

**IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA**

CLARK V. HOSHALL, JR.,

Appellant,

Appeal No. 01-2278

vs.

L.T. Case No. 98-974-CA

**NASSAU COUNTY, a political subdivision
of the State of Florida, BOARD OF COUNTY
COMMISSIONERS OF NASSAU COUNTY,
FLORIDA, J.M. OXLEY, JR., individually, and as
Ex-officio Clerk to the Board of County Commissioners,
JOHN A. CRAWFORD, CHRIS KIRKLAND, NICK D.
DEONAS, J. H. "PETE" COOPER, and MARIANNE
MARSHALL, individually, and as members of the
NASSAU COUNTY BOARD OF COMMISSIONERS,**

Appellees.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT FOR THE
FOURTH JUDICIAL CIRCUIT IN AND FOR
NASSAU COUNTY, FLORIDA**

**APPELLANT'S INITIAL BRIEF
AMENDED**

**GEORGE K. RAHDERT
PENELOPE T. BRYAN
Rahdert, Steele & Bryan, P.A.
535 Central Ave.
St. Petersburg, FL 33701
(727) 823-4191 (telephone)
(727) 823-6189 (facsimile)
Counsel for Appellant Clark
V. Hoshall, Jr.**

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INTRODUCTORY STATEMENT

As the Second District Court of Appeal recognized, the resolution of this appeal will affect “how every state agency and municipality maintain their records and the public’s access to those records.” *Times Publishing Company v. City of Clearwater*, 27 Fla. L. Weekly D1544, ___ So.2d ___ (Fla. 2d DCA 2002).¹

The Petitioner is the Times Publishing Company (the “Times”), publisher of the *St. Petersburg Times*, a daily newspaper of general circulation in the State of Florida. The Respondent is the City of Clearwater, Florida (the “City”).

STATEMENT OF THE CASE AND OF THE FACTS

In October, 2000, Christina Headrick, a reporter for the *St. Petersburg Times*, requested copies of all e-mails sent or received through the City of Clearwater’s computer network server by Assistant City Manager Garrison Brumback and by John Asmar, a City employee, for the preceding twelve-month period. (R. 182, 184.)² In response, the City furnished the Times with a compact

¹ At the time this Brief was submitted, the decision of the Second District Court of Appeal had not yet been published in the Southern Reporter. Therefore, that decision is referenced hereinafter via citations to Florida Law Weekly, in accordance with Fla. R. App. P. 9.800(b)(2).

² As noted by the Second District, “at least part of the reason for the Times’ request was a concern that the City employees whose e-mail the Times requested were utilizing their public time and resources for their personal benefit.” *See Times*

disk (“CD”) containing only the e-mails Brumback and Asmar considered to be “public,” and notified the Times that it was withholding e-mails the employees had claimed to be “personal” in nature. (R. 7, 184-185, 196-198.) The City did not claim that the allegedly “personal” e-mails were exempt from the Public Records Act. Instead, it contended that they were simply not “public records.” (R. 183-186.)

In December, 2000, the Times filed a petition in the Circuit Court for the Sixth Judicial Circuit for Pinellas County, Florida seeking, *inter alia*, a judicial declaration that the withheld e-mails were public records, a writ of mandamus compelling the City to provide copies to the Times, and a temporary injunction barring the City from allowing any employee e-mails to be deleted until the resolution of the case. (R. 1-15.) Following a hearing on December 13, 2000, the trial court entered the temporary injunction and a separate order requiring the City to show cause for withholding the e-mails that the employees had designated as “personal.” (R. 41-42; 59-60.)

At trial, it was established that the City had instituted e-mail service for the accomplishment of governmental business. (R. 36-40; R. 198: 20-25.) The City employs a department of “engineers” whose jobs include the operation and

Publishing Company, 27 Fla. L. Weekly at D1545.

management of the City's network e-mail system. (R. 183.) Sharon Marzola, the City's network technology manager, testified that she had accessed the main server at the time she received the Times' public records request, and copied all of the messages in both employees' City network e-mail accounts onto a CD. (R. 193-197, 257.) Ms. Marzola then contacted the employees and asked them to determine for themselves which of the e-mails in their agency accounts were "public," and which were "personal." (R. 197-198.)³ Thereafter, Ms. Marzola made a second CD for the Times, which omitted the e-mails the employees had designated as "personal." (R. 197-198.) Neither Ms. Marzola nor any other records custodian (other than Brumback and Asmar) reviewed the content of the allegedly "personal" e-mails. (R. 182, 185, 188, 195-196.)

Dan Mayer, the City's Assistant Director of Information Technology, testified that he and other City computer engineers had periodically found it necessary to ask City employees to delete personal e-mails, because of the space they consume on the City's network server. (R. 188.) The following is the relevant excerpt from his testimony:

“. . . We basically establish policy based on daily

³ At trial, Mr. Brumback testified that he maintained a personal, non-City owned e-mail account through a private provider for his own personal use, and that the Times had not sought access to any of those e-mails. (R. 167-168; *cf.*, R. 186.)

activities and because there are constraints about how much information we can store on the server we ask employees to act on their e-mails. If they are needed for business or regular operation . . . they are to print them or save them and if they are not and they have no substantive value they are to be deleted because they take up space on the server . . .”

Moreover, prior to receiving the Times’ request, the City had adopted a formal policy to put employees on notice that “**Computer Resources are the property of the City of Clearwater and are intended for use for legitimate business purposes.**” (R. 37; emphasis in original.) A violation of the City’s computer resources policy “may result in disciplinary action up to and including termination of employment, denial of access to the computer resources, and criminal charges or other legal action.” (R. 36.)⁴ The policy defines “Computer Resources” to include the City’s entire computer network, including all hardware,

⁴ Former City employee John Asmar did not testify at trial. During his court-ordered deposition, he invoked his Fifth Amendment right not to incriminate himself. (R. 68-69, 104, 114, 200.) Although the transcript of Mr. Asmar’s deposition was introduced into evidence at trial and designated as a part of the record, the transcript is absent from the record on appeal. (R. 200; 307-308).

Due to the accelerated briefing schedule in this case, the Times has filed a separate motion for permission to supplement the record before this Court with Mr. Asmar’s deposition transcript, because it contains additional relevant evidence (to-wit, copies of “private” e-mails apparently inadvertently supplied by the City of Clearwater and inquired about during the deposition) which suggests that Mr. Asmar was using the City’s e-mail service to conduct a private business. *Cf.*, note 2, *supra*.

software, and data, as well as the contents of the City’s e-mail system and messaging system. (R. 36.) While the policy allows individual department directors to permit “incidental use for personal research or communications not otherwise violating this Policy,” it goes on to state that

the Computer Resources . . . are to assist Users in the performance of their jobs. Users do not have an expectation of privacy in anything they create, store, send, or receive on the Computer Resources 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. Users understand that the City of Clearwater may use human or automated means to monitor their use of the Computer Resources.

(R. 37.) The Policy specifically prohibits the use of City computer resources

- to operate, engage in, or promote a private business . . .
- to send or forward classified or “for sale” notices . . .
- to post letters on electronic bulletin boards or chat room using the City’s e-mail address unless such actions are reasonably related to official City business.

(R. 37.)

City employees are also prohibited from altering the “‘From:’ line or other attribution-of-origin information in e-mail, messages or postings for the purpose of

misleading the recipient as to the sender's identity.” (R. 38.)

At trial, the Times requested that the trial court conduct an *in camera* review of the withheld e-mails. (R. 226:4-8). Although the City offered in arguments that it had “stood ready at all times to allow” the trial court to review the disputed e-mails, neither Mr. Mayer nor Ms. Marzola brought the CD containing those records with them to court on the day of trial. (R. 193, 197, 229).

On May 17, 2001, the trial court issued a written order in which it denied the Times' petition on the ground that e-mails sent and received over an agency's computer network, if claimed by an agency employee to be “personal” in nature, were not encompassed within the present statutory definition of “public records.” (R. 256-258; R. 256-267.) The Times sought review of that order in the Second District Court of Appeal. On May 10, 2002, the Second District affirmed the trial court's order. *Times Publishing Company v. City of Clearwater*, 27 Fla. L. Weekly D1073, ___ So.2d ___ (Fla. 2d DCA 2002).

In its opinion, the Second District concluded that the access rights guaranteed by Article I, section 24(a) of the Florida Constitution did not require the City to release the records at issue, because “private or personal e-mail simply falls outside the current definition of ‘public records’ set forth in § 119.011(1), *Fla. Stat.* (2000).” The court's approval of the trial court's decision was “without

prejudice to the Times seeking an in camera inspection to attempt to establish that some or all” of the disputed e-mails met the definition of “public record” reflected in the Second District’s opinion. *Id.*⁵

On July 3, 2002, the Second District granted the Times’ motion to certify to this Honorable Court the following question as one of great public importance, and issued a revised opinion:

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 D1544, D1546 (Fla. 2d DCA 2002). This Honorable Court therefore has jurisdiction over this cause, pursuant to Article V, § 3(b)(4) of the Florida Constitution and Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure.

⁵ The Second District also seemed to be under the erroneous impression that the Times had not sought an *in camera* review of the disputed e-mails at trial. *Id.*

This Honorable Court also has discretionary jurisdiction to accept this case because the lower court's opinion expressly construed Article I, § 24(a) of the Florida Constitution. *See Times Publishing Company*, 27 Fla. L. Weekly at D1545; *cf.*, Article V, Section 3(b)(3), FLA. CONST., and Rule 9.030(a)(2)(A)(ii) of the Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Records which reflect how agency employees are using governmental computer resources, and which are stored, maintained, and managed in the course of an agency's operation of its computer network are public records, because they are received and kept in the course of the agency's transaction of official public business. All such computers and related equipment and services are placed in the trust of the agencies' employees, through the use of public funds, solely for this purpose and not to further the personal interests of government employees. Therefore, absent a statutory exemption, all records that are generated by a public employee's use of his or her agency network e-mail account are public records. In the event agency employees wish to avoid the disclosure of personal correspondence, they need only avoid transmitting or receiving it through their governmental employer's computer network provided at public expense.

While content is a legitimate consideration in the event an agency record is claimed to be exempt, the content of a record is largely irrelevant to the determination of whether it is “public,” because agencies engage in numerous internal and external official activities which generate records, all of which are received in connection with the transaction of official business. Thus, Florida’s courts have historically focused on factors other than content to determine whether nonexempt records are “public records.” Those factors – the existence of a valid governmental reason for the agency’s possession of the record, and the finality of the record – mirror the language of the current statutory definition of “public records.” Accordingly, when an agency maintains and operates a computer network and e-mail service as a part of its official operations, like the City of Clearwater, the records of electronic correspondence that agency employees transmit or receive through agency-owned and operated e-mail accounts are “public records.”

Public policy also dictates that this Court find the records saved in agency-owned e-mail accounts are “public records.” Allowing the content-based objections of agency employees to form a part of this determination would deprive the Legislature of its status as the sole entity which is constitutionally empowered to determine which agency records are exempt from public inspection.

Moreover, when a public employee uses an agency e-mail account to transmit or receive personal correspondence, that employee is obtaining a personal benefit as a result of his or her status as a government employee. The cost of internet-based services, such as e-mail, currently makes such services inaccessible to a large number of the taxpayers whose monies make them available to local government agencies. An employee who transmits and receives personal correspondence over an agency's network also increases the likelihood that the agency's networked computers will be infected by e-mail borne computer viruses, which can only be repaired through the expenditure of more public funds.

Permitting agencies to withhold the records of these uses, based on nothing more than an employee's assertion that particular e-mails are "personal," serves to prevent the public from holding the government accountable for its administration and management of its employees' use of costly, publicly-furnished computer resources and services.

In summary, this case presents this Court with a choice: Allow personal use of taxpayer-furnished e-mail services to go totally unchecked by the public (whose right to insist on accountability from government employees is the reason behind the public records laws), or take a definitive stance that restores and confirms Florida's place at the forefront of protecting public access to government.

STANDARD OF REVIEW

Appeals which involve the interpretation of state statutes and provisions of the Florida constitution are purely legal matters which are reviewed *de novo*. See *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376 (Fla. 5th DCA 1998). This Court also employs a *de novo* standard to review decisions of district courts which apply Florida's public records law to particular records, when the underlying material facts are undisputed. See *Memorial Hospital - West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373, 381 (Fla. 1999)(approving Fifth District Court of Appeal's use of *de novo* standard to review trial court's legal conclusions in public records case where essential facts were undisputed).⁶

ARGUMENT

I. The Current Statutory Definition of "Public Records" Is Sufficiently Broad to Encompass All E-Mails Sent, Received, and Stored on Agency Computers.

The Second District Court of Appeal held that e-mail sent and received by government employees, through agency-owned accounts, "does not automatically become public records by virtue of" its storage on the agency's computer network server, and that such records are simply not encompassed within the statutory

⁶ The trial court found that the material facts in this case were not in dispute. (R. 256-257.)

definition of public records, if unilaterally claimed by an agency employee to be “personal” in nature. *Times Publishing Company*, 27 Fla. L. Weekly at D1545. That court also strongly suggested that the Legislature would have to expand the current statutory definition before such e-mails could ever properly be considered “public records.” *Id.*, citing *Browning v. Walton*, 351 So.2d 380 (Fla. 4th DCA 1977). The Appellant would respectfully submit that such holdings are erroneous.

The lower court’s overly restrictive reading of the public records laws creates a huge loophole that runs contrary to this state’s public policy as expressed in Chapter 119 of the Florida Statutes and applicable court decisions, and threatens to wholly defeat the public’s interest in government accountability.

A. Statutory Definition of “Public Records.”

In 1993, Florida’s voters overwhelmingly approved elevating the right to access guaranteed by the Public Records Act to a state constitutional right. *See* Article I, § 24(a), Florida Constitution. Clearly, this is an expression of Florida’s public policy through the overwhelming mandate of the electorate. Patricia A. Gleason and Joslyn Wilson, “The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4 (E) -- Let the Sunshine In!,” 18 *Nova L. Rev.* 973, 979 (Winter, 1994). Thus, Article I of the Florida Constitution embodies one of the principles of fundamental importance to the

people. *See, e.g., id.; cf., Armstrong v. Harris*, 773 So.2d 7, 21-22 (Fla. 2000)(Article I of Florida Constitution represents the fundamental rights of the people), *citing State ex re. Davis v. City of Stuart*, 97 Fla. 69, 102-103, 120 So. 335, 347 (Fla. 1929).

Against this background, the term “public records” has been statutorily defined as

all 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). As shown herein, this definition is broad enough to encompass the records at issue. *Cf., Siegle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982)(“there can be no doubt that the information stored on a computer is as much a public record as a written page in a book or a tabulation in a file”), *rev. denied*, 431 So.2d 988 (Fla. 1983).⁷

⁷ *See also*, § 119.084(5), *Fla. Stat.* (2001)(“each agency that maintains a public record in an electronic recordkeeping system shall provide to any person . . . a copy of any public record in that system which is not exempted by law from public disclosure”); § 119.01(3), *Fla. Stat.* (2001)(“as each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained”).

The courts long ago specifically rejected the notion that the Legislature must act to classify a non-exempt agency record as a “public record” before the public may properly inspect it. *See Douglas v. Michel*, 410 So.2d 936 (Fla. 5th DCA 1982), *aff’d*, *Michel v. Douglas*, 464 So.2d 545 (Fla. 1985). In that case, a public agency argued that

“ . . . by making some records open to public disclosure, the Legislature intended to exclude the balance. Expressio unius est exclusio alterius”

The court flatly rejected that argument as applied to public records. *See Douglas, supra*, at 939. On the contrary, to the extent an agency chooses to gather and keep records in the course of its regular operations (even if they are not specifically defined by statute as “public records”), the public is presumptively entitled to inspect them, unless they are statutorily exempt. *Id.* In affirming that decision, this Court recommended that agencies should simply avoid collecting information they are not required to keep, in the event they wish to avoid being required to disclose it. *Michel, supra*, at 547.⁸

⁸ In *Browning, supra*, at 381, the Fourth District Court of Appeal held that local government was pre-empted from *narrowing* the class of records which are subject to the public records laws. *Cf., Tribune Company v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984)(same).

Employees who have objections to the disclosure of their personal e-mail need only avoid sending and receiving it through e-mail, internet accounts, and computer networks which are owned, administered, and funded by the government at public expense. *Cf., Michel, supra, at 546-547; Tribune Company v. Cannella, 458 So.2d 1075, 1077 (Fla. 1984), appeal dismissed, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985).* There is no need (and no legal authority) for the judiciary to adopt a special rule to protect those employees who choose not to use this common sense approach when exchanging personal communications that they wish to avoid sharing with the public. For all of these reasons, this Court should reverse the decision of the Second District Court of Appeal, and declare that agencies may not legally withhold nonexempt e-mail records in response to the unilateral, unverifiable claims by agency employees that the content of the records is “personal.”

B. The Test to Determine Whether Agency-Owned, Nonexempt Materials Are Public Records Is Content-Neutral.

While the courts routinely consider a record’s content to determine whether it is subject to a statutory *exemption* from the Public Records Act, the courts have consistently refused to allow agencies to delay producing nonexempt documents in order for their employees to raise other content-related objections to disclosure.

See Cannella, 458 So.2d at 1077 (agencies may not delay producing records in order to give employees an opportunity to raise privacy challenges); *Wait v. Florida Power & Light Company*, 372 So.2d 420, 422-423 (Fla. 1979)(agency was not permitted to deny access to files in order to allow agency attorney to remove potentially privileged or confidential documents); *Gadd v. News Press Publishing Company*, 412 So.2d 894, 896 (Fla. 2nd DCA)(rejecting claim by public hospital’s employees of protected privacy interest in personnel files), *review denied*, 419 So.2d 1197 (Fla. 1982). Instead, this Court has traditionally examined two content-neutral criteria to distinguish “public records” from “non-public” records.

The first is whether the record is maintained by the agency in the course of the conduct of the agency’s business. *See Michel, supra*, at 546-547. This consideration satisfies the requirement that the record be received or transmitted in connection with the transaction of agency business. *Id.*

The second is whether the record constitutes the final evidence of the agency’s knowledge. *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980). This aspect of the test satisfies the requirement that the material actually be a “record,” as opposed to a mere “precursor.” *Id.*

E-mail which is sent and received by agency employees, from an agency's computer network server, satisfies both of these tests. Thus, under present law, the public should be allowed to inspect any records that a government agency receives and retains in connection with its administration and management of its computer network, including employee e-mails.

(1) The City Maintained the Records in the Course of Conduct of the Agency's Business.

This Honorable Court has recognized many times that a liberal interpretation of the term "public records" furthers the important public purpose of ensuring governmental accountability. *See, e.g., Forsberg v. Housing Authority of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984)(Overton, J., concurring). The nature of the "official business" for which a record is maintained need only be governmental in nature for the record to be considered "public." *See, e.g., Michel, supra*, at 546-547 ("whatever is kept in personnel files is largely a matter of judgment of the employer, but whatever is so kept is public record and subject to being published").⁹ Accordingly, it has already been determined that the public is entitled

⁹ Similarly, in *Capital Newspapers v. Whalen*, 505 N.E.2d 932, 933-934 (N.Y. App. 1987), the court held that the personal correspondence of a former mayor which was "intermingled with official government files and . . . being kept or held by a government entity" were subject to disclosure under New York's public records law.

to inspect records that reflect how an agency is managing and

administering its internal operations. *See Michel, supra*, at 547; *Gadd, supra*, at 895.

Thus, the Attorney General's Office has opined that an agency's records of *all* calls made from a school board's telephones constituted "public records," even if the calls reflected on those records were "personal," and even if school board employees reimbursed the school board for their calls, because the operation and maintenance of the agency's telephone system was part of the agency's official business. *See Op. Att'y Gen. Fla.* 99-74. Similarly, in *Detroit News, Inc. v. City of Detroit*, 516 N.W. 2d 151 (Mich. App. 1994), the court held that Michigan's public records law required disclosure of the records of all telephone calls to and from the Mayor's office, even if the records had not actually been examined by the agency in possession of them, because they were retained in the course of the agency's official business.¹⁰

Likewise, the e-mails at issue in this case were gathered and stored in connection with the transaction of the City's official business in its capacity as the operator and administrator of the City's publicly owned and supported computer network. As such, they should be treated as public records. *See, e.g.*, Barbara A. Peterson and Charlie Roberts, "Access to Electronic Public Records," 22 Fla. St.

¹⁰ *See also*, note 9, *supra*, at p. 17.

U. L. Rev. 443, 456-457 (Fall 1994)(hereinafter, “Access to Electronic Public Records”):

Many state agencies and local governments have established electronic mail (e-mail) systems for both inter and intra agency communication. E-mail is becoming an increasingly common and efficient means of communication. Given the Supreme Court of Florida’s definition of “public record” promulgated in *Shevin . . .* , e-mail, which is a form of communication between two or more people, is a public record under Florida law if generated by a public official or employee. In fact, the debate is focused more on the lack of retention schedules and the practical or managerial problems of providing public access, rather than on the status of e-mail as a public record.

For all of these reasons, the e-mails sent and received over the City’s agency-owned e-mail network server qualify as “public records.”

- (2) The E-Mails at Issue Constitute the Final Evidence of the City’s Knowledge of Its Employees’ Personal Use of the City’s Network Computer.

The second criterion this Court has used to determine whether a record is “public” is its finality. In *Shevin*, 379 So.2d at 634-635, a local television station asked to inspect documents generated by a private consulting company while assisting the Jacksonville Electric Authority with a hiring decision. After observing that some of the documents generated in connection with the company’s

public business were not actually “records,” this Court undertook to define what was meant by that term:

[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. To be contrasted with “public records” are materials prepared as drafts or notes . . . , and are not, in themselves, intended as final evidence of the knowledge to be recorded.

Id. at 640. Contrasted with “records” were documents such as drafts and notes taken purely to jog the writer’s memory, and other preliminary documents which have not yet been used to perpetuate, communicate, or formalize knowledge. 379 So.2d at 640.¹¹ But once the materials are finalized and transmitted (even if only to another government employee), or simply stored in a file, they are “records” and therefore presumptively “public.” *Id.*¹²

In contrast with the type of records discussed by this Court in *Shevin*, which were preliminary drafts that had not yet been used to communicate or

¹¹ *Cf.*, *Johnson v. Butterworth*, 713 So.2d 985, 987 (Fla. 1998)(rough outlines and preliminary handwritten notes that agency’s attorneys had not yet formalized were not public records).

¹² *Cf.*, *Op. Att’y Gen. Fla.* 85-87 (intermediate, machine-readable computer data did not constitute “public records” until such time as the data had attained finality by being saved to an identifiable computer file).

formalize any agency knowledge, the e-mails at issue in this case were actually finalized, used in communications by agency employees and saved on the City's network server. They constituted the only records of the City's knowledge of whatever content they held. Therefore, the lower court erred by analogizing the e-mails at issue to such precursors. *See Times Publishing Company*, 27 Fla. L. Weekly at D1545, *citing Lopez v. State*, 696 So.2d 725 (Fla. 1997).

Even if the City's managerial employees never read them, the e-mails were finalized and do qualify as "public records" under this Court's analysis in *Shevin* and its progeny. Accordingly, they are properly classified as "public records."

C. This Court's Recent Revisions of the Rules of Judicial Administration, and Its New Definition of "Judicial Records" Also Support a Presumption of Access to the E-Mails at Issue.

In arriving at their conclusion that the agency e-mails at issue were not "public records," the Second District and the trial court also relied heavily on the commentary to the 1995 version of Rule 2.051 of the Florida Rules of Judicial Administration. *See* R. 266-267. In the Second District's view, the Times' right of access to agency e-mail records was no broader than the public's right of access to judicial e-mail under the 1995 version of Rule 2.051. *See Times Publishing Company*, 27 Fla. L. Weekly at D1545 ("the Times' request would require a definition of public record that is broader than the definition provided by the

supreme court for use by this court”), *citing, In re Amendments to Rule of Judicial Administration 2.051 – Public Access to Judicial Records*, 651 So.2d 1185, 1190 (Fla. 1995). The Times respectfully submits that these observations were erroneous.

The Times acknowledges that the judiciary is a separate branch of government which was not “established or created by law,” and which is not subject to Chapter 119. *See Times Publishing Company v. Ake*, 660 So.2d 255, 257 (Fla. 1995). For this reason, whether the meaning of the term “judicial records” should be interpreted more restrictively than the accepted definition of “public records” has been the subject of considerable debate, both within the system and among this state’s citizens, practically since the adoption of Article I, § 24 of the Florida Constitution. *See, e.g., In re Amendments to Rule of Judicial Administration*, 651 So.2d at 1190; *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 794 So.2d 631, 637-638 (Fla. 2d DCA 2001)(Acting Chief Judge Fulmer, dissenting), *review granted*, 800 So.2d 615 (Fla. 2001); *cf.*, Judicial Management Council of Florida, “Privacy and Electronic Access to Court Records Report and Recommendations,” at p. 14 (November 15, 2001) (recommending that the Court adopt a broader definition of the term

“records of the judicial branch,” to make the current language of Rule 2.051 more consistent with Article I, § 24).¹³

Seemingly in response to the ongoing differences of opinion over these issues, this Honorable Court amended those of the Rules of Judicial Administration which address public access, to make them more consistent with Article I, § 24(a) of the Florida Constitution, on March 7, 2002. *See Report of the Supreme Court Workgroup on Public Records*, 27 Fla. L. Weekly S193, 195-196 (Fla. 2002)(amending, *inter alia*, Rules 2.051 and 2.075 of the Florida Rules of Judicial Administration). The term “records of the judicial branch” is now defined as follows:

all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity . . .

Id. at S195. The Court’s amendments also make clear that the public is entitled to view all “judicial records,” and that this term includes “administrative records” as well as traditional “court records.” *Id.* The amendments also provide a new procedure for gaining access to judicial records. *Id.* at S195-196.

¹³ *See also, Justice Coalition v. First District Court of Appeal Judicial Nominating Comm’n*, 27 Fla. L. Weekly D1645 (Fla. 1st DCA 2002) (Chapter 119, *Fla. Stat.* does not govern access to the records of the judiciary, despite Article I, § 24).

Importantly, this Court also explicitly recognized (despite seemingly contradictory language in its 1995 commentary to Rule 2.051), that the rule's definition of the term "court records" was actually different from the statutory definition of "public records."

The 1995 commentary notes that the definition of "judicial records" added at that time is consistent with the definition of "court records" contained in rule 2.075(a)(1) and the definition of "public records" contained in chapter 119, Florida Statutes. Despite the commentary, these definitions are not the same. The definitions added in 2002 are intended to clarify that records of the judicial branch include court records as defined in rule 2.075(a)(1) and administrative records. The definition of records of the judicial branch is consistent with the definition of "public records" in chapter 119, Florida Statutes.

Id. at S196 (new commentary to Rule 2.051)(emphasis added). Thus, to the extent that judicial e-mail reflects how the judiciary's computer network is being administered, and how employee usage is being managed or monitored, even judicial e-mail should be considered "public record" under the revised Rules of Judicial Administration.¹⁴

¹⁴ It should be noted that Rule 2.051 still broadly exempts records which ordinarily would not be exempt if created or received by employees of another branch of government. *See* 27 Fla. L. Weekly at S195.

Nonetheless, even if this Honorable Court had not abandoned the restrictive, 1995 definition of “judicial records,” it was well-settled in Florida that *agencies* which were already clearly defined as such in § 119.011(2), *Fla. Stat.* (like the City), were already subject to a broad construction of the *statutory* term “public records.” *See Michel, supra*, at 546-547 (although agency had no affirmative duty to obtain or store personal information from its employees, public had a right to inspect information the agency had actually accumulated in its files); *cf.*, *Hill v. Prudential Insurance Company*, 701 So.2d 1218, 1220 (Fla. 1st DCA 1997), *rev. denied*, 717 So.2d 536 (Fla. 1998); and *Wallace v. Guzman*, 687 So.2d 1351, 1353 (Fla. 3^d DCA 1997).

For all of these reasons, this Court should reverse the lower court, and hold that the public is presumptively entitled to inspect e-mails sent and received over agency computer networks, and order the City to furnish copies of the withheld e-mails.

**II. Florida’s Public Policy Strongly Supports a Finding that
E-Mails Sent, Received, and Stored on Agency Computer Networks,
by Agency Employees, are “Public Records.”**

“It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person.” *See* § 119.01(1), *Fla. Stat.*

A. The Constitutional and Statutory Intent of the Public Records Law Supports a Finding that “Personal” E-Mails are “Public Records.”

“The purpose of the Public Records Act is to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.” *Forsberg, supra, at 378-379*. Thus, Florida’s courts have uniformly construed the Public Records Act broadly in favor of disclosure of all nonexempt records owned by any government agency, notwithstanding demands by agency employees to hold particular records confidential, or to treat them as “private.” *See, e.g., Cannella, supra, at 1077; Browning, supra, at 381* (purpose of the public records laws is to allow citizens to discover what government is doing).

Furthermore, only the Legislature has the power to determine which agency records are exempt from public disclosure under the public record laws. *See* Article I, § 24(c) of the Florida Constitution (“the legislature . . . may provide by general law for the exemption of records from the requirements of subsection (a)”); *Wait, supra, at 424*. Allowing agencies to delay producing nonexempt, agency-owned records in order to determine whether an employee considers the content to be “personal” would vest agency employees with an uncontrollable amount of discretion over the issue of whether to allow public access, effectively elevating the

self-interested judgment of individual employees above the Legislature's constitutional prerogative to determine which agency records to exempt:

[T]o allow the maker or sender of documents to dictate the circumstances under which the documents are to be deemed confidential would permit private parties as opposed to the Legislature to determine which public records are subject to disclosure and which are not. Such a result would contravene the purpose and terms of Chapter 119.

See Florida Attorney General's Office, *Government in the Sunshine Manual*, 2000 Ed., at 107; cf., *Cannella*, 458 So.2d at 1077, and *Wait*, 372 So.2d at 422-423.¹⁵

Florida's Legislature is surely aware of the personal use by agency employees of agency e-mail resources. See *Access to Electronic Public Records*, *supra*, at 456. Despite this knowledge, and despite having had numerous opportunities to do so, the Legislature has failed to enact any statute to remove personal e-mail or other computerized "personal" data from the scope of the Public Records Act:

Nearly every year since 1985, the Florida Legislature has considered but failed to pass data protection legislation, usually in the form of a Fair Information Practices Act. In general terms, such legislation has recognized that 'every citizen has the right to know what kind of

¹⁵ It should be noted that this Court's decision in *Wait* predated the Legislature's enactment of a limited exemption now available to agencies which are involved in litigation. See § 119.07(3)(1), *Fla. Stat.* (2001).

information is being gathered about him or her. And if that information is part of a public record as the result of a publicly recorded transaction, then the individual should have the right to view, and, if necessary, to correct or contest that information.

Id. at 489-490.¹⁶ In the absence of legislative action, this Court should decline to recognize any special privilege for personal correspondence that agency employees choose to transmit and receive through their employers' governmental computer networks.

This is so notwithstanding the Second District's concern over the fact that "our rapidly expanding digital world . . . has made accessible some types of information that blur the lines between public and private information." *See Times Publishing Company*, 27 Fla. L. Weekly at D1545. In fact, Florida's courts have repeatedly addressed the issue of balancing the individual privacy of agency employees against the access rights protected by Article I, § 24(a) of the Florida Constitution. *See, e.g., Cannella*, 458 So.2d at 1077; *Michel, supra*, at 547; *cf., Gadd v. News-Press Publishing Company*, 388 So.2d 276, 277-78 (Fla. 2d DCA 1980)(courts may not consider public policy questions regarding relative

¹⁶ Unlike the State of Florida, the legislature of the State of Washington has enacted a specific statutory exemption to exclude the personal correspondence of agency employees from that state's public records laws. *See Tiberino v. Spokane County, Office of Prosecuting Attorney*, 29 Med. L. Rptr. 1139 (Wash.App. 2000).

significance of public's interest in disclosure of allegedly private, damaging records, or damage that individual might suffer as result of disclosure).¹⁷ In all of those previous cases, the courts held that the public's right of access outweighed the employee privacy challenges.

Even if this Court had not already prevented the courts from judicially carving out new exemptions to the public records laws, *see, e.g., Wait, supra* at 424, this case still would not present an appropriate occasion to deviate from the results that were reached in *Cannella, Michel, and Gadd*. The City's own policy advises its employees that they have *no* protected privacy rights in any data that they "create, store, send, or receive" on the City's computer network resources. (R. 37). That policy also advises City employees that the City has the right to access any such records for a variety of purposes, specifically including the fulfillment of public records requests. (R. 37.) Therefore, that the City's employees may not have intended for their "personal" e-mail to be collected and stored by the City's computer network server is a legally insufficient reason to find that such records, once so stored, are not public.

In short, this Honorable Court should reverse the lower court's decision,

¹⁷ *See also*, Article I, § 23 of the Florida constitution (state constitutional right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law").

declare that the public is presumptively entitled to inspect and copy all public records, including nonexempt e-mails that an agency employee claims to contain “personal” information, and order that the City produce the e-mails that the Times requested in October, 2000.

B. Unlike Other Forms of Personal Correspondence that Agency Employees May Prepare and Receive at Work, the Public Furnishes Internet and E-Mail Services Solely to Further Governmental Goals.

The Second District also drew an inappropriate comparison between agency e-mail and the other forms of personal correspondence that an agency employee might prepare or receive at work.¹⁸ Actually, correspondence that an employee transmits and receives through his agency employer’s e-mail account is qualitatively much different from paper-based forms of personal correspondence, such as greeting cards and household bills. Using an agency’s e-mail service requires access to a computer, the Internet, and an e-mail account (and, presumably, the intentional use of government-issued passwords), which are all costly, labor-intensive resources which, in the case of government agencies, are paid for and furnished by the taxpayers for governmental purposes. *See*, R. 36-40 (City’s

¹⁸ In its opinion, the Second District stated that “there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.” *Times Publishing Company*, 27 Fla. L. Weekly, at D1545.

computers were acquired for City business). In fact, the Legislature has specifically recognized that the government's investment in information technology is a "valuable state resource" which requires "focused management attention and managerial accountability" due to, *inter alia*, "the expanding need for, use of, and dependence on information technology" by the government. *See* § 282.005, *Fla. Stat.* (2001).¹⁹

According to the United States Department of Commerce, e-mail and the Internet are resources that nearly half of Florida's citizens found too expensive to access or use, as late as last year. *See* U.S. Dep't of Commerce, Economics and Statistics Administration, "A Nation Online: How Americans Are Expanding Their Use of the Internet" (February, 2002), at p. 7 (percentage of Florida citizens who were internet users in 2001 varied between 50.5% and 53.5%); and p. 76 (the largest single reason cited by citizens who lacked internet access was that it was "too expensive").²⁰ Because resources like e-mail are not freely available to citizens

¹⁹ "Information technology" is defined in § 282.0041(7), *Fla. Stat.* (2001) to include all "equipment, hardware, software, firmware, programs, systems, networks . . . , and related materials used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, communicate . . . , or disseminate information of any kind or form."

²⁰ During fiscal year 2001/2002, the City of Clearwater budgeted approximately \$1.4 million in taxpayer dollars for the administration of its governmental computer network system. *See* City of Clearwater, Budget in Brief,

who are not employed by government agencies, and further, because the public furnishes such resources to assist agencies in carrying out official government business, the public should be permitted to oversee how agencies are actually allowing them to be used.

In *City of North Miami v. Miami Herald Publishing Company*, 468 So.2d 218, 219 (Fla. 1985), this Court refused to recognize a privilege which would shield from disclosure certain written communications between an agency attorney and the agency's board, even though individual board members claimed that their individual, personal interests were at stake. This was because the agency attorney, whose services are acquired through the use of public funds, "furnishes legal assistance to council members *in their official capacity, not as individual citizens.*" *Id.* (emphasis added). Just as this Court prohibited the public officials in *City of Miami Beach* from withholding the nonexempt records of their "usage" of that agency's attorney, so it should also prohibit the employees of the City of

Information Technology, at p. 118 (http://www.clearwater-fl.com/City_Departments/omb).

Clearwater from withholding nonexempt records reflecting their usage of the City's official e-mail service.

Moreover, although it has not enacted any law to prevent the public from inspecting an agency employee's allegedly "personal" e-mails, the Legislature has broadly proscribed the use of government resources for personal gain. *See* § 112.313, *Fla. Stat.*; *Gordon v. State Commission on Ethics*, 609 So.2d 125, 126 (Fla. 4th DCA 1992)(public officer violated § 112.313 by, *inter alia*, using city-owned stationery to promote his private interests). A public employee need not obtain a direct economic benefit in order to have derived an improper personal gain from the use of government resources. *See Garner v. Commission on Ethics*, 439 So.2d 894, 895 (Fla. 2d DCA 1983), *rev. denied*, 449 So.2d 264 (Fla. 1984). By using public agency e-mail accounts to transmit and receive personal correspondence, agency employees can avoid the expense of obtaining and paying for their own, separate, personal Internet access and their own, personal e-mail accounts.

Agency employees also cannot overburden limited computer storage space or unwittingly download computer viruses and worms which could destroy an agency's computer network by simply preparing or storing greeting cards in their desk or by placing their "personal," paper-based documents in a file cabinet. In

May, 2000, it was widely reported that the “I Love You” computer virus had infected the Internet sites and e-mail systems of Florida’s Legislature, as well as the computer systems used by the Florida Department of the Lottery. *See, e.g., Capitol News Service, “Computer Virus Hits Capitol”* (May 4, 2000),²¹ and *St. Petersburg Times, “Virus sparks serious disruption across Florida,”* (May 5, 2000).²² In fact, the inadvertent infection of expensive computer resources through employee e-mail is a rapidly growing problem among businesses which furnish Internet access for their employees. *See generally, Robert H. Jerry II and Michele L. Mekel, “Cybercoverage for Cyber-Risks: An Overview of Insurers’ Responses to the Perils of E-Commerce,”* 8 Conn. Ins. L. J., 7, 10-11 (2002)(describing infected e-mail as the cause of numerous internet site failures).

It would be incredibly naive to assume that the continued unchecked personal use of governmental e-mail accounts will not result in similar, costly infections in the future, or that the public will not ultimately be called upon to pay for repairs. However, the knowledge that the public has the power to monitor and inspect such records (even if that power is not exercised) has long been

²¹(<http://www.flanews.com/archives2000/5400virus.htm>);

²²(http://www.sptimes.com/news/050500/business/virus_sparks_serious_shmtl).

acknowledged as a productive means of reducing that risk. *See* Access to Electronic Public Records, at 457 (describing Hillsborough County Administrator's use of automated warning screens and reminders of freely available public access as a tool to discourage and reduce personal use of the agency's e-mail system). The public can only exercise its right to hold the government accountable for its management of public employees' use of computerized resources and internet-based services if it is allowed to inspect the records of such use.

For all of these reasons, the lower court's decision must be reversed, and this Court should declare the e-mails at issue to be "public records," and order that the City produce them to the Times.

CONCLUSION

The records of a public employee's use of government-owned information technology systems, including records which are generated as a result of the employee's use of agency e-mail accounts, are records created and maintained in the regular course of the agency's official business operations. The decision of whether to exempt such records, to the extent they may reveal a public employee's personal communications, belongs solely to the Legislature, and not to the courts. Although the Legislature has previously considered proposed legislation which would have had such an effect, it has yet to enact any such exemption into law.

Furthermore, without judicial enforcement of the public's right to inspect the records at issue in this case, the public has no means of discovering how agencies are managing their employees' use of expensive, public-furnished computer systems and services, or of holding agencies accountable for abuses. Accordingly, a declaration that non-exempt e-mails sent and received by agency employees through government-owned and operated e-mail systems are "public records," is the only result consistent with this state's well-settled public policy, the reasons behind the Public Records Act and the public's adoption of Article I, § 24(a) of the Florida Constitution. For all of these reasons, the decision of the Second District Court of Appeal must be reversed.

Respectfully submitted,

George K. Rahdert, Esq.
FBN: 213365
Alison M. Steele, Esq.
FBN: 701106
Penelope T. Bryan, Esq.
FBN: 0120979
Rahdert, Steele & Bryan, P.A.
535 Central Avenue
St. Petersburg, FL 33701-0703
(727) 823-4191 (telephone)
(727) 823-6189 (facsimile)
Counsel for Petitioner, the Times
Publishing Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by regular U.S. Mail, this ____ day of August, 2002 to Leslie K. Dougall-Sides, Esq., Asst. City Attorney for the City of Clearwater, P.O. Box 4748, Clearwater, FL 33758-4748, and to Thomas E. Warner, Solicitor General, Office of the Attorney General, The Capitol-PL01, Tallahassee, Florida 32399-1050.

ATTORNEY

CERTIFICATE OF TYPEFACE AND FONT SIZE

This brief was written entirely in Times New Roman 14-point font, in accordance with Rule 9.210(a) of the Florida Rules of Appellate Procedure (2001).

Attorney