A LAST WORD ON RECENT DEVELOPMENTS

AGENCY E-MAIL AND THE PUBLIC RECORDS LAWS—IS THE FOX NOW GUARDING THE HENHOUSE?

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In *State v. City of Clearwater*,[1] the Florida Supreme Court held that an e-mail message sent and received over a public agency's network server "does not automatically become [a] public record[ ] by virtue of"[2] its automatic storage on the server, and that such a record is not encompassed within the statutory definition of "public records," if an agency employee claims that the content of the e-mail message is "personal."[3] The Court also agreed with the Second District Court of Appeal by holding that private or personal e-mail messages fall outside the current definition of "public records" in Florida Statutes Section 119.011(1).[4]

The Court's holding seemingly contradicts numerous other public records decisions, and appears to permit trial courts to consider the personal objections of agency employees when determining whether to grant access to nonexempt public agency records.

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1. 2003 WL 22097478 (Fla. Sept. 11, 2003).
2. *Times Publg. Co. v. City of Clearwater*, 830 So. 2d 844, 845 (Fla. 2d Dist. App. 2002).
3. *City of Clearwater*, 2003 WL 22097478 at **3, 4.
4. *Id*. at *6. For the text of Florida Statutes Section 119.011(1), consult *infra* note 46 and accompanying text.

I. FACTS

In early 2000, the City of Clearwater investigated allegations that Assistant City Manager Garrison Brumback and Planning and Development Administrator John Asmar used city equipment and staff to conduct their private storage business on city time. The City's final report indicated that Asmar had indeed made a number of calls regarding his private business using the city-owned office and cellular telephones.[5]

Based on the City's report, in October 2000, a reporter for the *St. Petersburg Times* requested copies of all e-mail messages sent or received through the City's computer network server by Brumback and Asmar during the preceding twelve-month period.[6] After receiving the *St. Petersburg Times*' request—but before complying with it—the City allowed the two employees to go through all the e-mail messages and designate which messages they considered to be "personal."[7] The City then produced only those messages the two officials designated as "public records," along with a letter explaining the City's reasoning for withholding all messages the officials deemed to be "personal."[8] No official records custodian—or for that matter any City official other than the affected employees—ever reviewed the content of the withheld and allegedly "personal" e-mail messages to determine their content.[9] As such, there was never any independent determination about the nature of these e-mail messages as "private" or "public."

In their haste to keep certain information confidential, the two officials failed to delete a handful of e-mail messages showing

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5. Christina Headrick, *Clearwater to Workers: Call on Your Own Dime*, http://www.sptimes.com; *search* "Clearwater to Workers" (Dec. 3, 2000); St. Petersburg Times, *Change Is in the Air at Clearwater City Hall*, http://www.sptimes.com; *search* "change" *and* "Clearwater City Hall" (Dec. 3, 2000) [hereinafter *Change Is in the Air*].

6. *City of Clearwater*, 2003 WL 22097478 at *1; *Times Publg. Co.*, 830 So. 2d at 845.

7. *City of Clearwater*, 2003 WL 22097478 at *1; *Times Publg. Co.*, 830 So. 2d at 845. The City had instituted its internal e-mail service solely for the accomplishment of governmental business. City of Clearwater, *2001/2002 Approved Annual Operating and Capital Improvement Budget 117*, http://www.clearwater-fl.com/gov/depts/omb/archive/FY_02_Approved_Budget/Operations/InformationTechnology. pdf (last updated Sept. 4, 2003) [hereinafter *Approved Budget*]. Even now, it employs a department of "engineers" whose job consists of operating and managing the City's network e-mail system. *Id*. The personnel and equipment costs for these functions likely depend, at least in part, on the volume of e-mail messages generated and received through the City's system. *Id*.

8. *Id*.

9. *City of Clearwater*, 2003 WL 22097478 at *1.

they had in fact used the City's e-mail system during the preceding year to exchange off-color jokes, to schedule meetings and dinners related solely to their private storage company, and even to discuss their company's business plan, line of credit, financial statements, and tax returns.[10] After the *St. Petersburg Times* published a news article about these inadvertently disclosed e-mail messages, Interim City Manager Bill Horne issued written reprimands to Brumback and Asmar for their inappropriate use of the City's e-mail system.[11] Horne also asked Asmar to resign, which he did.[12] Additionally, other City Commissioners spoke out publicly against the two officials' abuse of City resources, suggesting that the City prohibit all personal use of the City's e-mail system.[13]

This situation was not the first time the inappropriate use of e-mail by City employees became newsworthy. In 1999, a *St. Petersburg Times* reporter requested access to a series of e-mail messages exchanged via private e-mail between former City Manager Mike Roberto and his assistant at the time, Bill Horne.[14] The City's response, in part, was to authorize the expenditure of up to $25,000 in public funds to retain an expert to conduct a review of the e-mail correspondence.[15] At a special meeting on November 8, 1999, the City Commission hired former federal judge H. Hamilton Rice, Jr. for this task.[16] He was directed to interview employees to determine whether any violations of state public records laws were "willful" or "intentional."[17] Rice ultimately reported that he found insufficient evidence to conclude that the correspondence over Roberto's private e-mail account had been

10. Christina Headrick, *Officials' E-mail Use Called Inappropriate*, http://www.sptimes.com; *search* "Asmar" *and* "e-mail" (Oct. 17, 2000).

11. *Id*.; *Change Is in the Air*, *supra* n. 5.

12. Headrick, *supra* n. 5.

13. *See* Headrick, *supra* n. 10 (describing specific criticisms); *see also City Commission Minutes*, http://www.clearwater-fl.com/services/public_records/commission/minutes/110899.pdf (Nov. 8, 1999) (reviewing policies on private e-mail accounts).

14. Anita Kumar, *Concerns Raised over Roberto E-mail*, http://www.sptimes.com; *search* "Mike Roberto" *and* "e-mail" (Oct. 27, 1999).

15. City of Clearwater, *City Commission Minutes, Item #33*, http://www.clearwater-fl.com/services/public_records/commission/minutes/110499.pdf (Nov. 4, 1999); City of Clearwater, *supra* n. 13.

16. City of Clearwater, *supra* n. 13; The Brechner Report, *E-mail Exchanges OK for City Manager and Assistant*, http://www.brechner.org/reports/ 2000/rpt0002.htm (Feb. 2000).

17. City of Clearwater, *supra* n. 13.

"intentional [and] inappropriate."[18] However, he did recommend prohibiting City employees from using the City's official e-mail system for any nonemergency personal communications.[19]

By the time the *St. Petersburg Times* issued its October 2000 e-mail request, the City had adopted a new official computer-use policy.[20] The new policy allowed City employees "incidental" personal use of the e-mail system, but only with a departmental supervisor's permission.[21] The policy also advised employees that their e-mail messages would not be considered private, and clearly warned that the City could access and review all e-mail messages at any time for a variety of reasons, specifically including the fulfillment of public records requests.[22] Furthermore, it forbade any use of the City's official e-mail system to conduct a private business.[23]

In December 2000, the *St. Petersburg Times* sued for access to the withheld e-mail messages.[24] After a preliminary hearing, the trial court granted a temporary injunction barring the City from allowing any employee e-mail messages to be deleted until further order and requiring the City to show cause for withholding the e-mail messages that the employees designated as "personal."[25]

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18. The Brechner Report, *supra* n. 16; City of Clearwater, *City Commission Minutes, Item #41,* http://www.clearwater-fl.com/services/public_records/commission/minutes/120999.pdf (Dec. 9, 1999).

19. City of Clearwater, *supra* n. 18.

20. The policy defined "Computer Resources" to include the City's entire computer network, including all hardware, software, and data, as well as *the contents of the City's e-mail system and messaging system*. City of Clearwater, *Administrative Policy Manual: City of Clearwater Computer Resources Use Policy* (Sept. 14, 2000). It also provided 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.

Id.

21. *Id*.

22. *Id*.

23. *Id*.

24. Pet. for Writ of Mandamus, Declaratory Judm., & Injunctive Relief, *Times Publg. Co. v. City of Clearwater*, Civ. Case No. 00-8232-CI-13 (Fla. 6th Cir. Ct. Dec. 1, 2000).

25. Or. on Mot. for Temp. Inj., *Times Publg. Co. v. City of Clearwater*, Civ. Case No. 00-8232-CI-13 (Fla. 6th Cir. Ct. Dec. 18, 2000); Show Cause Or., *Times Publg. Co. v. City of Clearwater*, Civ. Case No. 00-8232-CI-13 (Fla. 6th Cir. Ct. Dec. 18, 2000).

However, the trial court ultimately denied the *St. Petersburg Times*' petition on the ground that e-mail messages 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."[26] The court essentially adopted the City's argument that the content of the e-mail messages determined whether they were "public records."[27] The court reasoned that, if the e-mail messages were private, they were not made or received pursuant to law or ordinance or in connection with the transaction of official business by the City.[28]

The *St. Petersburg Times* appealed the decision to the Second District Court of Appeal. On appeal, the *St. Petersburg Times* argued that the messages were "public records" regardless of content, because they were all sent, received, and automatically stored verbatim by an instrumentality of the agency itself, namely, the City-owned and operated e-mail server.[29] The City again asserted the position that the determining factors were content and the existence of a statutory duty to receive and retain the records.[30] The Second District Court of Appeal affirmed the trial court, but certified the following issue to the Florida Supreme Court as a matter of great public importance:

> 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?[31]

The *St. Petersburg Times* again argued that such e-mail messages were "public records" because they were all sent, received,

26. Final Or., *Times Publg. Co. v. City of Clearwater,* Civ. Case No. 00-8232-CI-13 (Fla. 6th Cir. Ct. May 17, 2001).

27. *Id*.

28. *Id*.

29. Initial Br. of Appellant, *Times Publg. Co. v. City of Clearwater*, 830 So. 2d 844 (Fla. 2d Dist. App. 2002).

30. Ans. Br. of Appellee, *Times Publg. Co. v. City of Clearwater*, 830 So. 2d 844 (Fla. 2d Dist. App. 2002).

31. *Times Publg. Co.*, 830 So. 2d at 848–849 (all capital letters omitted).

and stored in connection with the City's operation of its own e-mail server.[32] The Florida Attorney General's Office intervened and also argued that such e-mail messages were "public records," analogizing them to "phone records or mail logs, which the State assert[ed were] clearly public records."[33] Before responding to these arguments, the Florida Supreme Court revised the certified question as follows:

> 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.[34]

The Court affirmed "the Second District's conclusion that 'private' or 'personal' e-mails 'simply fall outside the current definition of public records.'"[35] In reaching its decision, the Florida Supreme Court reasoned that "[t]he determining factor is the nature of the record, not its physical location,"[36] and stated that e-mail messages created by an agency employee, on an agency-owned computer server, were properly classified as "public records" only if the employee intentionally created them for agency business.[37]

As the Second District Court of Appeal previously predicted, this decision will profoundly impact the way in which governmental agencies in Florida conduct the business of the people.[38]

II. THE LAW

"The purpose of the Public Records Act is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people."[39] Accordingly, "It is the policy of this state that all

32. *City of Clearwater*, 2003 WL 22097478 at **3, 5.
33. *Id*. at *2.
34. *Id*. at *1 (all capital letters omitted).
35. *Id*. at *3 (citing *Times Publg. Co.*, 830 So. 2d at 847 (omissions omitted)).
36. *Id*. at *5.
37. *Id*. at *4.
38. *Times Publg. Co.*, 830 So. 2d at 848.
39. *Forsberg v. Hous. Auth. of Miami Beach,* 455 So. 2d 373, 378 (Fla. 1984) (Overton, J., concurring).

state, county, and municipal records shall be open for personal inspection by any person."[40]

Over a decade ago, Florida's voters elevated this statutory right of access to a state constitutional right.[41] Because this constitutional provision is found within Article I of the Florida Constitution, it constitutes a fundamental individual right of every member of the general public.[42] Against this backdrop, the threshold questions before the Florida Supreme Court were: (1) what is a "public record," and (2) when may agencies legally withhold public records?

A. What Is a Public Record?

During the first part of the twentieth century, Florida defined the term "public records" to include only those documents that an agency was statutorily required to receive or maintain.[43] However, as the law evolved, the courts and the Florida Legislature unequivocally recognized that to maintain effective oversight of the government, the public has an enforceable right of access to *all* agency records.[44] In *Fuller v. State ex rel. O'Donnell*,[45] the Florida Supreme Court stated:

> Under our form of governmental organization, a municipality is one of the integers of democracy; the people who constitute the municipality are its owners and stockholders; its officers are nothing more than its agents. To say that the agent can deny the right of the stockholder to inspect and make copies of the records of the corporation would give countenance to the very evil that Jefferson warned against in his famous aphorism, "Every government degenerates when trusted to the rulers of the people alone. The people themselves are the only safe depositories." Not only this, to uphold such a doctrine would make rubbish of the well known trilogy of Abraham Lincoln

40. Fla. Stat. § 119.01(1) (2003).

41. Fla. Const. art. I, § 24(a); *see* Patricia A. Gleason & 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 (1994) (outlining Florida's legislative and judicial reinforcement of a dedication to open government).

42. *See e.g. Armstrong v. Harris,* 773 So. 2d 7, 21–22 (Fla. 2000) (explaining that Article I of Florida's Constitution represents the fundamental rights of the people, and quoting *State v. City of Stuart,* 120 So. 2d 335, 347 (Fla. 1929)).

43. *Amos v. Gunn*, 94 So. 2d 615, 634 (Fla. 1922).

44. *Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607, 607 (Fla. 1944).

45. 17 So. 2d 607.

> and in place of government of, for, and by the people, we would have government by petty autocrats.[46]

Subsequently, the Legislature enacted a broadened statutory definition of "public records" to include not only those records that an agency is statutorily obligated to maintain, but also all other records an agency sends and receives in the course of transacting its business.[47] Florida Statutes Section 119.011(1) provides that "public records" include,

> 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.[48]

This definition includes anything sent or received by an agency, public official, agency employee, or any private company acting on behalf of an agency, in connection with the transaction of the agency's official business.[49]

In *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*,[50] the Florida Supreme Court held that this definition includes everything made or received by an agency in connection with official business that is used to perpetuate, communicate, or simply to formalize knowledge, even if the material is only filed.[51] Additionally, in *Hill v. Prudential Insurance Co. of America*,[52] the First District Court of Appeal 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:

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46. *Id*.

47. Fla. Stat. § 119.011(1) (2003).

48. *Id*.

49. *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985) (citing *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633 (Fla. 1980)).

50. 379 So. 2d 633.

51. *Id*. In *Johnson v. Butterworth,* rough outlines and preliminary handwritten notes that agency's attorneys had not yet formalized were declared not to be "public records." 713 So. 2d 985, 987 (Fla. 1998) (citing *Orange County v. Fla. Land Co.*, 450 So. 2d 341 (Fla. 5th Dist. App. 1984)). Intermediate, machine-readable computer data also does not constitute "public records" until such time as the data has attained finality by being saved to an identifiable computer file. Fla. Atty. Gen. Op. 85-87 (Oct. 25, 1985).

52. 701 So. 2d 1218 (Fla. 1st Dist. App. 1997).

> 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).[53]

The Florida Attorney General's Office has gone even so far as to declare that the only relevant concern for an agency in deciding whether a document is a "public record" is whether that document is in the agency's lawful possession.[54] This interpretation is, of course, consistent with the Florida Supreme Court's previous express recognition that a liberal interpretation of the term "public records" furthers the important public purpose of ensuring governmental accountability.[55]

Traditionally, the courts applied two content-neutral criteria to distinguish "public" records from "nonpublic" records.[56] The first is whether the record is maintained by the agency in the course of conducting the agency's business.[57] The second is whether the record constitutes the final evidence of the agency's knowledge.[58] This latter aspect of the test satisfies the requirement that the material actually be a "record," as opposed to a mere "precursor."[59] In other words, any document or other material that reflects information "known" to an agency is a "public record."[60]

The definition of "public records" also includes all materials that reflect how an agency manages and administers its internal

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53. *Id*. at 1220.
54. Fla. Atty. Gen. Op. 77-141, Annual Rpt. of the Atty. Gen. 305, 306 (Dec. 30, 1977).
55. *Forsberg,* 455 So. 2d at 378.
56. *See Michel*, 464 So. 2d 545 (describing one criterion used to distinguish "public" and "nonpublic" records); *Shevin*, 379 So. 2d 633 (discussing a second criterion used to distinguish "public" and "nonpublic" records).
57. *Michel,* 464 So. 2d at 546.
58. *Shevin,* 379 So. 2d at 640.
59. *Id.*
60. *Id*.

operations.[61] In *Michel v. Douglas*,[62] a public hospital sought to avoid disclosing personal information it accumulated in its employees' personnel files by pointing out that no law or rule required the hospital to keep such information.[63] The Florida Supreme Court held that despite the content of the record, any record that an agency decides to gather and keep in the course of its regular operations qualifies as a "public record," even if the agency was not statutorily required to keep the record.[64] The Court suggested that agencies could avoid this result only by choosing not to collect and maintain nonessential, "personal" information.[65] More recently, the Florida Supreme Court disapproved the use of a narrow construction of the statutory definition of "public records" to avoid disclosure of "personal" judicial e-mail messages.[66] These principles have been held to apply with the same force to information maintained on a government agency's computer.[67]

B. When May Agencies Legally Withhold Public Records?

It is a well-established principle of Florida law that only the Legislature has the power to determine which agency records are

61. *Michel,* 464 So. 2d at 547; *Gadd v. News Press Publg. Co.,* 412 So. 2d 894, 895 (Fla. 2d Dist. App. 1982). The Florida Attorney General's Office also 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. Fla. Atty. Gen. Op. 99-74, Annual Rpt. of the Atty. Gen. 281, 281–282 (Dec. 20, 1999).

62. 464 So. 2d 545 (Fla. 1985).

63. *Id*. at 546.

64. *Id*. at 546–547.

65. *Id*. Also, the appellate court rejected the idea that the Legislature must act to classify a nonexempt agency record as a "public record" before the public may inspect it. *Douglas v. Michel,* 410 So. 2d 936, 938–939 (Fla. 5th Dist. App. 1982). Instead, the court held that all records kept in an agency's normal course of operations were "public records," even if a specific statute or rule does not require the agency to keep the record. *Id*. (holding that an "agency cannot exempt [itself] from the application of a general law," and certifying a question to the Florida Supreme Court, 464 So. 2d 545 (Fla. 1985)).

66. *Media General Convergence, Inc. v. C.J. of the Thirteenth Jud. Cir.*, 840 So. 2d 1008, 1015–1016 (Fla. 2003) (holding, *inter alia*, that records received by the Chief Judge were "public records" even though the Chief Judge had no explicit statutory or regulatory duty to receive them because they were actually received by him in connection with his transaction of official administrative court business).

67. *See Siegle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th Dist. App. 1982), *cert. denied*, 431 So. 2d 988 (Fla. 1983) (stating that "[t]here can be no doubt that information stored on a computer is as much a public record as a written page in a book or a tabulation in a file").

exempt from public disclosure under the public record laws.[68] Thus, Florida's courts have consistently refused to allow agencies to delay producing nonexempt documents for their employees to raise nonstatutory, content-related objections to disclosure.[69] To do so would effectively divest the Legislature of its status as the only government branch authorized to declare a record exempt from public inspection:

> To 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.[70]

The ability of an agency employee to unilaterally prevent disclosure of an e-mail message sent or received on an agency-owned computer system simply by declaring the same to be "private" is seemingly inconsistent with this longstanding legal precedent.

III. "PERSONAL" E-MAIL MESSAGES

Florida's Legislature is aware of the problems presented by the personal use by agency employees of agency e-mail resources.[71] Despite this knowledge, and despite having had numer-

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68. Fla. Const. art. I, § 24(c). "The [L]egislature . . . may provide by general law for the exemption of records from [disclosure]." *Id.*; *see Wait v. Fla. Power & Light Co.,* 372 So. 2d 420, 424 (Fla. 1979) (finding that an agency may not create an exemption to the public records law).

69. *E.g. Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077–1078 (Fla. 1984) (holding that an agency may not delay producing records to give employees an opportunity to raise privacy challenges); *Wait*, 372 So. 2d at 422–423 (holding that an agency was not permitted to deny access to files in order to allow agency attorney to remove potentially privileged or confidential documents); *Gadd*, 412 So. 2d at 896 (rejecting hospital's public policy argument for maintaining confidentiality of personnel files); *Browning v. Walton,* 351 So. 2d 380, 381 (Fla. 4th Dist. App. 1977) (stating that the purpose of the public records laws is to allow citizens to discover what government is doing).

70. Fla. Atty. Gen. Off., *Government-in-the-Sunshine Manual* 99 (2001 ed., First Amend. Found. 2001); *see Cannella*, 458 So. 2d at 1077 (holding that a municipality may not act to exempt public records because "the [L]egislature has clearly preempted local regulation" of public record exemptions); *Wait,* 372 So. 2d at 422–424 (explaining that only the Legislature is capable of creating exemptions to public records disclosure).

71. Before 1995, "public records" were statutorily defined as, "all documents, papers, letters, maps, books, tapes, photographs, films, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." *Siegle*, 422 So. 2d at 65. In 1995, Florida's Legislature tweaked that statutory definition, to ensure that it

ous opportunities to do so, the Legislature has steadfastly declined to enact any statute to remove personal e-mail messages 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 "[e]very citizen has the right to know what kind of 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."[72]

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clearly included e-mail. *See* Fla. Comm. Substitute/H. Bill 1149, 14th Leg., 1st Reg. Sess., (June 15, 1995) (amending the definition of "public records"). For the complete text of H. Bill 1149 that was enacted into law, *see* 1995 Fla. Laws ch. 95-296 § 6. In its Final Bill Analysis and Economic Impact Statement, the House of Representatives' Committee on Government Operations observed the following:

> According to the Joint Committee [o]n Information Technology Resources ("Joint Committee"), which has taken public testimony at hearings regarding electronic access to public records, there is still concern expressed by some as to whether data processing software and electronic mail are public records under the current definition. [Caselaw] has clearly indicated that they are public records, but it is the Joint Committee's recommendation that the definition of "public records" be amended to expressly so provide. . . . CS/HB 1149 amends the definition of "public records" in [Florida Statutes Section 119.011(1)] . . . to expressly provide that material made or received regardless of the "means of transmission" is a public record (thereby clearly including e-mail).

Fla. Comm. Substitute/H. Bill 1149, 14th Leg., 1st Reg. Sess. (June 15, 1995). Two commentators supported this position as follows:

> 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.
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> Given the Supreme Court of Florida's definition of "public record" promulgated in *Shevin* . . . , e-mail, which is a *form* of written 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.

Barbara A. Petersen & Charlie Roberts, *Access to Electronic Public Records*, 22 Fla. St. U. L. Rev. 443, 456 (1994) (emphasis in original, footnotes omitted).

72. *Id*. at 490 (footnotes omitted) (quoting Patricia Seybold, *Government Involvement in the Information Age*, 4 Paradigm Shift 1, 15 (1992)). Unlike the State of Florida, Washington State's Legislature has enacted a specific statutory exemption to exclude the personal correspondence of agency employees from that state's public records laws. *Tiberino v. Spokane County*, 13 P.3d 1104, 1108–1109 (Wash. App. Div. 3d 2000).

The obvious question is that if such a record is truly intended to be "personal," how could it possibly have been "made or received . . . in connection with the transaction of official business by any agency"?[73] However, nothing in the above-cited authorities suggests that an agency cannot be deemed to "know" the content of such messages simply because the sender intended for it to be "personal" or "private." This is so even though, as in this case, the receipt and verbatim storage of employee e-mail messages was an automated feature of the City's e-mail system, inherent to its normal operation, and not purely human choice.[74]

Even assuming arguendo that the City could lawfully create a public records exemption for "personal" e-mail messages, it clearly did not do so. The City's employees are on notice that the use of the City's e-mail system opens all of their e-mail messages to scrutiny, and that they have no reason to believe that the same will remain confidential.[75] 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.[76] That same 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.[77] Thus, the City's employees certainly have no reasonable expectation of privacy in these e-mail messages.

Florida's courts repeatedly have examined the meaning of the statutory phrase "received . . . in connection with the transaction of official business by any agency,"[78] and have concluded that the nature of the "official business" for which a record is maintained need only be governmental for the record to be considered "public."[79] Prior to the Second District's opinion in *Times Publishing*

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73. Fla. Stat. § 119.011(1) (2003).

74. *City of Clearwater*, 2003 WL 22097478 at *5; Depo. Garrison C. Brumback 20:17–21:17, 30:21–25 (Feb. 1, 2001).

75. City of Clearwater, *Administrative Policy Manual: City of Clearwater Computer Resources Use Policy*, *supra* n. 20.

76. *Id*.

77. *Id*.

78. Fla. Stat. § 119.011(1); *see supra* nn. 43–67 and accompanying text (discussing the meaning of the words "public records").

79. *Michel,* 464 So. 2d at 547. "What[ever] 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." *Id*.

Co.,[80] the courts had never relied on a content-based limitation to allow agencies to withhold nonexempt information that a particular employee considers "personal."[81]

On numerous occasions, Florida's courts also have addressed the issue of balancing the individual privacy of agency employees against the access rights protected by Article I, Section 24(a) of the Florida Constitution.[82] In all such cases, the courts held that the public's constitutional and statutory right of access took precedence over the employee privacy challenges.[83]

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 and which, in the case of government agencies, are paid for and furnished by the taxpayers for governmental purposes. Even the Florida Legislature has recognized that the government's investment in information technology is a "valuable state resource" that 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.[84]

Furthermore, according to the United States Department of Commerce, nearly half of Florida's citizens find e-mail and Inter-

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80. 830 So. 2d at 847.

81. *See City of N. Miami v. Miami Herald Publg. Co.,* 468 So. 2d 218, 219 (Fla. 1985) (refusing to allow withholding of written communications between board members and an agency attorney, even though the personal interests of the individual board members were at stake, because the agency attorney's services were acquired with public funds, and attorney therefore "furnishes legal assistance to council members *in their official capacity, not as individual citizens*" (emphasis added)); *Times Publg. Co.*, 830 So. 2d at 847; Fla. Atty. Gen. Op. 99-74, *supra* n. 61.

82. *E.g. Michel*, 464 So. 2d at 546 (explaining that there is "no state or federal right of disclosural privacy"); *Cannella*, 458 So. 2d at 1077 (determining that the need for open public records outweighs a protection of employee's privacy rights); *Gadd,* 412 So. 2d at 895 (determining that courts may not consider public policy questions regarding relative significance of public's interest in disclosure of allegedly private, damaging records, or damage that individual might suffer as result of disclosure). A 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." Fla. Const. art. I, § 23.

83. *See supra* n. 81 (listing cases that balanced employee privacy against access rights).

84. Fla. Stat. § 282.005(6) (2003). "'Information' technology [includes all] equipment, hardware, software, firmware, programs, systems, networks . . . , and related material used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, . . . communicate, . . . or disseminate information of any kind or form." Fla. Stat. § 282.0041(7) (2003); *cf. supra* n. 71 (discussing the definition of public records).

net resources too expensive to access or use.[85] The massive expense borne by the public (many of whom cannot even afford *personal* e-mail and Internet services) to furnish e-mail and Internet services to their local government agencies appears to be a sufficient reason to require that the public be allowed to inspect employee e-mail messages, because they show how these resources are actually being used.[86]

Although it has not enacted any law to prevent the public from inspecting an agency employee's allegedly "personal" e-mail messages, the Legislature has broadly proscribed the use of government resources for personal gain.[87] A public employee need not obtain a direct economic benefit to have derived an improper personal gain from the use of government resources.[88] 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.

Additionally, agency e-mail is much different from other paper-based forms of personal correspondence that an agency employee might prepare or receive at work, such as greeting cards and household bills.[89] In addition to concerns about the cost of maintaining the system, concerns also exist about agency employees overburdening limited computer storage space or unwittingly

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85. U.S. Dept. of Commerce, Econ., & Statistics Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet* 8 (Feb. 2002). The percentage of Florida citizens who used the Internet in 2001 varied between 50.5% and 53.5%. *Id*. The largest single reason cited by citizens who lacked Internet access was that it was "too expensive." *Id*. at 77.

86. During the 2001–2002 fiscal year, the City of Clearwater budgeted approximately $1.4 million in taxpayer dollars for the administration of its governmental computer network system. *Approved Budget*, *supra* n. 7 at 117.

87. *Gordon v. State Commn. on Ethics,* 609 So. 2d 125, 126 (Fla. 4th Dist. App. 1992) (holding that a public officer violated Florida Statutes Section 112.313 by, *inter alia,* using city-owned stationery to promote his private interests); *cf. supra* n. 71 (outlining the clear inclusion of e-mail messages within the definition of public records).

88. *Garner v. Commn. on Ethics,* 439 So. 2d 894, 895 (Fla. 2d Dist. App. 1983).

89. *See infra* nn. 90–91 and accompanying text (discussing the differences between paper-based personal correspondences and e-mail). The Second District failed to consider these differences and instead claimed 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 Publg. Co*., 830 So. 2d at 847. The Florida Supreme Court apparently shared these considerations. *See City of Clearwater*, 2003 WL 22097478 at **3, 4 (reinforcing the claim that little distinguishes e-mail correspondences from paper-based correspondences).

downloading computer viruses and worms that could destroy an agency's computer network. In May 2000, the "I Love You" computer virus 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.[90] In fact, the inadvertent infection of expensive computer resources through employee e-mail is a rapidly growing problem among businesses that furnish Internet access for their employees.[91]

The mere knowledge that the public has the power to monitor and inspect *all* agency records (even if not exercised) has long been acknowledged as a productive means of deterring or reducing the risk of misuse of government resources by agency employees.[92] The public can exercise its right to hold the government accountable for its management of public employees' use of computerized resources and Internet-based services only if it is allowed to inspect the records for such use.

The effects of the Florida Supreme Court's opinion in *State v. City of Clearwater*, if left unmodified by the Legislature, threaten to erase decades of caselaw that guarantees public access to agency records. At least one circuit court interpreted the Second District's decision to create a judicial exemption for "personal" information, even when that information appears on the face of a public record.[93] In *Hempel v. City of Pinellas Park,*[94] two public agencies conducted a formal internal investigation of a police captain employed by the City of Pinellas Park, to determine whether he was sending and receiving inappropriate e-mail messages at work.[95] As a part of the internal investigation, the Pinellas County Sheriff's Office copied and examined the contents of a personally-owned laptop computer that the captain was accused of using to

90. Scott Talan, *Computer Virus Hits Capitol*, http://www.flnews.com/archives2000/5400virus.htm (May 4, 2000); Dave Gussow & Helen Huntley, *Love Bug Infests the World*, http://www.sptimes.com; *search* "love bug" *and* "virus" (May 5, 2000).

91. Infected e-mail is the cause of numerous Internet site failures. Robert H. Jerry II & 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).

92. *See* Petersen & Roberts, *supra* n. 71, 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).

93. *Hempel*, *infra* n. 94.

94. Or. *Hempel v. City of Pinellas Park*, Civ. Case No. 01-1985-CI-19 (Fla. 6th Cir. Ct. Feb. 19, 2003), *rev. denied*, Case No. 2D02-4756 (Fla. 2d Dist. App. July 9, 2003).

95. *Id*.

send and receive inappropriate communications in his office during work hours.[96] After the investigation, the captain sued the Sheriff's Office and the City of Pinellas Park, both to obtain the return of his laptop computer and to prevent the investigatory records from being released to the public.[97]

The *St. Petersburg Times* intervened in that case to seek access to the investigatory records, including any copies of files from the computer's hard drive that the agencies had examined during the internal investigation.[98] The trial court conducted an in camera review of the reports and memoranda that the agencies themselves generated and granted partial access to those materials.[99] However, the court denied the *St. Petersburg Times*' request to review in camera the actual files that the agencies copied from the captain's laptop computer, on the ground that those materials were "personal."[100] It also, for the same reason, redacted allegedly "personal" information from the reports and memoranda *created by the investigating agencies* before releasing those materials to the *St. Petersburg Times*.[101]

The trial court's redactions of the agency materials (and its denial of access to the actual investigative records) in the *Hempel* case were not supported by any statutory exemption. Rather, the trial court's only reason for withholding this information was its own apparent determination that the Second District's opinion in the *Times Publishing* case had in fact created a new judicial exemption for "personal" information. This decision clearly conflicts with established law on the same issue.[102]

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96. *Id*.; Anne Lindberg, *Targeted by Inquiry, Captain Put on Leave*, http://www.sptimes.com/News/020701/news_pf/SouthPinellas/Targeted_by_inquiry_.shtml (Feb. 7, 2001).

97. Or., *supra* n. 94.

98. While the initial complaint against a law enforcement officer, along with investigatory records compiled during an internal investigation, are initially exempt, those records become open and available for public inspection as soon as the responsible agency has concluded the internal investigation. Fla. Stat. § 112.533(2) (2003).

99. *Hempel*, Case No. 01-1985-CI-19.

100. *Id*. "The [c]ourt finds that Volumes Two through Eight of the 3-page index are 'personal items' and not 'public records' and the Court will not perform an in camera inspection of those documents." *Id*. (italics omitted).

101. *Id.*

102. *See e.g.* Fla. Stat § 119.07(2)(a) (2003) (allowing redaction of only that information which is statutorily exempt from public's right of access to public records); *Michel,* 464 So. 2d at 546 (refusing to find "a right of privacy in public records" when "the state constitution does not provide" one); *Wait*, 372 So. 2d at 424 (holding that a court cannot create a

The *Times Publishing Co.* case is seemingly inconsistent with the longstanding Florida judicial precedents establishing that records maintained by agencies, regardless of their content, are "public records." Moreover, this decision appears to be antithetical to Florida's well-established public policy of favoring open government and the right to inspect agency records. The reasoning applied by the Court to support the decision may unfortunately have the deleterious effect of encouraging other agency employee misconduct, particularly if other Florida courts interpret the opinion as establishing a judicially created "privacy" exemption to the Public Records Act. Certainly, this decision will profoundly change the way that agencies are now required to openly conduct the business of the people.

public records exemption because "it is up to the [L]egislature, and not this Court, to amend the [public records] statute"); *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d Dist. App. 1985) (finding that the only permissible restrictions on public's right of access to public records are those found in statutory exemptions).