

**IN THE SUPREME COURT
STATE OF FLORIDA**

TIMES PUBLISHING COMPANY et al.,

**Petitioners,
CASES**

CONSOLIDATED

SC02-1694 and SC02-1753

vs.

L.T. No. 2D001-3055

CITY OF CLEARWATER,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL**

PETITIONER'S REPLY BRIEF

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INTRODUCTION

As in the Petitioner’s Initial Brief, this Reply Brief refers to Petitioner Times Publishing Company as the “Times,” and to the Respondent, City of Clearwater, Florida, as the “City.” Amicus, Florida Association of County Attorneys, is referenced as “Amicus.” Citations to Amicus’ Amended Brief are abbreviated as “Amicus Br.,” followed by the page number. Citations to the Times’ Initial Brief are abbreviated as “IB,” followed by the page number. Similarly, references to the City’s Answer Brief are abbreviated by “AB,” and the relevant page number.

ARGUMENT

I. The E-Mails at Issue Are “Public Records.”

According to § 119.011(1), *Fla. Stat.* (2001), a “public record” is any material, regardless of form, which is “made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The Legislature’s use of the word “or” makes this definition disjunctive, such that it applies to records “made or received pursuant to law or ordinance” or to any other records which are made or received “in connection with the transaction of official business.” Because the e-mails at issue in this case were generated by city employees, on city time, using a city-owned computer network system which was obtained, operated, and maintained at taxpayer expense, they are public records.

While the Public Records Act at one time applied only to those records that an agency was statutorily required to make or receive, such as a county's official records, the broader, current definition applies to *any* record that is sent or received in connection with any activity that an agency may legally undertake to perform. *See, e.g., Amos v. Gunn*, 94 So. 615 (Fla. 1922); *and compare*, Op. Att'y Gen. Fla. 77-141 (recognizing that the current statutory definition of "public records" includes a much broader class of documents and records than only those records that an agency is required by law to create); *Michel v. Douglas*, 464 So.2d 545, 546 (Fla. 1985), *citing Roberts v. News-Press Publishing Co.*, 409 So.2d 1089, 1095 (Fla. 2d DCA), *rev. denied*, 418 So.2d 1280 (Fla. 1982)(records which "were not kept as a principal function of a public agency," but rather "merely as an internal agency function," were nevertheless "public records").

In an effort to avoid this rule, the City argues that its "official business" is not its operation and administration of its computer network systems and services, but rather, the provision of "services" to the public. AB at 10. Unfortunately for the City, this position is patently fallacious. If this line of reasoning were followed to its logical conclusion, it would compel a holding that none of the records related to the City's telephone system are public records because the City is not in the business of operating a telephone system. The City's position is thus inconsistent

with Op. Att’y Gen. Fla. 99-74, in which the Attorney General opined that an agency’s records of all calls made from a school board’s telephones constituted “public records” even if the calls shown on those records were “personal” and even if the school board employees reimbursed the agency for their calls, because the operation and maintenance of the agency’s telephone system was part of the agency’s official business.

In fact, the City does operate its computer network and e-mail system as an integral part of its provision of governmental services to its citizens. R. 36-40, 183, 193, 257. These systems are certainly a portion of the instrumentalities utilized by the City for this purpose. Such services are also well within the scope of activities that municipalities may permissibly undertake, under § 166.021, *Fla. Stat.* (2001) (municipalities may legitimately perform any task or service which is not expressly prohibited by law).¹ Although the provision of computer network and e-mail services to its employees may be incidental to the City’s traditional governmental functions, this Court has categorically rejected the notion that agencies need only supply access to records that relate to their principal government activities. *See*

¹ Even if the City’s operation and management of its own internal computer network did violate the law, the City would be estopped from relying on its own illegal acts as a defense. *See Killearn Properties, Inc. v. City of Tallahassee*, 366 So.2d 172, 179-180 (Fla. 1st DCA 1979).

Michel, 464 So.2d at 546-547. The Public Records Act also requires agencies to allow access to records generated in connection with their incidental functions and internal operations. *Id.* Therefore, the City’s provision of computer network services to its employees, and its administration of those services, along with the records created as a result of the use of those services, are indeed connected to the City’s transaction of “official business.”

The City also argues that documents do not become public records merely by virtue of their inclusion in an agency’s file. AB at 12-13, *citing Lopez v. State*, 696 So.2d 725 (Fla. 1997); *Hill v. Prudential Insurance Co. of America*, 701 So.2d 1218 (Fla. 1st DCA 1997), *rev. denied*, 717 So.2d 536 (Fla. 1998); and *News & Sun-Sentinel Co. v. Modesitt*, 466 So.2d 1164 (Fla. 1st DCA), *rev. denied*, 476 So.2d 674 (Fla. 1985). The Times would submit that these cases are factually distinguishable and thus not controlling *sub judice*. Unlike the instant case, both *Hill* and *Modesitt*, *supra*, involved documents prepared by outside third parties, not documents prepared by agency employees on agency time, using taxpayer-funded and maintained equipment and services. *See Modesitt*, 466 So.2d at 1165; *Hill*, 701 So.2d at 1219.

Moreover, in *Hill*, the court also recognized that a private party’s privileged documents had become “public records” by virtue of being in the possession of

the state in connection with an official investigation:

“ . . . Appellee argues, however, that the documents in question are not public records in light of the supreme court’s opinion in *Kight v. Dugger*, 574 So.2d 1066 (Fla. 1990), and that a private party’s privileged documents do not become public records simply by virtue of the fact that they are in the government’s possession. While this general statement is true, it fails to recognize the essential difference between this case and *Kight*: The governmental agency in *Kight* was acting in an essentially private capacity (as the attorney for an accused in a criminal proceeding), while the governmental agency in the instant case was performing a public function (the investigation into violation of the state’s insurance code) . . .”.

Hill, 701 So.2d at 1220.

On the other hand, *Lopez, supra*, involved the handwritten notes of an assistant state attorney regarding trial strategy in a murder case. *Lopez*, 696 So.2d at 727-728. The court actually found that those notes were exempt from disclosure as a result of the work product exemption. By implication, had there been no such work product privilege, those notes would have become public record at the conclusion of the case. *See, e.g., City of North Miami v. Miami Herald Publishing Company*, 468 So.2d 218, 219 (Fla. 1985); *Wait v. Florida Power & Light Company*, 372 So.2d 420, 424 (Fla. 1979). In this case, there is no work product privilege or other exemption which would protect the e-mails at issue from disclosure.

The City also posits that no record created by an agency employee may ever properly be considered “public” unless its content is obviously “official,” or unless the employee had some official duty to create it. AB 8. Moreover, it argues that its own Computer Resources Use Policy, which appears to vest the City with ownership of all e-mails sent and received over its network e-mail server, is insufficient as a matter of law “to transform documents which would otherwise not be public records into public records.” AB 10-11. Amicus advances the equally facile argument that “since an agency has no power to keep that which is a public record from disclosure, it clearly follows that any policy it adopts cannot create public records from items that are not.” Amicus Br. 9.² Amicus takes this erroneous hypothesis one step further by arguing that the Legislature created a *de facto* “exemption” by omitting personal correspondence from the statutory definition of “public records.” Amicus Br. 7. These arguments misconstrue the actual language of the applicable statute. *See* § 119.011(1), *Fla. Stat.* (2001).

In order to support all of these arguments, the City casts aside (and Amicus ignores) important facts that were obviously presupposed by the Second District

² The Times submits that the only City policy at issue which is inconsistent with Chapter 119, *Fla. Stat.*, is the unwritten policy upon which the City relied to support its decision to withhold agency-owned e-mails that employees had designated as “personal.”

Court of Appeal when formulating the certified question before this Court, to-wit: that the employees in question were transmitting or receiving e-mails during time for which they were being paid their taxpayer-funded salaries, and that the e-mails were being sent through and stored on a computer network server that was purchased, operated, and maintained in the normal course of the City's governmental operations. *See* AB 7; *Times Publishing Company v. City of Clearwater*, 27 Fla. L. Weekly D1544, D1545 (Fla. 2d DCA 2002)(“at least a 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”). Obviously, the City and Amicus would prefer for this Court to ignore this context in order to support their own broad arguments that not all records are transformed into “public records” as a result of their “ownership, custody, location or control” by an agency, and that not all documents are transformed into public records merely because of their inclusion in an agency’s file. AB 8, 12-13.

Of course, the foregoing assumptions made by the City and Amicus must be blindly accepted if one is to embrace their flawed, joint conclusion: that a record is not “public” unless it facially deals only with the agency’s primary “governmental” functions, or unless the individual employee who created or received the e-mail intended for it to be so used. However, if these positions were to be adopted, then

even if every elected official and every managerial employee in the City reviewed personal e-mails, and even took disciplinary action against an employee based upon the transmittal or receipt thereof, the e-mails would still *never* be “public records,” because they were “personal.” This of course flies in the face of the intent behind Article I, § 24(a) of the Florida Constitution and Chapter 119 of the Florida Statutes. Furthermore, while the City’s managerial personnel may not in fact read every single personal e-mail, the City’s Computer Resources Use Policy clearly gives them an absolute, unqualified right to do so, at any time. R. 36-40.

The arguments advanced by the City and Amicus also clearly disclose a fundamental flaw in their analyses: Employing a content-based test to determine whether an agency must disclose nonexempt records sent or received by its employees and stored by the agency, on the agency’s network server, would elevate the self-serving motivations of objecting employees over the obligations that the Florida Constitution and the Public Records Act impose directly on agencies. As such, both the City and Amicus are attempting to answer the question before this Court from the wrong perspective. In using the words “by any agency,” instead of “by any agency *employee*” in § 119.011(1), *Fla. Stat.*, the Legislature clearly indicated that the public nature of a record be determined from the *agency’s* frame of reference, and not from that of its employees. *Cf.*, § 119.01(3), *Fla. Stat.*

(2001)(“the Legislature finds that providing access to public records is a duty of each agency”). That the process of receiving and storing the e-mails at issue may have been automated does not mean that the agency did not receive and store the records in the normal course of its operations.

Furthermore, in *Tribune Company v. Cannella*, 458 So.2d 1075 (Fla. 1984), this Court made clear that the interests and concerns of agency employees about the content of agency records are irrelevant to the obligations of the agency itself, when faced with a public records request:

“ . . . The Act does not provide that the employee be present during the inspection, nor even that the employee be given notice that an inspection has been requested or made.

* * *

When the records are on the table, the purpose of the Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge . . .”.

Adopting the narrow definition of “public records” favored by the City and Amicus would also require the reversal of this Court’s holdings in *Michel*, *supra*, 464 So.2d at 546 (all agency records, including those which relate only to

incidental, internal functions, are public records); and *Wait*, 372 So.2d at 424.³

In any event, it is unnecessary to draw any of the broad generalizations advanced by the City and Amicus in order to properly resolve the issues presented in this case. The e-mails are public records because they were created, sent, received, and stored in the normal course of the City's operation of its computer network, and its internet and e-mail resources; they were certainly designed and used by agency employees to communicate some type of knowledge; and they do constitute the only evidence of the City's knowledge of what those employees actually sent, received, and stored through the use of their government-issued e-mail accounts on the City's network server. *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)(a "public record . . . is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type"). For all of these reasons, this Honorable Court should so declare, and order the City to immediately produce them to the Times.

II. The City Did Violate the Public Records Act.

In its effort to avoid liability in the event this Court finds that the e-mails at

³ *Cf.*, *Tribune Company v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984).

issue are “public records,” the City has confused the question of whether the e-mails at issue are “public records,” with the separate question of how long agencies are required to retain public records in general. *See, e.g.*, AB at 9, 17, 19.

Notwithstanding the testimony of records custodian Sharon Marzola indicating that she did rely in part on the City’s internal records retention policy to determine which of the requested e-mails were “public records,”⁴ the City’s argument that it is proper to use such a policy to determine *vel non* whether a record is “public,” makes no sense. R. 198; AB 9, 17, 19.

For instance, the City maintains that the e-mails in question are governed by Rule 1B-24.001 of the Florida Administrative Code, and properly classified as “transitory messages” under Item #146 of the Department of State General Records Schedule GS1 for Local Government Agencies. AB 19. However, this argument actually supports the Times’ position, because a record necessarily must be “public” in order to be subject to either of those policies. *See* Rule 1B-24.001(1), *Fla. Admin. Code* (“this chapter establishes standards and procedures for the scheduling and dispositioning of public records”), and Department of State, General Records Schedule GS1 for Local Government Agencies, § III (“Scheduling and Disposition of Public Records”)(stating that the GS1 sets forth

⁴ *See* R. 188.

“procedures for scheduling and disposal of public records”). Moreover, the Times does not dispute that many e-mails and other public records having purely transitory value can and should be quickly deleted, to ensure that storage space will be available for records with higher archival value. But that concession is hardly enough to absolve the City of liability.

Even if the e-mails at issue were only “transitory” in nature, the City was still required to retain them, and the City should still be held liable for violating the Act, for permitting some of the e-mails to be deleted, after the City had received the Times’ request to inspect them.⁵ *See* § 119.07(2)(c), *Fla. Stat.*, (2001)(“even if an assertion is made by the custodian . . . that a requested record is not a public record . . . , the requested record shall, nevertheless, not be disposed of for a period of 30 days”). To the extent that the City has attempted to emphasize the Times’ two-month delay in filing its civil suit in circuit court, this Court also should not overlook that “the absence of a civil action instituted for the purpose stated in paragraph (c) will not relieve the custodian . . . if the record is in fact a public record . . . and will not otherwise excuse or exonerate the custodian from any

⁵ As Assistant City Manager Garry Brumback testified at trial, he did in fact continue to delete his “personal” e-mails between the time of the Times’ request in October, 2000 and the time that the trial court specifically enjoined such deletions, in December, 2000, as a part of his routine practice. *See* R. 176:1-7.

unauthorized or unlawful disposition of such record.”

§ 119.07(2)(d), *Fla. Stat.* (2001).

The City’s argument that it did not abdicate the duties that the Public Records Act imposes on “records custodians” is also wrong. AB 17-18. At trial, Sharon Marzola testified that she had been designated as the City employee in charge of maintaining the files in the City’s e-mail server. R. 193. That testimony was affirmed by Daniel Mayer, the City’s Assistant Director of Information Technology. R. 183. No witness testified that the custodians of the City’s e-mail files were the employees whose e-mails the Times had requested. Respectfully, that notion was a conclusion the trial judge appeared to have drawn independently of the evidence presented at trial, seemingly as a result of Mr. Brumback’s testimony that he himself had decided which of his own e-mail to designate as “personal.” R. 195, 204.

According to § 119.021, *Fla. Stat.*, the “custodian” of the City’s records is “the elected or appointed . . . municipal officer charged with the responsibility of maintaining the office having public records or his or her designee.” As shown above, the undisputed evidence in this case showed that person was Sharon Marzola. However, she did not review any of the e-mails that the City produced, *or*

any of the e-mails the City withheld.⁶

While Mr. Brumback may also have had a sufficient level of access to his e-mail account to fulfill the Times' request, the records custodian (here, Ms. Marzola) was forbidden by law from avoiding her duty to produce nonexempt public records by relying on Mr. Brumback or any other person or office to do so. The Public Records Act allows no one, "other than the custodian of records to withhold a record." *Cannella*, 458 So.2d at 1077. Moreover, "the only

⁶ The following is an excerpt from Ms. Marzola's testimony before the trial court:

Q. How did you determine what was related to city business?

A. I determined by what they [Brumback and Asmar] told me.

* * *

Q. Did you perform any review of the contents of the e-mails that were omitted from the city's response?

A. No, I did not.

* * *

Q. Who at the city reviews e-mails that are produced in response to a public records request or exemptions?

A. To date only the people that have the data, you know, that it's their data . . .

See R. 194, 195, 198.

justification for withholding a record or a portion thereof is the *custodian's* assertion of a statutory exemption.” *Id.* (emphasis added).

Permitting an agency to escape responsibility or liability by *conceding* that the records custodian failed to perform (or even to personally involve herself with) these statutory responsibilities “would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction.” *See Tober v. Sanchez*, 417 So.2d 1053, 1054 (Fla. 3d DCA 1982), *citing City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *cf., Mintus v. City of West Palm Beach*, 711 So.2d 1359, 1361 (Fla. 4th DCA 1998).

However, that appears to be exactly what happened in the instant case. Under no circumstances does the evidence support a finding that the City and its designated custodian actually lived up to the obligations imposed on them and the public trust invested in them, by the Public Records Act.

For all of these reasons, this Honorable Court should declare that the City violated the Public Records Act, by failing to properly ensure the preservation of all of the public records at issue and by failing generally to meet the duties imposed by law on the custodian of the City’s public e-mail records.

III. The State Constitution Entitles Citizens to Inspect Public Records

Regardless of their Motives or Intentions.

In its brief, Amicus argues without authority that “it would be inappropriate and violate current law” to allow citizens to request public records for the purpose of privately investigating misconduct by public officials. Amicus Br. at 8, 19. Amicus further states that it would “clearly be contrary to public policy” to allow members of the public to inspect the records at issue prior to their use in connection with City-sponsored disciplinary action, because such inspection would interfere with the City manager’s sole “authority to apply the personnel rules and ensure that employees are properly appointed, disciplined or dismissed,” and “to determine when investigations into employee’s [sic] performance or behavior are appropriate.” Amicus Br. 19. Moreover, according to Amicus, requiring the disclosure of e-mails claimed by agency employees to be “personal” would “contravene clearly established legislative intent.” Amicus Br. 16. Thus, Amicus seems to suggest that the City’s right as an employer to access the information it needs in order to manage its employees, somehow removes that information from the ambit of the public’s state constitutional right of inspection. Amicus effectively asserts that the bureaucracies they represent are immune from public and press scrutiny of waste and/or mismanagement of expensive, vitally important agency resources.

Amicus has failed to cite a single legal authority to support any of its broad, incorrect statements about Florida's law and public policy. Amicus was also unable to cite any documentation of what Amicus claims to be the legislative intent behind its generalized statements. Interestingly, Amicus' statements about the law all seem to ignore Article I, § 1 of the Florida Constitution, which provides that all of this state's political power is ultimately vested in the people – not in the City manager, its personnel department, Florida's Ethics Commission, or “public managers who answer directly or indirectly to either appointed or elected officials.” Amicus Br. 19-21. The rights of those entities to inspect the records at issue may be co-equal with, but cannot operate to extinguish or take precedence over, the rights of the people to inspect the same records under Article I, § 24(a) of the Florida Constitution.

It is also well-established that a citizen's right to inspect and copy public records cannot be conditioned on any requirement that the citizen disclose or justify his reasons or motives for requesting the records. *See Gadd v. News-Press Publishing Company*, 388 So.2d 276, 277-278 (Fla. 2d DCA 1980). Therefore, the Public Records Act cannot legally be interpreted as if it allowed local agencies to deny access to public records whenever they believed a citizen had requested the records in order to conduct an individual inquiry into possible misconduct by

public employees, or for any other purpose with which the agencies' officials might disagree or find objectionable, as Amicus has recommended.

Amicus also argues that if this Court holds that the e-mails at issue are "public records," then the public would also have to be allowed to inspect and copy all e-mails that agency employees send and receive on their home computers. Amicus Br. 8. That argument grossly oversimplifies and mischaracterizes the Times' actual position. The e-mails at issue in this case were all sent, received, and stored by agency employees on the City's agency-owned and operated network server. R. 179, 185, 197. As such, they are public records. While some e-mails that an agency employee might send and receive from a home computer could also be "public records," those e-mails would only be *presumptively* "public" (using the Times' reasoning) if transmitted through and stored on the agency's e-mail server. Personal e-mail, if sent from an employee's home computer, would not necessarily have to be routed through the agency's e-mail server.

Regarding the "policy" arguments advanced on pages 22 and 23 of Amicus' brief, the Times would respectfully point out that all medical records of state and municipal employees are already exempt by law. *See* §§ 110.123(9) and 112.08(7),

Fla. Stat. (2001).⁷ The same is true of agency employees' deferred compensation and retirement benefits. *See* §§ 112.21(1), 112.215(7). Thus, while these records are "public records," the Legislature has already properly acted to remove them from the public's right of inspection. Accordingly, there is no need for this Court to judicially exempt e-mails which contain an agency employee's personal medical information, or which refer in any manner to the employee's retirement savings plans.

CONCLUSION

E-mails which are sent, received, and transmitted by agency employees; stored on an agency's e-mail server; and maintained with other agency-owned data in the normal course of the City's official business operations, are public records. This is so regardless of the personal desires of agency employees, and regardless of the Times' motives for asking to inspect them. While the Legislature has the constitutional prerogative to declare such records exempt, in order to avoid disclosing the personal communications of agency employees, it has not exercised that prerogative. Accordingly, this Honorable Court should declare that the

⁷ *See also, News-Press Publishing Company, Inc. v. Kaune*, 511 So.2d 1023 (Fla. 2d DCA 1987)(recognizing that medical records related to public employees who enrolled in group insurance plan are exempt from public records disclosure).

withheld e-mails are public records, and it should order the City to produce them, in accordance with the Times' request.

Respectfully submitted,

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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 October, 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, and to

Carole Sanzeri, Esq., Michael A. Zas, Esq., Counsel for Amicus Florida
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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).

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