IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs. **CONSOLIDATED CASES SC 02-1694 AND SC02-1753**

CITY OF CLEARWATER, FLORIDA,
Respondent. **LT No. 2D001-3055**

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TIMES PUBLISHING COMPANY,
Petitioner,

vs.

CITY OF CLEARWATER, FLORIDA,
Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT CITY OF CLEARWATER'S ANSWER BRIEF

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INTRODUCTION

This case involves a newspaper's request for personal e-mails sent and received by municipal employees on a computer system provided to employees for work purposes, with incidental personal use allowed by written policy. Respondent City of Clearwater was not required by Florida's Public Records Act to provide such documents to the media or others.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Times Publishing Company made a request to the City of Clearwater under Florida Statutes Section 119.07, a portion of the Florida Public Records Act, for all e-mails of two managerial employees during the time period June 1, 1999 through October 6, 2000. R. 162. The City provided Petitioner with all such records except certain e-mails deemed personal by the subject employees and therefore deleted by them, in a good faith belief that such personal e-mails did not constitute public records within the meaning of Florida Statutes Section 119.011. R. 162.

City policy concerning use of "computer resources" requires employees to retain documents made or received in connection with City business whether they are generated on City-owned computers or privately owned computers. The City allows incidental personal use of its computer resources for personal research or communications if the use is not otherwise violative of the policy. City of Clearwater Computer Resources Use Policy, R. 36-39.

Petitioner then brought suit in Circuit Court seeking declaratory, injunctive, and mandamus relief. R. 1-7. Petitioner sought a declaratory judgment, requested temporary and permanent mandatory injunctive relief that the City provide the requested personal e-mails, and sought a peremptory writ of mandamus directed to the City again requiring it to furnish the subject e-mails. R. 1-7. A hearing on Petitioner's Motion for Temporary Injunction and Petitioner's Motion for Alternative Writ of Mandamus was held on December 13, 2000. R. 43-58. The Circuit Court issued an Order to Show Cause directing the City to answer the mandamus count and issued an Order on Plaintiff's Motion for Temporary Injunction directing the City to "make every reasonable effort to retrieve, preserve and secure from destruction any and all 'e-mails' sent or received by Garrison Brumback and John Asmar between the dates of October 1, 1999 and October 6, 2000. Said 'e-mails' shall be preserved and secured until further order of the court." R. 41-42, 59-60.

Final hearing was held on March 1, 2001. R. 150-248. The Circuit Court heard testimony from Assistant City Manager Garrison Brumback [R. 161-180], Information Technology Director Daniel Mayer [R. 180-191], and Network Technology Manager Sharon Marzola [R. 192-199]. The Court entered its Order Denying Writ of Mandamus and Permanent Injunctive Relief and Dissolving Temporary Injunction on May 17, 2001. R. 256-267.

Petitioner timely filed an appeal to the Second District Court of Appeal. R. 301-302. Following the receipt of briefs from the parties and oral argument, that Court issued its opinion affirming the Circuit Court on May 10, 2002. Petitioner Times Publishing Company filed a Motion for Certification on or about May 23, 2002. Petitioner State of Florida filed its Motion for Leave to Intervene as a Party on Behalf of the State of Florida and to be Heard in Support of Appellant's Motion to Certify the Question as one of Great Public Importance on or about May 24, 2002. On July 3, 2002, the Second District Court of Appeal granted Petitioners Times and State's Motions, withdrew its prior opinion, and issued a revised opinion certifying the following question to this Court:

> WHETHER ALL E-MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2000), AND ARTICLE I, SECTION 24(A), OF THE FLORIDA CONSTITUTION BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT-OWNED COMPUTER SYSTEM IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS THE EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E-MAILS?

Times Publishing Company v. City of Clearwater, 27 Fla. L. Weekly D1544a (Fla. 2d DCA July 3, 2002).

On or about July 24, 2002, Petitioner State filed its Notice to Invoke Discretionary Jurisdiction. On or about August 2, 2002, Petitioner Times filed its Notice to Invoke Discretionary Jurisdiction. On August 5, 2002, this Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule in State of Florida v. Times Publishing Co., et al., Case No. SC02-1694. On August 9, 2002, this Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule in Times Publishing Co., et al., Case No. SC02-1753. On August 23, 2002, this Court entered an Order granting Petitioner State's Motion to Consolidate the two cases.

References to the record on appeal will refer to the Record before the Second District Court of Appeal and will be indicated by "R." followed by the relevant page number.

SUMMARY OF ARGUMENT

The statutory definition of "public records" contained in Section 119.011(1) contains the qualifying language "made or received pursuant to law or ordinance or in connection with the transaction of official business." Thus it is the content and context of a document which determines its public records status. Applicable case law, attorney general opinions, and State of Florida policies have recognized a nexus between official business and the public records definition. A policy stating that the municipal employer retains ownership of computer resources and has the right to inspect employee e-mail does not and cannot change their public records status. Documents created or stored on an employee's personally owned equipment, if done so in connection with official business, are public records despite private hardware or software ownership. The presence of a header in e-mail does not change this analysis. There is no duty to create a log of e-mail headers, and to require agencies to do so is contrary to the Public Records Act and uneconomical. Evidence of Respondent City's overall public records retention policy is not of record in this action. Chapter 119 contains few specifics regarding duties of records custodians and retention procedures. Respondent City did not violate Chapter 119 in its handling of Petitioner Times' public records request. Even if the subject e-mails are public record, they fell within the "transitory records" retention category and any duty to retain them was short-lived.

STANDARD OF REVIEW

In appellate proceedings in which a question has been certified by a District Court of Appeal to this Honorable Court, the Court has broad authority to review issues other than the precise issue certified. E.g., G.W.B. v. J.S.W., 658 So. 2d 961 (Fla. 1995), cert. den., 516 U.S. 1051 (1996). However, the instant case is not a purely theoretical inquiry in that Petitioners seek an order directing the production of the subject records to Petitioner Times. Therefore, this Honorable Court should consider the record evidence below in the event that it accepts jurisdiction and renders a decision on the merits.

ARGUMENT

I. E-MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ON A GOVERNMENT-OWNED COMPUTER SYSTEM ARE NOT PUBLIC RECORDS SOLELY BECAUSE THE AGENCY HAS A WRITTEN POLICY STATING THAT IT MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E-MAILS.

The question certified by the Second District Court of Appeal was whether a government agency's assertion of custody, control, and inspection over electronic mail ("e-mail") documents transmitted or received by public

employees was enough to transform them into public records, whatever their content. (The question was formulated by Petitioner Times in its Motion for Certification.) Article I, section 24, of the Florida Constitution provides that

> [e]very person has the right to inspect or copy an public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

The statutory definition of "public records" implementing that constitutional mandate, as well as judicial opinions and attorney general opinions interpreting that definition, indicate that it is the duty to make or receive documents, as well as their content, which determines whether they are public records:

> "Public records" are defined as
> [a]ll documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

§ 119.011(1), Fla. Stat. (2001) (emphasis added). It is not the ownership, custody, location or control of the documents that determines their public records status. It is their content and context, and the duty to make or receive them, which matters. E-mails of personal content are not public records because they are not made or received in the course of official business, and there is no duty to create or receive them.

Judicial and administrative interpretations to date support this conclusion. In construing the statutory definition, this Honorable Court has focused upon the intent of the document drafter or recipient:

> [W]e hold that a public record, for purposes of section 119.011(1), is 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, Schafer, Reid & Associates, 379 So. 2d 633, 640 (Fla. 1980). The subject e-mails do not constitute the "final evidence of the knowledge to be recorded" [Shevin at 640], as argued by Petitioner Times, because they are of personal, not business-related, content and do not represent the agency's knowledge. In Opinion 96-34, the Florida Attorney General

concluded that e-mail messages "made or received by [the office of a property appraiser] in connection with the transaction of official business are public records subject to the requirements of Chapter 119…." (emphasis added). Such messages made or received by public employees "in carrying out their duties" must be retained per an approved retention schedule. The Attorney General noted that the Florida Legislature amended Section 119.011(1) in 1995 to include records made or received in connection with official business regardless of the means of transmission, "thus evincing an intent to include information transmitted by computer". It was the connection to official business, however, which in the Attorney General's opinion rendered the documents subject to inspection. Likewise, a Department of State Office of General Counsel Memorandum dated November 9, 1995 discussing e-mail states that "[s]ome e-mail messages are public records within the meaning of Chapter 119, Florida Statutes; other messages are not. E-mail messages that are not public records need not be retained….Non-business e-mail messages are not public records and need not be retained." R. 29-34. At least some branches of State government, then, find personal e-mails not to be public records. This Honorable Court's review of the statutory definition should be in accordance with the "plain meaning" rule; that is, where the language of a provision is clear and unambiguous and conveys a clear and definite meaning, it should be given that plain meaning. E.g., Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000). Even in the event that rules of statutory construction must be applied, those principles require that the plain and ordinary meaning of the terms "pursuant to law or ordinance" and "transaction of official business" be used, with the same result as reached by the Second District Court of Appeal in this case. Id. at 298.

The business of a city is to provide services to the public, not to operate a computer network; therefore, it cannot be said that e-mail capability itself constitutes "official business" as seemingly argued by Petitioners.

The City's Computer Resources Use Policy asserts certain rights with regard to the Computer Resources, although it does not use the specific terminology ("custody, control, and inspection of e-mails") of the certified question. The Policy provides that

> The Computer Resources are the property of the City of Clearwater and are intended for use for legitimate business purposes. . . . Incidental use for personal research of communications not otherwise violating the Policy may be allowed by individual Department Directors. . . . Users consent to allowing City personnel to access and review all materials which Users create, store, send, or receive on the Computer Resources, for purposes such as complying with a public records request, investigation of suspected misuse of the Computer Resources, or conducting system repairs.

R. 36, City of Clearwater Computer Resources Use Policy, Page 2,

Subsections A., B. Also included is a statement meant to negate any assertion of expectation of privacy by the employee. Id., Subsection B. As the Second District Court of Appeal noted, this case does not involve the assertion of any right of privacy on the part of the employees. Times Publishing Co., supra; R. 170. The rights asserted by the City in its Policy do not somehow transform documents which otherwise would not be public records into public records.

The Policy further recognizes that it is not the computer system on which a document is generated, but rather the content and context of the document, that is relevant to public records retention, and requires City employees to retain public record documents wherever kept. The Policy states that

> [u]sers are advised that documents created, stored, sent, or received on computers other than those belonging to the City, such as home computers, or using private e-mail accounts, may be public records if they are made or received in connection with City business. Public records must be saved and retained in accordance with records retention schedules adopted by the City. Users are responsible for reviewing the City Clerk's Policy for Electronic Mail [Retention] and complying with it. . . .[1]Those Users who . . . use home or mobile computer equipment owned by them for the purpose of telecommuting will be subject to this policy while engaged in work for the City of Clearwater and using such equipment. Those Users who use personal e-mail accounts to conduct City of Clearwater business will be subject to this Policy during such use of the accounts.

R. 38, City of Clearwater Computer Resources Use Policy, at 4, Subsection D. Again, it is the content and not computer ownership or location of the documents that controls.

This portion of the policy comports with cases holding that an agency may not withhold documents whose content makes them public record by depositing them with a private entity. See, e.g., Times Publishing Company, Inc. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990) (documents in custody of counsel for other party in negotiations not insulated from public records status where being discussed and revised by City's counsel). And as the Second District Court of Appeal recognized, documents do not become public record simply by virtue of their inclusion in an agency file. Times Publishing Company, supra, citing Lopez v. State, 696 So. 2d 725 (Fla. 1997) (state attorney notes not public record); Hill v. Prudential Insurance Company of America, 701 So. 2d 1218 (Fla. 1st DCA 1997) rev. den., 717 So. 2d 536 (Fla. 1998) (private party privileged documents not public record because of inclusion in state agency file); News & Sun-Sentinel Co. v. Modesitt, 466 So. 2d 1164 (Fla. 1st DCA 1985), rev. den., 476 So. 2d 674 (Fla. 1985) (custodial records held by Department of Agriculture not public record).

The only record testimony in this action regarding the nature and content of the e-mails sought by Petitioner Times was that of Assistant City Manager Garrison Brumback, who stated that some of the e-mails sought were of a personal nature not related to City business and that he had no business duty to make them. R. 177-78. This testimony was unrebutted, and Petitioner Times did not move to obtain an in camera inspection of the documents.

Admittedly not identical, but analogous, are the requirements derived from article I, section 24, of the Florida Constitution concerning judicial records. In In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records, 651 So. 2d 1185 (Fla. 1995), this Honorable Court stated that "[e]-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record." The "fact that information made or received in connection with the official business of the judicial branch can be made or received electronically does not change the constitutional and rule-mandated obligation of judicial officials and employees to direct and channel such official business information so that it can be properly recorded as a public record" Id. at 1190, 1187 (emphasis added). Petitioner Times points out that the Rule was recently amended. Relevant amendments appear directed at clarifying the definitions of "records of the judicial branch" and its subcategories "court records" and "administrative records". The definition of "records of the judicial branch" includes the wording "made or received in connection with the transaction of official business," the definition of "administrative records" contains the wording "made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business," and "court records" is defined as "contents of the court file." Report of Supreme Court on Public Records, No. SC01-897, Revised Opinion (September 12, 2002), at 15. Thus all current judicial records characterizations include a nexus with the official business of the judicial branch.

If this Honorable Court finds that the City's Policy does not conform to state constitutional or statutory requirements, then the Policy is void and unenforceable to the extent that it violates those requirements. However, that would not render what is not public record in the first instance to be such. The Second District Court of Appeal recognized this principle when it determined that the City's policy "did not and could not alter the statutory definition of public records for purposes of Chapter 119." Times Publishing Co., supra, citing as cf., Browning v. Walton, 351 So. 2d 380 (Fla. 4th DCA 1977) (agency cannot create public records exemption not in accord with Section 119.07(2)).

II. THE PRESENCE OF A HEADER IN PERSONAL E-MAILS DOES NOT TRANSFORM THEM INTO PUBLIC RECORDS.

Petitioner State argues that personal e-mails become public record because all e-mails contain a header containing certain information. Theoretically this could include information as to who sent and received the e-mails, the date

and time of transmission/receipt, the topic, and other information, or could contain no information, as dictated by computer software. There is no evidence of record in this case to indicate whether headers existed in the subject e-mails and if so what their content was. The authority cited for this proposition by the State, General Records Schedule GS1-L, merely states that if a paper memorandum is determined to be public record and is to be retained, the custodian should not remove the To: and From: information prior to retention. Likewise, if an e-mail is public record and is to be retained, any header information in existence should be included. This does not mean, however, that an e-mail otherwise not public record becomes one simply because it has a header, or that software to generate headers with certain content must be purchased and installed.

The Public Records Act does not use the terminology "record of a transaction using government-owned equipment" mentioned by the State, nor is there a statutory duty to create such records. Rather, the inquiry is whether a document exists and was made or received pursuant to law or ordinance or in connection with the transaction of official business.

An agency is not required to purchase computer software or write programs in order to generate lists of e-mail headers. The Public Records Act does not require the generation of documents, only the retention of documents already in existence which are public records. The State recognizes that "no agency is required to create such a log", but argues that e-mail headers constitute a log, though not kept as such. "Log" is defined as "a record of performance, events or day-to-day activities". Merriam Webster's Collegiate Dictionary (10th ed. 1997). A "logbook" is "any journal or record of events." Black's Law Dictionary (7th ed. 1999). Municipalities are not required to generate logs or logbooks consisting of e-mail headers. Although not mentioned by Petitioner State, Attorney General Opinion 99-74 found that telephone numbers contained in a school district's records of calls made on district telephones are public records even when the calls may be personal and reimbursed. The opinion was explicitly based, though, on the assumption that the district already maintained such a set of records [presumably phone bills sent to the district and itemized by number called, date, and time], in contrast to the current case. Petitioner State's argument, if successful, would force all agencies to generate headers (with unspecified parameters) in all e-mails sent or received, and to collect all e-mails, including personal and "spam" e-mails, in a central location for the purpose of retaining any headers. Such a result is not contemplated by Florida Statutes Chapter 119.

III. THE CITY OF CLEARWATER DID NOT VIOLATE THE PUBLIC RECORDS ACT REGARDING RECORDS CUSTODIANS IN RESPONDING TO PETITIONER TIMES' PUBLIC RECORDS REQUEST.

The City of Clearwater does not, as alleged by Petitioner State, have a

"practice and policy of allowing each of its employees unfettered discretion in the destruction and withholding of email". The City's overall records retention policies are not of record in this action. What is of record is that the employees subject to a specific public records requests were an assistant city manager and an administrator of several departments, and that legal advice was sought prior to response to Petitioner Times' request. R. 162. The City does not dispute that Florida Statutes Section 119.07 contemplates the existence and supervision of one or more records custodians, but does not agree that the Second District Court of Appeal misconstrued the Public Records Act when it concluded that the Act contains no specific direction as to who is designated as such and as to procedures for determination of public records status and exemptions.

If the records custodian is not to be the assistant city manager or administrator, then the only logical person to review documents for public records status is the city manager, the highest-ranking employee. It is not cost-effective, practical, or required by Florida Statutes Chapter 119 that the agency head review all documents in order to determine whether they are public record and if so what the retention period shall be.

There is no record evidence to demonstrate that Respondent City of Clearwater violated the provisions of the Public Records Act in responding to Petitioner Times' request, and this Honorable Court should not so hold.

IV. EVEN IF THE SUBJECT E-MAILS ARE PUBLIC RECORDS, THE CITY OF CLEARWATER HAD NO DUTY TO RETAIN THEM UNDER THE PUBLIC RECORDS ACT.

Even if this Honorable Court were to find that the personal e-mails requested constituted public record, there has been no violation of the Public Records Act by the City of Clearwater in declining to furnish them to Petitioner Times. The Circuit Court took judicial notice, or considered as authority, Florida Department of State, Bureau of Archives and Records Management General Records Schedule GS1 for Local Government Agencies in effect at the time of Petitioner's request. R. 200. Item 146 of that Schedule, Transitory Messages, is described as follows:

> This record series consists of those records that are created primarily for the communication of information, as opposed to communications designed for the perpetuation of knowledge. Transitory messages do not set policy, establish guidelines for procedures, certify a transaction, or become a receipt. The informal tone of transitory messages might be compared to the communication that might take place during a telephone conversation or a conversation in an office hallway. Transitory messages would include, but would not be limited to: <u>E-mail messages with short-lived, or no administrative value</u>,

> voice mail, self-sticking notes, and telephone messages. RETENTION: a) Record copy. Retain until obsolete, superseded or administrative value is lost. B) Duplicates: Retain until obsolete, superseded or administrative value is lost.

Schedule GS1 at page 28 (emphasis added).[1] See also Fla. Admin. Code R. 1B-24.001-.012, establishing standards and procedures for records retention and disposal. The personal e-mails of Mr. Brumback and Mr. Asmar, if determined to be public record, would fall within this category and thus would not be required to be maintained for any extended time period. Nor has Respondent City violated the provisions of Florida Statutes Section 119.07(2)(c). Even if the subject documents were public record, the testimony of Sharon Marzola was that the City did not destroy or delete the personal e-mails within the statutorily referenced thirty-day period. R. 197.[2]

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[1] An almost identical provision is contained in State of Florida, Judicial Branch, Records Retention Schedule for Administrative Records, adopted in Amendments to Rule of Judicial Administration 2.076, Report of Supreme Court on Public Records, No. SC01-897, Revised Opinion (September 12, 2002).

[2] Respondent City does not entirely agree with the Second District Court of Appeal's assessment of Section 119.07(2)(c) [see Times Publishing Co. v. City of Clearwater, supra, at ftn. 2.]. In the City's view, since Petitioner Times did not file its action in Circuit Court within thirty days of its request, any requirement that the custodian not dispose of a document except by court order after notice is not applicable. In fact, the entire subsection may well not apply in that the requested documents do not constitute public records in the first instance. Nevertheless, upon information and belief, Respondent City has to date retained the referenced CD(s) containing the subject e-mails.

CONCLUSION

Petitioner Times couches this proceeding as involving its enforcement of the public's right of access to public records, and suggests that all public officers and employees who transmit and receive personal e-mails on agency accounts are guilty of ethics violations [Petitioner Times' Initial Brief at 33], despite no such determination having been made by the Florida Commission on Ethics. The arguments of both Petitioners extend well beyond the current constitutional and statutory public records provisions. The Florida Legislature is the appropriate body to undertake any refinement of the public record definition necessary as a result of the development of new technologies. Under the current definition of "public records" contained in Florida Statutes Section 119.011(1), e-mails of agency employees which are of personal or private content do not constitute public records. For the reasons set forth above, the certified question should be answered in the negative and the decision of the Second District Court of Appeal should be affirmed in all respects. In the event that this Honorable Court finds that the subject documents constitute public records, it should hold that Respondent City of Clearwater did not by its actions violate the Florida Public Records Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to George K. Rahdert, Esquire, Counsel for Petitioner Times Publishing Company, Rahdert, Steele, Bryan & Bole, P.A., 535 Central Avenue, St. Petersburg, Florida 33701-0703, to Thomas E. Warner, Counsel for Petitioner State of Florida, Solicitor General, Office of the Attorney General, The Capitol-PL01, Tallahassee, Florida 32399-1050, and to Carole Sanzeri, Counsel for Amicus Florida Association of County Attorneys, Senior Assistant County Attorney, Pinellas County Attorney's Office, 315 Court Street, Clearwater, Florida 33756 by mail on September 24, 2002.

_____

Attorney

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Attorney

[1] The City Clerk has promulgated the referenced policy and other policies relating to public records retention, although the others are not of record in this action, and therefore Petitioner State's assertion that all retention decisions are left to the individual employee is not correct.