

IN THE CIRCUIT COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2009-20218-CINS  
DIVISION: 02

BILL OF RIGHTS, INC., a Florida  
Corporation,

Plaintiff,

vs.

CITY OF NEW SMYRNA BEACH,  
A Florida Municipal Corporation,

Defendant.

OFFICE OF CITY ATTORNEY

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**ORDER ON PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT'S AFFIRMATIVE DEFENSES**

THIS CAUSE came to be heard March 16, 2010, on Plaintiff's motion to strike the Defendant's Affirmative Defenses. The court heard the argument of counsel, and has considered Defendant's Affirmative Defenses, Plaintiff's Motion to Strike Defendant's Affirmative Defenses, and the written submissions of the parties bearing on the motion. The court finds, determines and adjudges as follows:

1. Plaintiff is seeking to inspect and copy the Defendant city's cellular telephone bills under Chapter 119, Florida Statutes, and the Florida's Public Records Act. Defendant has redacted from the cellular telephone bills all information relating to personal telephone calls that were made by the city's employees. Defendant argues that the billing information on the cellular telephone bills relating to personal telephone calls is *not* a public record and therefore is *not* subject to inspection and copying under Florida's Public Records Act. Defendant argues that it may block from public inspection and copying, by redaction: (1) the *statutorily exempt* billing information on the telephone bills (such as police officers' home telephone numbers); and, (2) billing information contained on the telephone bills which is not statutorily exempt, but which relates to personal telephone calls by city employees on the city telephones; this billing information includes the date, the time, the city called, the number called, the duration of the call, and the charges for the call.
2. An affirmative defense is a defense that admits the cause of action, but avoids liability or the legal effect, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting the liability or effect. See *St. Paul Mercury Ins. Co. v. Couch*, 837

So.2d 483 (Fla. 5<sup>th</sup> DCA 2002), citing Henry P. Trawick, Jr., *Florida Practice & Procedure* §11-4. What constitutes an affirmative defense is a matter of substantive law. Each defense must be sufficient in and of itself. Trawick, *Florida Practice & Procedure*, §11-4. A legally insufficient affirmative defense is properly attacked by motion to strike.

3. In this action, Defendant's First Affirmative Defense states:

*Records of personal telephone calls made and received on a government owned cellular telephone are not public records under Article I, Section 23, Florida Constitution, and Chapter 119, Florida statutes.*

This court finds and determines, as a matter of law, that billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones *are* public records, when those documents are received and maintained in connection with the transaction of the official business of the city; and, the "official business" of a city includes paying for telephone service and obtaining reimbursement from employees for personal calls. The First Affirmative Defense must therefore be stricken, as it is an incorrect statement of Florida law, and cannot serve as a matter negating or limiting the effect of the Plaintiff's action.

4. Regarding Defendant's Second Affirmative Defense, Plaintiff conceded at the hearing, and the court finds, that the telephone numbers of law enforcement personnel appearing on public records otherwise subject to inspection are *exempt* from inspection and subject to redaction in accordance with Section 119.071(4), F.S. Therefore, the Second Affirmative Defense should not be stricken.

5. Defendant's Third, Fourth, Fifth and Sixth Affirmative Defenses fail to contain ultimate facts necessary to establish elements required to allege defenses/avoidances to the complaint. Therefore, they should be stricken, but with leave to amend should Defendant desire.

Whereupon,

IT IS ADJUDGED that:

1. Defendant's First Affirmative Defense is stricken, with prejudice, and without leave to amend.
2. Plaintiff's motion to strike Defendant's Second Affirmative Defense is denied.
3. Defendant's Third, Fourth, Fifth, and Sixth Affirmative Defenses are stricken, with leave granted to Defendant to amend within 20 days of the date of this order.

DONE AND ORDERED in Chambers at DeLand, Volusia County, Florida, this 8<sup>th</sup> day of April, 2010.

**/s/ R. K. ROUSE, JR.**

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ROBERT K. ROUSE, JR.  
CIRCUIT JUDGE

Copies to:

Edward H. Beazley, Esquire

Frank B. Gummey, III, City Attorney