
IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1396

**MEDIA GENERAL CONVERGENCE, INC., and
MEDIA GENERAL OPERATIONS, INC.,**

Petitioners,

vs.

CHIEF JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT,

Respondent.

**ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
Case No. 2D00-1346**

REPLY BRIEF ON THE MERITS

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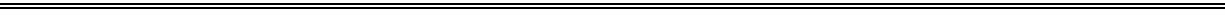


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INTRODUCTION

The *Answer Brief* of the Respondent, Chief Judge F. Dennis Alvarez, is premised on this Court's willingness to turn a blind eye to the facts and to believe what is not believable. In the Respondent's "make believe" world, the Petitioners are representatives of an "overzealous media" bent on "sensationalism or the sale of newspapers," who interrupt the judiciary by inquiring into salacious matters about which the public is better off not knowing. (*See Answer Brief* at 11.) The participants within the Hillsborough County Courthouse, by contrast, are merely "persons who were the subject of *false* or *unsubstantiated* allegations of sexual misconduct." (*Answer Brief* at 27 (emphasis added).)

As the Court will surely realize, however, this make believe world is quite different from the real world. In the real world, the Petitioners (WFLA-TV/News Channel 8 and *The Tampa Tribune*) sought access to documents in the possession of Chief Judge Alvarez concerning alleged misconduct by former Circuit Judge Edward Ward. More than 18 months ago, Florida's Judicial Qualifications Committee disclosed many of those same documents, and the documents it disclosed vindicated WFLA's and the Tribune's inquiry because they contained substantial evidence of misconduct by Judge Ward.

The documents further vindicated WFLA's and the Tribune's efforts to obtain the

records from Chief Judge Alvarez because they established that Chief Judge Alvarez had in his possession numerous judicial records reflecting allegations of misconduct concerning Judge Ward dating back to August 1998, more than a year before WFLA and the Tribune first requested the records.

In the real world, WFLA and The Tribune were doing what news organizations have long been doing – uncovering the truth. Thus, contrary to Chief Judge Alvarez’s suggestion, this has never been a case about fishing for scandalous or sensational news. Instead, this case has always been about the public’s right to know about the way in which its judicial officials carry out their official business. As the Florida Constitution makes abundantly clear, “Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body . . . [including the] judicial branch[.]” Fla. Const. Art I, § 24(a). That basic right is at the core of this case.

In his *Answer Brief*, Chief Judge Alvarez goes to great lengths to defend his refusal to disclose the records sought by the Petitioners. In the end, however, there is no proper legal basis for that refusal. Nor is there any proper basis for affirming the decision of the Second District Court of Appeal denying WFLA’s and the Tribune’s Petition for Mandamus. Accordingly, WFLA and the Tribune respectfully request that this Court reverse the decision of the Second District

Court of Appeal, and direct the Court of Appeal to grant WFLA's and the
Tribune's Petition for Mandamus.

ARGUMENT

The two groups of records to which Petitioners seek access – the “Judge Ward Records” and the “Fraternization Records” – are open to public inspection under both Article I, Section 24(a) of the Florida Constitution and Rule 2.051(a) of the Florida Rules of Judicial Administration. The Second District Court of Appeal erred when it concluded that the records were not “judicial records” and refused to order that they be disclosed. Nothing in Chief Judge Alvarez’s *Answer Brief* provides a proper basis for the Court of Appeal’s decision. Indeed, contrary to the Court of Appeal, Chief Judge Alvarez essentially admits that the Judge Ward Records and the Fraternalization Records are “judicial records.” (*See Answer Brief* at 21 (acknowledging a chief judge’s administrative duty to make and receive records concerning alleged sexual misconduct).) However, Chief Judge Alvarez argues that even though the records are judicial records, they are exempt from disclosure. That position is untenable.

I. THE EXEMPTIONS CONTAINED IN RULE 2.051(C) DO NOT APPLY TO THE JUDGE WARD OR FRATERNIZATION RECORDS

Chief Judge Alvarez continues to point to three subsections of Rule 2.051 as support for his position that the records are now and have always been exempt from disclosure. As demonstrated below, none of those subsections apply to the

records at issue in this case.

A. Rule 2.051(c)(3)(A), Which Concerns “Complaints” Of Judicial Misconduct, Is Not Applicable

Rule 2.051(c)(3)(A) exempts from disclosure “[c]omplaints alleging misconduct against judges, until probable cause is established.” As previously demonstrated by the Petitioners, no formal (or informal) complaint of sexual harassment or discrimination was ever lodged by anyone in this matter. (*See Initial Brief* at 31.) Indeed, in response to the Tribune’s October 1999 request for the Judge Ward Records, Chief Judge Alvarez wrote: “I do not have custody of, nor am I aware of, any ‘*complaints*’ of sexual harassment and/or sexually inappropriate comments or behavior made against Hillsborough Circuit Judge Edward Ward.” (*See Appendix to Petitioners’ Initial Brief* (“*App.*”), Tab A, Exh. C.) Because Chief Judge Alvarez had not received any “complaint” regarding Judge Ward, he had no legal or factual basis for invoking Rule 2.051(c)(3)(A). This Court should reject his belated effort to do so here.

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¹ Chief Judge Alvarez now maintains that he did receive a “complaint,” but that he did not disclose the records because he never found “probable cause” that misconduct had occurred, as required by Rule 2.051(c)(3)(A). (*See Answer Brief* at 21.) This claim must be rejected. According to Chief Judge Alvarez, he was aware by August 1999 of at least two judicial assistants in the Hillsborough County

B. Rule 2.051(c)(8), Which Concerns Records Maintained By The Judicial Qualifications Commission, Is Not Applicable

Rule 2.051(c)(8) provides that records that are exempt from disclosure under the Rules of the Judicial Qualifications Commission (“JQC”) shall not be disclosed. Chief Judge Alvarez relies upon this provision to justify his refusal to disclose the Judge Ward Records. Indeed, he claims that the Judge Ward Records were, “*at all material times*, excepted from public disclosure under Rule 2.051(c)(8) and the rules governing Florida’s Judicial Qualifications Commission.” (*Answer Brief* at 11

Courthouse who had made allegations, and signed sworn affidavits, concerning Judge Ward’s sexual misconduct, but who had decided not to pursue formal charges against Judge Ward. (*Answer Brief* at 23.) Based on this information, Chief Judge Alvarez had enough reason to suspect that Judge Ward had engaged in misconduct that he “pledged” to support any action the second victim wished to pursue against Judge Ward. In particular, he promised to support her in “filing a formal complaint with the JQC,” if she wished to do so (which she declined to do). (*Id.*)

Chief Judge Alvarez now asks this Court to believe that he was prepared to support the filing of a formal complaint against one of his judicial colleagues, but at the same time he did not believe there was probable cause to support such charges. (*Id.*) This suggestion is so self-contradictory that it is not deserving of any credence. “Probable cause means a reasonable ground of suspicion supported by circumstances strong enough in themselves to warrant a cautious person in belief that the named suspect is guilty of the offense charged.” *Johnson v. State*, 660 So. 2d 648, 654 (Fla. 1995) (internal quotation omitted). Even if the Judge Ward Records somehow constituted “complaints” of judicial misconduct, the facts demonstrate that Chief Judge Alvarez had probable cause to believe that misconduct had occurred, and therefore was required to disclose the Judge Ward Records. Rather than do so, however, Chief Judge Alvarez simply denied their existence. (cite)

(emphasis added).) The validity of this assertion must be tested at three key points in time, however: (1) in October 1999, before the JQC investigation began; (2) in February/March 2000, during the JQC investigation but before the JQC found probable cause; and (3) in March 2000 and afterwards, after the JQC found probable cause. As explained below, at each point in time the records were subject to disclosure.

1. The JQC Rules Could Not Have Applied In October 1999, Before The JQC Began Its Investigation

The Tribune first requested the Judge Ward Records from Chief Judge Alvarez in October 1999, *before* the JQC even commenced its investigation of Judge Ward. Thus, at the earliest relevant time, the Rules pertaining to the JQC obviously did not apply. In October 1999, Chief Judge Alvarez had no reason to rely on the JQC's Rules to deny access to the Judge Ward Records; accordingly, he did not invoke the JQC's Rules in response to the Tribune's initial request for the records. Rather, he simply denied that the records existed, even though they had been in his possession or custody for more than a year. (*See App.*, Tab A, Exh. C.)

2. Even During the JQC's Investigation, the JQC's Rules Did Not Apply to Chief Judge Alvarez

Because the JQC is a commission created under Article V of the Florida

Constitution, the records in the possession of the JQC are judicial records. Thus, Rule 2.051(a), which states that the public has a right of access to judicial records, would appear to provide for access to JQC records. But, Rule 2.051(c)(8) limits this right of access by providing that in those instances where the *JQC's Rules* make records confidential, they shall remain confidential under Rule 2.051. *See Fla. R. Jud. Admin. 2.051(c)(8)* (“The following records of the judicial branch and its agencies shall be confidential: . . . All court records presently deemed to be confidential . . . by the rules of the Judicial Qualifications Commission.”). JQC Rules 10(a) and 23(a) make the records of the JQC confidential until formal charges are filed against the judge suspected of misconduct.

There is no suggestion in Rule 2.051(c)(8) or the JQC’s Rules, however, that a circuit court judge can rely on the JQC’s Rules to prevent the disclosure of judicial records in *his* possession. *See Fla. Jud. Qual. Comm'n R. 23(a)* (“Until formal charges against a judge are filed . . . all proceedings *by or before the Commission* shall be confidential.”) (emphasis added). But that is precisely the position taken by Chief Judge Alvarez in this matter. He claims that records that were made or received by him – and that were in his possession – were transformed into JQC records as soon as he provided *copies* to the JQC. This argument has been rejected in the context of the Public Records Act and must be

rejected here. *Cf. Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. 3d DCA 1982) (“To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act.”); *Tribune Company v. Canella*, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), *rev’d on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Company*, 105 S. Ct. 2315 (1985).

During the time that the JQC was investigating Judge Ward, but before the JQC found probable cause, there was no basis for Chief Judge Alvarez to invoke the JQC’s Rules and to refuse to disclose records that were in *his* possession.

3. Chief Judge Alvarez Concedes That The JQC’s Rules Do Not Apply Today

Chief Judge Alvarez acknowledges that since March 2000, when the JQC found probable cause, the Judge Ward Records have not even arguably been exempt under the JQC’s Rules. (*See Answer Brief* at 19.) Despite this admission, Chief Judge Alvarez has never disclosed a single document in response to the Petitioners’ requests. Instead, he has maintained that because WFLA and the Tribune *can* get the records from another source (the JQC), they *must* get them from another source. This position is in direct conflict with the open government policies of this State and must be rejected. *See, e.g., Warden v. Bennett*, 340 So.

2d 977, 979 (Fla. 2d DCA 1976) (party seeking public records is not required to demonstrate that he first attempted to obtain the records from some other source). In response to requests from WFLA and the Tribune, Chief Judge Alvarez was required to disclose records in *his* possession, and WFLA and the Tribune were not required to look elsewhere for those records.

The JQC's Rules have never been applicable to the records made or received by Chief Judge Alvarez. Therefore, he cannot rely upon those Rules or Rule 2.051(c)(8), and he should be ordered to disclose the requested records immediately.

C. Rule 2.051(c)(9), Which Prohibits Disclosure Of Records Made Exempt By "Court Rule," Is Not Applicable

Rule 2.051(c)(9) provides that judicial records will be exempt from disclosure if they are confidential pursuant to "case decision or court rule," and if they meet certain additional requirements. Among the additional requirements are that the "degree, duration, and manner of confidentiality ordered by the court shall be not broader than necessary" to protect the policy interests supporting the exemption, and that "no less restrictive measures are available" to protect such interests. *See* Fla. R. Jud. Admin. 2.051(c)(9)(B) and (C). Rule 2.051(c)(9) does not apply to the Judge Ward Records or Fraternalization Records.

There is no “case decision or court rule” that renders the Judge Ward Records or Fraternalization Records exempt from disclosure. The Second District Court of Appeal denied WFLA and the Tribune access to the Judge Ward and Fraternalization Records by relying upon so-called “Complaint Procedures” adopted by this Court and the Thirteenth Judicial Circuit. *See* Opinion at 5-8. That decision was incorrect and should be rejected by this Court.

It is clear that the Complaint Procedures adopted by this Court – more particularly, the *Supreme Court Civil Rights Complaint Procedures* – do not apply to Chief Judge Alvarez or the other judges of the Thirteenth Judicial Circuit. (*See Initial Brief* at 24-26). Thus, Chief Judge Alvarez does not even attempt to explain how the Complaint Procedures could apply to him, or how the Procedures could create new exemptions from disclosure consistent with the Florida Constitution. The simple fact is that the Complaint Procedures cannot do so.

Moreover, it is clear that any rule that would permit Chief Judge Alvarez to withhold the Judge Ward Records even *after* the JQC found probable cause would be far “broader than necessary” to protect any interested enumerated in Rule 2.051(c)(9), and that “less restrictive measures” would be available. Thus, there is no basis for withholding the records under Rule 2.051(c)(9).

II. THE CONCERNS RAISED BY THE FLORIDA CONFERENCE OF CIRCUIT COURT JUDGES ARE UNFOUNDED

The Florida Conference of Circuit Court Judges (the “Conference”) has filed an Amicus Curiae Brief (the “*Amicus Brief*”) arguing against disclosure of the Judge Ward and Fraternization Records. The Conference primarily raises two concerns: (1) disclosure of the records will intrude on personal privacy; and (2) disclosure will impose new administrative burdens on the courts. (*Amicus Brief* at 4-5.) Both concerns are unfounded.

A. The Records Sought Are Judicial Records

The first concern expressed by the Conference is that release of the Judge Ward Records and Fraternization Records would constitute a “gross intrusion on personal privacy” because they are not judicial records. (*Amicus Brief* at 4.) Citing to a plethora of Internet web sites and sociological studies, the Conference argues that office romances are commonplace and private, and that the public has no reason to know about them. (*Id.* at 6-8.) According to the Conference, because the records sought by WFLA and the Tribune related to office romances, they were not judicial records and Chief Judge Alvarez was right to deny access. But this argument, based on assumptions rather than facts, misses the point.

As WFLA and the Tribune have emphasized throughout this litigation, from the very start they asked Chief Judge Alvarez to disclose documents that he “made

or received” as the chief administrator of the Thirteenth Judicial Circuit. Where, as here, records are made or received by the chief judge with the assistance of courthouse personnel, are made or received using public courthouse facilities (offices, telephones, computers, etc.), are made or received during business hours, and are made or received at taxpayer expense, such records absolutely are “judicial records.” Indeed, as explained above, Chief Judge Alvarez apparently concedes as much.

In addition, the records at issue in this case are not records of personal matters unrelated to the business of the government; they are not, as the Conference suggests, analogous to a letter written by a judge from his home confirming reservations for a law school reunion dinner. (*Amicus Brief* at 5.) Rather, they are records of *improper conduct within the boundaries of the courthouse*. Indeed, the JQC concluded that Judge Ward’s actions could amount to sexual harassment and might “impair the confidence of the citizens of this state and the integrity of the judicial system.” (*App.*, Tab A, Exh. A, at 2.) It cannot be argued that such conduct is merely private or personal, and is not accessible to the public. The Conference’s allusion to the scandal involving former President Clinton, Paula Jones, and Monica Lewinsky bears out this point – such information can be of enormous public significance. Indeed, the Conference acknowledges

that records relating to social, romantic, or sexual relationships of judges “contrary to law or ethics” *are* judicial records – and may, therefore, be accessible (*Amicus Brief* at 2.) Given the facts of this case, it is plain that even under the Conference’s overly restrictive view of judicial records, the records sought by WFLA and the Tribune, which relate to an investigation of improper conduct within the courthouse, are judicial records.

B. Disclosing The Records Sought Would Not Impose An Unworkable Burden On The Courts

The second concern voiced by the Conference is that granting access to the Judge Ward Records and Fraternalization Records would impose an “unworkable administrative burden on the courts of Florida.” (*Amicus Brief* at 5.) This suggestion is groundless.

WFLA and the Tribune consistently asked Chief Judge Alvarez to disclose documents that he had already gathered. The requests did not seek to impose a new burden on Chief Judge Alvarez to seek out and catalogue documents.

Inasmuch as the Conference is suggesting that disclosing the Judge Ward or Fraternalization Records would have imposed an unworkable administrative burden on Chief Judge Alvarez, the Conference is mistaken – by definition, the “administrative burden” of making and receiving the Judge Ward Records and

Fraternization Records had already been undertaken well before WFLA and the Tribune first requested the records, because WFLA and the Tribune asked for documents that *already* were in Chief Judge Alvarez's possession.

Moreover, it goes without saying that the Florida Constitution, which embodies the will of the people of Florida, *does* impose administrative burdens on public officials. A public official may not ignore those burdens merely because he disagrees with them. Rather, as the Florida Constitution requires, a public official, such as a chief judge, must recognize that “[a] public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.” Fla. Const. Art. II, § 8. Allowing the public access to the judicial records at issue in this case will serve to prevent abuse and to secure and sustain the people's trust in Florida's government.

CONCLUSION

More than two years have passed since the Petitioners first requested the Judge Ward Records, and more than 18 months since they requested the Fraternalization Records. The time has come for the custodian of those records to do what he should have done long ago – disclose the records and allow the public to see for itself how the judicial branch of Florida’s government conducts its important business. There is no legal basis for continuing to withhold the records.

For all of the foregoing reasons, the Second District Court of Appeal’s decision denying the Petition for a Writ of Mandamus should be reversed with directions to the Second District Court of Appeal to grant the Petition for Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by U.S. Mail to C. STEVEN YERRID, ESQ. and RICHARD C. ALVAREZ, ESQ., Yerrid, Knopik & Krieger, P.A., 101 E. Kennedy Blvd., Suite 2160, Tampa, FL 33602-5148; THOMAS E. WARNER, ESQ., Solicitor General on behalf of Robert A. Butterworth, Attorney General, Office of the Attorney General, The Capitol, PL01, Tallahassee, FL 32399-1050; W. ROBERT VEZINA, III, ESQ., Vezina, Lawrence & Piscitelli, P.A., 318 N. Calhoun Street, Tallahassee, FL 32301; and to W. DEXTER DOUGLASS, ESQ., Douglass Law Firm, P.A., 211 East Call Street, P.O. Box 1674, Tallahassee, FL 32302, this _____ day of October, 2001.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief, typed in 14 point (proportionately spaced) Times New Roman, complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Attorney

