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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., and MICHAEL BARFIELD,

Petitioners,

v. Case No. 2014-CA-_____

CITY OF SARASOTA, and MICHAEL JACKSON,

Respondents.
_____/

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED EMERGENCY PETITION FOR WRIT OF MANDAMUS

Petitioners, through counsel, file this Memorandum of Law in Support of Verified Emergency Petition for Writ of Mandamus.

ARGUMENT

Petitioners seek to inspect certain records in the custody of the City and Detective Jackson because they are public records. Petitioners also seek the entry of an Order directing the Clerk to take possession of all records responsive to the public records request and to have them filed under seal pending the outcome of this proceeding.

Petitioners contend that Respondents have failed to perform mandatory duties to make public records available for inspection. Mandamus is the appropriate remedy to enforce violations of the public records law. *See Smith v. State*, 696 So. 2d 814, 816 (Fla. 2d DCA 1997) (for purposes of mandamus relief under the Public Records Act, disclosure of public records is a mandatory act). A petition for writ of mandamus is also the proper vehicle for enforcing one's right of access to court records. *Blackshear v. State*, 115 So. 3d 1093, 1094 (Fla. 1st DCA 2013).

In *Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2006), the Second District Court of Appeal outlined the requirements for issuance of an alternative writ of mandamus:

> A party petitioning for a writ of mandamus must establish a clear legal right to performance of the act requested, an indisputable legal duty, and no adequate remedy at law. When a trial court receives a petition for a writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. If it is not facially sufficient, the court may dismiss the petition. If the petition is facially sufficient, the court must issue an alternative writ of mandamus requiring the respondent to show cause why the writ should not be issued.

914 So. 2d at 1067-68 (internal citations and quotation marks omitted). *See also Moore v. Ake*, 639 So. 2d 697, 698 (Fla. 2d DCA 1997) (a petitioner is not required to serve the respondent with the complaint and could not serve the alternative writ until the trial court had performed the tasks required of it under the rule). As will be demonstrated below, Petitioner has established all of the above requirements, and an alternative writ of mandamus should issue forthwith directing Respondent to show cause why the requested relief should not be granted.

A. Clear Legal Right

All citizens of this State enjoy the right to inspect public records. Indeed, this right is not only a statutory right under § 119.07(1), but has been elevated by the citizens of Florida to constitutional status. Art. I, § 24(a), Fla. Const. The Florida Public Records Act was enacted to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people. *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 52 (Fla. 5th DCA 2004). "The motivation of the person seeking the records does not impact the person's right to see them under the Public Records Law." *Curry v. State*, 811 So. 2d 736, 742 (Fla. 4th DCA 2002).

The City has asserted that the records are not a public record and has refused to produce them. Additionally, the City and Detective Jackson refuse to honor the requirements of § 119.07(1)(h) to not dispose of the records. For the reasons stated below, these assertions are erroneous.

1. Trap and Trace Authorization Applications and Orders Are Public Records and Must Be Preserved Pursuant to 119.07(1)(h), Florida Statutes.

Florida's Public Records Act is to be liberally construed in favor of public access and in a manner that frustrates all evasive devises. *Lightbourne v. McCollum*, 969 So. 2d 326, 332-33 (Fla. 2007); *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009); *Weeks v. Golden*, 846 So. 2d 1247, 1249 (Fla. 1st DCA 2003); *Tribune Co. v. Public Records, P.C.S.O. No 79-35504 Miller/Jent*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986). Consistent with this guiding principle, exemptions to the Public Records Act are to be "construed narrowly and limited in their designated purpose." *Lightbourne*, 969 So. 2d at 333 (citing *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994). *See also Times Publ'g Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002) (citing *Tribune Co.*, 493 So. 2d at 484). Indeed, "[w]hen in doubt the court should find in favor of disclosure rather than secrecy" and "the government agency claiming the benefit of the exemption bears the burden of proving its entitlement to the exemption." *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998) (citations omitted).

Moreover, the Sunshine Amendment to the Florida Constitution grants every person a fundamental, constitutional right of access to "any public records made or received in connection with the official business of any public body, officer, or employee of the state, or any persons

acting on their behalf . . ." Art. I, § 24, Fla. Const. The Public Records Act similarly defines public records 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(12), Fla. Stat. The Florida Supreme Court has recognized these definitions encompass all materials made or received by an agency in connection with official business which are used to "perpetuate, communicate or formalize knowledge." *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*, 379 So. 2d 633, 640 (Fla. 1980) (finding documents made or received by a private consultant in the course of its contract with a public agency public records); *see also State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) (public records are "materials that have been prepared with the intent of perpetuating or formalizing knowledge").

All the elements of the definition are present here. The "trap and trace" applications were created (i.e., "made") by Detective Jackson in furtherance of his official duties as an SPD detective. They further constitute the formal presentment document perpetuating, communicating and formalizing his bases for seeking court orders authorizing such a "trap and trace." Any resultant order also qualifies as a public record as it was then "received" and maintained by Detective Jackson from the court for the purpose of carrying out the "trap and trace." It too perpetuates, communicates, and formalizes, knowledge of official action. Neither Detective Jackson nor the city of Sarasota has asserted any exemption applies to the records at issue, as is their burden under the law.

These records remain in the custody of Detective Jackson and, as custodian, he is required to immediately produce all non-exempt portions of any public records in his possession

when a request is made pursuant to the Public Records Act. As the Florida Supreme Court has held, the only delay permissible when responding to a Public Records Act request "is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).

Given that the records at issue qualify as public records under Florida law, the custodian of the records (Detective Jackson) is required to abide by the commands of § 119.07(1)(h). That section of the Public Records Act states in full:

> Even if an assertion is made by the custodian of public records that a requested record is not a public record subject to public inspection or copying under this subsection, the requested record shall, nevertheless, not be disposed of for a period of 30 days after the date on which a written request to inspect or copy the record was served on or otherwise made to the custodian of public records by the person seeking access to the record. If a civil action is instituted within the 30-day period to enforce the provisions of this section with respect to the requested record, the custodian of public records may not dispose of the record except by order of a court of competent jurisdiction after notice to all affected parties.

§ 119.07(1)(h), Fla. Stat.

The directive of section 119.07(1)(h) is clear. Regardless of whether a custodian believes a record to be exempt from disclosure, once a public record request has been made, a custodian cannot dispose of a record for 30 days after the date upon which written inspection request was made. Further, once litigation ensues within that same 30-day period, as has occurred here, a custodian cannot ever dispose of records except pursuant to court order.

The May 19, 2014, request requires Detective Jackson to maintain custody of the subject records for 30 days. However, Sarasota Assistant City Attorney Eric Werbeck has represented that he cannot guarantee this as the U.S. Marshals Service may assert improper dominion over the records at any time and force Detective Jackson to relinquish custody. On or about May 29,

2014, federal agents took custody of the applications and orders. As set forth in the Petition and concurrently filed Emergency Motion for Temporary Injunction, the City and Detective Jackson possess additional records that are likely to be identified in response to Petitioners' records request, which will likely trigger another improper transfer of records into federal custody.

Numerous Florida appellate decisions have held that it is improper for an agency to transfer records in its possession that are the subject of a public records request.

Most recently, in *Chandler v. City of Sanford*, 121 So. 3d 657 (Fla. 5th DCA 2013), the Fifth District Court of Appeal held that an agency who is the custodian of records may not avoid compliance with Chapter 119 by transferring the records to another agency. In *Chandler*, the state attorney instructed the Sanford Police Department not to release records in its possession relating to the George Zimmerman case. Chandler brought a mandamus action but the trial court dismissed the petition because the state attorney, not the city, had possession of the records. The appellate court reversed, holding that instructions not to release records by another agency was not a valid defense to an action seeking the production of records in the city's possession at the time the records request was made. The Court stated:

> Given the aggressive nature of the public's right to inspect and duplicate public records, a governmental agency may not avoid a public records request by transferring custody of its records to another agency. *See Tober v. Sanchez*, 417 So.2d 1053, 1054 (Fla. 3d DCA 1982). In the case at bar, the City asserts that it was under an order from the executive branch, specifically the State Attorney, not to produce the original, unredacted email. However, despite this instruction from the State Attorney, as a matter of law, the City remained the governmental entity responsible for the public records. While the court is sympathetic that the City was placed between a proverbial "rock and a hard place," the City cannot be relieved of its legal responsibility for the public records by transferring the records to another agency.

121 So. 3d at 660.

Similarly, in *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), records relating to bus accidents were transferred to another agency after receipt of a public records request. The

Third District rejected the suggestion that a custodian may transfer actual physical custody of the records and thereby avoid compliance with a request for inspection under the Public Records Act. The Court stated:

> To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office 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.

Id. at 1054. See also *Wallace v. Guzman,* 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) ("public records cannot be hidden from public scrutiny by transferring physical custody of them to the Agency's attorneys."); *In re Grand Jury Investigation Spring Term 1988*, 543 So. 2d 757, 759 (Fla. 2d DCA 1989) ("we cannot allow the governmental agencies involved to avoid disclosure merely by transferring [public records] away."); *Tribune Co. v. Cannella,* 438 So. 2d 516, 523 (Fla. 2d DCA 1983) *decision quashed on other grounds,* 458 So. 2d 1075 (Fla. 1984) (city improperly played a "shell game" by transferring the requested records to the state attorney's office).

The City and Detective Jackson cannot lawfully dispose of public records in this manner. This Court must therefore provide the relief requested herein to prevent such federal overreach into state affairs.

B. Mandatory Duty

A records custodian has a mandatory duty to produce public records. *Rhea v. Dist. Bd. of Trustees of Santa Fe Coll.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013). Because the records are a public record, the City and Detective Jackson have no discretion to refuse to produce them.

C. No Adequate Remedy

Petitioners have no other adequate remedy at law. Mandamus is the appropriate remedy for violations of the Public Records Law. *Smith v. State, supra,* 696 So. 2d at 816.

D. Accelerated Hearing

Petitioners are entitled to an immediate hearing under § 119.11(1), which provides that:

> [w]henever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

See Woodfaulk v. State, 935 So. 2d 1225, 1227 (Fla. 5th DCA 2006) (trial court abused its discretion in refusing immediate hearing as filing of mandamus action itself triggered requirement that court set immediate hearing under § 119.11(1)). *See also Salvador v. Fennelly*, 593 So. 2d 1091, 1093 (Fla. 4th DCA 1992).

E. Attorneys Fees and Costs

Attorney's fees and costs are proper because there is no basis for withholding the requested records. *See Office of the State Attorney for 13th Jud. Cir. v. Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007) (attorneys fees awardable under § 119.12 when (1) a court finds that the basis for withholding the requested records is improper or (2) when an agency unlawfully delays producing public records).

Respectfully submitted,

s/Benjamin James Stevenson
Benjamin James Stevenson
Fla. Bar. No. 598909
ACLU Found. of Fla.
Post Office Box 12723
Pensacola, FL 32591-2723
T. 786.363.2738
F. 786.363.1985
bstevenson@aclufl.org

Counsel for ACLU

/s/ Andrea Flynn Mogensen
ANDREA FLYNN MOGENSEN
Cooperating Attorney for the American Civil Liberties Union of Florida, Inc.
Law Office of Andrea Flynn Mogensen, P.A.
200 South Washington Boulevard, Suite 7
Sarasota FL 34236
Telephone: 941.955.1066
Fax: 941.955.1008
Florida Bar No. 0549681
amogensen@sunshinelitigation.com

Counsel for ACLU

Maria Kayanan
MARIA KAYANAN
Associate Legal Director
ACLU Foundation of Florida, Inc.
4500 Biscayne Boulevard
Miami, FL 33137
Florida Bar No. 305601
Telephone: (786) 363-2700
Facsimile: (786) 363-1108
MKayanan@aclufl.org

Counsel for ACLU

THOMAS & LOCICERO PL

/s/ Gregg D. Thomas
Gregg D. Thomas
Florida Bar No. 223913
601 South Boulevard
Tampa, Florida 33606
Telephone: (813) 984-3066
Facsimile: (813) 984-3070
Primary: gthomas@tlolawfirm.com
Secondary: kbrown@tlolawfirm.com

Attorney for Michael Barfield