IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No. 4D15-3700

LAKE POINT PHASE I, LLC, and
LAKE POINT PHASE II, LLC,

Appellants,

v.

MARTIN COUNTY,

Appellee.

On Appeal from the Circuit Court
of the Nineteenth Judicial Circuit
in and for Martin County, Florida
(Case No. 2013-001321-CA)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes

Page

State Constitution

Miscellaneous

Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of the Appellant, Lake Point Phase I, et al. (Lake Point).

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt foundation organized for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for citizens committed to limited government, private property rights, individual freedom, and free enterprise. PLF supports the faithful adherence to strong public records laws, because they provide one important means by which citizens may protect these rights. Using information acquired through public records requests, PLF has argued numerous cases advancing individual rights in Florida and elsewhere. *See*, *e.g.*, *Breinig v. Martin County*, No. 2014-CA-1017 (Fla. 19th Cir. 2015); *Powell v. County of Humboldt*, 222 Cal. App. 4th 1424 (2014); *Lee v. Brevard County*, 05-2005-CA-068266 (Fla. 18th Cir. 2012). In light of the importance of a transparent government, PLF has also supported open government policies as amicus curiae. *See Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 359 P.3d 753 (Wash. 2015). And PLF has long participated in Florida courts as amicus curiae in a variety of cases. *See*, *e.g.*, *Charlotte County v. Andress Family Florida, LP*, 163 So. 3d 1190 (Fla. 2d DCA 2014); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011), *rev'd*, 133 S. Ct. 2586

(2013); *Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220 (Fla. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida's open government laws are among the most expansive in the country. Reporters Committee for Freedom of the Press, Open Government Guide: Access to Public Records and Meetings in Florida at 1 (6th ed. 2011).[1] The Public Records Act broadly grants, to citizens and non-citizens alike, access to public records with only limited exceptions. *Id*.; §§ 119.01 to 119.15, Fla. Stat. Public records include all documents, films, sound recordings, electronic data, and other material, transmitted by any agency in connection with official business. § 119.011(1), Fla. Stat. The Act entrusts public agents with the duty to maintain and release public records as provided by law. § 119.021, Fla. Stat.; § 119.01, Fla. Stat. By opening records to the public, the Act helps citizens hold government accountable. *See Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985). When government violates its legal duty, forcing a party to file suit to compel access to public records, the Act requires the government agency to pay attorney fees. *See* § 119.12, Fla. Stat.

[1] http://www.rcfp.org/rcfp/orders/docs/ogg/FL.pdf

Pursuant to the Public Records Act, in February 2013, Lake Point submitted a request to Martin County for public records discussing the Lake Point project. *Lake Point Phase I, LLC v. South Florida Water Management District*, No. 2013-1321 CA, Order on Public Records Act Claims ¶ 3 (Sept. 3, 2015). The County failed to collect and release multiple public records from commissioners' private emails and notes. Appellants' Initial Brief at 8. Indeed, the County neglected its statutory duty to keep copies of many of these public records in the first place. *See* Order on Public Records Act Claims ¶ 7; § 119.07(h), Fla. Stat. When the County continued to fail its statutory duty for one year, even after Lake Point repeatedly reached out to the County, Lake Point filed a civil claim alleging violation of the Public Records Act. *Id*. at ¶ 4. One week later, the County released public records from a commissioner's private email account. *Id*. at ¶ 6. The County failed to retain or release other public records because they had been destroyed. *Id*. at ¶ 9. Despite the County's violation of the Public Records Act, the trial court held that Lake Point was not entitled to attorney fees, because the County's failure to release records in a timely manner was "inadvertent" and "by the time the plaintiffs first filed the public record counts against Martin County, the County had made a reasonable effort to respond and provide public records to the Plaintiffs." *Id*. at ¶ 6.

The lower court's decision violates the spirit and intent of the Public Records Act, by creating a new exception to the law's requirement that government pay

attorney fees when it violates the public records law. Contrary to the court's reasoning, the Act does not allow the government to escape paying attorney fees if its failure to abide by the law is "reasonable" or merely "inadvertent." The attorney fee provision requires only that the government's failure to abide by the Act forces a plaintiff to file a lawsuit in pursuit of public records. The provision is an important part of fulfilling the intent of the Act because it motivates the government to follow the law, and it compensates people who enforce the terms of the law. The provision also helps protect the public's access to records themselves, which protects our representative system of government.

I

THE PUBLIC RECORDS ACT REQUIRES THE COUNTY TO PAY ATTORNEY FEES

The purpose of the Public Records Act is to "open all state, county, and municipal records for personal inspection by any person." *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 423 (Fla. 1979); § 119.01(1), Fla. Stat. ("It is the policy of this state that all state, county, and municipal records are open for a personal inspection and copying by any person."). The right is so important that the Florida Constitution also assures the right to access public records. *See* Fla. Const. art. I, § 24(a) (protecting "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of

the state, or persons acting on their behalf"). Florida courts construe the Public Records Act liberally in favor of the state's policy of open government. *Lightbourne v. McCollum*, 969 So. 2d 326, 332 (Fla. 2007).

Section 119.12, Fla. Stat., provides that where a plaintiff files a civil action to enforce the requirements of the Public Records Act, a court "shall" award attorney fees and reasonable costs "if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied." Courts construe this provision "liberally . . . so as to best enforce access to public records." *Hewlings v. Orange County*, 87 So. 3d 839, 840 (Fla. 5th DCA 2012).

The intent of the attorney fee provision is to "motivate the records holder to be more responsive and careful when a request for disclosure is made" and to "compensat[e] members of the public where a request for disclosure is frustrated when no specific exemption is involved." *News & Sun-Sentinel Co. v. Palm Beach County*, 517 So. 2d 743, 744 (Fla. 4th DCA 1987).

In this case, the clear intent of the legislature indicates that Martin County should pay attorney fees to Lake Point for enforcing public records requests against the County. Martin County failed to fulfill its statutory duty regarding public emails to and from private email addresses of two commissioners. The County unjustifiably delayed releasing public records from Commissioner Fielding's private account. And the County failed its duty to collect and release copies of public records, including

Commissioner Heard's notes. Each failure entitles Lake Point to reasonable attorney fees under Florida law.

A. Martin County Should Pay Attorney Fees for Unjustifiably Delaying the Release of Public Records

The Public Records Act entitles a plaintiff to attorney fees when the agency "unlawfully refused" to allow the plaintiff access to public records. An unlawful refusal under the Public Records Act includes "not only affirmative refusal to produce records, but also unjustified delay in producing them." *Yasir v. Forman*, 149 So. 3d 107, 108 (Fla. 4th DCA 2014) (quoting *Lilker v. Suwannee Valley Transit Auth.*, 133 So. 3d 654, 655-56 (Fla. 1st DCA 2014)). A delay is justified when it is limited to the reasonable time required to collect records and redact exempt portions, or when special circumstances allow for additional time. *See*, *e.g.*, *Tribune v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1983); *Consumer Rights, LLC v. Union County*, 159 So. 3d 882, 883 (Fla. 1st DCA 2015), *review denied sub nom. Consumer Rights, LLC v. Union County*, 177 So. 3d 1264 (Fla. 2015) (delay justified where request was made anonymously and appeared to be a scam). Delays are *not justified* when they are caused by, for example, "ineptitude" or an "honest mistake" by government personnel. *See*, *e.g.*, *Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So. 2d 759, 765 (Fla. 2d DCA 2007); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

Even honest mistakes based on reasonable but wrong interpretation of the law fail to qualify as a justified delay. *News & Sun-Sentinel Co.*, 517 So. 2d at 744. In *Gonzalez*, Wesley Gonzalez filed suit 90 days after he submitted a request to the state attorney's office for records pertaining to his probation. 953 So. 2d at 760-61. The state attorney released the records a few days later. *Id*. at 761. The state attorney's office "argued that its failure to turn over the records was not a refusal at all but simply a mistake that could have been remedied had Mr. Gonzalez or his attorney called the office to request the records again." *Id*. But the Second District Court of Appeal declined to create a requirement that plaintiffs make repeated records requests before filing suit and instead held the government liable for paying attorney fees, because its delay was unjustified. *Id*. at 765. The court held that regardless of whether the government's failure was a result of "ineptitude" or an "honest mistake" of the personnel in the Office of the State Attorney, the delay amounted to an "unlawful refusal." *Id*.

The Fourth District Court of Appeal likewise rejected an "honest mistake" exception in *News & Sun-Sentinel*, where the government had a better excuse for failing to release records. 517 So. 2d at 744. The government agency failed to release public records about the locations of certain hazardous materials, because another statute appeared to *prohibit* release of those documents. *Id*. at 743. Although the government had acted in good faith in its refusal, the Court held that it was still

liable for attorney fees. The Court explained that adding "either a good faith or an honest mistake exception" to "the term 'unlawfully refused'" would violate the intent of the public records statute. *Id*. at 744. Six years later, the Florida Supreme Court held that this decision fulfills the intent of the Public Records Act, by encouraging government to comply with the Public Records Law. *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993). The court rejected the idea that government could avoid paying attorney fees simply by acting in good faith, because a "refusal by an entity that is clearly a[government] agency . . . will always constitute unlawful refusal." *Id*. at 29.[2]

To qualify as a justified delay, government must show special circumstances that warrant the delay. For example, in *Consumer Rights*, Consumer Rights anonymously sought public records in an unsigned email from a generic Gmail account, stating that the request was made on behalf of an unidentified "Florida company." 159 So. 3d at 883. "[T]he request did not contain any information as to

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[2] The Florida Supreme Court in *PHH Mental Health Services* disapproved *News & Sun-Sentinel* only "to the extent that [it] would permit the award of attorney's fees under section 119.12(1) without a determination that the refusal was unlawful." *Id*. at 30. The court explained that the refusal by PHH Mental Health Services—a private corporation—was not unlawful, because it justifiably believed that it was not an "agency" subject to the Public Records Act. Although the court ultimately recognized the corporation was an "agency" for purposes of the case, it held the corporation did not have to pay attorney fees, because the purpose of the fee provision was to force government—not private entities—to comply with the Public Records Act. *Id*.

how the county might contact the agent or the corporation." *Id*. Union County did not respond to the records request because it appeared to be a potentially unsafe email that could subject the government to hacking or other problems. *Id*. at 884. Consumer Rights waited four months without contacting the county again and then sued, spurring the county to release the records. *Id*. at 885. The court held that the county did not have to pay attorney fees, because the email request for records was suspicious, "lead[ing] anyone familiar with the perils of email communication to exercise caution, if not to disregard the communication entirely." *Id*. at 886. The court held the delay was justified, because the government logically feared subjecting its agents to potential viruses, attacks by hackers, or other similar problems. *Id*.

Here, Martin County has failed to provide an adequate justification for its delay in releasing the public records from Commissioner Fielding's private email account. It offers nothing that rises to the requirements laid forth in *Gonzalez*, *News & Sun-Sentinel*, and *Consumer Rights*. Unlike the government in *Consumer Rights*, the County knew exactly who was requesting the public records and knew that answering the request would not subject it to any plausible risks like hacking. To the contrary, the County's mistake was simply "inadvertent"—in other words, an honest mistake or a result of the ineptitude of its personnel—like the state attorney's office in *Gonzalez*. *See* Order on Public Records Act Claims ¶ 9; *Gonzalez*, 953 So. 2d at 765. And indeed, the County's case is far less persuasive than offered by the government

in *Gonzalez*, because the plaintiffs communicated with the County about its failures, giving it many additional chances to fulfill the records request before filing suit. *See* Appellants' Initial Brief at 8. Likewise, the County's excuses are weaker than those offered by the government in *News & Sun-Sentinel*, because there was never any question about the legality of releasing the documents requested here. Accordingly, the Public Records Act entitles Lake Point to reasonable fees for its effort in seeking these records.

B. Martin County Should Pay Reasonable Attorney Fees for Lake Point's Pursuit of Destroyed Records

The Public Records Act protects records from improper destruction. Government agencies must use protective measures to retain public records like handwritten records and emails. § 119.021, Fla. Stat. (charging the records custodian with keeping records—wherever "practicable"—in "the buildings in which they are ordinarily used" and "rooms fitted with noncombustible materials," and other such protective measures). The Act forbids officials and agencies from deleting records outside of the requirements of the official retention schedule. § 119.021(2), Fla. Stat. Moreover, the law requires agencies to avoid even the appearance of impropriety: when a member of the public requests *any* record, the Act prohibits the agency from destroying that record for at least 30 days, regardless of whether the record is determined to be a public record subject to public inspection. § 119.07(h), Fla. Stat.

The Act does not explicitly state that a plaintiff may recover attorney fees when the government has rendered the request impossible by destroying the record, but a plain reading of the statute dictates as much. *See* § 119.12, Fla. Stat. (A court "shall" award attorney fees and reasonable costs "if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied."). When interpreting a statute, courts must first look to the statute's plain meaning. *State v. City of Clearwater*, 863 So. 2d 149, 152-53 (Fla. 2003). The public records statute does not define "unlawfully" or "refused." The Merriem-Webster Dictionary defines "refuse" as "to show or express unwillingness to do or comply with."[3] *See Sch. Bd. of Palm Beach County*, 3 So. 3d at 1233 (To determine the plain and ordinary meaning of a word, courts look to dictionary definitions). *Id*. And it defines "unlawful" as "not legal" or "not allowed by the law." The County's actions satisfy both terms here: it demonstrated an unwillingness to comply with the requirements of the Act by failing to, at minimum, secure the handwritten notes for 30 days prior to their destruction. *See* § 119.07(h), Fla. Stat. The parties debate whether the document ultimately qualified as a public record, but do not have the ability to actually review the record. Regardless of whether the notes ultimately were a public

[3] http://www.merriam-webster.com/dictionary/refuse.

record, the Public Records Act protected it from destruction and thus attorney fees are appropriate.

"[L]egislative intent is the polestar" that must guide the court's interpretation of any statute. *Sch. Bd. of Palm Beach County*, 3 So. 3d at 1232. The intent of the attorney fee provision is to "motivate the records holder to be more responsive and careful when a request for disclosure is made" and to "compensat[e] members of the public where a request for disclosure is frustrated when no specific exemption is involved." *News & Sun-Sentinel*, 517 So. 2d at 744. The attorney fee provision is also meant as a way of protecting citizens' access to public records by encouraging government agencies to voluntarily comply with the public records law. *Gonzalez*, 953 So. 2d at 762-63. Accordingly, courts interpret the attorney fee provision liberally in favor of protecting citizens' access to public records, which necessarily means protecting the records themselves. *Hewlings*, 87 So. 3d at 840.

The public would benefit from requiring the government to pay attorney fees, because it would motivate the County (and other observant government agencies) to follow the retention requirements of the Public Records Act, thereby protecting access to public records. Moreover, government agencies and the public benefit when civil suits like this cause courts to "[c]larif[y] . . . particular applications of the public records law." *News & Sun-Sentinel*, 517 So. 2d at 744. When a member of the public ultimately wins some part of his claim, it is "appropriate" or fair that he "at

least have his attorney's fees reimbursed for that endeavor." *Id*. In light of the improper destruction of the handwritten notes, and the purpose of the statute, the court should award attorney fees, regardless of whether the notes were a public record.

II

A BROAD ATTORNEY FEE PROVISION ASSISTS THE PUBLIC RECORDS ACT IN PROMOTING A FUNCTIONING DEMOCRACY AND JUSTICE SYSTEM

Democracy and liberty require accountability by the people to flourish. Citizens seeking to hold government accountable must be able to "study their governors." Open Government Guide: Access to Public Records and Meetings in Florida, *supra*, at iv. When government acts in secret, "no citizen can carry out these responsibilities." *Id*. James Madison wrote that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both." Letter from James Madison to W. T. Barry (Aug. 4, 1822), in The Founders' Constitution (Philip Kurland & Ralph Lerner ed., 1987).[4]

Indeed, government transparency stands among the few ideals that have captured a broad consensus among major political thinkers. *See* Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 895-96 (2006). All states and the

[4] http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html

federal government have passed laws that require transparency by the government. Open Government Guide: Access to Public Records and Meetings in Florida, *supra*, at iv. And when the public has learned of scandals involving the government acting in secret, legislatures have at times strengthened public records laws. *Id.* (listing Watergate as one example of scandal that spawned improvement in laws protecting citizens' access to public records).

Florida's Public Records Act "promote[s] public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people." *Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) (Overton, J., concurring). And the Act's attorney fee provision helps fulfill that purpose by helping prevent government agencies from "restricting access to public records without a valid reason." *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012); *Bludworth*, 476 So. 2d at 779 ("underlying policy of the Public Records Act" is to provide for "open government to the extent possible in order to preserve our basic freedom"). In this case, requiring the County to pay reasonable attorney fees would benefit the public by holding the County to the requirements of the statute. Moreover, an attorney fees award would help promote the Act's intent of ensuring that the government remain accountable to the people by encouraging plaintiffs to challenge unlawful refusals in the future. Here, the County ignored its duty to retain records that are the subject of

requests for at least 30 days, and public emails, which curiously led to the alleged destruction of all of Commissioner Heard's emails, and which led to the haphazard and delayed releases of Commissioner Fielding's emails. By requiring the government to pay attorney fees, the court will protect the public's access to these same kinds of records in the future.

The transparency provided by public records laws also allow citizens themselves to hold government accountable in multiple ways. Citizens may review public documents to learn of government action and to "challenge the decisions they make and petition or vote for change when change is needed." Open Government Guide: Access to Public Records and Meetings in Florida, *supra*, at iv. Citizens may also use information from public records to enforce statutory and constitutional rights. For example, PLF has filed many lawsuits to enforce constitutional rights based on information acquired from public records. *See*, *e.g., Powell v. County of Humboldt*, 222 Cal. App. 4th 1424 (2014); *Lee v. Brevard County*, No. 05-2005-CA-068266 (Fla. 18th Cir. 2012).

Strong public records laws also allow members of the public to conserve judicial resources. By reviewing public records, citizens may better identify which claims to bring against the government, drafting better informed pleadings that require fewer amendments and less discovery. At times, public records help avoid litigation in the first place. For example, PLF recently submitted a public records

request in North Carolina when contemplating a potential challenge to the state's Certificate of Public Convenience and Necessity law. *See* N.C. Gen. Stat. § 62-262. Thanks to the state's records law, PLF learned that the government was not applying the law in an unconstitutional manner—so there was no need for a lawsuit.

Strong public records laws give citizens the information they need to make better choices and hold government accountable. Public records can prevent unnecessary litigation, or arm litigants with evidence of constitutional abuses and let them know they will have to sue rather than waste resources trying futile administrative avenues. And it warns government agencies and officials that their actions will be held to public scrutiny—whether in court or in the voting booth—thereby pushing them to make better choices. But if government may ignore its duty to retain and release records as required by the law, and suffer no responsibility for its failures, then these benefits are lost.

CONCLUSION

For the above reasons, Pacific Legal Foundation respectfully requests that this Court reverse the decision below.

DATED: February 18, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: February 18, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE has been electronically filed with the Clerk of Court using the E-Filing Portal on this 18th day of February, 2016, which will send a notice of electronic filing to the following:

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