

25 Fla. L. Weekly Supp. 243a

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Public records -- Municipal corporations -- City unlawfully refused to permit public records to be inspected or copied when it failed to conduct timely, good-faith search for the records requested; misrepresented to plaintiff that all responsive records had been located and produced; failed to maintain electronic communications in a manner that prevented their accidental destruction or deletion by individual city officials; and failed to produce public records responsive to request until threatened with litigation and ordered by court to conduct proper search -- Defendants directed to require all city officials or employees who use electronic devices to communicate regarding matters of official business to conduct those communications only on devices that records those communications on servers directly accessible by city's public records custodians and further directed to search for all responsive electronic communications at time public records requests are made

SDE MEDIA LLC, a Florida limited liability company, Plaintiff, vs. CITY OF DORAL, FLORIDA, a Florida Municipal corporation, and DANIEL ESPINO, as City Attorney for the City of Doral, Florida, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, General Jurisdiction Division. Case No. 2015-013184-CA-30. May 5, 2017. Norma S. Lindsey, Judge. Counsel: Thomas R. Julin, Gunter, Yoakley & Stewart, P.A., Miami; Frank A. Zacherl, Shutts & Bowen, Miami; and Jason Gonzalez of Shutts & Bowen, Tallahassee, for Plaintiff. Samuel A. Zeskind, Weiss Serota Helfman Cole & Bierman, Fort Lauderdale, and Alan K. Fertel, Weiss Serota Helfman Cole & Bierman, Coral Gables, and Dan Espino, City Attorney, for Defendant City of Doral.

ORDER GRANTING FINAL SUMMARY JUDGMENT

This cause came before the Court on April 27, 2017, on the motion of Plaintiff, SDE Media LLC ("SDEM"), for entry of an order of final summary judgment pursuant to Florida Rule of Civil Procedure 1.510(b) declaring that the Defendants: (1) failed to conducted a timely, good-faith search for requested public records, (2) failed, and continues to fail, to maintained public records in the manner required by law, and (3) unlawfully refused to permit a public record to be inspected or copied. The Court has considered the pleadings, depositions, and declarations on file, the memoranda of law filed in support of and in opposition to the motion, and the oral argument of counsel for the parties. Based on the undisputed facts and for the reasons sets forth below, SDEM's motion for final summary judgment is granted.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.¹ The Florida Supreme Court has cautioned that trial courts should exercise restraint in granting summary judgments due to the fact that such a motion deprives a party of its right to a trial.² The party moving for summary judgment bears the burden of coming forward with competent evidence demonstrating not only that the facts support its own theory, but also that the party moved against cannot prevail under any theory.³

UNDISPUTED MATERIAL FACTS

SDE Media LLC submitted a request for public records on January 23, 2015. The City's Public Records Custodian responded 17 days later by making many responsive records available. The Records Custodian did not conduct a search for responsive records that might be maintained by the City Attorney or for electronic records that City Council Members and other Public Officials might have on electronic devices. On May 6, 2015, 103 days after the request had been made, the City's Records Custodian revealed to SDEM that no search had been made for electronic records maintained by City Officials on devices provided to them by the City or on their own personal devices. The City Attorney disclosed nine days later that if he had responsive text messages on his cellular phone, they could not be retrieved because a boat trailer had fallen on his phone.

SDEM filed this lawsuit on June 12, 2015, alleging that Defendants had violated the Public Records Law through their delay in conducting a good faith search for responsive records. Thereafter, the City's Counsel advised that some responsive electronic records might be available through Verizon, the cell phone service provider used by the City. SDEM sought and obtained an order requiring the City to preserve information on City Officials' cellular telephones. Defendants appealed this order to the Third District Court of Appeal which affirmed the order. Thereafter, the search was carried out and some responsive records not previously produced were located on March 23, 2016, 425 days after the public records request had been made. It is uncontroverted that the City neither has, nor has had, a policy in place regarding how City Officials should maintain electronic communications regarding official City business.⁴

Based on the undisputed facts, Defendants have not complied with the Public Records Law. Electronic communications regarding official business are public records. *State v. City of Clearwater*, 863 So.2d 149, 155 (2003) [28 Fla. L. Weekly S682a]; *Agrosource, Inc. v. Florida Dept. of Citrus*, 148 So. 3d 138 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2064a]. "The same rules that apply to email should be considered for electronic communication including Blackberry PINs, SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies." *Informal AG Opinion to Sec. of State Kurt Browning* (Mar. 17, 2010).

All public records must be kept in a safe place. Section 119.021, Florida Statutes. They also must be maintained in a fashion that allows them to be found and produced quickly when they are requested by the public. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984). Unjustifiable delay in conducting a search violates the act. *See, e.g., Barfield v. Town of Eatonville*, 675 So.2d 223, 224 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1035a] ("An unjustified delay in complying with a public records request amounts to an unlawful refusal under section 119.12(1)"); *Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So.2d 759, 765 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1035a] (attorneys' fees may be awarded when the agency "unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced"); *Wisner v. City of Tampa Police Department*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (City unlawfully delayed production of public records).

Injunctive relief is warranted where a pattern of non-compliance is shown together with a showing of likelihood of future violations. *Daniels v. Bryson*, 548 So. 2d 679, 680-81 (Fla. 3d DCA 1989) ("We have no hesitation in holding that injunctive relief is available upon an appropriate showing for a violation of Chapter 119"). The voluminous record before the Court shows a lengthy delay in fully responding to the public records request at issue herein. There is no evidence before the Court of the City having any policy in place regarding how City Officials should maintain electronic communications regarding official City business. Thus, there is undisputedly no compliance with the Public Records Law. Absent a policy for the maintenance and preservation of electronic records, "the

circumstances of this past violation give rise to a reasonable inference that the past course of conduct will continue in the future.” *Daniels*, 548 So.2d at 681. Injunctive relief is and should be granted by summary judgment where, as here, the material facts are not in dispute and show that the plaintiff is entitled to injunctive relief. *Carmona v. Wal-Mart Stores, East, LP*, 81 So. 3d 461, 463 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2535a].

The City's purported effort to put in place a policy that provides for compliance with the Public Records Law is to be commended. However, this unsworn allegation made in a footnote almost two years after this lawsuit was filed is insufficient to deny SDEM the relief it seeks. Simply stated, it does not address the many months of noncompliance with the Public Records Law and is legally insufficient to oppose SDEM's motion for final summary judgement. When City officials are receiving and creating electronic email and text messages concerning official business, those communications must be conducted so that the City's public records custodian can access them and produce them to the public in a timely fashion.

Accordingly, it is hereby Ordered and Adjudged that SDEM's motion for final summary judgment is GRANTED. The Court declares that Defendants unlawfully refused to permit public records to be inspected or copied by:

1. Failing to conduct a timely, good-faith search for the records requested herein.
2. Misrepresenting to SDE Media LLC that all responsive records had been located and produced when, in fact, they knew that a good faith search had not been made and that additional responsive records may not have been produced;
3. Failing to maintain electronic communications in a manner that prevents their accidental destruction or deletion by individual city officials; and
4. Failing to produce public records responsive to the request until after threatened with litigation, being sued, and ordered by the Court to conduct a proper search for public records.

The Court further directs Defendants to require all City Officials or employees who use electronic devices to communicate regarding matters of official business to conduct those communications only on devices that record those communications on servers directly accessible by the City's Public Records Custodian. The Court further directs Defendants to conduct a timely search for all responsive electronic communications at the time that public records requests are made.

¹*Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a].

²*Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) [28 Fla. L. Weekly S866a].

³*Fla. East Coast Ry. Co. v. Metro. Dade County*, 438 So. 2d 978, 980 (Fla. 3d DCA 1983).

⁴Ten days before the summary judgment hearing, the City filed a memorandum in opposition claiming that “the City has instituted a policy prohibiting the use of private devices for the conduct of City business and has further implemented instructions for the maintenance of records should such

communications be initiated by a third-party.” See Defendants' Memo at 23 n. 11. The City did not file a copy of this policy or an affidavit of any City Official confirming that this policy has in fact been adopted. Defendants' memo in opposition was neither verified nor sworn. Counsel for Defendants attempted, in open court, to present a copy of this new policy. Counsel for SDEM objected and represented that they had never seen the document and that this was the first time they had heard of the existence of the document. The Court inquired of counsel for Defendants as to SDEM's objection and representations. Counsel for Defendants advised the Court that he had just received the document the night before.

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