99 cases

CIRCUIT COURT FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

97 CA 4047

CONE & GRAHAM, INC.,

Plaintiff,

Case No. 97-4047

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, BEN G. WATTS, as Secretary of the Department of Transportation, and LINDA S. MONTE, as Designated Records Custodian of the Department of Transportation,

Defendants.
_____/

ORDER GRANTING ACCESS TO ELECTRONIC PUBLIC RECORDS

This Court has for consideration the complaint of Cone & Graham, Inc. ("C&G") seeking access to public records -- specifically, electronic mail ("e-mail") records -- created by the State of Florida, Department of Transportation ("FDOT").

FDOT agrees that the e-mail records are public records under the Public Records Act, Chapter 119, Florida Statutes (1995 & Supp. 1996). As a condition of allowing C&G access to these e-mail records, however, FDOT seeks to assess charges of (1) $61.62 for "public access" and (2) $517.72 for "document retrieval and setup."

This Court has reviewed the pleadings and relevant caselaw, and has heard the argument of counsel and the testimony of witnesses on September 17, 1997. It is

ORDERED AND ADJUDGED:

1. The Public Records Act creates broad rights of access to the records of state, county, and local agencies. See Ch. 119, Fla. Stat. (1995 & Supp. 1996); see also art. I, § 24, Fla. Const. The intent of the Public Records Act is to "make available to the public information which is a

matter of public record, in some meaningful form." Seigle v. Barry, 422 So. 2d 63, 66 (Fla. 4th DCA 1982), rev. denied, 431 So. 2d 988 (Fla. 1983).

2. The definition of "public record" includes the e-mail records that C&G seeks. See § 119.011(1), Fla. Stat. (Supp. 1996) ("public records" include documents and other material "made or received pursuant to law or ordinance or in connection with the transcription of official business by any agency"); see also Seigle, 422 So. 2d at 65 (information stored on computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet"); Op. Att'y Gen. Fla. 96-34 (1996) (e-mail messages made or received by an agency in connection with the transaction of official business are subject to the Public Records Act).

3. To ensure that Florida's broad policy of access to public records is realized, the Public Records Act sets express limits on the charges an agency may assess for copies of public records. Section 119.07(1)(a) provides that an agency may charge a fee prescribed by law; or, if there is no fee, fifteen cents per page; or not more than the actual costs of duplication. The phrase "actual cost of duplication" means the cost of the material and supplies used to duplicate the record, but does not include any labor or overhead associated with copying the record. § 119.07(1)(a), Fla. Stat.

4. Under certain limited circumstances, the Public Records Act also allows an agency to assess a special service charge for access to its records -- if the request requires extensive use of information technology resources or extensive clerical or supervisory assistance. See § 119.07(1)(b), Fla. Stat. (Supp. 1996). However, the special service charge may not be routinely imposed. See, e.g., Op. Att'y Gen. Fla. 92-38 (1992).

5. FDOT seeks to assess this special service charge because agency personnel must identify and retrieve the requested e-mail records from FDOT's online computer and archived computer tapes and because the e-mail records must be reviewed for any statutory exemptions.

6. This Court finds that FDOT is not entitled to assess a special service charge.

IDENTIFICATION AND RETRIEVAL OF RECORDS

7. First, FDOT's witnesses and counsel told the court that certain e-mail records are accessible from the agency's computer terminal. Thus, the Court finds that C&G is entitled to review the relevant e-mail records online at a time convenient to C&G and FDOT. Should C&G request copies of any of those e-mail records, FDOT may charge fifteen cents a page for such copies.

8. Second, FDOT's witnesses and counsel described the agency's system for storing older e-mail records. Like any filing system, the agency's computers can store only a limited amount of information. Thus, FDOT has chosen an archive system to store older e-mail records on tapes. The archived e-mail records cannot be retrieved or printed without the aid of a system programmer. This is true regardless of the form in which archived e-mail records are requested.

9. FDOT witnesses explained that the archive system is necessary because there simply is not enough room on the computers to store all e-mail records. FDOT chose this particular archive system as an economically efficient way to store older e-mail records. Cf. Op. Att'y Gen. Fla. 90-7 (agency's decision to store older records off-premises is policy decision about how to maintain public records in light of space restrictions).

10. Based on the testimony, evidence, caselaw, and all other facts and information presented at the September 17 hearing, this Court finds that the tasks required of FDOT in responding to this public records request do not require extensive clerical or supervisory assistance

or extensive use of information technology resources. Thus, this Court finds that FDOT is not entitled to assess a special service charge. If C&G requests copies of any e-mail records that are responsive to this public records request, FDOT may charge fifteen cents a page for such copies.

REVIEW FOR EXEMPTIONS

11. Further, although statutory exemption conceivably could apply to some of the e-mail records that C&G seeks, FDOT may not assess any charges for its review of the e-mail records for exemptions. Section 119.07(1)(b) does not authorize such charges. An agency must review any records for exemptions, regardless of the format of the records. The Florida Attorney General has repeatedly opined that a special service charge may not be imposed merely because a record contains exempted materials. See Op. Att'y Gen. Fla. 91-61 (1991); Op. Att'y Gen. Fla. 90-7 (1990); Op. Att'y Gen. Fla. 86-69 (1986); Op. Att'y Gen. Fla. 84-81 (1981) (all rejecting service charge only because records may contain exempted materials).

12. In Florida, "the right of citizens to be informed of all facets of governmental operations is zealously protected." City of Gainesville v. Florida, 298 So. 2d 478, 479 n. 3 (Fla. 1st DCA 1974). The right to public records does not recede simply because records are magnetically stored on computers. An agency's decision about how to store its computerized records is an internal one, made with full knowledge that records may need to be retrieved in response to a public records request. Thus, absent extraordinary circumstances, an agency's costs to make computerized records available to the public in a readable form should be borne by agency -- not the public. After reviewing all of the evidence and authority presented, this Court finds that no such extraordinary circumstances exist.

13. This Court reserves jurisdiction to consider the issue of an award of reasonable costs, including attorneys' fees, to C&G pursuant to Section 119.12.

Accordingly, C&G's petition for access to public records from FDOT is GRANTED, under the conditions described in this order.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 7th day of September, 1997.

CHARLES D. MCCLURE
CIRCUIT JUDGE

Copies furnished to:

Frederick J. Springer
Cindy S. Price