

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,  
IN AND FOR PALM BEACH COUNTY, CIVIL DIVISION

CASE NO. CL 94-8549-AD

WFTV, INC, d/b/a PALM BEACH  
NEWSPAPERS, INC., etc., et al.,

Petitioners,

vs.

SCHOOL BOARD OF PALM BEACH  
COUNTY, et al.,

Respondents.

*Final Order*  
**ORDER GRANTING PETITIONERS' MOTION FOR PARTIAL REHEARING  
AND AMENDING AMENDED FINAL JUDGMENT OF JANUARY 18, 1995**

THIS ACTION is before the Court on the motion of petitioners, WFTV, Inc. and Sun-Sentinel Company for attorneys' fees and costs and for clarification or partial rehearing of the Amended Final Judgment entered in this cause January 18, 1995. The Court heard argument on petitioners' motion March 14, 1995.

The Amended Final Judgment and the Court's original order of November 8, 1994 found that the documents sought by petitioners in this public records action (a telephone survey questionnaire used to assess parents' attitudes toward the concept of year-round schools, and preliminary drafts of the questionnaire) were "public records" within the meaning of Chapter 119, Florida Statutes, and therefore subject to disclosure. The records in question were released to the petitioners by respondent Profile Marketing Research, Inc., a private entity which was acting on behalf of the School Board in designing and conducting the telephone survey, immediately after the Court announced its ruling at an evidentiary hearing November 7.

*On appeal*

*95-01119*

*per curiam (Aug. 1995)*

*FILED  
CLERK OF COURT  
PALM BEACH COUNTY  
FLORIDA  
AUG 1 1995*

*(24)*

The School Board sought rehearing of the November 8 order, in part because that order required both it and Profile to produce the records to the petitioners even though the evidence heard November 7 established that the School Board no longer possessed the records. School Board employees had previously reviewed and commented on a draft of the survey questionnaire, but had returned their copies to Profile before the petitioners' reporters made their public records requests to the School Board. Because the Board did not have physical possession of the records when this action was filed, this Court entered the January 18 Amended Final Judgment, denying the petition as to the respondent School Board and its employee, respondent Nagy.

Petitioners request for clarification and rehearing of the January 18 Amended Final Judgment argues that they are entitled to recover attorneys' fees and costs against the School Board under section 119.12(1), Florida Statutes, even though the Board did not have physical possession of the records. Section 119.12(1) makes a public agency liable for attorneys' fees if the court determines that the agency "unlawfully refused" to permit a public record to be inspected, examined or copied.

The phrase "unlawfully refused" has been interpreted to mean that a public agency is always liable for fees if the requesting party prevails in an action to enforce the public records law. New York Times v. PHH Mental Health Services, 616 So.2d 27, 29 (Fla. 1993) ("Refusal by an entity that is clearly an agency within the meaning of Chapter 119 will always constitute unlawful refusal."). There are no "good faith" or "innocent mistake" exceptions to an agency's liability for fees under section 119.12(1). News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743, 744 (Fla. 4th DCA 1987). Liability for attorneys' fees may be viewed by the agency as a penalty for noncompliance, but it is important to keep in mind that the law also

serves to encourage members of the public to seek clarification of the public records laws, which were enacted to help assure that government functions in the sunshine to the benefit of both public agencies and the public. Id. at 744.

Times Publishing Company, Inc. v. City of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990), is similar to this case. In Times Publishing Company, the agency agreed with a private entity, the Chicago White Sox Baseball Team, that all leases and draft leases being negotiated between the City and the White Sox would be kept confidential until after the lease was executed. The City agreed to the White Sox' request for confidentiality because it believed that attracting a major league baseball team to the City was in the public interest. The City agreed not to take possession of any drafts of the lease, but instead to review and comment upon them at the offices of the White Sox' local attorney. The City attorney apparently believed in good faith that following this procedure would avoid the lease drafts becoming "public records" subject to disclosure under Chapter 119 and the attorney so advised City officials and the White Sox in a legal memorandum. Id. at 489.

The St. Petersburg Times sued the City and the White Sox after both parties refused public records requests. The trial court concluded that the leases and draft leases were public records, Id. at 491, but denied the newspaper's request for relief against the City (including a demand for attorneys' fees) because the City did not have possession of the records and because the Court found that the White Sox -- not the City -- had requested and formulated the plan for evading the Public Records Act. Id.

The Second District reversed the trial court's finding that the City was not liable and remanded the case with instructions to the trial court to award the newspaper its fees and costs. Id. at 492-93, 495. The appellate court reasoned that the draft leases and related documents



became public records "once exhibited to city officials as part of the bargaining process..." Id. at 494. By purposely avoiding taking possession of the documents, the City "improperly delegated its record keeping functions to the White Sox." Id. at 492.

Here, Profile -- like the White Sox -- proposed that the survey questionnaire and all drafts of the questionnaire be kept confidential. The School Board -- like the City -- agreed to this request because it accepted Profile's representation that public disclosure of the survey questions before the survey was completed would invalidate the survey, contrary to the public interest. The Board -- like the City -- performed the agreement to keep the records confidential by purposely avoiding taking possession of copies of the drafts of the survey that were presented to its employees for their review, comment and approval. These records -- like the draft leases in the White Sox case -- were public records and the Board improperly delegated its record keeping functions to Profile.

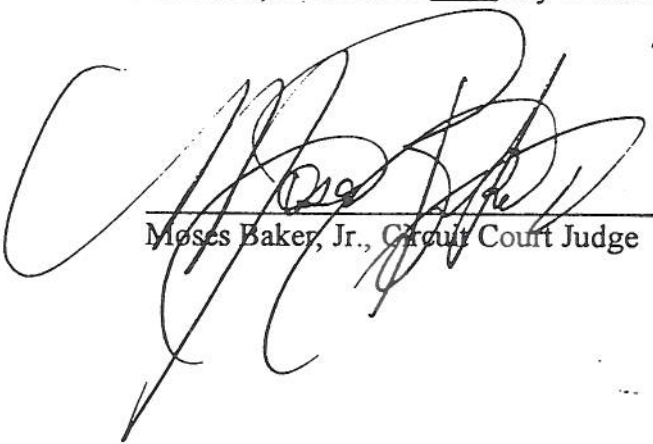
The School Board argues that Times Publishing Company is distinguishable because it was decided before the Florida Supreme Court announced the "totality of the factors" test in News and Sun Sentinel Company v. Schwab Twitty and Hansor Architectural Group, 596 So.2d 1029 (Fla. 1992). This argument is unpersuasive, however, because the totality of the factors test is used to determine whether a private entity is "acting on behalf of a public agency" within the meaning of section 119.011(2), Florida Statutes. That test was properly applied by this Court to determine that respondent Profile was acting on behalf of the Board in designing and conducting the survey.

At the time the petitioners here made their public records requests, the Board had reviewed and commented on the survey draft and the documents were therefore public records regardless of whether or not Profile was acting on behalf of the agency. The Board could have

obtained the records from Profile and produced them to the petitioners, but it elected not to do so, choosing instead to try to avoid disclosure by noting that it did not have possession of the records and arguing that Profile was not acting on its behalf. This amounted to an "unlawful refusal" according to the holdings of Times Publishing Company and Wisner v. City of Tampa Police, 601 So.2d 296 (Fla. 2d DCA 1992), decisions that are not only persuasive, but are also binding on this Court in the absence of an opinion by the Fourth District Court of Appeal on the same issue of law. State v. Hayes, 333 So.2d 51, 53 (Fla 4th DCA 1976).

ACCORDINGLY, petitioners' motion for partial rehearing is GRANTED and the Amended Final Judgment of January 18, 1995 is amended and modified as follows: The petition is Granted as against the respondent School Board to the extent that this Court now finds that the Board unlawfully refused petitioners' public records requests. The petitioners are therefore entitled to recover reasonable attorneys' fees and costs against the Board pursuant to sections 119.12(1) and 57.041, Florida Statutes. The Court will determine the amount of such fees and costs at a later hearing if the parties are unable to agree on the amounts.

DONE AND ORDERED in West Palm Beach, Florida this 29<sup>th</sup> day of March, 1995.



Moses Baker, Jr., Circuit Court Judge

cc: Counsel of Record