IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	**Consolidated Cases**
v.	)	**Case No. SC02-1694**
	)	**Case No. SC01-1753**
	)	
CITY OF CLEARWATER, FLORIDA,	)	
	)	
Respondent.	)	

_____/

INITIAL BRIEF OF PETITIONER
STATE OF FLORIDA

On Certified Question From The
District Court of Appeal, Second District

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INTRODUCTION

This case is about a policy of the City of Clearwater that allows city employees to destroy and withhold public records created by them on government-owned computer equipment. This policy is sanctioned by the City in direct contravention of Art. I, § 24, Fla. Const. and Chapter 119, Fla. Stat., which define the public's constitutional right of access to public records, including electronic records. This Court must correct the lower courts' failure to enforce the public's right of access to these records.

Statement of the Case and Facts

The City of Clearwater ("City") allows employees to make limited personal use of computers that are City property and that are otherwise used by City employees to conduct City business. As a consequence of this policy, some City employees maintain computer files that contain email relating to their official duties and other email that is said to be "personal" and unrelated to the City's official business.

A handful of employees in the City's information technology department determine, on a day-to-day basis, whether and when employee email deemed "of no value" should be deleted to reduce

the overall size of the City's email database. (TR 188.)[1] When such directives are given, the actual purging is left to individual City employees who are given no further guidance than the bare instruction to delete this "valueless" email. Id.

In October of 2000, the St. Petersburg Times ("the Times") requested the City to produce all email sent to or from two city employees, John Asmar and Garrison Brumback, between June 1, 1999 and October 6, 2000. Upon receipt of the Times' request, the City allowed Mr. Asmar and Mr. Brumback, in their sole discretion, without review by anyone, and with no written policy to guide them, to select which email would be provided and which would be withheld as "personal." (E.g., TR 164, 166, 187, 197-98; Times Ex. 2.) The City then provided to the Times only that email not deemed "personal" by Mr. Asmar and Mr. Brumback, and no portion of any withheld email. This is the City's procedure regarding public records requests made in reference to any employee's email, though the City has no policy defining "personal" email. (TR 197-98.)

Thereafter, the Times initiated this litigation by filing a petition for writ of mandamus with the trial court. (TR 1 et seq.) The Times asked the trial court to: 1) temporarily enjoin

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[1] Citations to the record on appeal from the trial court will be designated "TR [page number]". Trial exhibits will be referenced "[Party] TR Exhibit #."

all City employees from deleting any email until the case was resolved; 2) order the City to deliver to the trial court a copy of all current, archived, or deleted-but-recoverable email to or from Mr. Brumback and Mr. Asmar for the period at issue; 3) declare that the email requested by the Times was a public record and that the City had not complied with the Public Records Act, both by failing to produce it and by failing to retain it; and 4) order the City to immediately allow the Times access to inspect and copy the records. Id.

In December of 2000, the trial court held an initial hearing on the motion for temporary injunction and ordered the City to make every reasonable effort to retrieve, preserve, and secure from destruction all email sent to, or received by, Mr. Asmar and Mr. Brumback between October 1, 1999, and October 6, 2000, until further court order. (TR 59-60.) However, in March of 2001, the trial court issued its final order denying the requested relief on the merits and dissolving its temporary injunction. (TR 256-57.)

The Times appealed to the Second District Court of Appeal, which affirmed the trial court's decision without prejudice to the Times' right to seek in camera review of the disputed documents. The Times then requested the district court to certify a question of great public importance to this Court, and

the Attorney General filed a motion to intervene as a party on behalf of the State of Florida and to be heard in support of the Times' motion for certification. On July 3, 2002, the district court withdrew and reissued its opinion in the case, granting the Attorney General's motion to intervene and amending its May 10, 2002, opinion to certify to this Court, as a matter of great public importance, the following question:

> 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?

On May 24, 2002, the Attorney General timely filed a notice to invoke the discretionary jurisdiction of this Court to review the July 3, 2002, opinion.

SUMMARY OF ARGUMENT

The City's policy has led to the gutting of the public's rights by authorizing the destruction and withholding of records that are unquestionably public. This Court can restore and protect the public's rights by holding, at a bare minimum, that 1) records created by an agency and documenting the use of its equipment are public and must be protected as such, and 2) the

legislatively-imposed duties of an agency's public records custodian preclude giving all agency employees unfettered authority over the destruction and withholding of records owned by the agency.

Article I, Section 24, of the Florida Constitution grants to "every person" the right to access the public records of their government unless said records are explicitly made exempt by the Legislature. When the Times was rebuffed in its request for City email and initiated an action to enforce its right of access, the City and the lower courts erroneously failed to provide the Times access to government-generated, public records of the use of its equipment. By failing to produce these records, the City violated the Times' constitutional right of access. By failing to provide any remedy to the Times, the courts below compounded this constitutional wrong.

The district court also misread, Florida's Public Records Act, Chapter 119, Fla. Stat., which creates a detailed scheme to protect access to public records and contemplates its oversight by an agency's public records custodian. The City's policy, allowing each and every employee to act as the de facto public records custodian of the email sent by and to them, is contrary to the statutory scheme laid out by the Legislature and it defeats the public's rights under Art. I, §24. The policy

allows unbridled, unsupervised discretion in the maintenance and destruction of public records by those who may, at worst, have a personal stake in withholding or destroying the records, and who, at best, are often untrained and unqualified to determine what is to be maintained or destroyed or what is to be produced pursuant to a public records request.

The district court, in error, found otherwise, stating in its opinion that:

> Nothing in [Section 119.021] limits who the elected officer may designate in order to delegate the task to review requested records. Moreover, chapter 119 provides no specific procedure for a government entity to follow in determining whether a record is "public," and, if so, whether it is otherwise exempt from disclosure.

The district court's first finding, that nothing in § 119.021 "limits who the elected officer may designate...to review the public records," is both unacceptably far-reaching and inconsistent with the duties imposed on an agency's custodian of records by Chapter 119.

The second point in the above-quoted paragraph, that the Public Records Act "provides no specific procedure for [an agency] to follow in determining whether a record is 'public'," ignores both the expansive definition of "public records" found in § 119.011(1) and the core requirement of § 119.021: that the agency's head, or his or her designee, performs the custodial

role that is referenced throughout the Public Records Act–a role that includes, expressly and impliedly, making such determinations. By placing this constitutional burden on an agency head, it must be presumed that the Legislature chose the person highest in the chain of command because he or she would be more informed and aware of the public records law than the rank-and-file employee (or that he or she would be wise enough to designate an individual well-versed in the law's requirements or sufficiently informed to know when to seek legal advice).

Unfortunately, the district court threw up its hands, finding that the issues presented in this case were not a matter for it to "resolve." However, by failing to resolve these issues–or even to examine them discerningly–the district court has failed to protect the public's constitutional right of access to the electronic records of its government.

Accordingly, the decision of the district court should be modified to protect the public's right of access to all governmental records of email activity and to account for the only reasonable interpretation of the duties of an agency's public records custodian. If the district court's opinion is allowed to stand, the public will have no access to records documenting the use of public property by public employees.

Standard of Review

This appeal presents solely issues of interpretation and application of law which are reviewed *de novo*. See Sarkis v. Pafford Oil Co., 697 So. 2d 524 (Fla. 1st DCA 1997); see also Hancock v. Dep't of Corrections, 585 So. 2d 1068 (Fla. 1st DCA 1991).

ARGUMENT

I. THE DISTRICT COURT ERRED BY NOT RECOGNIZING THAT ANY RECORD OF THE USE OF CITY EQUIPMENT IS A PUBLIC RECORD.

Though Florida's courts have consistently held that email may be a public record, e.g., In re Amendments to Rule of Judicial Administration 2.051, 651 So.2d 1185 (Fla. 1995), they have failed to acknowledge marked and material differences between email and traditional paper documents. This case demands that such a material difference be recognized–because electronic mail, in addition to containing a communication, carries with it a public record of the use of government equipment: the email "header." As discussed below, the inclusion of this public information in an email makes the document a public record.

In the "General Records Schedule GS1-L for Local Government Agencies," Division of Library and Information Services, Department of State ("DOS") (available at

http://dlis.dos.state.fl.us/barm and establishing the minimum retention periods for public records), the DOS has recognized both this unique feature and its import. At page ii of the GS1-L, the DOS notes that traditional paper documents and "records created or maintained in electronic format must be retained in accordance with the minimum retention requirements presented in these schedules.... Printouts of e-mail files are acceptable in place of the electronic files **provided that the printed version contains the complete header information, including all date/time stamps, routing information, etc."** (Emphasis added.)

This language denotes an important distinction between email and traditional paper documents: that is, the header provides the record of a transaction using government-owned equipment. This is why analogies to traditional paper documents, filing cabinets, and the like, are unhelpful, and why maintenance of the email, including its header, is important both to the DOS and in considering the case at bar.

If an agency were to keep a log of its incoming and outgoing "traditional" mail (including the senders, recipients, times, dates, etc.), without question, no statutory exemption would justify withholding this log–regardless of the nature of the letters sent and received. And while no agency is required to

create such a log, it is a fact that the City computers sending and receiving the email at issue do create one. The only distinction is that, rather than condensing it into a single document, the log information is contained with each individual email. This distinction, however, fits no exemption that would preclude a citizen from access to such transactional information.

Further, there is no question that the telephone records of a government agency are computer-generated, public records. This is so because they are logs of the agency's use of its equipment. And though legislative exemptions from disclosure might be asserted regarding certain numbers contained in the phone records, this would by no means justify an agency's destruction or withholding of the entire document. E.g., § 119.07 (providing for redaction of exempt material from public records). The email header is like the phone record in that it documents the use of agency communications equipment. Like a phone record, the document (i.e., the email) containing the information (i.e., the header) is public and must be maintained, regardless of whether it also includes non-public information.

This would be no less true if an agency's phone records were formatted with the record of each individual phone call on a

single page–regardless of what a given employee may write on it. And, while phone records are not usually kept in this manner, it is clearly analogous to what the City's computers do: when an email is sent or received, they record, in the header atop the page, a record of each such use of the computer. Thus, the document containing the header must be considered a public record. When viewed in this context, the public-record status of an email is clear.

Therefore, the Times should have been provided the email they requested. Like a traditional-mail log, they are non-exempt, public records created in the course of the agency's business; and, like phone records, they are non-exempt, computer-generated, public records of the City's use of its communications equipment. Whether the content in the body of the email may or may not be exempt would in no way exempt the portion of the record documenting that the transaction occurred. If the City's records custodian determined the content of any email to be somehow non-public, then the custodian could have redacted it in accordance with the specific procedures outlined in Ch. 119–rather than withholding it completely, in violation of the constitution.

II. FLORIDA'S PUBLIC RECORDS ACT CANNOT REASONABLY BE CONSTRUED TO ALLOW EACH AND EVERY PUBLIC EMPLOYEE

TO BE A DESIGNATED "RECORDS CUSTODIAN" AS THE TERM IS DEFINED AND USED IN FLORIDA'S PUBLIC RECORDS LAW.

The City's practice and policy of allowing each of its employees unfettered discretion in the destruction and withholding of email violates Chapter 119 and the public's rights under the Florida Constitution. If the integrity of the public's right of access to its government's electronic public records is to be preserved in any meaningful way, the lower courts' construction of Chapter 119 must be corrected.

The plain language of Fla. Const. Art. I, § 24, and the Public Records Act create a broad right of access to the records of Florida's state agencies, counties, and municipalities. See, e.g., § 119.01(1) ("It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person."); accord, e.g., Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Lorei v. Smith, 464 So.2d 1330 (Fla. 2nd DCA 1985) rev. denied, 475 So.2d 695 (Fla. 1985); Dade Aviation Consultants v. Knight Ridder, Inc., 800 So.2d 302 (Fla. 3rd DCA 2001); § 119.01(3) ("The Legislature finds that providing access to public records is a duty of each agency and that the automation of public records must not erode the right of access to those records.")

An agency's duty to provide access to public records under

§ 119.01(3) includes, of necessity, the duties to determine which records in the agency's custody are public and to maintain them.[2] This duty is vested in the legal custodian of the records. See, e.g., §§ 119.07 (requiring, inter alia, the legal records custodian to supervise the inspection and release of public records and to assert exemptions to release); 119.08 (requiring the custodian to supervise photography of records); and 119.11(4) (when a civil action is filed to enforce the provisions of Chapter 119, the custodian of the public record that is the subject of such action shall not transfer custody, alter, destroy, or otherwise dispose of the record). This issue frequently arises in one of two contexts: when an agency seeks to dispose of a record and when access to records is sought.

In the context of record retention or disposal, the DOS, under the authority of the Legislature, has promulgated minimum retention schedules for various classes of public records. §§ 119.09, 119.041(1) (requiring the consent of the DOS prior to disposal of "records no longer needed"); "General Records Schedule GS1-L for Local Government Agencies"; see also § 119.01(4) (stating that each agency shall establish a records disposal program in accordance with retention schedules

[2] The definition of an "agency" in § 119.011(2) includes municipalities.

established by the DOS).

If an agency wishes to dispose of a record, a determination must first be made whether a record is a public record vel non. Further, the person making the determination on behalf of a local government must consult Schedule GS1-L before disposal of any record he or she determines to be public.

When access to records is sought, an agency is required to produce all public records not exempt from disclosure by statute. § 119.07. This responsibility requires an answer to the threshold question: "Are the records for which disclosure is sought, 'public'?" It clearly follows that an incorrect answer to the threshold question of whether a record is public will lead to the destruction or withholding of records that should be available to the public. Thus, without proper oversight and guidance, the public's rights under the Florida Constitution and the Public Records Act could easily be frustrated.

As a practical matter, the threshold question of whether a record is a public record vel non is almost always answered without the public's knowledge that it has even been asked. This is why the Public Records Act vests the duty to answer that question in an individual, elected or appointed, employed by and on behalf of the public: a Records Custodian.

Section 119.021(a) states:

> Custodian Designated.
>
> The elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee, shall be custodian thereof.

When read in context, the word, "officer" cannot reasonably be construed to mean, "any individual governmental employee," therefore, the word, "office," cannot reasonably be construed to mean "the office of any individual governmental employee." Public records belong to the office, not to individual employees.

Further, one finds this same type of language in other sections of the Public Records Act and, likewise, its restrictive nature simply cannot be ignored. See, e.g., § 119.08 (allowing photography of public records "while in the custody and control of the lawful custodian thereof, or his or her authorized deputy")(emphasis added); § 119.05 (requiring the custodian to deliver records to succeeding officer); § 119.11(4) (prescribing the custodian's duties when a civil action is filed). If the legislative intent were to allow innumerable custodians, this language would not be necessary.

Thus, when read alone or in pari materia with other sections of the Public Records Act, including the legislative policy stated in § 119.01, § 119.021 cannot reasonably be interpreted

to mean that a governmental officer may, on his or her behalf, designate each and every one of his or her employees as the lawful "public records custodian." Significantly, and in error, the district court found otherwise.

Admittedly, it is possible for any individual employee to violate the law, intentionally or otherwise, by destroying, or withholding from the legal custodian, the public records in his or her possession at any given time. This does not, however, transform the employee into the legal records custodian. Puls v. City of Port St. Lucie, 678 So.2d 514 (Fla. 4th DCA 1996) (distinguishing between an employee with possession of a public record and the legal records custodian while holding that a cause of action existed against an employee who, individually, withheld a public record, not the legal records custodian).

Likewise, there is certainly no practical way to keep a constant eye upon each employee to ensure that he or she is not, at any given time, sitting in his or her office shredding a public document. However, protection of public records, where practicable, is mandated. See e.g., § 119.031 ("Keeping records in safe places; copying or repairing certified copies."); cf. § 119.01 (echoing the constitutional right to access public records and adding that "automation of public records must not erode the right of access"); cf. also Art. I, § 24 (mandating

the right of access to public records).

With the advent of computer networks like the City's (where all employees' computerized records are stored in a central server over which an individual manager exercises control), with the capacity to create data backups therefrom, and with the advent of software programs to block the deletion of electronic records (e.g., TR 193, 196), electronic records can easily be protected from destruction prior to review by the agency's lawful custodian. Unfortunately, the City's policy of improperly vesting custodial and decision-making authority in each of its individual employees fails to meet its constitutional and statutory duties. Further, and to compound its error, the City has failed to provide any written guidance to these employees.

Nothing in the record suggests that the aforementioned computer-record maintenance is cost-prohibitive. Any argument that it is not feasible to maintain the records for review by a legal records custodian before they are destroyed should be directed to the Legislature, which may, in accordance with Art. I, § 24, "provide by general law for the exemption of [such cost-prohibitive] records..., provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated

purpose of the law." Chapter 119, as now written, does not take this approach. See e.g., § 119.01(3) (stating that, "automation of public records must not erode the right of access"). In fact, the Legislature has taken an opposite tack. Section 119.07(1)(b) specifically allows agencies to add a "special service charge" where expensive maintenance of public records is required.[3]

The particular statutory duties of a legal records custodian, e.g., knowing, understanding, and following the multiplicity of procedures outlined in the Public Records Act and the DOS General Records Schedule GS1-L for Local Government Agencies, requires a working knowledge of laws and procedures not possessed by every rank-and-file government employee. See, e.g., TR 21 (where the Assistant City Manager of Clearwater exhibits an incomplete working knowledge of even the City's own public-records policies). Section 119.07 and the other above-cited provisions of that chapter make it clear that the public records custodian's duty is to oversee compliance with the law and, presumably, seek legal advice whenever necessary. It is perilous to turn a blind eye to this necessary expertise and construe § 119.021 to allow an agency head to designate all

[3] It should be further noted that any concerns over "server space" can easily be put to rest by a policy requiring employees to print hard copies of any email before they delete it.

employees as legal records custodians, especially where the determinations made by them, e.g., what are and what are not public records, affect an important constitutional right of Florida citizens.

Finally, this Court has, for nearly two decades, recognized the distinction between a legal records custodian and any given government employee, finding that, "[t]he only person with the power to [assert a statutory exemption to the production of public records] is the custodian," and implying that the legal records custodian may not have actual possession of the public records by allowing delay in production based upon "the physical problems involved in retrieving" public records. Tribune Company v. Canella, 458 So.2d 1075, 1078-79 (Fla. 1984). Other courts have, likewise, recognized such a distinction. See, e.g., Mintus v. City of West Palm Beach, 711 So.2d 1359, 1360-1361 (Fla. 4th DCA 1998) (acknowledging that an agency employee may have possession of a document, but, unless the employee is the officer appointed, by statute, to maintain custody of the records, or that officer's specific designee, the employee in possession of the records is not the legal records custodian); cf. Puls, supra, at 514 (distinguishing between an employee with possession of a public record and the legal records custodian).

The language used in § 119.021 and throughout Chapter 119,

the complexity of understanding required to perform the job of a records custodian, and the constitutional ramifications of randomly dispersing throughout an agency the authority to determine what is or is not a public record, all militate against the facile interpretation that any and all employees may be legally-designated records custodians for their agency. The district court misconstrued Chapter 119 in stating that nothing in § 119.021 limits who may be designated the custodian of public records and that there is no specific procedure for a government entity to follow in determining whether a record is public, and, if so, whether it is exempt from disclosure. Chapter 119 simply cannot be read to permit every employee to be the agency's designated custodian of public records. And, clearly, it must be the responsibility of the custodian to decide what records kept in agency files, be they electronic or not, are public records. A policy that delegates such decisions to each individual employee who happens to have mere custody of a record is not consistent with Chapter 119.

CONCLUSION

The decision of the district court of appeal must be modified to reflect 1) that the Times is entitled, at a minimum, to all email they initially requested, though the City may remain free to assert exemptions from disclosure in accordance with Chapter 119, and 2) that the City of Clearwater may not deem all employees to be public records custodians and, as such, allow employees to purge supposedly "valueless" email from their email records or select which of their email is public in response to a public records request. Any other result is tantamount to holding that Art. I, § 24, does not apply to an agency's electronic documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to GEORGE K. RAHDERT, ALISON M. STEELE, and PENELOPE T. BRYAN of Rahdert, Steele & Bryan, P.A., 535 Central Avenue, St. Petersburg, Fl. 33701 and PAM AKIN and LESLIE K. DOUGALL-SIDES, City of Clearwater, P.O. Box 4748. Clearwater, Florida 33758, this _____ day of August 2002.

_____
Louis F. Hubener

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that the type size and style used in this brief is 12-point Courier New.

_____
Louis F. Hubener

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