 8, an award-winning television station based in Tampa.

Dennis A. Ribaya is a retired Tampa firefighter and plaintiff in a Sunshine Law case against The Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa.

WPLG, Inc., a Berkshire Hathaway company, is a Delaware corporation which owns and operates WPLG, the ABC television affiliate based in Broward

County, Florida, and known as Local 10. Local 10 serves all of southeastern Florida, including Miami-Dade, Broward, Monroe, and part of Palm Beach counties. The station is a long-time leader in the South Florida news market and regularly is in the forefront of legal challenges to ensure the public's continued right of access to Florida's records and courtrooms.

Cox Media is Cox Television of Jacksonville LLC, a foreign limited liability company which owns and operates television stations WTEV-TV CBS 47 and WAWS-TV FOX 30 in Jacksonville. WTEV-TV and WAWS-TV gather and report local and national news by broadcast and on their websites.

Patrick Lynch is a retired City of Tampa Police Sergeant, a former Trustee and Chairman of the Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa and a current pensioner of that Fund.

The Interest of Amici. The Amici are interested in this case because the order under review erroneously adopts a standard that would substantially adversely affect the ability of citizens to obtain legal counsel to enforce the public records law. Except in rare cases, counsel must undertake such cases on the basis of a contingent fee. The difficulty and risk of such a case would be greatly increased if the citizen were required to establish not merely that the denial of access to the record was unlawful but also that the agency denied access in bad faith. This would greatly diminish the ability of a citizen to obtain counsel and

gain access to the court system to remedy an unlawful denial of access to a public record. The Amici urge the Court to render an opinion that clearly re-affirms that a citizen who establishes that he or she was unlawfully denied access to a public record by a public agency will recover his or her reasonable attorneys' fees and costs of enforcing the public records law.

SUMMARY OF ARGUMENT

The court should approve the decision of the district court. It correctly and emphatically reiterates this Court's holding that denial by a public agency of access to a nonexempt public record will *always* be unlawful for purposes of the fee-shifting provision of Section 119.12, Florida Statutes. Below, even though it held that the agency *unlawfully* refused to permit the requested records to be copied, the trial court nevertheless denied the petitioner's attorneys' fees because it found that the agency had acted in good faith.

The First District rejected that subjective standard with appropriate emphasis. It is essential to the enforcement of the constitutional right of access to public records that the citizen has the right to recover attorneys' fees incurred in the successful prosecution of a suit to enforce the public records law. In the current economic environment, substantially all litigation under the public records law is conducted by attorneys working on the basis of a contingent fee. If the right to recover fees were determinable under such a subjective standard as the trial court

had applied below, the ability of Florida citizens to obtain legal counsel in such cases would be severely restricted.

ARGUMENT

THE RIGHT TO RECOVER ATTORNEYS' FEES IS CRITICAL TO THE PROMOTION OF THE CONSTITUTIONAL RIGHT OF ACCESS TO PUBLIC RECORDS.

> 119.12 Attorney's fees.—If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

Section 119.12, Florida Statutes, allows a citizen to recover reasonable attorneys' fees and costs incurred in enforcing the public records law[1] against a public agency that unlawfully refused to permit a public record to be inspected or copied. The statute does not leave the recovery of fees to the discretion of the trial court. It provides that the court *shall* award attorneys' fees if the court determines that the agency *unlawfully* refused to permit a public record to be inspected or copied.

This fee-shifting statute reflects "a clear legislative intent to alleviate the financial burdens incurred by citizens who seek to enforce their right of access to

[1] In this brief, phrase "public records law" refers collectively to the provisions of Fla. Const., art. I, § 24(a) and Chapter 119, Florida Statutes, as construed and applied by the Courts of Florida.

public records in Florida." *Weeks v. Golden,* 846 So.2d 1247, 1249 (Fla. 1st DCA 2003). Its purpose is to encourage public agencies to voluntarily comply with the public records law and to encourage persons seeking access to such records to pursue their right to access beyond initial refusal. *New York Times Co. v. PHH Mental Health Servs., Inc*., 616 So.2d 27, 29 (Fla.1993). "Section 119.12 [is] a part of the Act and intended as a tool for its enforcement. [It] should be 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).

The trial court erred by implying a "good-faith" exception to liability under this statute. It is true that this Court adopted a "good-faith" exception for a private entity that is in doubt of its status as an agency as defined in Section 119.011(2) because it is "acting on behalf of [a] public agency." See, *PHH Mental Health Servs*. However, the Court distinguished the case of a private entity from that of a public agency and made clear that the good-faith exception does not apply to an entity created or established by law. *Id.* ("Conversely, refusal by an entity that is clearly an agency within the meaning of Chapter 119 will *always* constitute unlawful refusal"). (emphasis supplied)

In the experience of Amici, substantially all litigation under the public records law currently is conducted by attorneys working on the basis of a contingent fee. The right to shift liability for attorneys' fees is essential to the

citizen's ability to seek judicial enforcement of the public records law, and it is critical that this right be determinable under an objective standard. Without the predictability of an objective standard, the citizen's ability to obtain legal counsel to enforce the public records law will be substantially impaired and the purpose of the law will be thwarted.

Thus the contingent fee is critical to the ability of citizens to enforce the public records law. This Court has recognized "that the availability of attorney's fees would have the effect of encouraging plaintiffs to bring meritorious claims that would not otherwise be economically feasible to bring on a noncontingent fee basis." *Bell v. USB Acquisition Corp*., 734 So.2d 403, 411 (Fla. 1999).

In order to make the right meaningful, entitlement to fees must be determinable on an objective basis as a matter of law. Requiring the successful litigant to prove the *malafides* of the agency would add a difficult question of fact to the burden of the citizen. That additional fact question will make it significantly more difficult for an attorney to evaluate the risk of the contingency fee arrangement and would deter attorneys from undertaking meritorious cases.

In the experience of the Amici, many agencies do not understand that the holding in *PHH Mental Health Servs* clearly restricts the good-faith exception to private entities which genuinely doubt their agency status. Increasingly, as in the trial court below, agencies defend against entitlement arguing good faith. And, as

was true of the lower court here, the courts sometimes fail to appreciate the distinction drawn by *PHH Mental Health Servs*. See, *Greater Orlando Aviation Auth. v. Nejame,* 4 So. 3d 41 (Fla. 5th DCA 2009) (court denied fees citing pre-1984 case law without discussing the 1984 statutory amendment). Because the agency's legal services are funded by the taxpayer whereas the citizen's attorney is working at his own risk, the citizen is at a great disadvantage. When this imbalance is exacerbated by an uncertain standard for the citizen's recovery of fees, the right of access is extremely prejudiced.

Legislative intent to impose strict liability for attorneys' fees on public agencies in civil actions also emerges from the context of Chapter 119. *Compare* § 119.12 ("if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award") *with* § 119.10(1)(b) ("Any public officer who: . . . [k]nowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083"). The Legislature knew how to impose an intent requirement on public records violations. It omitted such a requirement from § 119.12 and the Court should not rewrite the statute to do so.

What Petitioner hopes will be seen as a "good faith" exception is really effort to graft criminal intent to unlawful denial of access to records as a baseline

for recovery of fees. If that happens, every time records are improperly withheld a plaintiff will need to discover the private motivations of every person involved in the agency's denial. Did they hold a personal interest or animus as to the subject matter of the records? Did they have a history with or dislike the requestor or his/her conduct? The result will be hour upon hour, perhaps day upon day—to say nothing of the cost—diverted from the performance of public business to discover the intent behind every unlawful refusal. Public employees may need to invoke their right to remain silent. The "crime-fraud exception" to the attorney-client privilege may permit discovery of the mental impressions, conclusions, litigation strategies, or legal theories of an agency lawyers who advise withholding of records. This will harm, not promote, the public's interest in efficient, law-abiding government, while strict liability for attorneys' fees under § 119.12 encourages enforcement of access to records with no need for litigation over intent.

Accordingly, the Amici urge the Court to uphold the order under review and in doing so to clarify that the standard for awarding attorney fees against a public agency under section 119.12 is whether the agency *unlawfully* denied access to the public record. Both the citizens and the public agencies of the state should have the clear understanding that an unlawful denial of the right of access to public records will subject the agency to the responsibility of recompensing the citizen for fees and costs incurred in protecting the right.

CONCLUSION

The Amici urge the Court to uphold the order under review with an opinion making clear that a public agency that unlawfully denies access to a public record will be responsible for the plaintiff's reasonable attorneys' fees and costs of enforcement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 18th day of August, 2014 via Electronic Service to: Robert D. Klausner, Esq. and Adam P. Levinson, Esq., Klausner, Kaufman, Jensen & Levinson, 10059 N.W. 1st Court, Plantation, Florida 33324, Email: bob@robertdklausner.com; adam@robertdklausner.com; and Robert M. Dees,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text of this Brief of Amicus Curiae complies with the font requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

/s/ Jonathan D. Kaney Jr.
Jonathan D. Kaney Jr.