

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER
STATE OF FLORIDA

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

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ARGUMENT IN REPLY

Standard of Review

As the Attorney General noted in his Initial Brief, this appeal presents solely issues of interpretation and application of law which are reviewed de novo. AG Ini. Br. at 8.¹ As the City correctly pointed out in its Answer, this Court possesses the broad authority to review and rule upon issues other than the precise issue certified. CC Ans. Br. at 6. Should this Court find itself presented with issues not addressed by the specific wording of the certified question, but necessary to the proper resolution of this matter, this Court's authority to rule upon those issues should be fully exercised.

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

In their Answer Briefs, the City fails to address, and Amicus fails to rebut, the central point of the Attorney General's first argument: that the information contained in the

¹ Citations will be formatted as follows. Attorney General's Initial Brief: AG Ini. Br. at [page #]; St. Petersburg Times' Initial Brief: SP Ini. Br. at [page #]; City of Clearwater's Answer Brief: CC Ans. Br. at [page #]; Amicus's Answer Brief: Am. Ans. Br. at [page #]; Record on Appeal: R [page #]. The deposition of John Asmar, with which this Court ordered the record supplemented on October 9, 2002, will be cited as Asmar Depo. [at [page #]] or [Exhibit #] (as the supplementation had not yet occurred as of the completion of this Reply Brief).

header of email, like the City's, is public record as much as the information contained in an agency's telephone bill or traditional mail log. The Answer Briefs attempt to deflect attention away from this key point, making it reasonable to presume that the City and Amicus recognized the point's import, but were unable to formulate any coherent or credible response to it. These failures are fatal to the arguments in the Answer Briefs, and help demonstrate that the Attorney General is correct and that the focus of the district court's opinion was misplaced.

A. Email Created On The City's Computer System Was, From The Time Of Its Transmission, Public Record.

There is an important, facial conflict between the City and Amicus regarding headers, even though Amicus "adopts the brief of...the City of Clearwater in its entirety." Am. Ans. Br. at 2. For example, the City unqualifiedly asserts that "[t]here is no evidence of record" that headers existed on the email at issue and fervently argues that it should not be required to purchase and install software to "generate headers," forcefully implying, if not saying outright, that there is no such thing regarding City email. E.g., CC Ans. Br. at 15-16. Meanwhile, Amicus acknowledges the ubiquity of email headers. E.g., Am. Ans. Br. at 12.

With respect to the conflict between the City and Amicus

over whether the City's email includes headers, Amicus is clearly correct. Exhibits 1, 2, and 3 attached to the deposition of John Asmar and made a part of the record, at trial, by the City, R at 200, are City email that does, in fact, include headers. Asmar Depo. Exhibits 1-3. As for the conflict between the City and Amicus regarding the existence of headers as a feature of all email, this conflict with the City must likewise be resolved in Amicus's favor, as demonstrated by Argument I.A.1., infra.

1. The City and Amicus Erroneously Contend That A Public Record Including "Personal" Information Is Not Public.

Contrary to the City's and Amicus's assertions in their Answer Briefs, the Attorney General has not argued that the public header information, intrinsic to all city email, "transforms" personal email into a public record. E.g., CC Ans. Br. at 15; Am. Ans. Br. at 10. A document containing public information simply is a public record, period, with no alchemy required.

Though the City and Amicus purport to be addressing an argument made by the Attorney General, they are, in fact, simply creating their own that bears a striking resemblance to the imaginary argument they condemn: they are arguing that the inclusion of allegedly private information makes a previously-

public record public no more. E.g., CC Ans. Br. at 15; Am. Ans. Br. at 10. The argument's true nature remains both apparent and in clear conflict with the established law on public records. See, e.g., Fla. Const. Art. I, § 24 (granting right of access to public information); § 119.01 (same); § 119.07 (allowing only for redaction of non-public information from an otherwise public document); see also, e.g., Lorei v. Smith, 464 So.2d 1330 (Fla. 2nd DCA 1985) (right of access to public information "is virtually unfettered, save for the statutory exemptions", rev. denied 475 So.2d 695 (Fla. 1985); Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977); Michel v. Douglas, 464 So.2d 545, 546 (Fla. 1985).

Further, the logical lynchpin of the City's and Amicus's argument is best summed-up as an inaccurate, temporal view that the "personal" portion of an email is written and, thereafter, the header information is attached to it. This is wrong. Until it is sent, by definition there is no such thing as email. Just as a letter cannot be sent without an address, or a phone call made without the numerical "address" of the recipient having been dialed into the caller's phone, an email cannot be sent without header information including the addressee. There simply is no such thing as email without header information. Thus, there is no issue of "adding" a header to a "personal"

communication and thereby "transforming" it into an email. Once the "SEND" button is clicked, there immediately exists an electronic communication including both the address information and the text of the communication. Thus, a temporal view is simply incorrect.

However, even if this temporal view were accepted, it is inapplicable to determining whether a record is public. Though the Attorney General never makes the inaccurate argument that header information is "added" to an email already in existence, assuming, arguendo, the Attorney General had advanced such an argument, the email would still be a public record. No credible response is made by the City or Amicus to rebut the Attorney General's initial argument: the information included in an email header is public record for the same reasons a record of phone calls or traditional mail activity would be: it is a record of an agency's use of its resources and a record of communications made and received using City equipment.

Given that the header information is public, the City and Amicus still argue that it loses its public status because it is placed upon a non-public record already in existence. This view must fail for the same reasons that an agency cannot avoid public disclosure by placing public information in the hands of a third party: public information is public information,

regardless of where, how, why, or on what it is kept. Cf., e.g., Michel v. Douglas, 464 So.2d 545, 546 (Fla. 1985); Shevin v. Byron, 379 So.2d 633 (Fla. 1980); Times Publishing Co., Inc., v. City of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990). Thus, even if a temporal view of the creation of an email and its public-record header is accepted, it is clear that the email is a public record.²

2. Amicus's Additional Arguments That Header Information Is Not Public Record Because It Is "Automatically" Created And Not "Used" By The City Are Misplaced.

As addenda to the argument addressed immediately above, Amicus asserts, throughout its second argument, that the presence of a header is of no significance whatsoever to the analysis of whether email may be considered public record, asserting that the proper test is whether a record is "automatically" created and whether the City "uses" the record. Though creative, these arguments are untenable.

First, the argument that a record is not public if the

² Of course, if the information asserted to be non-public is specifically exempt from disclosure, such information may be redacted pursuant to § 119.07. See §119.07(2); see also AG Ini. Br. at 13; compare Am. Ans. Br. at 22 (stating, in error, that credit card information cannot be protected) with § 215.322(6) (creating a specific exemption for such information).

agency makes or receives it by non-human means is of no moment and its illogic is easily exposed by a single example of the absurd results of its application. Were the Court to accept Amicus's argument, a licensing agency could claim as exempt a "deficiency letter" to a license applicant because the letter was automatically sent out by an agency computer after the computer analyzed application data input by an employee who simply entered information provided by the applicant, without regard for whether the application was complete and, therefore, without any intent to create the letter produced. However, there is no question that this letter, created automatically by a computer and without any employee's specific intent to create it, would be a public record. In length only does Amicus's argument transcend the clearly unsupportable argument, "This document isn't public because the laser printer wrote it!" Cf., e.g., Shevin, 379 So.2d at 641 (relied upon by Amicus, but holding only that "merely preliminary materials," only if to be later formalized, were exempt from disclosure).

Whether an agency "uses" the information it makes or receives is likewise irrelevant to the inquiry of whether a record is public or not. A simple example of this "test"'s inadequacy would be where a public official has a large box into which he or she tosses all correspondence sent by complaining

constituents. The official never intends to open, read, consider, or use in any way, these letters, but, as with the preceding example, these letters would be public under any proper legal analysis of Florida's law. Cf. Op. Att'y Gen. Fla. 99-74 (1999) (finding telephone records simply "retained" by school board to be public records because they "related to the use of district equipment....").

Finally, Amicus cites no statutory or case law for its proposed "automatically-created" or "use" tests, and it cannot because there is none. Yet Amicus, nevertheless, urges this Court to create exemptions for public records created by an agency via non-human means and those which the city creates but does not "use." These arguments are inconsistent with both Florida law and Argument III of Amicus's own brief. See Times Publishing, 558 So.2d 487, 492 (Fla. 2d DCA 1990) (citing Wait v. Fla. Power & Light, 372 So.2d 420 (Fla. 1979) when stating, "[T]he judiciary cannot create a privilege of confidentiality to accommodate the desires of local government.").

In sum, no legally-cognizable reason has been offered by either the City or Amicus to defeat the first argument in the Attorney General's Initial Brief. The Attorney General's argument remains a proper and coherent statement of the law demonstrating that the district court erred in its opinion.

Thus, the opinion should be reversed.

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.

As was argued in the Attorney General's Initial Brief, 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, and the City failed to follow, and the district court misinterpreted, the law regarding public records custodians. AG Ini. Br. at 11-19. This, though one of only two arguments advanced by the Attorney General, is not at all addressed by Amicus and only scantily addressed by the City. These failures are telling, as is the City's failure to offer its employees or this Court any definition of "personal," a word of many meanings on which the City's entire position relies.

A. The City's Improper And Meritless Arguments

In contrast to the City's previously-cited, improper argument--that the record lacked evidence that email headers were present on City email, notwithstanding the fact that the City had itself introduced such evidence into the record--here, in an attempt to rebut the Attorney General's argument regarding records custodians, the City relies on phantom internal policies

it claims to exist but that it admits are beyond the record before this Court. Further, the City argues, in disregard of its own laws, that "the only logical" people to fulfill the role of statutory public records custodians are the two men whose email was requested by the Times or the City Manager.

1. The City's Non-Record References

The City asserts in its brief that "The City Clerk has promulgated...[internal] policies relating to public records retention, although [these policies] are not of record in this action...." CC Ans. Br. n.1; see also CC Ans. Br. at 5; id. at 17. The City thereafter argues that the contents of these extra-record, mystery documents disprove the Attorney General's argument. See id. Even assuming (without conceding) that any such policies actually exist, their absence from the record dictates that any and all references to them, any arguments that rely upon them, and any "facts" alleged to be contained in them are improper for this Court to consider and, therefore, must be disregarded.

2. The "Only Logical" Custodians

The City argues that, "the employees subject to a specific public records requests [sic] were an assistant city manager

[Mr. Brumback] and an administrator of several departments,³ going on to assert that, "[i]f 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." Although the City's concession, that the legal records custodian is the proper person "to review documents for public records status," is both welcome and correct, there nevertheless exists a disquieting problem with the balance of the City's argument.

The problem with the City's argument is that the City never mentions that, by City Ordinance, the Clearwater City Clerk is the City's duly designated Records Custodian. CLEARWATER, FLA., Code, Part I, Subpart A, § 3.04(a) (1999) (available online at <<http://livepublish.municode.com/4/lpext.dll?f=templates&fn=main-hit-j.htm&2.0>>). Thus, and notwithstanding its arguments to the contrary, the City has had in place, at least since 1999, a "logical" public records custodian that is neither Mr. Brumback, Mr. Asmar's successor, nor the City Manager.

As the City, in conflict with its argument, actually has a duly designated, legal public records custodian, of whose

³ The City is presumably referring to Mr. Asmar, though, again contrary to the City's assertion, there is no record evidence of his holding any such position. Cf., e.g. Asmar Depo. at 6-7 (where Mr. Asmar, no longer a city employee, refuses even to admit that he ever worked for the City).

existence the City cannot credibly claim to be unaware, further argument is unnecessary to demonstrate that this "only logical custodian" argument must be rejected.

B. The City Has Yet Not Defined The Term "Personal" Email.

The City has failed to offer its employees or this Court any working definition of the word "personal"--a term with no fewer than nine adjectival meanings. See "Personal," The American Heritage Dictionary of the English Language, Fourth Edition (2000). Yet the City claims "personal" email to be outside the ambit of public records, disavowing any fault in allowing its individual employees to determine what is "personal" and what is not when discarding or withholding records belonging to the City. And though the City asserts otherwise, the testimony of its employees demonstrates that, in contravention of the state's public records laws, the City allowed Mr. Brumback and Mr. Asmar in their sole discretion to decide what the City would withhold from the Times.

When asked if the City had "any type of written policy to provide guidance to city employees about what is and what is not personal email," Assistant City Manager Mr. Brumback testified, "No, not that I'm aware of." R 164. Mr. Brumback further testified that, after the City's receipt of the Times' public records request, "I was told that I could go back and review

those things in my inbox that I hadn't previously put in my personal folder and that I was not required to provide those things on [sic] my personal folder."⁴ R 173. Further, Mr. Brumback testified that he instructed a city employee to withhold this "personal" email from the Times and that he was never asked by any City employee to inspect it. R 165, 163. Cf. Tribune Company v. Canella, 458 So.2d 1075 (Fla. 1984) (denying employees a right even to be present for disclosure of personal information and holding that the public records custodian, not an employee, was only person with power to assert a privilege of non-disclosure).

Likewise, the City's Assistant Director of Information Technology,⁵ Daniel Mayer, testified that the City had no policy regarding "personal" email, R 188, and that Mr. Brumback and Mr. Asmar were allowed, in their sole discretion and without oversight, to determine which email should be withheld as "personal." R 185-86, 188; see also R 20 (letter provided by Mayer in response to records request stating that the records

⁴ This is the "legal advice" the City to which the City refers. CC Ans. Br. at 17. However, such advice does not obviate the requirement of disclosure. See Shevin v. Byron, et al.

⁵ Contrary to the record facts of this case, the City erroneously refers to Mr. Mayer as the City's, "Information Technology Director." Compare R 181 (Mr. Mayer's testimony) and R 20 (letter signed by Mr. Mayer) with CC Ans. Br. at 3.

did not include email "asserted to be personal by Mr. Asmar or Mr. Brumback").

The City's arguments depend upon the amorphous term "personal," yet that term remains undefined by the City in its brief or its written policies. As reasonable minds could greatly differ as to the term's definition, its use should bear little, if any, probative force in the case at bar.

CONCLUSION

The crux of the Attorney General's argument is simply that the City treat its public records in a manner respectful of the laws and to the citizens of the state. The City has no power of its own to define what is or is not a public record. Fla. Const. Art. I, §24. Further, to allow individuals to withhold records without consulting the City's designated public records custodian--whose existence the City ignores--is inconsistent with the core provisions of Chapter 119. See, e.g., Tribune Company, 458 So.2d at 1078, 1079 (public records custodian, not employee, only person with power to assert privilege of non-disclosure under § 119.07); § 119.07(c) (governing where records custodian asserts "that a requested record is not a public record"); cf. Fla. R. Jud. Admin. 2.051(e)(2) (2002) ("Public Access to Judicial Branch") ("The custodian shall be solely responsible for providing access to records of the custodian's

entity. The custodian shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure."). However uncomfortable the City may be with the public records law, it must, nonetheless, be required to abide by it. Hence, the district court's opinion should be reversed or, at a minimum, modified to be consistent with Florida law.

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, Florida 33701; PAM AKIN and LESLIE K. DOUGALL-SIDES, City of Clearwater, P.O. Box 4748, Clearwater, Florida 33758; and CAROLE SANZERI and MICHAEL A. ZAS, Pinellas County Attorney's Office, 315 Court Street, Clearwater, Florida 33756 this _____ day of October 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