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Editorial: Texting settlement an important message for Florida governments

Editorial Board, Tallahassee Democrat Published 4:35 p.m. ET Jan. 11, 2018



(Photo: Fodemesi Attila)

Floridians should feel great satisfaction with the city of Tallahassee's settlement of a public records lawsuit over preservation and disclosure of text messages.

It would have been nice if the case had never arisen – if the city had acted openly to start with – but City Attorney Lew Shelley and city commissioners deserve credit for admitting they were wrong, and working to fix it.

At a meeting in which retiring City Manager Rick Fernandez's separation agreement was approved, the commission settled a public records dispute sparked by his solicitation and acceptance of costly tickets to a Florida State University football game. A friendly lobbyist whose firm had business pending with the city provided those tickets and Fernandez had purged texts they'd exchanged.

Initially, Fernandez denied the existence of any texts. When the Tallahassee Democrat newspaper reported the existence of the texts, Fernandez clammed up and the city claimed it never knew the texts existed.

In the spirit of an amicable legal settlement, we'll accept that city officials really were unaware of the texts. The experience led to a new policy and, we hope, a change of attitude among those who create, transmit and maintain such records.

"I am glad we are at this point now, because, over the last several months, many of us who work in this office have slipped and maybe even fallen from being the shining beacon among local governments, with compliance to Chapter 119," Shelley told commissioners, referring to the section of Florida Statutes which covers public records.

Commissioners Curtis Richardson, who previously worked in state government and served in the Florida House, and Gil Ziffer, president of the Florida League of Cities, deserve particular credit for recognizing this golden opportunity. Ziffer said he hopes it serves as a model for agencies around the state, if any need to be reminded that public records — all public records — are to be preserved and reasonably reproduced for citizens.

"We need to set an example," Ziffer said.

New procedures

In addition to admitting violation of the public records act by failing to produce the texts, the city agreed to new procedures for use of cellphones in city business.

If employees use their personal phones or computers to send a text involving city business, a copy will have to be sent to the government computer system for preservation as a public record.

So if a city employee sends a text to his wife, saying, "I'll pick up a pizza on the way home," does that have to be preserved as a public record? Not if he uses his own phone or computer — but, yes, if it's done on city equipment.

And if another employee uses her cellphone — no matter who owns it — to alert co-workers of changes in the agenda for a coming meeting, is that public

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City employees will receive training in requirements of the public records law, under terms of the settlement. Commissioners and top managers will file annual reports, certifying compliance with state and federal public records laws and Florida Sunshine Law. The city will cover the reporter's legal costs for the suit.

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It's good that the city was willing to work out a settlement, rather than going to court in defense of secrecy. It's also commendable that Shelley and commissioners were willing to admit error – something many officials reflexively hate doing – and work on reform.

Now, officials in Florida should just flip the script. Instead of asking why a document should be public, their thinking should be, "Why not?"

The Tallahassee Democrat and Naples Daily News are part of the USA TODAY NETWORK Florida.

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Politics

Martin County Commissioners Arrested, Charged in Public Records Case

By [BARBARA CLOWDUS \(/TAXONOMY/TERM/316\)](#)

November 29, 2017 - 6:00am



Ed Fielding, Sarah Heard and Anne Scott

Three Martin County commissioners, Sarah Heard and Ed Fielding, and former commissioner Anne Scott of Jupiter Island, were arrested Tuesday and charged with violating Florida public records laws, according to court records and sources close to the investigation.

Heard called in sick Tuesday, said County Administrator Taryn Kryzda. Within a few hours, she was arrested by the Martin County Sheriff's Department for failing to respond to a public records request.

Had Heard not called in sick, she likely would have been at the dais of the Martin County Commission meeting, which spared her constituents the sight of a sheriff's deputy escorting her out of the commission chambers during a live-streamed meeting.

Fielding's arrest on two counts of public records law violations came after the meeting concluded. He was processed and released, according to sources close to the investigation. Scott, also charged with two counts of public records law violations, turned herself in and was released on her own recognizance.

Heard's attorney, Barbara Wagner of Stuart, waived a formal arraignment and pleaded not guilty in writing to all charges on Heard's behalf, asking also for a jury trial after filing a formal request with the Martin County Clerk of the Circuit Court for a copy of the indictment or information filed in the case.

Thus far, only one count was filed by the State Attorney's Office with the clerk in a non-criminal

information, a formal document that begins a criminal proceeding in the court.

The information listed only one count of a public official violating state public records laws by failing to respond to a public records request, a non-criminal misdemeanor punishable by a fine up to \$500.

As of Tuesday afternoon, the grand jury was still in session, sources close to the investigation said, so more charges are expected in the case that stems from a public records request made by the Lake Point mining and water restoration project in February 2013.

Lake Point was seeking evidence in its breach-of-contract case against Martin County and the South Florida Water Management District, and asked for all emails on private email accounts between former commissioner Maggy Hurchalla and commissioners. As of Sept. 27, 2017, copies of commissioner emails were still being provided to Lake Point attorney Ethan Loeb, according to court testimony.

Lake Point also filed suit against Hurchalla for tortious interference in those contracts. Now that both Martin County and the SFWMD have settled with Lake Point, the only defendant in the case is Hurchalla. Her jury trial will begin Feb. 5.

Over the past four-and-a-half years that the case has been in the courts, Martin County has paid the fees of commissioners' personal attorneys to defend them against Lake Point's charges of public records violations.

A "mini" trial conducted in February by court arbiter Howard Gooze found Heard, Fielding and Scott guilty of violating public records laws, which prompted the state attorney's investigation.

Gooze's ruling, which was upheld by Circuit Court Judge William Roby, levied sanctions against Martin County that have totaled more than \$500,000. More attorney fees are likely still to be awarded to Lake Point, should the company file for additional sanctions, because the first two awards for attorney fees and costs included the time only through July 2017; court hearings for public records were still going on as late as October.

After the Lake Point settlement with Martin County, however, the county no longer is paying private attorney fees for commissioners, and the joint defense agreement with Hurchalla also ended.

Heard's attorney also requested all evidence in the case, including Heard's grand jury testimony, wire taps, all emails, or any other investigative reports in the case in her request for the court to allow sufficient time to obtain evidence in the case.

Barbara Clowdus is editor and publisher of Martin County Currents.



Criminal charges rare in public records violations

WEATHER By Kimberly Miller - Palm Beach Post Staff Writer



2



Former Martin County Commissioner Anne Scott was charged with violation of public records laws on Nov. 28, 2017. Photo contributed by Martin County Sheriff's Office

Posted: 7:01 a.m. Friday, December 08, 2017

The filing of criminal charges against public officials for violating open records laws is a rare event usually reserved for the most flagrant incidents, according to a Florida legal expert.

That's why proponents of the state's sweeping Government in the Sunshine Law are closely watching the cases of Martin County Commissioner Edward Fielding, 73, and former Commissioner Anne Scott, 69, who were arrested in November on criminal misdemeanor charges of failing to allow inspection of public records.

Martin County Commissioner Sarah Heard, 63, was accused of a non-criminal infraction related to violating public records laws.

Related: New law designed to curb frivolous public records lawsuits.

The charges were brought after the powerful Lake Point Restoration mining company sued Martin County in 2014 for public records violations. After years in court and hundreds of thousands of dollars in legal fees, Lake Point won the case in February.

Most cases of alleged public records violations are made by average citizens without the resources for a lengthy legal battle.

"It's very challenging to get a prosecutor to take an open records violation seriously as a criminal offense because violations are so habitual and routine, it's like trying to put someone in jail for driving over 55 mph on the highway," said Frank LoMonte, a lawyer and director of the Brechner Center for Freedom of Information at the University of Florida. "The law is so widely winked at, prosecutors hesitate to single someone out and make an example of them."

RELATED: Powerhouse cast embroiled in Florida tale of taxpayer loss

Records kept by the Brechner Center between 2010 and mid-2016 include three incidents where criminal charges were levied for violating public records laws. In all cases the people charged were either cleared or had penalties reduced to a civil infraction.

In 2010, former Palm Beach County Commissioner Jeff Koons was charged with a second-degree misdemeanor for violating sunshine laws, as well as extortion and perjury. The charges stemmed from an accusation that he threatened opponents of a mangrove preserve that he was championing. He pleaded guilty to all charges, was sentenced to five years' probation and fined \$11,500.

Barbara Petersen, president of Florida's First Amendment Foundation, could only think of one criminal prosecution off the top of her head. That was a case against an Escambia County School Board member, who, in 1999, was convicted criminally of a public records law violation. The conviction was ultimately tossed and all charges dropped.

Most incidents of Sunshine Law violations researched by the Brechner Center were handled civilly, usually with a \$500 fine akin to a traffic ticket.

That's what Heard is likely facing. She's pleaded not guilty to the noncriminal infraction and is scheduled to appear in court Dec. 18.

"There are safeguards in the law so that if you just misinterpret it, you don't go to jail," LoMonte said.

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Judge rules for Gulf Stream in battle over public records lawsuits

Updated May 09, 2017

By Jane Musgrave, Palm Beach Post Staff Writer



WEST PALM BEACH — In what may become a powerful weapon for governments to use to block people from filing frivolous public records lawsuits, a Palm Beach County judge this week said he will consider imposing sanctions against a Gulf Stream man who has buried the tiny town with hundreds of requests for information.

PalmBeachPost

Turning a lawsuit Christopher O'Hare filed against the oceanfront town against him, Circuit Judge Thomas Barkdull ruled that O'Hare acted in bad faith when he filed as many as 60 public records requests a day and then sued Gulf Stream when it couldn't keep up with his demands.

"O'Hare's conduct in this case was clearly intended to inappropriately manufacture public records requests in order to generate public records litigation and attorney's fees," Barkdull wrote in an 18-page decision.

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Instead of having any true desire for information, O'Hare used the state's public records laws to inundate the town with "gotcha type requests," Barkdull wrote. O'Hare's intent was to "harass and intimidate the town's employees to generate litigation and fees," the judge said.

Attorney Robert Sweetapple, who represents the town in dozens of lawsuits filed by O'Hare and fellow Gulf Stream resident Martin O'Boyle, applauded Barkdull's decision. It marks the first time a Florida judge has ruled that a person acted in bad faith in a public records lawsuit and therefore could be forced to reimburse the government for its attorneys' fees, Sweetapple said. In O'Hare's case, the bill could exceed \$20,000, he said.

"I suspect there's going to be a lot of happiness and relief in the government sector that sooner or later judges are going to put a stop to these scammers who are ripping off government," Sweetapple said.

Governments are already celebrating an amendment the Florida Legislature made to the state's public records law before leaving Tallahassee Monday. The bill (SB 80) headed for Gov. Rick Scott's desk would give judges the flexibility to decide whether those who file public records lawsuits against government agencies are entitled to recover their court costs and attorneys' fees. Currently, judges have no discretion. The law requires governments to pay if a judge finds they wrongfully withheld public records .

"Unfortunately, there are attorneys who have made careers of sabotaging public records laws," said Craig Mosteller, a spokeswoman for the Florida Association of Counties. "They have made their livings on the backs of taxpayers."

But O'Hare said he isn't in that camp. The recently-passed bill, along with Barkdull's ruling, will have a chilling effect on those who want information from tax-funded agencies, he said.

"I feel like I have an obligation to appeal," he said. "I think (Barkdull's decision) will hurt record-requesters throughout the state."

Contrary to Barkdull's assessment, O'Hare said his requests for information from Gulf Stream were



legitimate. While Barkdull blasted him for his practice of making multiple requests a day, O'Hare likened it to getting dozens of books on a single trip to a public library. Sometimes, he said, he saved up his requests and made them all at one time.

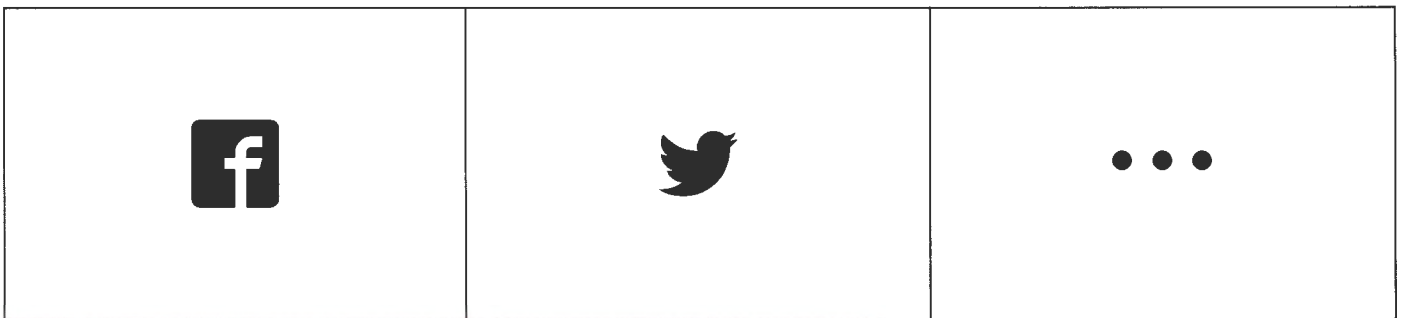
But evidence presented during a two-day trial in December showed Gulf Stream did its best to respond to the hundreds of requests flooding in from O'Hare, O'Boyle and others, Barkdull said. The town hired more workers. It updated its computer system. Faced with lawsuits for not responding quickly, its legal bills soared from \$6,000 to as much as \$79,000 a month, the judge wrote.

And after workers spent hours researching O'Hare's requests, he "routinely refused to pay for the production of the records he sought," Barkdull wrote. When the overburdened staff didn't respond quickly enough, he sued the town 12 times.

Attorney Jonathan O'Boyle, who has represented O'Hare and his father, Martin O'Boyle, in similar lawsuits, predicted that Barkdull's ruling would be reversed by an appeals court. Numerous judges have rejected the notion that people can be accused of acting in bad faith for filing public records lawsuits, he said.

Sweetapple previously failed to persuade a federal judge that Gulf Stream could sue O'Boyle and O'Hare for violating the federal racketeering act.

Still, O'Boyle acknowledged, Barkdull's decision was an interesting one. "It is certainly earth-shattering to some degree," he said.



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Lawyer for Barwin contends few emails are missing from Sarasota public servers

By Nicole Rodriguez

Staff Writer

Posted Sep 10, 2018 at 8:15 PM

Updated Sep 11, 2018 at 8:51 AM

SARASOTA — A partial examination of City Manager Tom Barwin's personal Gmail account revealed the top administrator's personal email account contained more than 100 public records he failed to forward to the city.

Barwin's Palm Beach Gardens-based attorney Lloyd Schwed and the city on Monday evening released a batch of 390 emails out of more than 16,000 from Barwin's personal account from Nov. 22, 2017, to June 30, 2018, as part of a comprehensive exam Schwed's firm is conducting of Barwin's Gmail account. Schwed said his staff has retrieved roughly 53,000 emails from Barwin's Gmail account going back to 2012 and is meticulously sifting through the messages to identify public records in an analysis that should be complete by Oct. 1 and released in phases. The examination and public release follows revelations last month of Barwin's extensive use of his personal email account related to city matters.

In the firm's review of the first batch of Barwin's emails, Barwin's lawyers claim more than 97.5 percent were personal and did not qualify as public records. Of the 390 emails that might be construed as public records, 217 — or nearly 56 percent — are already on the city's computer server and/or were previously produced in response to records requests, Schwed said in a statement the city released Monday.

"Thus far in the evaluation process, the city's outside counsel has not found evidence that the city manager has engaged in any incidents, pattern or practice of transacting official city business through personal email," Schwed said.

But 173 of the emails that could be considered public records may not have been saved on the city's computer server, Schwed said.

"Those emails relate primarily to informational publications or newsletters from various sources," Schwed said of the emails possibly never forwarded to the city server as required by city policy signed by Barwin on Feb. 22.

Current policy allows city employees to use private email accounts only if they are forwarded to the city server. Public officials are urged to use government emails for their official duties so that their conversations are properly archived and available to the public and those conducting oversight. It is not illegal for government officials to use private email accounts, but they must preserve the messages because they are public records.

An independent review of the emails released Monday could not be conducted by the Herald-Tribune due to the timing of their release.

The release of the first batch of Barwin's emails comes days after Michael Barfield, a paralegal consultant and president of the Florida American Civil Liberties Union, filed a lawsuit alleging Barwin's frequent failure to produce city-related discussions from his private Gmail account as part of numerous public records requests broke state open records law and eroded public trust in local government. Barfield in the Sept. 6 filing is asking a judge to grant an accelerated hearing in the case, and declare Barwin and the city violated state record retention rules and the Sunshine Law, which is intended to guarantee that citizens have access to public records and the decision-making of governmental officials. Barfield also asked a judge to order Barwin and the city to follow the law, make records on Barwin's personal electronic devices available for inspection, pay Barfield's legal fees and award any other relief the court deems appropriate.

"While I haven't fully evaluated the belated production, this is political spin for conduct the city manager never should have engaged in from the beginning," Barfield said of Monday's email release. "If we were keeping score, this means nearly 1,000 emails that are public record were hidden from the public on the city manager's personal account and they've only went through approximately one-fourth of the total of 53,000."

"Seems odd to me that the city manager heralds vindication by admitting that he didn't comply with the law approximately 40 percent of the time he sent or received public emails on his private account," Barfield added. "None of this rectifies the fact that the city manager intentionally mislead the public and shielded government activity from public scrutiny. What's worse is that the city manager saddled the public treasury with paying his legal bills."

A recent public records request made by a former City Commission candidate for city-related emails on Barwin's Gmail account, which was fulfilled last month, revealed Barwin has frequently used his personal account to conduct city business. The fulfilled records request showed at least 500 messages to and from Barwin from 2015 to 2017 regarding city matters. The messages included electronic communications from his deputy, the mayor, city spokeswoman, private citizens and media outlets — with responses from Barwin to numerous messages.

On several occasions dating back to 2013, Barfield requested public records from the city and Barwin on both work and personal devices since Barwin was appointed city manager in 2012, according to Barfield's lawsuit. Some, but not all, of the records were produced, Barfield alleges in the suit. In June, Barfield again requested the same records and was reportedly told by the city they did not exist, he said.

Not complying with Barfield's previous requests could be public records violations, City Attorney Robert Fournier told the Herald-Tribune last month.

Barwin has vehemently denied using his private email account to conduct city business and has stressed his commitment to transparency and open government law. Barwin late last month surrendered his personal cell phone and laptop to Fournier pending an independent forensic examination of the devices to ensure all stored city-related matters are made public. An exam of Barwin's mobile phones was conducted last week by a Tampa-based firm, Schwed said.

City releases first production of City Manager's personal emails that might constitute "public records"

The City of Sarasota's outside legal counsel has not found evidence that City Manager Tom Barwin has engaged in any incidents, pattern or practice of transacting official city business through personal email thus far in the evaluation process. The following is a comprehensive statement from Lloyd Schwed, attorney representing the City of Sarasota and Mr. Barwin:

The City of Sarasota and City Manager, Thomas Barwin, are committed to full compliance with both the letter and spirit of Florida's "public records" statutes.

As outlined in this release, thus far in the review and evaluation process, the City's outside counsel has not found evidence that the City Manager has engaged in any incidents, pattern or practice of transacting official city business through personal email.

Requests have been received for "public records" – as defined by Florida Statutes -- sent or received through the City Manager's personal email, or text messages sent or received through his city-issued cell phone or his personal cell phone.

To ensure full compliance with these requests, the City Manager offered to: (1) surrender his personal laptop to the City Attorney's office, and (2) provide the password to his personal email account to the City's Information Technology ("IT") Department for downloading of all personal emails for the entire period he has been employed by the City, and (3) to allow an independent, national computer forensics firm to download a forensic image of all emails and text messages on his city-issued cell phone and even his personal cell phone.

The City's IT personnel signed on to the City Manager's personal email account (gmail), and downloaded all 53,326 emails on the account for the period from September 1, 2012 – when Mr. Barwin became City Manager – through June 30, 2018 (the date covered by the document requests). All 53,326 emails were downloaded to a city-owned computer and are in the possession of the City of Sarasota.

In addition, all emails or text messages downloaded from the City Manager's city-issued cell phone and personal cell phone have been captured and preserved.

Because the Florida Statutes and court decisions recognize numerous important exemptions for private, confidential, and other sensitive materials, the City of Sarasota and its counsel are statutorily required to evaluate the 53,326 emails downloaded from the City Manager's personal email account and the text messages and emails downloaded from the two cell phones to identify emails that qualify as "public records" and then to determine if any statutory exemptions or other provisions prohibit their production.

Florida Statute Section 119.011(12) defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

The City's outside counsel is working as quickly as possible to review and evaluate the 53,326 emails and to immediately produce all non-exempt documents that might qualify as "public records" pursuant to Florida law and to ensure that all such "public records" have been saved to the City's computer server for future access. The City's outside counsel has been instructed to liberally apply the language defining "public records" and to produce all documents that might qualify under the statutory definition.

In an effort to expedite production, the City will be releasing the "public records" on a rolling basis – rather than waiting until all 53,326 emails have been reviewed – starting with the most recent documents.

Specifically, the first production at the link below covers the seven-month period from November 22, 2017 to June 30, 2018. The City's outside counsel evaluated 16,009 personal emails transmitted through the City Manager's personal gmail account during that seven-month period and identified only 390 emails that might qualify as "public records."

Of the 390 emails that could possibly qualify as "public records," at least 217 of those emails are already on the City's computer server and/or have already been produced in response to the records requests.

Moreover, the vast majority of those limited emails not already on the City's computer server relate to informational publications or newsletters from organizations such as Florida City and County Management Association, Florida Fish and Wildlife Conservation Commission, Lido Key Residents Association, or SRQ Magazine and Newsletter -- all of which are independently accessible to the public and are transmitted to thousands of readers.

Finally, a large number of the e-mails relate to the City Manager's Weekly Briefs, which are already accessible to the public.

In summary, the review and evaluation by the City's outside counsel of this first batch of 16,009 personal emails found that:

- More than 97.5 percent of the emails were strictly personal in nature and do not qualify as "public records";
- Of the 390 emails that might be construed as "public records," 217 emails, or nearly 56 percent, are already on the City's computer server and/or were previously produced in response to the records requests;
- An initial review of the 173 personal emails that might be construed as "public records," but which may not have been saved on the City's computer server, indicates those emails relate primarily to informational publications or newsletters from various sources;
- The City's outside counsel's evaluation of the first batch of 16,009 personal emails did not locate or identify personal emails – which are not already on the City's computer server – in which the City Manager is transacting official business in any substantive manner.

Accordingly, thus far in the evaluation process, the City's outside counsel has not found evidence that the City Manager has engaged in any incidents, pattern or practice of transacting official city business through personal email.

The emails can be reviewed via the following link:

<https://www.dropbox.com/sh/dm5dkq7lb7bkxvy/AADQPj1jEOCG4IekyBxULXoia?dl=0> (You may need to copy & paste the link into your browser.) The password is schwed2018 (all lowercase).

We will continue to make rolling production of documents as soon as the City's outside counsel has completed the statutorily required review of the next batch of emails.

Should you have any questions, please do not hesitate to contact us.

For more information, contact Jan Thornburg, Sr. Communications Manager: 941-954-2613