

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY FLORIDA

STATE OF FLORIDA, ex rel,
SAMUEL MCDOWELL,

Plaintiffs,

v.

Case No.: 2006-CA-0003

CONVERGYS CUSTOMER
MANAGEMENT GROUP, INC.,

Defendant.

**ATTORNEY GENERAL'S EX PARTE EMERGENCY MOTION
TO UNSEAL QUI TAM COMPLAINT AND/OR COURT FILE**

The STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS (hereinafter Attorney General), by and through undersigned counsel and pursuant to § 68.083, Florida Statutes, moves on an *ex parte* and emergency basis to unseal the subject *qui tam* Complaint and/or court file and states in support as follows:

1. Section 68.083(3), Florida Statutes, requires that immediately upon the filing of a *qui tam* complaint, the complaint and written disclosures of substantially all material evidence and information the person [relator] possesses shall be served on the Attorney General and the Chief Financial Officer.

2. The *qui tam* Complaint and related documents attached in support thereof were filed

with the Court on or about December 29, 2005.

3. Section 68.083(3), Florida Statutes, further provides that the Attorney General "may elect to intervene and proceed with the action, on behalf of the state, within 90 days after it receives both the complaint and the material evidence and information."

4. The Attorney General received the subject *qui tam* complaint and required evidentiary disclosures on January 3, 2006 at 9:42 a.m., therefore the 90 days the Attorney General has to evaluate the *qui tam* lawsuit does not expire until April 2, 2006.

5. Section 68.083(5), Florida Statutes, authorizes the Department of Legal Affairs to request an extension of time to initiate a further investigation and analysis in order to make a decision on whether or not to intervene in the *qui tam* action on behalf of the state.

6. The *qui tam* Complaint states on its face that it has been filed "IN CAMERA AND UNDER SEAL."

7. On March 24, 2006, *The Tallahassee Democrat*, published an article on www.tdo.com, its online web-based publication, that an ethics complaint had been filed by the Relator in this *qui tam* action, Sam McDowell, against Attorney General Charlie Crist and former Deputy Attorney General, George LeMieux. In his ethics complaint, Mr. McDowell alleges, based on his reading of a single *Miami Herald* article, that the Department of Legal Affairs will not properly investigate his Convergys lawsuit due to various alleged relationships between the Office of the Attorney General, the Crist for Governor Campaign and a Tallahassee lobbyist.

8. Sam McDowell, the Relator in this lawsuit and the ethics complainant, has effectively broken the seal on the *qui tam* Complaint and any inherent confidentiality by providing the media with

the allegations underlying the Convergys *qui tam* lawsuit and by publishing a copy of his ethics complaint to *Tallahassee Democrat* reporter, Bill Cotterell..

9. The Office of the Attorney General is not aware of any appropriate basis for the Clerk of the Court to ministerially seal the complaint and court file, nor for the Court to do so by way of court order under the circumstances of the instant case.

MEMORANDUM OF LAW

A. Access to Court Records

In 1992, the Florida Supreme Court adopted Rule 2.051, Florida Rules of Judicial Administration, which establishes a public right of access to records of the judicial branch, except as enumerated in the rule or as otherwise provided in the Constitution or statutes. Moreover, section 69.081, Florida Statutes (2001), provides with limited exceptions, that no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard.

Except as otherwise provided by law or rule of court, reasonable notice must be given to the public of any order closing a court record. Rule 2.051(c)(9)(D). Note that unlike the closure of court proceedings, which has been held to require notice and hearing prior to closure, "the closure of court records has not required prior notice." Commentary, In re Amendments to Florida Rules of Judicial Administration, 2.051, 651 So. 2d 1185, 1191 (Fla. 1995).

However, "the court may elect to give prior notice in appropriate cases." *Id. See, WESH Television, Inc. v. Freeman*, 691 So. 2d 532 (5th DCA 1997) (once audio and videotapes in criminal case were turned over to the defendant during discovery, they were public records subject to disclosure under Ch. 119, Florida Statutes; only after an evidentiary hearing with the

media participating and in camera review of the tapes, may the court enter an order limiting access to the records based on constitutional considerations).

B. The Florida Attorney General has oversight authority in evaluating state civil actions involving the Florida False Claim Act.

Legislative intent is to be determined primarily from the language of a statute. American Tel. and Tel. Co. v. Florida Dept. of Revenue, 764 So.2d 665, (1st DCA 2000). Section 68.082(1), Florida Statutes (2001), et. seq. creates the Florida False Claims Act (FFCA). The plain language of the statute places investigative authority over FFCA lawsuits with the Department of Legal Affairs. Section 68.083, Florida Statutes (2001) authorizes the Attorney General to conduct investigations into allegations of False Claims, from any source, it provides in part:

(1) The department may diligently investigate a violation under s. 68.082. If the department finds that a person has violated or is violating s. 68.082, the department may bring a civil action under the Florida False Claims Act against the person. The Department of Banking and Finance may bring a civil action under this section if the action arises from an investigation by that department and the Department of Legal Affairs has not filed an action under this act.

In addition to the authority to investigate, the statute gives the Attorney General's Office the authority over a *qui tam*, such as the instant case. The statute also provides that such an action is brought on behalf of the State of Florida. It provides in part:

(2) A person may bring a civil action for a violation of s. 68.082 for the person and for the affected agency. Civil actions instituted under this act shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the State of Florida. Prior to the court unsealing the complaint under subsection (3), the action may be voluntarily dismissed by the person bringing the action only if the department gives written consent to the dismissal and its reasons for such consent.

(3) The complaint shall be identified on its face as a qui tam action and shall be filed in the circuit court of the Second Judicial Circuit, in and for Leon County. Immediately upon the filing of the complaint, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General, as head of the department, and on the Comptroller, as head of the Department of Banking and Finance, by registered mail, return receipt requested.

These provisions clearly provide the Attorney General statutory authority to deal with fraud committed on the state government. Where fraud is detected, the Attorney General is given clear federal and state legislative responsibility to act to deter fraud, not act as bureaucratic traffic cop by referring the matter to a particular state agency upon which the fraud was conducted in the first place for a second opinion about the fraud. See, §68.082, *et, seq.* The Florida Legislature, through the FFCA authorizes the Attorney General, through the Department of Legal Affairs, to investigate any person who is suspected of knowingly presenting or causing to be presented a false claim for payment to an agency of the State of Florida. See, § 68.083(1), Florida Statutes (2001). It also authorizes the Attorney General to sue on behalf of the State of Florida or to intervene and take over actions, initiated as a *qui tam*. See, § 68.082 (2), Florida Statutes (2001).

Relator and his counsel have spoken to the media and made public, related ethics complaints that directly relate to the facts underlying the sealed *qui tam* action, which has the net effect of disclosing the nature of the action, not only to the prospective Defendants, but to the entire world, all before the Attorney General has completed his investigation. The Relator's actions constitute a blatant violation of the purposes of the seal provisions, to allow the Attorney General to investigate the nature of the allegations to determine whether he chooses to intervene and the extent of the action he wishes to

take. The purpose of the seal is to allow the government to investigate the allegations without making those allegations known to the prospective Defendants, so as to avoid "tipping the Government's hand," and to protect the identity of, not only the Relator, but the *prospective Defendants* from frivolous actions filed by vexatious relators. Furthermore, premature disclosure of the Attorney General's investigation may permit the *prospective Defendants* to limit, not only the existence of any fraud, but the extent that the Government or relator(s) may be able to ultimately recover.

The public policy underlying the sealing of a *qui tam* lawsuit is no longer present in this case due to the *de facto* unsealing that has resulted from Mr. McDowell's public statements to the media and the filing of an ethics complaint against the Attorney General and former Deputy Attorney General. The public policy supporting a continued seal in this case is no longer present and there is no further need to keep the complaint sealed until this office can complete its investigation. Accordingly, the *qui tam* Complaint and case file should be unsealed. Further, failure to unseal the Complaint and court file hampers the ability of the Attorney General and the Department of Legal Affairs from fully and thoroughly disclosing the pertinent facts of this matter during its investigation to the public in this matter which is of great public concern.

CONCLUSION

Based upon the foregoing, the Attorney General respectfully requests that the instant case be

unsealed forthwith.

Respectfully submitted,

CHARLES J. CRIST, JR.

Attorney General



CHESTERFIELD SMITH, JR.

Senior Assistant Attorney General

Chief, State Programs Litigation

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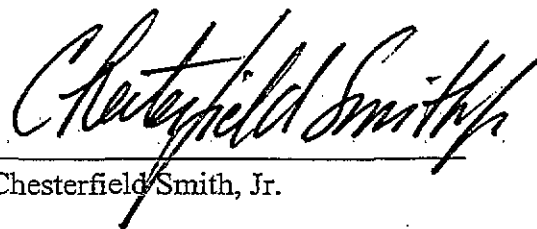
Fax: (850) 488-4872

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by U.S. mail on: Steven R.

Andrews and David W. Moye, Andrews & Moye, LLC, 822 North Monroe Street, Tallahassee, FL

32303, on March 25th 2006.



Chesterfield Smith, Jr.

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Article published Mar 24, 2006

Whistleblower files ethics complaint against Crist

By Bill Cotterell

DEMOCRAT POLITICAL EDITOR

The former Convergys employee who blew the whistle on security problems in the state's People First system filed ethics complaints today against Attorney General Charlie Crist and a former top deputy who now runs Crist's campaign for governor.

Sam McDowell of Tallahassee said he was forced out of his job after informing the Department of Management Services that People First employees were able to read through personnel files, copy information and e-mail data out of the Convergys service center - sometimes without leaving a trail in the computers. DMS last December ordered several security revisions to prevent such practices.

At the same time, the department began an investigation into unrelated reports that a former Convergys subcontractor hired companies in India to process some Florida personnel records. Last week, DMS Secretary Tom Lewis told a Senate committee that some illicit "off-shoring" had occurred, but he said there is no evidence of identity theft resulting from the incident.

Convergys said it did not know of the use of overseas subcontractors by GDXdata. It has ended its contract with the Denver firm.

McDowell said in two complaints to the Florida Commission on Ethics that he is not confident in Crist's ability to investigate Convergys for political reasons. He filed twin complaints against Crist and George LeMieux, who was Crist's top deputy at the time of the security breaches and is now his campaign manager.

McDowell asked the Ethics Commission to investigate whether Crist's refusal to get involved in the initial Convergys case was related to politics. The company's lobbyists in Tallahassee include Brian Ballard, a top fund-raiser and adviser in Crist's campaign, and Convergys donated \$37,000 to the Florida Republican Party in the past four years.

"I have often wondered why the attorney general of the State of Florida has not started an investigation of Convergys," McDowell wrote in his complaint. "My complaints as well as the internal affairs investigation was well publicized, beginning in December of 2005."

That was when the *Tallahassee Democrat* reported on both the unauthorized access to state employee files by Convergys employees and the allegations of "off-shoring" of data to India.

Crist last week said his office has begun an investigation of the India subcontracting.



STATE OF FLORIDA
COMMISSION ON ETHICS
 P. O. DRAWER 15709, TALLAHASSEE, FLORIDA 32317-5709

COMMISSION ON E
 DATE RECEIVED

MAR 24 2006

COMPLAINT

1. PERSON BRINGING COMPLAINT:

Name: Sam McDowell Telephone Number: 850-576-8075
 Address: 2012 Silver Lake Road
 City: Tallahassee County: Leon Zip Code: 32310

2. PERSON AGAINST WHOM COMPLAINT IS BROUGHT:

(Current or former public officer, public employee, candidate, or lobbyist) (Please use one complaint form for each person you wish to complain against):

Name: George LeMieux Telephone Number: 850-414-3300
 Address: Charlie Crist Campaign and former Chief Assistant Attorney General
 City: Tallahassee County: Leon Zip Code: 32301

Title of office or position held or sought: George LeMieux, Charlie Crist Campaign and Former Chief Asst. AG

3. STATEMENT OF FACTS:

Please explain your complaint fully, either on the reverse side of this form or on additional sheets, providing a detailed description of the facts and the actions of the person named above. Include relevant dates and the names and addresses of persons whom you believe may be witnesses. If you believe that a particular provision of Article II, Section 8, Florida Constitution (the Sunshine Amendment) or of Part III, Chapter 112, Florida Statutes (the Code of Ethics for Public Officers and Employees) has been violated, please state the specific section(s). Please do not attach copies of lengthy documents; if they are relevant, your description of them will suffice. Also, please do not submit video tapes or audio tapes.

4. OATH:

I, the person bringing this complaint, do depose on oath or affirmation and say that the facts set forth in the foregoing complaint and attachments thereto are true and correct to the best of my knowledge and belief.

STATE OF FLORIDA

COUNTY OF Leon

Sworn to (or affirmed) and subscribed before me this 23rd day of March 2006, by Sam McDowell
 (name of person making statement)

(Signature of Notary Public - State of Florida)

MY COMMISSION # 00215366 EXPIRES
May 29, 2007
 BONDED BY THE FAIR INSURANCE CO.

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known X OR Produced Identification
X Type of Identification Produced:

SIGNATURE OF COMPLAINANT

CE FORM 50 — EFF. 1/2000

EXHIBIT

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Mar 24 06 03:51P

3. Statement of Facts:

I was forced from my job at Convergys as a result of blowing the whistle on the lack of security of state employees private confidential data. My affidavit was submitted to the Department of Management Services who conducted a internal affairs report which made the following findings:

1. Convergys employees can access and print confidential payroll information on state employees in the People First Payroll System.
2. Convergys employees viewed personal information of senior level state employees.
3. Convergys employees can access, view and print personal information on state employees without leaving an audit trail
4. Convergys employees can access and view personal information on confidential employees.
5. Convergys employees can access, view and download state employee personal information to a Word document and then e-mail that information anywhere in the world.
6. That there are no auditing features utilized in the Convergys software to track who has accessed state employee information.

I have often wondered why the Attorney General of the State of Florida has not started an investigation of Convergys. My complaints as well as the internal affairs investigation was well publicized beginning in December of 2005. Despite my complaints, the Internal Affairs investigation as well as various articles by Bill Cotterell in the Tallahassee Democrat I have never been interviewed by anyone from the Attorney General's Office.

I have know read the Miami Herald article by Marc Caputo and now believe that the following individuals caused my Convergys complaints as well as the complaints of others to not be investigated due to the various relationships between the Attorney General's Office, the Crist for Governor Campaign, as well as powerful Tallahassee Lobbyists. These people are: Charlie Crist, George LeMieux, Clay Roberts, and Brian Ballard.

I believe that Convergys will not be properly investigated by the Attorney General's Office and that the Ethics Commission should conduct an investigation of this misconduct as well as the Convergys relationship with these individuals and any others who may have committed wrong doing. The only persons against whom I have filed ethics complaints are those who are named in Mr. Caputo's article, however, I believe there may be other undisclosed lobbyists who are involved with Convergys.