

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CITY OF ST. PETERSBURG, a municipality,

Appellant,

v.

DORCHESTER HOLDINGS, LLC,

Appellee.

No. 2D20-463

October 20, 2021

BY ORDER OF THE COURT:

Appellee's motion for rehearing and rehearing en banc is denied. On the court's own motion, the opinion issued July 21, 2021, is withdrawn and the attached opinion revising footnote two is substituted in its place. No further motions will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

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Appellee.

No. 2D20-463

October 20, 2021

Appeal from the Circuit Court for Pinellas County; Linda R. Allan,
Judge.

Jeannine S. Williams and Danielle Weaver-Rogers, Office of the City
Attorney, St. Petersburg, for Appellant.

Michael J. Labbee and Tyler A. Hayden of Phillips, Hayden &
Labbee, LLP, St. Petersburg, for Appellee.

VILLANTI, J.

The City of St. Petersburg (the City) appeals from an order
declaring that the City's cost estimate for the production of records

sought by Dorchester Holdings, Inc. (Dorchester), pursuant to chapter 119, Florida Statutes (2019), also known as the Florida Public Records Act (the Act), was unreasonable and therefore constituted a violation of Dorchester's right to inspect or obtain copies of public documents under the Act. We reverse.

In 2017, RBF Properties, Inc. (RBF), purchased approximately twenty-two acres of vacant land at the corner of North Gandy Boulevard and Grand Avenue in St. Petersburg. During an environmental assessment, RBF discovered that the land was contaminated with arsenic, allegedly caused by illegally dumped muck from a City of St. Petersburg dredging project at Lake Maggiore in south St. Petersburg. The parties entered into an agreement whereby the City agreed to remove the contaminated muck from the development site. During this period, RBF assigned its rights in the property to Dorchester. The removal of the contaminated soil did not go according to plan; consequently, Dorchester filed a lawsuit against the City sounding in breach of contract.

After the breach of contract lawsuit was filed, Dorchester's counsel sent a public records request to the City Clerk pursuant to the Act. That request sought the following:

1. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City of St. Petersburg (the "City") official, employee, agent or third-party, related to the dredging of Lake Maggiore.
2. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to arsenic and Lake Maggiore.
3. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to arsenic and the City's "Nursery Site."
4. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to City's Final Progress Report on the Lake Maggiore Restoration Dredging and Dewatering Facility.
5. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official,

employee, agent or third-party, related to Professional Service Industries, Inc. ("PSI") and Lake Maggiore.

6. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the Florida Department of Environmental Protection ("FDEP") and Lake Maggiore.

7. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the Toytown Landfill and Lake Maggiore.

8. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to Tarpon Ridge, Inc. and/or Mr. Grady Pridgen and/or Lake Maggiore.

9. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the sale of the "Sod Farm" to Tarpon Ridge, Inc. or Mr. Grady Pridgen.

10. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the placement of muck, sediment or other sand and dirt materials at the "Sod Farm" owned by Tarpon Ridge, Inc. or Mr. Grady Pridgen.

11. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to Dorchester Holdings, LLC, or RBF Properties, Inc., and Lake Maggiore.

12. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to real property legally described as Lot 1 and Lot 2 of the North Gandy Boulevard Subdivision Replat, according to the plat thereof as recorded in Plat Book 142, Page 43, of the Public Records of Pinellas County, Florida (the "Gateway Property") and/or Lake Maggiore.

13. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to Hardy Huntley-Gateway, LLC and/or Lake Maggiore.

14. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to RBF Properties, Inc. and/or Lake Maggiore.

15. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to Waste Management Inc. of Florida or Dirt on Demand, LLC and the Gateway Property.

16. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the City's 2018 soil test results from the Gateway Property.

17. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to the City's violations, failures to perform or breaches of the City's sustainability goals and other directive issued under the Executive Orders establishing "Sustainability and Resiliency Initiative," EO - 2017-1 and/or EO-2015-07.

18. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, regarding Lake Maggiore, the Gateway Property and/or arsenic and other contaminants, including, but not limited to, public records involving: Rick Kriseman, Rick Baker, Jacqueline Kovilaritch, William "Bill" Coughlin, Thomas Gibson, Michael Connors, Cece McKiernan, Maryellen Edwards, Bill Vorstadt, Carlos Frey, Mark Culbreath, Kenneth MacCollum and/or Harry Michaels.

19. Any and all public records, including, but not limited to, meeting minutes, agendas, emails, correspondences, text messages, memorandums, documents or other communications by and between any City official, employee, agent or third-party, related to FDEP Environmental Resource Permits and Sovereign Submerged Lands Permits:

- a. File No.: 522932113 (July 2, 1997);
- b. File No. 522932113 (52-0136212-001) (April 13, 1999);

- c. File No. 52-0202867-001 (August 28, 2003);
- d. File No. 52-0207912-001 (November 21, 2003);
- e. File No. 52-0207912-002 (December 13, 2004);
- f. File No. 52-0207912-003 (Date unknown); and,
- g. File No. 52-0207912-004 (January 20, 2006).

The request directed the Clerk to send the requested records to Dorchester's counsel's office "as soon as possible" and ended with an invitation to charge for copying, if necessary, and to "forward the invoice along with the documents." The City Clerk provided a preliminary cost estimate for the production of these documents in the amount of \$6,154.95, for which payment would be required in advance. The Clerk also forwarded a copy of the City's Administrative Policy AP30102, which outlines the process for providing cost estimates for public records requests. The Clerk further advised Dorchester's counsel that she had conducted a citywide email search using the search phrase "Lake Maggiore" from 2015 to present and that this had yielded 1,361,726 hits. The Clerk advised Dorchester's counsel that the estimated final cost to review that many emails for exempt information would be \$256,571.71 but that this figure was not included in the amount required to be paid in advance.

Dorchester's counsel responded by requesting that the Clerk provide a revised estimate solely for emails discovered by using the following Boolean search terms:

'Lake Maggiore' and 'Toytown'
'Lake Maggiore' and 'arsenic'
'Lake Maggiore' and 'contamination'
'Lake Maggiore' and 'muck'
'Lake Maggiore' and 'Gateway'
'Muck' and 'Gateway'
'Arsenic' and 'Gateway'
'Settlement' and 'Gateway'
'Cleanup' and 'Gateway'
'Settlement' and 'Dorchester Holdings'
'Lake Maggiore' and 'Mandarin Groves'
'Lake Maggiore' and 'Sod Farm'
'Lake Maggiore' and 'Jabil'
'Lake Maggiore' and 'Canterbury School'
'Lake Maggiore' and 'Lake Blue Heron'
'Dirt on Demand' and 'Gateway'
'Dirt on Demand' and 'muck'

The searches yielded 146,246 hits. The Clerk advised Dorchester's counsel that "the estimated cost to review the emails for exempted information at the entry level payrate of an Administrative Assistant is \$27,555.03."¹

¹ Dorchester's assertion in its complaint that the City demanded that Dorchester pay \$27,555.03 before it would produce any responsive documents is not supported by the record. To the contrary, it appears that the City never demanded more than \$6,154.95 as payment in advance.

On August 20, 2019, Dorchester's counsel emailed the Clerk claiming that "Florida Law generally prohibits government's [sic] from charging for the cost to review responsive records for statutorily exempt material" and asking the Clerk to "[p]lease explain why the City thinks it can—or needs to—spend over 1,200 hours manually reviewing such documents, and charge my client nearly \$30k for doing so." Counsel added, "I'm worried that the City appears disinterested [sic] in providing a good faith estimate of a reasonable service charge. Instead, the City's estimate more closely resembles a concerted effort to constructively deny my client's right of access to public records."

The Clerk forwarded Dorchester's counsel's email to the City Attorney.² The City Attorney emailed Dorchester's counsel

² It appears that the City Attorney was unaware of Dorchester's public records request until the City Clerk - not opposing counsel - advised her that the request had been received. Although there appears to be no prohibition against using the Act as a discovery device, thereby circumventing the rules of civil procedure regarding discovery, this does not provide an attorney who represents a party in pending litigation with carte blanche to directly contact a represented opposing party. See R. Regulating Fla. Bar 4-4.2; Fla. Bar Ethics Opinion 09-1 (concluding that a lawyer may not communicate with government officers, directors, or employees who are directly involved or whose acts can be imputed

explaining that the City is permitted to charge a reasonable service charge for both the time expended by employees and for the use of technology resources and that reviewing 146,246 emails would require the extensive use of personnel to review them for possible exemptions, which might include attorney work product and personal identifying information of employees whose information is exempt from disclosure.

Dorchester's counsel disagreed, claiming that the City Attorney's explanation "is contrary to Florida law and violates my

to the government entity in a represented matter); *see also* Robert D. Pelz, *Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State*, 39 U. Miami L. Rev. 291, 303 (1985) ("It is axiomatic that when litigation is pending the attorney for one party may not ethically communicate directly with the adverse party, but instead must communicate through the adverse party's attorney. Accordingly, the proper course under such circumstances should require that the public records requests be submitted to the agency's attorney, rather than through the agency's records custodian. This procedure would also prevent uninformed agency personnel from producing records which the attorney might intend to invoke a valid claim of exemption."). In this case, the City Clerk informed the City Attorney of the public records request on the same day the request was filed, so no harm has been done. Nevertheless, the better practice would have been to submit the public records request via the City Attorney.

client's right of access to public records." The City Attorney responded that if Dorchester's counsel would like to make a more specific request that might yield fewer than 146,000 emails, the City "is more than willing to produce the records or provide another estimate." Dorchester's counsel replied:

You didn't even respond to the fact that the information you, yourself, are charging time for redacting is not protected under Florida law. As a result, your response makes clear that the City's failure to adhere to the public records act is intentional.

Please consider this correspondence as formal notice under Section 119.12(b), Florida Statutes, of the City's unlawful refusal to permit inspection of public records.

On September 9, 2019, Dorchester filed a one-count complaint against the City, claiming that "the City has unlawfully refused to permit public records responsive to Dorchester's Revised PRR to be inspected or copied." The prayer for relief demanded "entry of judgment requiring that the defendant . . . produce records responsive to Dorchester's Revised PRR"

On December 11, 2019, the trial court held a "final hearing." The hearing consisted mostly of argument, but the City Clerk also testified. Following the hearing, the trial court entered an "Order

and Judgment from Final Hearing." The order states, in pertinent part:

- The final revised cost estimate provided by the City was in the amount of \$27,555.03 – though it is still unclear if the City also intended to assess the Plaintiff \$6,154.95 in addition to that amount.
- The City's final estimated special service charge was unreasonable and, therefore, constituted a violation of the Act.
- By demanding that the Plaintiff prepay an unreasonable special service charge, the City unlawfully refused to permit the inspection or copying of documents responsive to the PRR.
- The City's actions, and proposed cost estimates, were unreasonable, failed to sufficiently comply with the act, and delayed the production of the public records responsive to the PRR.

The order requires the City to

provide a revised special service charge cost estimate to the plaintiff within ten (10) days of the date of this Order and the Parties shall thereafter continue in good faith to work through any further revisions, Boolean searches, and other efforts to narrow the scope of the request, reduce the special services costs of same to a reasonable amount, and to ensure the records are produced pursuant to the Act and this Court's Order.

DISCUSSION

We begin our discussion by reviewing the law governing the production of documents pursuant to a public records request such

as this one. Contrary to Dorchester's assertions, the Public Records Act requires a records custodian to determine whether the requested records exist, locate the records, and review each record to determine if it is exempt from production. See § 119.071. Also contrary to Dorchester's assertions, the Act clearly exempts attorney work product as well as work done at the direction of an attorney in preparation or anticipation of litigation. See § 119.071(1)(d)1. It is also well established that work product prepared in anticipation of litigation can precede the filing of a complaint and can include preliminary investigative materials. See *Anchor Nat'l Fin. Servs., Inc. v. Smeltz*, 546 So. 2d 760, 761 (Fla. 2d DCA 1989) ("[E]ven preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim.").

In addition, if the nature or volume of the requested records requires the extensive use of information technology resources or clerical or supervisory assistance to locate, review, and copy them—which the request(s) in this case would doubtless require—the agency may charge a special service charge to cover these costs in addition to the costs of duplication. See § 119.07(4)(d); *see also* Fla.

Admin. Code R. 1-2.0031(1)(b) (providing that clerical or supervisory assistance includes "searching for and or locating the requested record, reviewing for statutorily exempt information, deletion of statutorily exempt information, and preparing, copying and re-filing of the requested record"); *Bd. of Cnty. Comm'rs v. Colby*, 976 So. 2d 31, 35 (Fla. 2d DCA 2008) (approving the County's definition of "extensive" as used in section 119.07(4)(d) "as a public records request that 'will take more than 15 minutes to locate, review for confidential information, copy, and refile the requested material' "); *Fla. Institutional Legal Servs. v. Dep't of Corr.*, 579 So. 2d 267, 268 (Fla. 1st DCA 1991) (same).

Finally, the estimated special service charge must be paid in advance. *See* Fla. Admin. Code. R. 1-2.0031(2)(b) ("The requestor shall be required to pay any estimated special service charges, as determined by the Department, prior to personnel rendering such services. The Department will refund to the requestor any monies deposited with the Department in excess of the actual costs incurred . . . or . . . the requestor shall be required to remit additional monies to pay for any costs in excess of the deposit."); *see also Colby*, 976 So. 2d at 35 (approving the County's calculation

of labor costs based on a fee schedule that multiplied the estimated research time by an employee's hourly wage and benefits). The rationale for this rule unmistakably applies to the instant case: "[T]he County's policy of requiring an advance deposit seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records." *Id.* at 37.

On appeal, as it did below, Dorchester argues that the City was required to "assert exemptions with particularity in advance." Dorchester does not explain how the City might determine the existence of such exemptions without actually reviewing the documents first. The concept is absurd: It would clearly be impossible for a records custodian to comply with the requirements of the Act without first reviewing all of the documents appearing to be responsive to the request.

In sum, the Public Records Act requires a records custodian to determine whether the requested records exist, locate the records, and review each record to determine if any of those records are exempt from production. Moreover, if the nature or volume of the requested records requires the extensive use of information

technology resources or clerical or supervisory assistance, the Act permits the agency to charge a special service charge to cover these costs, and the City's preliminary estimate regarding this charge must be paid in advance.

Turning our attention to the order on appeal, we first observe that the trial court appears to have been under the impression that the City was demanding a prepayment of \$27,555.03 before it would produce the requested records. But the only amount the City asked Dorchester to prepay was \$6,154.95. The trial court's misunderstanding of this fact is itself understandable. From the beginning, Dorchester's counsel miscast the Clerk's initial good faith estimates as a nefarious attempt to avoid a valid public records request. The facts do not bear out this self-serving assertion. Indeed, Dorchester presented no objectively reasonable basis for the conclusion that the Clerk's estimates—which were based on the City's own administrative policy, the administrative code, and the controlling statutes—were themselves unreasonable.³

³ Indeed, there is no evidence to suggest that the City's written internal administrative policy misinterprets or misconstrues the City's duties under the Act.

Thus, the trial court's determination that the amount of the advance payment request—or even the estimated final cost to review 146,246 emails—was unreasonable is not supported by competent, substantial evidence. Accordingly, we conclude that the trial court erred in holding that the City's prepayment request constituted an unlawful interference with Dorchester's right of access to public records.

More importantly, the order contains no meaningful findings, fails to explain by what criteria or upon what basis the trial court found the estimate to be unreasonable, and fails to explain to the City what action it must take to comply with the order other than directing the parties to try to "work together in good faith" and that the City should try to "reduce the special services costs . . . to a reasonable amount."⁴ This alone—apart from our separate

⁴ This court initially struggled with whether the order on appeal is a final order or an appealable nonfinal order because it fails to provide clear direction to the parties and reserves jurisdiction to "enter any further orders that may be necessary and just to afford the parties full and complete relief for the alleged acts as outlined in Plaintiff's Complaint." However, because the order also declares that the City violated the Act by refusing to permit the inspection or copying of documents responsive to Dorchester's public records request, we granted review of the order as a final order on this basis. However, we do not suggest that orders similar

consideration of the trial court's legal conclusion that the City had violated Dorchester's right of access to public records—requires reversal. *See Exotic Motorcars & Jewelry, Inc. v. Essex Ins. Co.*, 111 So. 3d 208, 209 (Fla. 4th DCA 2013) ("In cases where, as here, orders on review cannot be resolved without meaningful findings, effective review may be deemed impossible and the cause remanded for findings, notwithstanding that such findings may not be mandated by rule or statute." (citing *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011))).

We therefore reverse the order on appeal and remand for further proceedings consistent with this opinion. If the trial court again concludes that the City has violated the Public Records Act, it shall enter a written order containing appropriate findings and legal conclusions in support of its decision.

to this one are reviewable as final orders in all cases. Certiorari review may be more appropriate, and even dismissal of the appeal as an attempt to appeal from a nonfinal, nonappealable order is not out of the question.

Reversed and remanded for further proceedings.

SLEET and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.