

IN THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH, )  
ATTORNEY GENERAL, )  
 )  
Petitioner, )  
 )  
v. ) **Case No. SC01-1398**  
 )  
CHIEF JUDGE OF THE THIRTEENTH )  
JUDICIAL CIRCUIT, )  
 )  
Respondent. )  
\_\_\_\_\_ /

---

REPLY BRIEF OF PETITIONER  
ROBERT A. BUTTERWORTH, ATTORNEY GENERAL

---

THOMAS E. WARNER  
Solicitor General

T. KENT WETHERELL, II  
Deputy Solicitor General  
MATTHEW J. CONIGLIARO  
Deputy Solicitor General  
OFFICE OF THE SOLICITOR GENERAL  
The Capitol - Suite PL-01  
Tallahassee, FL 32399  
(850) 414-3681  
(850) 410-2672 (fax)

and

Patricia R. Gleason  
General Counsel  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol - Suite PL-01  
Tallahassee, FL 32399  
(850) 245-0157  
(850) 414-2641

On behalf of Petitioner Robert A.  
Butterworth, Attorney General

TABLE OF CONTENTS

Table of Authorities . . . . . ii

Argument . . . . . 1

**I.** THE PUBLIC’S RIGHT TO INSPECT OR COPY  
“PUBLIC RECORDS”, INCLUDING THOSE OF THE  
JUDICIAL BRANCH, IS A SELF-EXECUTING RIGHT  
GUARANTEED BY ARTICLE I, SECTION 24, OF THE  
FLORIDA CONSTITUTION, NOT THE RULES OF  
JUDICIAL ADMINISTRATION . . . . . 1

**II.** THE “PUBLIC NATURE OF THE RECORDS SOUGHT BY  
THE MEDIA PETITIONERS DOES NOT DEPEND ON ANY  
SPECIFIC DUTY OR AUTHORITY OF THE CHIEF  
JUDGE TO INVESTIGATE JUDICIAL MISCONDUCT OR  
SUPERVISE OTHER JUDGES, OR “ANYONE ELSE.” . . . . 3

**III.** THE RECORDS SOUGHT BY THE MEDIA  
PETITIONERS ARE NOT EXEMPT FROM  
PUBLIC DISCLOSURE UNDER RULE 2.051  
OR ANY OTHER PROVISION OF LAW . . . . . 4

Conclusion . . . . . 9

Certificate of Service

Certificate of Compliance

**TABLE OF AUTHORITIES**

**Cases:**

Amendments to Fla. Rules of Judicial Admin.  
-Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992)  
. . . . . 2

Times Public Co. v. Ake, 645 So. 2d 1003 (Fla. 2d DCA 1994) . . 8

Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982) . . . . 5

**Florida Constitution:**

Article I, section 24 . . . . . 1,2

Article V, section 2 . . . . . 1,2

Article V, section 12 . . . . . 4,5

**Court Rules:**

Fla. R. Jud. Admin. 2.015 . . . . . 4

Fla. R. Jud. Admin. 2.020 . . . . . 7

Fla. R. Jud. Admin. 2.051 . . . . . *passim*

Fla. R. Jud. Admin. 2.075 . . . . . 7

**Other:**

Report of the Supreme Court Workgroup on Public Records,  
Case No. SC01-897 (Apr. 30, 2001) . . . . . 7

## ARGUMENT

The Attorney General's Initial Brief demonstrated that the materials at issue in this case are public records under Article I, section 24 of the Florida Constitution and that those records are not exempted from disclosure by the confidentiality provisions of the State Court System Personnel Rules and Regulations (hereafter the "Personnel Manual"). In response, the chief judge effectively concedes that the disputed materials are public records. Nonetheless, he contends that various provisions of the Rules of Judicial Administration exempt disclosure in this case, although he abandons the sole exemption relied upon by the Second District.

**I. THE PUBLIC'S RIGHT TO INSPECT OR COPY "PUBLIC RECORDS", INCLUDING THOSE OF THE JUDICIAL BRANCH, IS A SELF-EXECUTING RIGHT GUARANTEED BY ARTICLE I, SECTION 24, OF THE FLORIDA CONSTITUTION, NOT THE RULES OF JUDICIAL ADMINISTRATION.**

As demonstrated in the Attorney General's Initial Brief, whether the materials at issue are public records in the first instance is controlled by the Florida Constitution, not the definition of "judicial records" added in 1995 to Rule of Judicial Administration 2.051. Citing Article V, section 2(a) of the Constitution, the chief judge responds by asserting that the judiciary has "exclusive power and responsibility over court records." Ans. Br. at 3-4.

The chief judge is wholly incorrect that Article V, section 2(a) empowers this Court to create rules inconsistent with the public's right of access under Article I, section 24. Article V, section 2(a) authorizes this Court to adopt practice and procedure rules for all Florida courts. Nothing in that authorization permits the Court to alter the general right of access to public records set forth in Article I, section 24 - a right that expressly encompasses materials in the possession of the judiciary. Article I, § 24(a), Fla. Const. ("This section specifically includes the legislative, executive and judicial branches of government . . . ."); see also Amendments to Fla. Rules of Judicial Admin.-Public Access to Judicial Records, 608 So. 2d 472, 473 (Fla. 1992) (acknowledging the limiting effect of Article I, section 24 on the Court's ability to close access to public records).

Rule 2.051 can certainly extend the scope of judicial records available to the public beyond that prescribed by Article I, section 24, but Rule 2.051 cannot contract the scope of the constitutional term "public record" and thereby limit the scope of materials to which the public has a general right of access under the constitution. If an item qualifies as a "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 . . . .," Art. I, § 24, Fla. Const., then the item is a public record and must be open for public inspection or copying, unless, of course, a valid exemption overcomes the general right of access. The Second District thus erred in relying on Rule 2.051 to define the scope of records to which the public has a general right of access.

**II. THE "PUBLIC NATURE" OF THE RECORDS SOUGHT BY THE MEDIA PETITIONERS DOES NOT DEPEND ON ANY SPECIFIC DUTY OR AUTHORITY OF THE CHIEF JUDGE TO INVESTIGATE JUDICIAL MISCONDUCT OR SUPERVISE OTHER JUDGES, OR "ANYONE ELSE."**

The Attorney General's Initial Brief demonstrated the Second District's error in holding that the materials at issue are not public records because no rule, law or ordinance obligated the chief judge to make or receive them. Tellingly, the chief judge makes no argument whatsoever in support of the Second District's decision.

Indeed, the chief judge admits that he made or received the documents at issue in connection with the Thirteenth Judicial Circuit's official business when he acknowledges that, as "the primary administrator" in the circuit, he had the duty to give "full consideration and scrutiny" to "[m]aterials alleging sex between courthouse personnel or courthouse personnel and judges." Ans. Br. at 9. The chief judge thus effectively, and correctly, confesses error in this aspect of the Second

District's decision.<sup>1</sup>

**III. THE RECORDS SOUGHT BY THE MEDIA PETITIONERS ARE NOT EXEMPT FROM PUBLIC DISCLOSURE UNDER RULE 2.051 OR ANY OTHER PROVISION OF LAW.**

The chief judge has also abandoned the Second District's holding that the requested materials were exempt from disclosure by court rule, namely this Court's 1993 Personnel Manual, pursuant to Florida Rule of Judicial Administration 2.015(c)(8). The Attorney General's Initial Brief demonstrated the incorrectness of that holding because, among other things, the Personnel Manual sets forth an administrative procedure, not a court rule, and the Personnel Manual was not "presently" in effect when Rule 2.015(c)(8) was adopted in 1992, as the rule plainly requires.

The chief judge's advertent failure to defend the Second District's decision should be deemed another confession of error. Further, this Court should reject the chief judge's arguments that three other exemptions apply to the materials at issue in this case. The Attorney General will discuss each of

---

<sup>1</sup> That the materials at issue were produced or compiled during an investigation by the chief judge is ignored by the Florida Conference of Circuit Court Judges, which argues only that items concerning judges' and employees' "personal" affairs should not be public records unless "the relationship is contrary to law or ethics." Conf. Br. at 2. Under the facts of this case, the requested items are clearly public records, as the chief judge effectively concedes. The Conference makes no argument to the contrary.

the chief judge's arguments in turn.

First, the chief judge argues that, pursuant to Rule 2.051(c)(8), the requested materials concerning Judge Ward were exempted by Article V, section 12(a)(5) of the Constitution and the "rules" of the Judicial Qualifications Committee (hereafter "JQC"). Ans. Br. at 6-8. In essence, the chief judge argues that once the JQC began to investigate Judge Ward, all "materials and any independent knowledge" possessed by the chief judge became exempt from disclosure unless and until probable cause was established by the JQC. Id. at 6. No authority supports that position. Article V, section 12(a)(5) addresses JQC proceedings, not a court's internal records. Further, as the Second District held below, the chief judge could not shield public records from disclosure simply by turning them over to an entity that treats them as confidential. See also Tober v. Sanchez, 417 So. 2d 1053, 1055 (Fla. 3d DCA 1982) (holding agency in whose hands records were public could not shield them from disclosure by delivering them to an attorney).

Moreover, as the chief judge admits at page 7 of his Answer Brief, even if turning materials over to the JQC could somehow render those items confidential, that confidentiality ended when the JQC found probable cause to suspect Judge Ward of misconduct - an event that occurred long before the Media Petitioners

sought a writ of mandamus from the Second District and before the chief judge denied the Media Petitioner's final request to inspect and copy the records at issue. Accordingly, the JQC "rule" exception of Rule 2.051(c)(8) cannot support the Second District's decision.

Second, the chief judge asserts that the materials concerning fraternization or relationships between judges and court personnel are deemed confidential by Rule 2.051(c)(3), which regards "complaints" against judges and court personnel. Ans. Br. 8-9. Nothing in the record, however, suggests that all of the materials at issue could possibly constitute "complaints" - particularly given that the record contains a letter from the chief judge stating that he was not aware of any complaints against Judge Ward concerning sexual harassment or sexually inappropriate behavior. See Petitioner's App., Tab C.

Rule 2.051(c)(3) is unequivocal in that complaints against judges are no longer confidential once probable cause is found to exist and that complaints against other personnel are no longer confidential once probable cause is found or not found to exist. Nothing in the record supports the notion that either the chief judge or the JQC was still conducting any probable cause review when the Media Petitioners petitioned for a writ of mandamus or, for that matter, when the chief judge denied the

Media Petitioners' last request to inspect and copy the materials. In fact, the records shows exactly the opposite with respect to the JQC's investigation of Judge Ward, as the chief judge admits. Ans. Br. at 7. Accordingly, the Second District's decision cannot be upheld on the basis that all of the requested materials are "complaints" exempted by Rule 2.051(c)(3).

The chief judge last contends that the fraternization materials are exempt based on this Court's Personnel Manual (and the Thirteenth Circuit's corresponding local policy), but rather than assert that the Personnel Manual triggers Rule 2.051(c)(8), as the Second District held, the chief judge asserts that the Personnel Manual triggers Rule 2.051(c)(9). Ans. Br. at 9-11. That rule provides that "court records determined to be confidential in case decision or court rule" may be exempt from disclosure under certain circumstances. Fla. R. Jud. Admin. 2.051(c)(9). The Personnel Manual, however, is not a court rule, see Fla. R. Jud. Admin. 2.020(a) (defining "court rule" as a rule of practice or procedure adopted to facilitate the uniform conduct of litigation); nor is the Personnel Manual a case decision. Thus, Rule 2.051(c)(9) is not applicable to the Personnel Manual.

Rule 2.051(c)(9) is also inapplicable because the "court

records" addressed by that rule are records in case files, not administrative records created or compiled during internal investigations such as that conducted by the chief judge in this case. See Fla. R. Jud. Admin. 2.075(a)(1)(defining "court records" as the contents of a court file with respect to a case); Report of the Supreme Court Workgroup on Public Records, Case No. SC01-897 (Apr. 30, 2001)(proposing amended rule 2.051(b)(1) that would clarify distinction between "court records" and "administrative records"). Indeed, if Rule 2.051(c)(9) were read to include administrative records such as those at issue here, the rule's requirement that reasonable public notice be given of any order "closing" any court record would be nonsensical and meaningless. See Fla. R. Jud. Admin. 2.051(c)(9)(D)("except as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record").

Further, and as already shown by the Attorney General in his Initial Brief, the Personnel Manual is insufficiently narrow to satisfy Rule 2.051(c)(9)'s narrowness requirements, Fla. R. Jud. P. 2.051(c)(9)(B)-(C), and the Personnel Manual's adoption after the effective date of Article I, section 24 renders it an unconstitutional attempt by the judiciary to close public access to public records. Init. Br. at 17-19. The chief judge's

statement at page 18 of his brief, that the Personnel Manual's confidentiality policies were "probably not new in 1993" is entirely unsupported, and his reliance on the confidentiality policies regarding sexual discrimination expressed in chapter 119 is misplaced because that chapter's provisions have no application to the judiciary. Times Pub. Co. v. Ake, 645 So. 2d 1003 (Fla. 2d DCA 1994), approved, 660 So. 2d 255 (Fla. 1995). Thus, the materials supposedly exempted by the Personnel Manual were not exempt from public access prior to that manual's adoption, and the judiciary is not constitutionally empowered to create any new public records exemptions following the effective date of Article I, section 24.

In sum, the chief judge has abandoned the "presently" existing "court rule" exemption that the Second District relied upon when it held that the chief judge need not disclose the materials at issue in this case. Further, none of the alternative bases asserted by the chief judge exempts the requested materials. The materials are thus not exempted from the general rule of public disclosure and must be disclosed to the Media Petitioners.

#### **CONCLUSION**

The Second District's decision should be reversed. The requested materials are public records that are not exempted

from public disclosure. Accordingly, the Second District should be ordered to issue the writ of mandamus requested by the Media Petitioners.

Respectfully submitted,

---

THOMAS E. WARNER  
Solicitor General  
Fla. Bar No. 176725

T. KENT WETHERELL, II  
Deputy Solicitor General  
Fla. Bar. No. 0060208  
MATTHEW J. CONIGLIARO  
Deputy Solicitor General  
Fla. Bar. No. 63525

Office of the Solicitor General  
The Capitol - Suite PL-01  
Tallahassee, FL 32399  
(850) 414-3681  
(850) 410-2672 (fax)

and

PATRICIA R. GLEASON  
General Counsel  
Fla. Bar No. 218758  
Office of the Attorney General  
The Capitol - Suite PL-01  
Tallahassee, FL 32399  
(850) 245-0157  
(850) 414-2641 (fax)

**On behalf of Attorney General Robert A.  
Butterworth and the State of Florida**

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of October, 2001, a true and correct copy of the foregoing was provided by U.S. Mail, postage prepaid, to the following:

C. Steven Yerrid  
Richard C. Alvarez  
The Yerrid Law Firm  
101 East Kennedy Blvd. - Suite 2160  
Tampa, FL 33602-5187  
**Counsel for Respondent**

Gregg D. Thomas  
James J. McGuire  
Holland & Knight  
P.O. Box 1288  
Tampa, FL 33601-1288  
**Counsel for Petitioner in Case No. SC01-1396**

W. Robert Vezina, III  
Mary Piccard Vance  
Frederick J. Springer  
Vezina, Lawrence & Piscitelli, P.A.  
318 North Calhoun Street  
Tallahassee, FL 32301

and

W. Dexter Douglas  
Thomas P. Crapps  
Douglas Law Firm, P.A.  
211 East Call Street  
Post Office Box 1674  
Tallahassee, FL 32302  
**Counsel for Florida Conference of Circuit Court Judges  
(Amicus Curiae)**

---

Attorney

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared with 12-point  
Courier New font in compliance with Fla. R. App. P. 9.210(a)(2).

---

Attorney