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State of Florida v. City of Clearwater; Times Publishing Co. v. State of Florida

CHIEF JUSTICE: THE NEXT CASE OR CASES THIS MORNING ARE THE STATE OF FLORIDA AND THE TIMES PUBLISHING COMPANY VERSUS THE STATE OF FLORIDA FORM. GOOD MORNING. YOU ALL HAVE AGREED ON THE DIVISION OF YOUR TIME IN THE CASES, AND IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS PENELOPE BRIAN, AND I AM HERE TO REPRESENT THE ST. PETERSBURG TIMES AND THE TIMES PUBLISHING COMPANY, WHICH IS ONE OF THE PETITIONERS. WITH ME IS CHRIS KISE, WHO IS REPRESENTING THE ATTORNEY GENERALS OFFICE, AND WE HAVE DIVIDED OUR TIME SUCH AS I WILL TAKE NINE MINUTES AND HE WILL TAKE SIX MINUTES, RESERVING FIVE MINUTES FOR REBUTTAL. THIS CASE CONCERNS EMAILS THAT WERE SENT AND RECEIVED OVER A CENTRALIZED NETWORK EMAIL SERVER, BY EMPLOYEES OF THE CITY OF CLEARWATER. THE TIMES REQUESTED THE CITY'S COPIES OF THOSE EMAILS WITHOUT REGARD TO THEIR CON -- CONTENT. AS THIS COURT IS AWARE, VARIOUS EMAILS WERE WITHHELD, ON THE GROUNDS THAT THEY CONTAINED INFORMATION THAT THE EMPLOYEES CONSIDERED TO BE PERSONAL. WE RESPECTFULLY SUBMIT, HOWEVER, THAT THE ISSUE IS NOT WHETHER THE EMAILS HAVE A PERSONAL SIGNIFICANCE TO THE EMPLOYEES BUT WHETHER THE CITY'S COPIES OF THOSE EMAILS, WHICH WERE AUTOMATICALLY CREATED AND STORED ON THE CITY'S CENTRALIZED SERVER, ARE PUBLIC RECORDS. WHAT IS THE SIGNIFICANCE OF THOSE RECORDS TO THE CITY? THE RECORD OF OUR CASE SHOWS THAT THE CITY PURCHASED AND IMPLEMENTED THE SERVER AND GAVE EMPLOYEES EMAIL ACCOUNTS TO THE SERVER IN ORDER TO CONDUCT TRANSACTION OF OFFICIAL BUSINESS. SO MUCH IS CONCEDED ON THE FIRST PARAGRAPH OF THE CITY'S ANSWER BRIEF. THE RECORD ALSO INDICATES THAT --

DO YOU AGREE OR DISAGREE THAT, WHETHER EMAILS ARE PUBLIC RECORDS, TURNS ON WHETHER THEY WERE EITHER MADE OR RECEIVED IN THE CONDUCT OF OFFICIAL BUSINESS?

YES. YOUR HONOR, AND IT IS OUR POSITION THAT THESE WERE, EVEN THE ONES THAT ARE DESIGNATED AS PERSONAL. EYE JUST WANT TO MAKE SURE THAT I UNDERSTAND YOUR POSITION. YOU ARE NOT ARGUING, THEN, THAT ANY PERSONAL EMAILS ARE PUBLIC RECORD, BY VIRTUE OF THE FACT THAT THEY ARE STORED ON A PUBLIC SERVER?

WELL, IN OUR CASE, THE RECORD SHOWS THAT THE CITY MAINTAINS A WHOLE DEPARTMENT OF COMPUTER ENGINEERS. THE HEAD OF THE IT DEPARTMENT ACTUALLY USES THESE EMAILS, TO JUDGE HOW MUCH SPACE IS ON THE SERVER, AND OCCASIONALLY ASKS THE EMPLOYEES TO GO THROUGH ANDPURGE THEIR EMAIL AC OUNTSZ AND PRINT THEM OUT TO -- EMAIL ACCOUNTS AND PRINT THEM OUT TO MAKE MORE ROOM ON THE SERVER. THE CITY HAS A POLICY ALLOWING IT TO MONITOR EMPLOYEE EMAILS FOR ANY PURPOSE. IN FACT, THAT POLICY SAYS THE CITY ACTUALLY OWNS ALL OF THE EMAILS THAT ARE SENT AND RECEIVED OVER THE SERVER.

SO YOU ARE SAYING THEN, THAT IT DOES NOT MATTER THAT, WHETHER THESE WERE MADE DURING OFFICE HOURS OR AFTER OFFICE HOURS? IF AN EMPLOYEE, AFTER THEIR WORKDAY IS OVER, SENT AN EMAIL, THAT WOULD STILL BE AN OFFICIAL BUSINESS RECORD. IS THAT YOUR POSITION HERE?

OUR POSITION IS THESE EMAILS HAVE INDEPENDENT SIGNIFICANCE TO THE CITY, NOTWITHSTANDING THE CONTENT.

I AM NOT, OKAY, BUT I AM TALKING ABOUT, ARE YOU OUTSIDE OR IN SIGHT SIDE OF OFFICIAL -- OR INSIDE OF OFFICIAL WORKING HOURS, DOES THAT MAKE ANY DIFFERENCE IN YOUR ARGUMENT TO THIS COURT?

ACTUALLY NO, BECAUSE IN EITHER CASE, THE EMAIL ITSELF, CONSTITUTES THE ONLY RECORD THAT WE HAVE EVIDENCE OF OF THE CITY'S, OF THE USE OF THESE CITY RESOURCES, BY CITY EMPLOYEES. AND THAT ALONE, MAKES THEM PUBLIC RECORDS, NOTWITHSTANDING THE CONTENT THAT THE EMPLOYEE MIGHT PUT INTO THEM.

IS IT YOUR POSITION THAT THERE IS SOMETHING UNIQUE ABOUT THIS BEING EMAIL, ABOUT IT BEING ON A COMPUTER? FOR INSTANCE, IF THE EMPLOYEE USED A CITY PENCIL AND WROTE A NOTE THAT SAID, "MY CHILD HAS AIDS." AND BECAUSE THE EMPLOYEE WROTE THAT TO HIS WIFE, WITH THE CITY PEN, WOULD THAT MAKE IT A PUBLIC RECORD?

IN THAT CASE, YOUR HONOR, THAT RECORD WOULD NOT NECESSARILY BE RECEIVED BY THE CITY, ITSELF, BY THE AGENCY, IN CONNECTION WITH THE AGENCY'S TRANSACTION OF OFFICIAL BUSINESS.

SO THE USE OF THE CITY COMPUTER, IN AND OF ITSELF, DOES NOT MAKE IT A PUBLIC RECORD.

IN THIS CASE, AN EMPLOYEE'S USE OF THE CITY'S EMAIL SERVER AUTOMATICALLY CREATES A RECORD THAT IS OWNED BY THE CITY. THE CITY AUTOMATICALLY RECEIVES IT, AND IT IS THE RECORD OF THE USE OF THE RESOURCES. RESPECTFULLY, UNDER YOUR HONOR'S ANALOGY, IF THE CITY HAD A COMPUTER SYSTEM WHERE THE EMPLOYEE HAD TO ENTER A PASS CODE TO GET A PENCIL ISSUED BY THE CITY AND A REASON WHY THE PENCIL IS BEING REQUISITIONED, IT WOULD BE CLEAR THAT THAT COMPUTER RECORD WOULD BE A PUBLIC RECORD, BECAUSE IT WOULD BE A RECORD OF THE USE OF AGENCY RESOURCES BY THE AGENCY EMPLOYEE, JUST LIKE THESE EMAILS ARE THE RECORD OF THE USE.

I AM CONFUSED BY YOUR INITIAL ANSWER TO JUSTICE CAN'T CAPITAL'S QUESTION, WHICH YOU SEEM TO AGREE THAT THERE WAS THIS RESTRICTION, THAT IT HAD TO BE RELEVANT TO THE CITY'S OFFICIAL BUSINESS. DO I UNDERSTAND YOUR FIRST ANSWER TO HIS QUESTION WAS THAT, YES, YOU AGREE THAT IT HAD TO BE IN CONNECTION WITH THE CITY'S BUSINESS? MENT I -- AM I CORRECT THAT YOU GAVE AN ANSWER AFFIRMATIVELY TO THAT, THAT, YES, THAT APPLIED HERE? NOW, LET'S JUST START WITH THAT, BECAUSE I, IS THAT YOUR POSITION? OR AT LEAST IS THE THAT WHAT YOU RESPONDED TO JUSTICE CANTERO?

OUR POSITION IS PART OF THIS CITY'S OFFICIAL BUSINESS IS TO OPERATE AND MAINTAIN THE SYSTEM.

THAT IS WHAT I WOULD LIKE YOU TO, HAVING SAID THAT THERE MUST BE SOME OFFICIAL BUSINESS CONNECTION, SO WE ARE REAFFIRMING THAT YOU AGREE WITH THAT PROPOSITION.

YES, YOUR HONOR.

IS THAT CORRECT?

YES, YOUR HONOR.

CHIEF JUSTICE: SO CONNECT US, THEN, CONNECT THE DOTS OF HOW YOU, WHEN YOU, WHEN THERE IS PERSONAL MATTERS DONE BY EMAIL, MUCH IN THE WAY THAT THEY MIGHT BE DONE BY TELEPHONE OR CALL A DOCTOR'S OFFICE OR TALK ABOUT THEIR CHILDREN, YOU KNOW, WITH THE FAMILY BACK HOME OR THEY HAVE A FAMILY EMERGENCY, TELL ME, IN OTHER WORDS, WHAT YOUR THEORY IS OR THE TIMES'S THEORY OF HAVING ACCESS TO THOSE MATTERS, AND I AM TRYING TO THINK OF THE MOST EXTREME EXAMPLE, JUST AS JUSTICE WELLS WAS THERE, OF

SOMETHING EVERYBODY INITIALLY WOULD AGREE THAT CLEARLY WAS INTENDED TO BE PERSONAL AND HAD NOTHING TO DO WITH THE OFFICIAL BUSINESS OF THE GOVERNMENT AGENCY THAT WE ARE TALKING ABOUT. BUT BY VIRTUE OF THE FACT THAT IT IS CONDUCTED THROUGH THIS EMAIL SYSTEM, THAT IT BECOMES CONNECTED TO THE OFFICIAL BUSINESS, SO WOULD YOU LAY OUT YOUR THEORY FOR US.

YES, YOUR HONOR. I THINK YOUR HONOR HAS SUMMARIZED IT QUITE WELL. IT IS THE USE OF THIS SYSTEM WHICH AUTOMATICALLY RECORDS EMPLOYEE USE OF THE SYSTEM, AND WHICH THE CITY RUNS AND ADMINISTERS AND ACTIVELY MANAGES IN THE COURSE OF ITS DAY-TO-DAY PROVISIONS -- DAY-TO-DAY OPERATIONS THAT MAKE IT PUBLIC. IT IS THE SIGNIFICANCE TO THE AGENCY, RATHER THAN THE SIGNIFICANCE OF THE CONTENT TO THE EMPLOYEE THAT MAKES IT A PUBLIC RECORD, AND RESPECTFULLY, THE PUBLIC RECORDS STATUTE DEFINES A PUBLIC RECORD AS ANYTHING THAT IS MADE AND RECEIVED IN CONNECTION WITH THE TRANSACTION OF OFFICIAL BUSINESS BY THE AGENCY.

I AM NOT SURE. ARE YOU SAYING IT IS THE USE OF THE RESOURCE, BECAUSE THAT IS ONE THING. LIKE, SAY, FOR EXAMPLE, I HAVE A LETTER AND IT IS A PERSONAL LETTER. I USE MY OWN STAMP, BUT IN THE MAIL THAT IS PICKED UP EVERYDAY, THAT LETTER IS PART OF THE MAIL THAT IS PICKED UP, SO A COURT EMPLOYEE PHYSICALLY HAS THAT LETTER. IS THAT BECAUSE IT IS BEING HELD FOR A TIME, BY AN EMPLOYEE OF THE STATE OR OF THE CITY, DOES THAT BECOME AN OFFICIAL, IN CONNECTION WITH OFFICIAL BUSINESS?

MUCH LIKE A GREETING CARD OR A BILL THAT ANY OTHER AGENCY EMPLOYEE MIGHT BRING TO THE OFFICE, THAT IS NOT SOMETHING THAT IS NECESSARILY RECEIVED IN CONNECTION WITH THE AGENCY'S TRANSACTION OF OFFICIAL BUSINESS.

ALL RIGHT. SO LET'S JUST NOW GO BACK TO UNDERSTAND, SO IT IS AN ANSWER TO WHAT JUSTICE WELLS SAYS, SOMETHING UNIQUE ABOUT COMPUTER SYSTEMS, THAT, AS OPPOSED TO USING THE PEN, YOU ARE MAKING THE DISTINCTION, IS THAT CORRECT?

CHIEF JUSTICE: I WANT YOU TO REALIZE THAT YOU ARE NOW INTO YOUR COLLEAGUES' TIME.

IS THAT BECAUSE IT IS THE NATURE OF THE COMPUTER SYSTEM THAT THIS CHANGES THE WHOLE MATRIX OF ANALYSIS, AS OPPOSED TO THE TRADITIONAL PENS OR PAPER OR TYPEWRITERS?

THE RECORD IN OUR CASE, YOUR HONOR, ESTABLISHES THAT THE CITY HAS ESTABLISHED INDEPENDENT SIGNIFICANCE FOR THESE EMAILS. THEY HEAVILY REGULATE THE USE OF THE EMAILS. THEY WARNED THE EMPLOYEES THAT THEY ARE MONITORED BY HUMAN AND AUTOMATED REMAINS, AND THE IT DEPARTMENT DIRECTOR TESTIFIED AT TRIAL. HE ALSO ACTIVELY USES THE ACTUAL EMAILS TO JUDGE HOW MUCH ROOM THEY ARE GOING TO NEED ON THE SERVER, TO CONDUCT ONGOING CITY BUSINESS FOR THE CITY, AND SO YES, YOUR HONOR.

THE CONTENT OR THE SIZE BY BYTE SIZE?

HE ACCESS THE FILES OF THE EMAIL. HE DID NOT TESTIFY AS TO SPECIFICALLY WHETHER IT IS CONTENT OR BYTE SIZE. BUT THERE IS JUST ONE RECORD. THE CITY MAINTAINED IN THE BRIEF THAT THEY DON'T MAINTAIN BY BYTE SIZE.

IF AN EMAIL COMES -- IF A LETTER COMES TO THIS FACILITY IN THIS BUILDING, IT IS PROTECTED AND MONITORED AND OPENED AND RECORDED BY DETERMINATION WITH THE THREATS THAT WERE MADE, AND THAT IS THEN DISTRIBUTED THROUGHOUT THIS BUILDING, AND RECORDS ARE KEPT OF THAT WITH REGARD TO THE NATURE OF THE FLOW OF HOW MUCH MAIL GOES THROUGH A PARTICULAR FACILITY, WHERE IT GOES, WHETHER YOU NEED ADDITIONAL HELP, ADDITIONAL PEOPLE ARE PUT ON, SO BY YOUR ANALYSIS, THAT WOULD RENDER ANYTHING THAT CAME THROUGH THAT SYSTEM, IT IS A SYSTEM, AND IT IS MONITORED AND IT IS REGULATED, BUT

WOULD BECOME, THEN, PART OF THE PUBLIC RECORD.

THE LOG WOULD. THE EMAILS IN OUR CASE AREN'T SEPARATELY LOGGED. THE ONLY LOG IN OUR CASE, OF THE EMAILS, ARE THE EMAILS, AND THAT MUCH IS CONCEDED IN THE CITY'S BRIEF. IN YOUR HONOR'S EXAMPLE, THE LOG LOG -- THE LOG, I DON'T THINK IN YOUR HONOR'S EXAMPLE, I DON'T THINK THERE IS ANY QUESTION THE LOG ITSELF WOULD BE PUBLIC RECORD, BUT IN YOUR HONOR'S EXAMPLE, THE CONTENT IS NOT NECESSARILY RECORDED ALONG WITH THE LOG.

THIS CHANGES BECAUSE THE CONTENT IS RECORDED IN SOME FASHION, WHETHER THAT HAS ANYTHING TO DO WITH PUBLIC BUSINESS OR NOT, THAT CHANGES THE ANALYSIS IN YOUR VIEW?

IT JUST, IT IS ADDITIONAL, IF, FOR INSTANCE, AN EMPLOYEE OF THE COURT WROTE PERSONAL INFORMATION ON THE MAIL LOG, THAT WOULDN'T MAKE IT ANY LESS A PUBLIC RECORD. IN OUR CASE, THAT IS WHAT HAPPENED. THANK YOU. I WILL DEFER TO THE ATTORNEY GENERAL.

CHIEF JUSTICE: HOW MUCH TIME SDT ATTORNEY GENERAL HAVE?

MAY IT PLEASE THE COURT. CHRISTOPHER KISE. SOLICITOR GENERAL OF THE STATE OF FLORIDA ON BEHALF OF ATTORNEY GENERAL CHARLIE CRIST.

LET ME FOLLOW-UP ON JUSTICE LEWIS'S QUESTION. I THINK IT RELATES TO, I THINK, THE POSITION THAT YOU ASSERTED IN THE BRIEF. MY UNDERSTANDING OF THE STATE'S BRIEF IS ITS POSITION IS A LITTLE BIT DIFFERENT FROM THE TIMES'S POSITION, IN THAT YOU ARGUE THAT ONLY THE HEADER OF THE EMAILS ARE PUBLIC RECORD, AND THE CONTENT OF THE EMAILS ARE NOT, AND THAT WOULD ANALOGIZE IT TO THE TIMES'S ARGUMENT THAT THE LOG OF THE CORRESPONDENCE ENTERING THE COURT, WOULD BE A PUBLIC RECORD, BUT THE CORRESPONDENCE, ITSELF, WOULD NOT. IS THAT ACCURATE?

WELL, TO CLARIFY, YOUR HONOR, I WOULD SAY THAT OUR POSITION IS THAT THE HEADER, IF IT WERE SEPARATELY STORED, WOULD SIMPLY CONSTITUTE THE PUBLIC RECORD. IF THERE WERE AWAY TO SEPARATE THAT INFORMATION, AND I BELIEVE THAT THE TIMES COUNSEL IS CORRECT, IN INDICATING THAT, WITH EMAIL, AND I DO BELIEVE, AND THIS GOES TO SEVERAL OF THE QUESTIONS FROM THE BENCH THAT, EMAIL DOES PRESENT A UNIQUE CHALLENGE FOR THE PUBLIC RECORDS ACT, AS OPPOSED TO OTHER FORMS OF COMMUNICATION, BUT OUR POSITION IS THAT, IF THERE WERE, IN FACT, A LOG, THAT THAT LOG WOULD BE PUBLIC RECORD, IRRESPECTIVE OF THE CONTENT OF THE COMMUNICATION, AND IF IT WERE MAINTAINED THAT WAY, THEN THERE WOULD BE THAT RECORD. OUR POINT IS, IS TO ALLOW THE PUBLIC, THE PEOPLE, ACCESS TO THE RECORD OF USE OF THE PEOPLE'S PROPERTY. THAT IS EFFECTIVELY THE FOCAL POINT OF THE PEOPLE'S POSITION HERE, IS THAT IT IS THE PEOPLE'S PROPERTY.

LET ME JUST ASK YOU THIS, HOW DO YOU RECOLLECT ONECILE THE CASE OF IN RE THE AMENDMENTS TO RULES OF JUDICIAL PROCEEDING, WHERE WE SPECIFICALLY SAID AN EMAIL MAY INCLUDE UNOFFICIAL BUSINESS AND SUBSEQUENTLY ARE NOT PUBLIC RECORDS?

I WOULD RESPOND TWOFOLD. ONE, I WOULD POINT OUT THAT AT THAT TIME WHEN THAT CASE WAS DECIDED, I BELIEVE THAT THE COURT RECOGNIZED AT THAT TIME THAT EMAIL, THE COURT WAS JUST BEGINNING TO EXPERIMENT WITH EMAIL, AND IT WAS NEW TO THE COURT SYSTEM, AND THE CHALLENGES THAT WERE PRESENTED WERE NEW AT THAT TIME, AND I BELIEVE IN SECOND PART, THAT THIS ISSUE, THIS ISSUE THAT, THE PRECISE ISSUE THAT IS BEFORE THE COURT TODAY, WAS NOT PRESENTED TO THE COURT IN THAT FASHION. I THINK THAT THE COURT, AT THAT TIME, WAS CONSIDERING MORE GENERICALLY, THE USE OF EMAIL AND FOCUSING, PERHAPS, ON THE PERSON AS OPPOSED TO THE AGENCY, AND OUR FOCUS IS, REALLY, IS SORT OF THE FOREST IN THE TREES ANALYSIS. I THINK THE CITY AND THE SECOND DISTRICT IN THEIR NARROW INTERPRETATION OF THE PUBLIC RECORDS ACT, ARE FOCUSING ON THE TREES IF YOU WILL, ON THE PERSON. THE CONTENT OF THE COMMUNICATION OF THE PERSON AS OPPOSED TO

THE AGENCY, WHERE IN THIS RECORD CONSTITUTES A RECORD OF OFFICIAL USE OF STATE PROPERTY OF THE CITY'S PROPERTY.

SO IN YOUR POSITION, IF SOMEBODY -- GO AHEAD. I AM SORE I.

SO THE TERM OFFICIAL BUSINESS -- I AM SORRY.

SO THE TERM OFFICIAL BUSINESS, THEN, IS MORE INCLUSIVE THAN JUST WORK THAT THIS PARTICULAR AGENCY OR CITY MAY BE ENGAGED IN.

WELL, YES, YOUR HONOR. I THINK IT S I MEAN, LIKE WITH PERSONNEL RECORDS THAT ARE NOT, I THINK THIS COURT HAS RECOGNIZED THAT PERSONNEL RECORDS ARE INCIDENTAL TO THE FUNCTIONING OF THE AGENCY, BUT THEY ARE NEVERTHELESS A PART OF THE AGENCY'S BUSINESS. THEY FACILITATE THE ABILITY OF THE AGENCY TO CARRY ON ITS PRINCIPLE PURPOSE, JUST LIKE THE COMPUTER SYSTEM FACILITATES THE ABILITY OF THE AGENCY TO CARRY ON ITS PRINCIPLE FUNCTION. IT IS NOT THE SOLE FUNCTION OR THE SPECIFIC FUNCTION.

SO EVEN UNDER YOUR ARGUMENT, IF SOMEBODY, LET'S SAY IN AN EMAIL, SET UP A COMPLETELY SEPARATE EMAIL ACCOUNT THAT IS NOT THE GENERAL AGENCY ACCOUNT, LIKE SAY A HOT MAIL ACCOUNT, AND USED IT STRICTLY FOR PERSONAL COMMUNICATION AS YOU WOULD WITH A PHONE, UNDER YOUR POSITION, THE TIMES'S POSITION, EVEN THAT HOT MAIL ACCOUNT THAT THAT IS ONLY USED SPECIFICALLY WITH REFERENCE TO FRIENDS AND NOT OFFICIAL BUSINESS, BUT UNDER YOUR POSITION AND THE TIMES'S POSITION, THAT, ALSO, WOULD BE A PUBLIC RECORD.

THAT IS PRESUMING --

SEPARATE EMAIL ACCOUNT NOT THE AGENCY AC COUNT BUT A SEPARATE ACCOUNT BUT IT GOES THROUGH THE GENERAL SERVER THAT IS PROVIDED --

ON THE STATE'S EQUIPMENT.

ON THE STATE'S EQUIPMENT.

YES, YOUR HONOR, IF IT WAS UTILIZING THE STATE'S RESOURCE. IF THE CITY WERE TO MAINTAIN A RECORD OF THAT TRANSACTION, THAT COMMUNICATION, THEN, YES, YOUR HONOR, THAT COMMUNICATION, THE RECORD OF THAT USE OF STATE FACILITY --

I AM NOT TALKING, I AM NOT AS MUCH CONCERNED, I AM MORE CONCERNED ABOUT THE CONTENT THAN THE RECORD THAT THERE WAS AN EMAIL TRANSACTION THAT WENT THROUGH. I AM MORE CONCERNED ABOUT THE COMMENT, BUT IT IS IT YOUR POSITION THAT IT IS NOT JUST RECORD LIKE A PHONE NUMBER WOULD ON A PHONE RECORD, BUT YOU WOULD ALSO WANT THE CONTENT.

IF THERE WERE AWAY TO SEPARATE IT, YOUR HONOR, WHICH IN THIS CASE IT DOES NOT APPEAR TO HAVE BEEN, BUT IF THERE WERE AWAY TO SEPARATE IT, THEN AGAIN THE PEOPLE ARE SIMPLY INTERESTED IN MAKING SURE THAT THE PEOPLE HAVE ACCESS TO A RECORD OF THE USE OF THE PEOPLE'S FACILITIES.

IS THAT WHAT THIS CASE WAS ABOUT? YOU SEE, BECAUSE I THOUGHT THERE WERE TWO PARTICULAR EMPLOYEES, WHERE THEY WERE SEEKING THEIR PERSONAL EMAILS, NOT THAT THEY WERE TRYING TO GET, WE WANT TO GET ALL THE EMPLOYEES, GET EVERY EMPLOYEE IN THE CITY OR WE WANT EVERY EMAIL THAT HAS BEEN SENT FOR THE LAST YEAR, AND NOW WE ARE GOING TO DO AN AUDIT OF THE USE OF THE EQUIPMENT? A.

I WANT YOU TO RESPOND TO THE QUESTION, BUT AGAIN THE MARSHAL IS REMINDING US THAT YOU ARE GETTING VERY LOW ON TIME TO SAVE ANY TIME FOR REBUTTAL, SO A BRIEF RESPONSE.

YES, MR. CHIEF JUSTICE, THANK YOU. THIS CASE WASN'T SPECIFICALLY ABOUT AN AUDIT OF THE FACILITIES, BUT IT COULD JUST AS EASILY BE, IN MAKING SURE THAT THE PEOPLE'S FOCUS IS MAKING SURE THAT THE PEOPLE HAVE THE ACCESS TO THE RECORD OF THE USE OF EQUIPMENT. IN THIS CASE THERE, IS NO SEPARATION BETWEEN THE CONTENT AND THE RECORD OF USE. THEY ARE ONE AND THE SAME, BECAUSE EMAIL PRESENTS THAT UNIQUE CHALLENGE TO THE COURT AND FRANKLY TO THE GOVERNMENT AGENCIES.

COULD THEY NOT ALWAYS BE REDACTED IN SOME FAX FOR -- IN SOME FASHION FOR THE PERSONAL MATERIALS. YOU COULD ALWAYS GET THE MATERIAL AND REDACT THE PERSONAL INFORMATION, COULD YOU NOT?

YES, YOUR HONOR.

BUT IN YOUR LEGAL POSITION, THAT WOULD BE SATISFIED, THEN.

THAT GOES BACK TO JUSTICE CANTERO'S QUESTION ABOUT A POSITION IN OUR BRIEF ABOUT THE LOG OF USE, IS SIMILAR TO A TELEPHONE LOG OR AN AUTOMOBILE LOG.

THAT WOULD RESOLVE YOUR LEGAL POSITION. YOUR LEGAL POSITION IS CONCURRENT WITH THE VIEW I JUST EXPRESSED.

YES, YOUR HONOR.

OKAY.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. LESLIE DOUGALL-SIDES, ASSISTANT ATTORNEY FOR THE RESPONDENT CITY OF CLEARWATER. THE CITY HAS ALWAYS TAKEN THE POSITION THAT THE NEXUS BETWEEN THE DOCUMENT AND THE OFFICIAL BUSINESS OF THE AGENCY OR THE DUTY BY LAW OR ORDINANCE TO MAKE OR RECEIVE IT, DOES DEPEND UPON THE CONTENT OR THE CONTEXT OR THE INTENT OF THE CREATION OF THE DOCUMENT.

WHY SHOULD WE TAKE YOUR WORD FOR IT? THAT IS THAT IN OTHER WORDS, IF, INDEED, THE MEDIA, SOLICITOR GENERAL, SOMEBODY OUT THERE LOOKING OUT FOR THE PEOPLE OF THE STATE OF FLORIDA, SAY THAT WE HAVE PROVIDED, IN YOUR CASE, THE TAXPAYERS FOR THE CITY OF CLEAR WATER, WE HAVE PROVIDED THE CITY WITH THIS VERY COMPLEX, SOPHISTICATED SYSTEM, COST A LOT OF BUCKS, AND WE WANT TO KNOW WHETHER IT IS BEING USED PROPERLY. WE WANT TO KNOW, FOR INSTANCE, WHETHER IT IS ENDING UP THAT ALL OF THOSE CITY EMPLOYEES ARE SPENDING 95 PERCENT OF THEIR TIME ON PERSONAL BUSINESS, JUST HAVING FUN, YOU KNOW, WITH THE EMAIL. THEY ARE DOING ALL OF THEIR BUSINESS WITH THEIR DOCTORS AND PAYING THEIR BILLS AND TALKING TO THEIR FAMILIES ALL OVER THE WORLD AND ANYWAY, YOU UNDERSTAND MY QUESTION THAT, WHY SHOULD WE TAKE YOUR WORD FOR IT, ABOUT HOW THIS THING IS BEING USED AND WHETHER A PARTICULAR COMMUNICATION IS PERSONAL OR NOT?

WELL, YOU SHOULDN'T, YOUR HONOR, BUT THE LEGISLATURE HAS DEFINED PUBLIC RECORDS TO NOT INCLUDE ITEMS THAT ARE NOT OFFICIAL BUSINESS.

WHO IS GOING TO DETERMINE THAT THOUGH?

WELL, THAT GETS INTO --

THAT IS WHY MY QUESTION ABOUT WHY SHOULD WE TAKE YOUR WORD FOR IT? THAT HAS ALWAYS BEEN A FAMOUS THING. TRUST ME.

YES, SIR. WELL, ON SOME LEVEL, EACH PUBLIC EMPLOYEE DOES SOME SEGREGATION OF PUBLIC RECORDS AND NONPUBLIC RECORDS. A RECEPTIONIST IN THE CITY ATTORNEYS OFFICE, IN OPENING THE MAIL, MAY THROW AWAY AN OFFICE SUPPLY CATALOG OR A PIECE OF MAIL THAT IS MISDIRECTED OR JUNK MAIL, SPAM EVENT MAIL, PERHAPS, WOULD BE -- SPAM EMAIL, PERHAPS, WOULD BE DISCARDED. WE HAVE GOTTEN INTO THE BRIEFS, THE CUSTODIAN ARGUMENT, AND I THINK THE TIMES ARGUES THAT ALL 1800 CITY EMPLOYEES ARE WILLY-NILLY ACTING AS THEIR OWN RECORDS CUSTODIANS AND DESTROYING THESE DOCUMENTS. I DON'T THINK THERE IS ANYTHING OF RECORD TO INDICATE THAT, BUT IT DOES GO BACK TO THE DEFINITION, WHICH THE LEGISLATURE HAS SET FORTH, OF PUBLIC RECORDS, AND THRESHOLD QUESTION IS NOT SOMETHING THAT IT NOT BE A PUBLIC RECORD, IS MAINTAINED.

LET'S GO BACK TO WHAT THE CITY DOES. IF THE CITY WERE TO BE MONITORING ITS INDIVIDUAL EMPLOYEES, IT, COULD A CENTRAL SERVER HE, THERE IS -- SERVER THERE, IS SOMEBODY THAT COULD ACTUALLY PULL UP THE PERSONAL EMAIL AND PRINT IT OUT, CORRECT?

YES, YOUR HONOR.

AND THAT WOULD BE BECAUSE THEY HAVE RETAINED THE RIGHT TO MONITOR THAT EMAIL, AND YOU WOULD AGREE THAT, IF THAT WERE DONE BECAUSE THE CITY WAS, ITSELF, MONITORING THE USE, THAT THAT WOULD BECOME A PUBLIC RECORD.

YES. AT SUCH TIME AS THE IT DEPARTMENT WERE FOCUSING ON A PARTICULAR EMPLOYEE AND PERHAPS GENERATE A LIST OF INTERNET WEB SITES VISITED OR EMAILS THAT THE EMPLOYEE HAD SENT, THAT WERE, PERHAPS, SEXUALLY HARASSING OR THEY ARE VISITING PORNO SITES, AND THEN AT SOME POINT IF THAT PERSON IS MONITORING AND GOING TO PRINTOUT A DOCUMENT AND PERHAPS ATTACH IT TO A NOTICE OF SUSPENSION OR NOTICE OF TERMINATION, AT SOME POINT IN THAT PROCESS, IT BECOMES PUBLIC RECORD.

SO ON A DAY-TO-DAY BASIS, ARE ALL OF THE EVENT EMAILS THAT ARE SENT, EVEN IF -- ARE ALL OF THE EMAILS THAT ARE SENT, EVEN IF THEY ARE DELETED BY THE EMPLOYEE AFTER THEY ARE SENT OR RECEIVED, AND I GUESS THAT IS ANOTHER THING THAT EMPLOYEES MAYBE RECEIVING EMAILS FROM PEOPLE OUTSIDE THAT HAVE NO IDEA THAT THEY ARE GOING TO BE, PERHAPS, SUBJECT TO SCRUTINY BUT EVEN RECEIVED, AND THE EMPLOYEE DELETES THEM, DOES THE CITY, EVERY NIGHT, BACK THEM UP INTO SOME CENTRAL SERVER? IS THAT WHAT HAPPENS IN YOUR CITY?

YES. THERE IS TESTIMONY IT WAS MORE IN THE DEPOSITION RECORD THAN THE RECORD BEFORE THE COURT BURKES THERE ARE BACK UP TAPES THAT ARE MADE AT THE CLOSE OF EACH BUSINESS DAY, AND PER, APPARENTLY, COMMON PRACTICE, THOSE BACK UP TAPES ARE KEPT FOR ABOUT TWO WEEKS, AND THEN THEY ARE OVER WRITTEN, SO AFTER TWO WEEKS, YOU WOULD, MIGHT NOT BE ABLE TO RECOVER SOME OF THE DATA. HOWEVER, APPROXIMATELY ONCE A MONTH, A SAMPLE TAPE IS SENT TO AN OUT-OF-STATE ARCHIVEAL FACILITY, SO THAT IF THE WHOLE SYSTEM WERE TO CRASH, YOU CAN INSERT THAT TAPE AND BRING IT BACK UP TO ONLY THAT DATE OF WHAT WAS GOING ON IN THE SYSTEM AND THEN GO ON FROM THERE.

SO ALSO, IF SOMEONE WAS TO ASK, I WOULD LIKE ALL, A LIST OF ALL OF THE EMAILS THAT WERE SENT ON A PARTICULAR DATE, I KNOW THAT YOU KNOW, WHEN YOU SEE AN EMAIL ACCOUNT AND IT SAYS TO SLASH FROM, AND IT IS NOT THE CON -- TO-FROM, AND IT IS NOT THE CONTENT BUT JUST LIST, ARE THOSE AVAILABLE? AND I AM REALLY GOING BACK TO THINKING ABOUT WHAT THE ISSUE IS FROM THE ATTORNEY GENERAL'S POINT OF VIEW WHICH IS THE USE, ISN'T THERE SOME INDEPENDENT RECORD THAT JUST HAS TO SLASH FROM A THAT IS JUST -- HAS TO

AND FROM AND THAT IS JUST WITHOUT THE TOTAL EMAIL?

THERE IS A LOG OF THE SO-CALLED HEADER OF EACH EMAIL.

I AM NOT TALKING ABOUT THE HEADER WHEN YOU OPEN IT UP. I AM TALKING ABOUT WHAT ACTUALLY APPEARS ON A SCREEN, WHEN YOU SEE THIS IS YOUR LIST OF EMAILS BEFORE YOU OPEN IT. ISN'T THAT --

TO MY KNOWLEDGE, THERE IS NO CENTRALLY-GENERATED LIST OF ALL EMAILS SENT OR RECEIVED IN THE CITY. EACH EMPLOYEE IS ASKED TO RETAIN THOSE EMAILS THAT CONSTITUTE A PUBLIC RECORD, SO IF SUCH AN INQUIRY CAME IN, WE WOULD HAVE TO GO AROUND TO THE DIFFERENT EMPLOYEES AND ASK THEM TO GATHER THEIR EMAILS FOR THOSE DATES.

I UNDERSTAND THAT THERE WAS NO REQUEST FOR AN IN CAMERA INSPECTION TO SEE WHETHER OR REQUEST FOR REDACTION OR THAT THAT, IT WAS JUST REALLY A BLANKET REQUEST, AND THERE WAS NO FINE TUNING, TO SEE WHETHER THE ISSUE MIGHT BE THAT MAYBE THE SORTING OUT OF THE EMAILS, THAT THERE WERE SOME EMAILS THAT WERE PUBLIC AND SOME THAT WERE PRIVATE, THAT CORRECT?

THAT'S CORRECT, YOUR HONOR. BOTH PARTIES ALLUDE TO IN CAMERA INSPECTION AT THE CLOSING OF THE TRIAL AND JUDGE RONDILAROAL LUDZ TO IT IN THE HEARING. THERE WAS NO MOTION OR FORMAL REQUEST BY EITHER PARTY FOR AN IN CAMERA INSPECTION, AND THE COURT DID NOT PURSUE A SUE SPONTE REQUEST, ALTHOUGH IT COULD HAVE. I DON'T KNOW THAT THAT SOLVES THE ISSUE, THOUGH, IF THERE IS TO BE AN IN CAMERA INSPECTION, IT MIGHT FERRET OUT SOME OF THE EMAILS THAT MIGHT NOT BE BUSINESS, BUT IT DOESN'T SOLVE THE ISSUE OF WHETHER THE PERSONAL EMAILS ARE.

I WAS JUST SIGHING -- I WAS JUST SEEING IF THERE WAS A REQUEST FROM EITHER SIDE THAT SAID, I WANT TO SEE IF THERE WAS 100 EMAILS LAST MONTH, HOW MANY EMAILS WERE CONSIDERED PERSONAL. IS THAT THE RECORD THAT WAS PRODUCED? THEY SAID EMAILS. AND THEY SAID A CERTAIN NUMBER WERE PUBLIC AND A CERTAIN NUMBER WERE PERSONAL. DO WE HAVE THE NUMBER THAT EXISTED, HOW MANY WERE PERSONAL DESIGNATED BY THE EMPLOYEE, AND HOW MANY WERE PUBLIC?

WE DON'T HAVE HOW MANY, YOUR HONOR. THOSE THAT WERE PUBLIC WERE PROVIDED TO THE TIMES. THOSE THAT WERE DEEMED PERSONAL BY THE TWO EMPLOYEES IN QUESTION, WERE MOVED TO PERSONAL FOLDERS ON THEIR COMPUTERS, AND THE IT DEPARTMENT DID, AS WE CALL IT, BURNING A CD OF THOSE ITEMS, WHICH THE CITY TODAY RETAINS.

HERE IS MY CONCERN THAT, REGARDING THE CUSTODIAN OF RECORD ISSUE, THAT THE SAME EMPLOYEE WHO IS SENDING AND RECEIVING THESE EMAILS AND DETERMINING WHETHER THEY ARE PERSONAL OR PUBLIC, NOW IN DETERMINING THAT KIND OF A POLICY, AREN'T WE SIMPLY ENCOURAGES THOSE WHO ARE CONDUCTING EITHER OFFICIAL BUSINESS INAPPROPRIATELY OR MAYBE HAVE RECEIVED OR SENT SOME EMBARRASSING EMAILS AND THEY DON'T WANT THAT REVEALED TO THE PUBLIC, SIMPLY TO DETERMINE THAT THOSE ARE PERSONAL, AND NOT TO BE REVEALED, AND THAT IS IRREVIEWABLE.

THESE TWO EMPLOYEES, YOUR HONOR, WERE PARTICULARLY HIGH LEVEL, THE ASSISTANT CITY MANAGER, AND LEVEL BELOW THE CITY MANAGER AND THEN ONE LEVEL BELOW. THAT.

THAT IS MY POINT. LET'S SAY A COMMISSIONER SENDS AN EMAIL TO THE CITY MANAGER AND THE EMAIL SAYS I WANT YOUR CHIEF ASSISTANT CITY MANAGER FIRED, BECAUSE HIS ATTITUDE DOES NOT REFLECT THE IMAGE THAT WE NEED TO REFLECT IN THIS CITY, AND THE CITY MANAGER LIKES THAT ASSISTANT CITY MANAGER. HE DOESN'T WANT TO REVEAL THAT EMAIL, AND WHEN HE GETS A CALL AND SAYS I WOULD LIKE ALL YOUR EMAIL, I DON'T WANT ANY

PERSONAL EMAIL, I JUST WANT ALL THE EMAIL ABOUT THE OFFICIAL BUSINESS OF THE CITY, HE SAYS, WELL, I AM GOING TO PUT THAT IN MY PERSONAL FOLDER, AND WHO IS GOING TO REVIEW THAT DETERMINATION?

THE STATUTE REQUIRES THAT A CUSTODIAN BE DESIGNATED AND THAT PERSON IS THE PUBLIC OFFICER OR DESIGNEE. IN THE CITY'S OPINION, THAT PERSON IS THE CITY CLERK, AND THEN SHE, ALTHOUGH NOT NECESSARILY IT APPEARS OF RECORD, DOES HAVE POLICIES BY WHICH EMPLOYEES ARE ADMONISHED TO RETAIN PUBLIC RECORDS.

NOW, UNDER MY UNDERSTANDING OF YOUR BRIEF, THOUGH, WAS THAT THE MAYOR THE CITY MANAGER COULD DESIGNATE EACH INDIVIDUAL EMPLOYEE AS CUSTODIAN OF THAT AND THEN EACH INDIVIDUAL EMPLOYEE DETERMINES WHETHER IT IS PERSONAL OR CONDUCTED PURSUANT TO OFFICIAL BUSINESS?

THAT IS PROBABLY TRUE. I THINK IN REALITY IT IS DESIGNATED TO THE DEPARTMENT HEADS OR ASSISTANT DEPARTMENT HEADS. A JANITOR I IS PROBABLY NOT OUT THERE SEPARATING HIS EMAIL.

IF ONE EMPLOYEE HAS BEEN SEXUALLY HARASSING AND STARTS TO, SAYS I WANT TO GO OUT WITH YOU OR THAT TYPE OF THING, WHICH IS FOR THAT EMPLOYEE, IS CONSIDERED PERSONAL EMAIL, HOW, AGAIN, NOW WE ARE TALKING ABOUT, I GUESS, ABOUT NOT THE, MAYBE IT IS GETTING A LITTLE WAY FROM THE TIMES, BROAD IDEA THAT EVERY EMAIL IS AVAILABLE FOR THEIR INSPECTION, BECAUSE THEY ARE ON THE CITY'S COMPUTER, BUT REALLY FOLLOWING UP ON THE ISSUE ABOUT THAT, FROM WHAT IS TOTALLY PUBLIC TO WHAT IS TOTALLY PERSONAL, HOW WOULD THAT DETERMINATION BE MADE? IN OTHER WORDS, I DETERMINE THAT THAT WAS A PERSONAL MATTER, BECAUSE I WAS SENDING SOMETHING OF AN INAPPROPRIATE NATURE BUT IT WAS PERSONAL. HOW WOULD THAT BE DETERMINED?

WELL, THE CITY IS GOING TO HAVE TO BECOME AWARE OF IT BUT THE COMPUTER RESOURCES USE POLICY DOES STATE THERE IS A WHOLE NO-NO LIST, INCLUDING SEXUALLY HARASSING EMAILS, THAT IS FODDER FOR DISCIPLINARY ACTION, AND SO THAT WOULD BE PUBLIC RECORD, IF THE HR DEPARTMENT ASCERTAINS AN EMPLOYEE HAS BEEN DOING THAT, THEN IT IS NOT, SO IT MAY BE PERSONAL BUT IT VIOLATES THE CITY POLICIES, AND SO IT MAY BE USED AS DISCIPLINARY ACTION AND WOULD BE PUBLIC RECORD. I WOULD POINT OUT THAT THIS COURT, IN THE RECENT MEDIA GENERAL CONVERGENCE VERSUS CHIEF JUDGE CASE, DID DISCUSS THAT GENERAL EMAILS REGARDING SOCIAL GATHERINGS AND SO FORTH MOST LIKELY WOULD NOT CONSTITUTE DOCUMENTS MADE OR RECEIVED IN CONNECTION WITH OFFICIAL BUSINESS, BUT WENT ON TO SAY THAT SEXUALLY HARASSING EMAILS INVOLVING JUDICIARY WOULD BE A DIFFERENT MATTER, SO IT IS REALLY THE SAME ANALYSIS IN OUR CASE. AGAIN, THE COMPUTER RESOURCES POLICY DOES ADOPT CONTENT ANALYSIS, AND THE POLICY STATES THAT, EVEN IF AN EMPLOYEE IS SITTING AT HOME USING A PERSONALLY-PURCHASED COMPUTER AND A PERSONALLY EMAIL ACCOUNT OR INTERNET ACCOUNT, IF THAT EMPLOYEE GENERATES AN EMAIL REGARDING AN ORDINANCE OR A BID OR PERHAPS EMAILS A CONSULTANT, THEN THAT DOCUMENT IS TO BE CONSIDERED PUBLIC RECORD, BECAUSE IT IS RELATED TO THE OFFICIAL BUSINESS, AND THE EMPLOYEE IS DIRECTED TO SAVE THAT DOCUMENT BY EMAILING IT TO THE CITY ACCOUNT OR PRINTING IT OUT OR OTHERWISE SAVING IT, SO WE GO WHOLLY BY CONTENT AND NOT POSSESSION OR LOCATION OF THE DOCUMENT.

GETTING BACK TO MY QUESTIONS, I AM NOT SURE THAT WE FULLY EXPLORED THAT ABOUT A CUSTODIAN. IS IT YOUR POSITION THAT THE STATUTE ALLOWS THE HEAD OF AN AGENCY TO DESIGNATE WHOM EVER THE HEAD WANTS, AS CUSTODIAN OF RECORDS, AND THAT CUSTODIAN MAY BE WHOEVER INDIVIDUALLY SENDS AND RECEIVES EMAILS, IS THE CUSTODIAN OF THOSE PARTICULAR RECORDS?

I THINK THE STATUTE DOES ALLOW THAT, AS THE SECOND DCA POINTS OUT, IT REALLY CONTAINS NO PARAMETERS, OTHER THAN THAT THERE WILL BE A CUSTODIAN, AND THERE IS NO PROCEDURE FOR THE CUSTODIAN TO DETERMINE WHAT IS PUBLIC RECORD AND WHAT IS NOT PUBLIC RECORD. THAT IS SET FORTH IN THE STATUTE.

BUT DOESN'T THE STATUTE SEEM TO CONTEMPLATE THAT, ALTHOUGH THE AGENCY HEAD CAN APPOINT WHOEVER THE HEAD WANTS AS CUSTODIAN, THAT THERE IS A CUSTODIAN OF RECORDS, NOT AS MANY CUSTODIANS AS THERE ARE EMPLOYEES OF THE AELING AGENCY?

THERE IS A OFFICIAL CUSTODIAN, YES, YOUR HONOR, AND I THINK THE CITY AND THE STATE AGREE IT IS THE CITY CLERK, EITHER BY CHARTER PROVISION, THAT THE STATE HAS CITED, OR BY DESIGNATION FROM THE COMMISSION.

SO IN THIS CASE, WHEN THE EMPLOYEE SAID, NO, THERE ARE CERTAIN EMAILS THAT ARE PERSONAL, I AM GOING TO PUT THOSE IN MY PERSONAL FOLDER, DID THE CITY CLERK REVIEW THAT DETERMINATION, TO SEE WHETHER THAT THEY, IN FACT, WERE PERSONAL EMAILS OR SHOULD BE DISCLOSED AS PUBLIC RECORDS?

THERE IS NO EVIDENCE OF RECORD THAT THE CITY CLERK REVIEWED THEM, YOUR HONOR. THERE IS EVIDENCE THAT THE, MR. BRUMBOCK CONSULTED THE CITY ATTORNEY REGARDING WHAT WOULD BE CONSIDERED PUBLIC RECORD AND PRESUMABLY RECEIVED THE ADVICE THAT PERSONAL ITEMS WERE NOT AND NEED NOT BE PROVIDED, BUT THERE IS A RECORD THAT THE CITY CLERK HAS AN EMAIL RETENTION POLICY, EVEN THOUGH THAT POLICY IS NOT OF RECORD.

WHEN, AGAIN, IN TRYING TO MAYBE SEE WHERE THE LINE IS, I THINK THAT WE HAVE ONE END OF THE SPECTRUM, SOMETHING THAT, AGAIN, TO THE CITY, WOULD BE ABOUT AN ORDINANCE OR WHAT WE WOULD CLEARLY UNDERSTAND TO BE OFFICIAL BUSINESS, AND THEN AT THE OTHER END OF THE SPECTRUM WOULD BE SOMEBODY WHO IS, HAS A SICK CHILD AND YOU KNOW, BUT WHAT ABOUT JUST GENERAL ISSUES CONCERNING, YOU KNOW, THERE IS GOING TO BE A PARTY DOWNSTAIRS AT FIVE O'CLOCK. I MEAN, ARE THOSE CONSIDERED, MAYBE THAT IS REALLY, IT DOESN'T MATTER WHETHER THIS WAS AN EMAIL OR A REAL DOCUMENT. THE SAME ISSUE WOULD COME UP. IS THAT, WHERE DOES THAT FALL IN THE SPECTRUM AND WHO, YOU KNOW, AGAIN, BACK TO WHO REALLY IS THE BEST, IN THE BEST POSITION TO DETERMINE THAT?

IF THE CORRESPONDENCE REGARDING THE PARTY IS, SAY, FOR A RETIREMENT PARTY OR A CITY GATHERING, IT WOULD BE PUBLIC RECORD, BUT IT WOULD FALL WITHIN THE CATEGORY 146 OF TRANSTORY MESSAGES SET OUT BY THE STATE AND, YES, THE RETENTION SCHEDULE, AND THOSE MESSAGES ARE LIKENED TO WATER COOLER OR HALLWAY CONVERSATIONS AND ARE TO BE RETAINED UNTIL OBSOLETE, SUPERSEDED OR LOST, AND SO THERE MAY BE EMAILS LIKE THAT AND THEY ARE PRETTY REGULARLY DISCARDED OR DELETED. AGAIN, THE CUSTODIAN ISSUE, WHEN WE HAVE CONTENDED THAT THE STATUTE DOESN'T REQUIRE A BIG BROTHER OR BIG SISTER TO REVIEW ALL 1800 EMAILS OF EMPLOYEES EVERYDAY AND DECIDE WHAT IS PUBLIC RECORD AND WHAT IS NOT. THE STATUTE DOES INVOLVE SOME DISCRETION ON BEHALF OF ALL EMPLOYEES. THERE ARE PENALTIES FOR RIGHTING THE LAW, INCLUDING --

WOULDN'T THAT KIND OF ISSUE BE SOLVED, IF WE ACCEPT THE TIMES'S AND THE ATTORNEY GENALCEE POSITION THAT, BECAUSE THESE -- ATTORNEY GENERAL'S POSITION THAT, BECAUSE THESE RECORDS ARE MAINTAINED AND STORED BY THE CITY THAT, THAT SHOULD BE A PUBLIC DOCUMENT? WOULDN'T THAT SOLVE, ALSO SOLVE THE PROBLEM THAT JUSTICE WELLS POSED, ABOUT WRITING SOMETHING DOWN ON A PIECE OF PAPER WITH A STATE PENCIL, THAT ISN'T ACTUALLY KEPT AND STORED BY THE CITY, BUT IN THIS INSTANCE, IT IS IN FACT, KEPT AND STORED BY THE CITY.

WELL, YOUR HONOR, IT HITS THE SERVER OF THE CITY'S COMPUTER AT SOME POINT. NOW, WHETHER IT IS KEPT AND STORED, I WOULD --

HOW DO YOU RETRIEVE IT? IT HAS TO BE STORED IN SOME MANNER IN ORDER TO BE ABLE TO RETRIEVE IT A YEAR LATER, DOESN'T IT?

IF IT IS NOT PUBLIC RECORD --

DOES IT HAVE THE CAPACITY WHAT SHOULD AND SHOULDN'T BE FERRETED OUT AND WHAT SHOULD BE STORED? BECAUSE WHEN I USE THE EMAIL SYSTEM, ONCE I HAVE READ IT OR ANSWERED IT OR DONE WHATEVER I AM GOING TO DO WITH IT, I KIND OF DELETE IT BUT I DON'T KNOW EXACTLY WHAT WR IT GOES, SO IF IT -- EXACTLY WHERE IT GOES, SO IF IT IS STORED IN THE SYSTEM THERE SOMEPLACE, WHY ISN'T THAT, ISN'T THAT RETRIEVABLE AT SOME POINT?

NOT AFTER TWO WEEKS, BECAUSE THE BACKUP TAPES THAT ARE USED ARE OVER WRITTEN. I AM NOT SURE WHAT YOUR SYSTEM PROVIDES.

I GUESS I AM A LITTLE CONCERNED ABOUT HOW TO GET BACK TO A YEAR'S WORTH OF EMAILS, ANYWAY, IF THEY ARE ONLY KEPT FOR TWO WEEKS.

THE EMPLOYEES ARE DIRECTED TO KEEP THEM ON A DISC OR CD OR PRINTOUT THE PAPER VERSION AND KEEP IT IN A FILE, IF THEY ARE PUBLIC RECORD, BUT IF THEY ARE NOT PUBLIC RECORD, IF THEY ARE PERSONALITY EPPS, THE EMPLOYEES AT LEAST IN THIS INSTANCE, WERE ALLOWED TO MOVE IT, ACTUALLY THEY DIDN'T DELETE IT. THEY MOVED IT TO A PERSONAL FOLDER ON THE SYSTEM AND THEN IT WAS CAPTURED BY THE IT DEPARTMENT. AGAIN, SOME OF THESE TECHNOLOGY ISSUES, I AM PROBABLY NOT WELL-VERSED.

DID YOU INDICATE EARLIER THAT WHAT HAPPENS IS THAT THE CLERK HAS SOME DISCRETION IN REVIEWING OR WHETHER TO REVIEW THIS EMAIL TO MAKE A DETERMINATION AS TO WHETHER IT IS PERSONAL OR PRIVATE?

NOT DISCRETION YOUR HONOR. MY ARGUMENT, I THINK, WAS THAT AS A PRACTICAL MATTER, WITH THE VOLUME OF DOCUMENTS, THAT EXIST IN A CITY OR COUNTY, THAT THE CLERK IS NOT THE OFFICIAL DELEGATE, BUT PASSES THAT TO THE DEPARTMENT HEADS OR EMPLOYEES WHO ARE DEALING WITH THE DOCUMENTS. THAT WOULD BE MORE THAN A FULL-TIME JOB FOR THE CITY CLERK.

> WHAT I AM TRYING TO UNDERSTAND IS THE IMPORT OF THE SECOND PART OR THE PART OF THIS CERTIFIED QUESTION FROM JUDGE ALTENBERND, WHICH IS THAT, IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT OF CUSTODY, CONTROL AND INSPECTION OF EMAILS, DOES THE CITY HAVE SUCH A POLICY?

IT DOES, YOUR HONOR. THE COMPUTER RESOURCES USE POLICY THAT IS OF RECORD, AND IT ATTEMPTS TO ABROGATE A RIGHT OF PRIVACY IN THE EMPLOYEE, SO THE EMPLOYEE CAN'T SAY THAT SEXUALLY HARASSING EMAIL THAT I SENT, YOU DON'T HAVE THE RIGHT TO LOOK AT IT, THAT IS THE PURPOSE OF THAT LANGUAGE.

DOESN'T THAT POLICY, THOUGH, CONVERT WHATEVER IS TRANSMITTED INTO A PUBLIC RECORD, BECAUSE A PUBLIC OFFICIAL THEN HAS A RIGHT TO REVIEW IT IN THE NORMAL COURSE OF THAT PUBLIC OFFICIAL'S DUTIES?

THERE IS A RIGHT TO, BUT IT IS NOT NECESSARILY REVIEWED. IT IS ONLY REVIEWED, IF THERE IS A PROBLEM.

WELL, IT SAYS RIGHT, MAINTAINS A RIGHT TO CUSTODY, CONTROL.

THAT WAS LANGUAGE. IT IS SORT OF BOILERPLATE THAT WAS PUT IN THE POLICY, TO, SO THAT

EMPLOYEES DON'T ARGUE EW THIS IS MY PROPERTY. I AM TAKING IT AND YOU CAN'T DISCIPLINE ME FOR THIS, AND AS I THINK IS POINTED OUT IN THE BRIEFS, IF THE POLICY FAILS, THEN YOU KNOW, PERHAPS IT VIOLATES THE STATUTE. PERHAPS IT DOESN'T. BUT THE STATUTE REALLY CONTROLS. AND DEPENDING ON THE RULING OF THIS COURT, THE CITY COULD BE REWRITING ITS POLICY.

CHIEF JUSTICE: THAT IS A GOOD TIME TO END. THANK YOU VERY MUCH. HOW MUCH TIME FOR REBUTTAL? ALL RIGHT.

I JUST WANT TO MAKE SURE, JUST ON THE LAST PART OF THIS, IS THAT, THAT PART OF THE CERTIFIED QUESTION, THAT IS THAT THE WRITTEN POLICY INFORMS, THE AGENCY MAINTAINS THE RIGHT TO CUSTODY, CONTROL AND INSPECTION? I DIDN'T GET, IN THE FIRST PART OF YOUR ARGUMENT, THAT THE TIMES POSITION INCORPORATED ON THE EXISTENCE OF THAT POLICY.

OUR POSITION, RESPECTFULLY, DOESN'T HINGE ON THAT, BUT THE POLICY CERTAINLY DOES BOLSTER IT, AND I MIGHT ADD THAT IN THAT POLICY, THE CITY STATES FLAT-OUT THAT, IT OWNS ALL THE EMAILS, EVERY BIT OF DATA THAT IS SENT OVER ITS AGENCY-OWNED EMAIL ACCOUNTS.

SO IF YOU ACCEPT THAT ARGUMENT, THEN, THEN IT WOULD BE CONSISTENT WITH THE DUTY TO MAINTAIN, IF IT IS A PUBLIC RECORD, YOU AGREE, THEN, THAT EVERY EMAIL, SPAM, PERSONAL, OFFICIAL BUSINESS OR NOT,, UNDER YOUR POLICY, THE CITY WOULD NOT ONLY HAVE TO DISCLOSE IT BUT WOULD HAVE AN OBLIGATION AND A DUTYTY TO MAINTAIN EVERY EMAIL, WHETHER IT WAS PERSONAL, SPAM OR OTHERWISE.

RESPECTFULLY, I THINK THAT THE CITY'S BRIEF MAY HAVE BLURRED THE LINE BETWEEN RETENTION REQUIREMENTS AND WHETHER A DOCUMENT IS A PUBLIC RECORD TO BEGIN WITH. SPAM, EVEN SOME OF THESE PERSONAL EMAILS, WE DON'T ARGUE EW THAT -- WE DON'T ARGUE THAT THOSE AREN'T RETENTION RECORDS. IN FACT THOSE WOULD BE IMMEDIATELY DELETED. THEY WOULD HAVE TO BE, YOUR HONOR, IN ORDER TO MAINTAIN ADEQUATE SPACE ON THE CITY'S SERVER.

SO DO YOU DISAGREE, THEN, THAT IT IS OKAY FOR THE CITY TO DELEGATE TO THE INDIVIDUAL RECEIVING IT, SOME DETERMINATION OF WHETHER SPAM SHOULD BE RETAINED OR NOT RETAINED?

YES, BUT THAT DOESN'T, THAT IS NOT AN ISSUE OF WHETHER IT IS A PUBLIC RECORD. THAT IS AN ISSUE OF WHETHER OR NOT THIS IS A ZERO RETENTION PUBLIC RECORD, YOUR HONOR. AND WE RESPECTFULLY AGREE THAT EMPLOYEES SHOULD HAVE SOME DISCRETION TO DETERMINE WHETHER THIS IS SOMETHING, A PUBLIC RECORD THAT NEEDS TO BE RETAINED FOR MORE THAN ZERO DAYS, ESPECIALLY AS REGARDS SPAM AND EMAILS SUCH AS THAT AND BECAUSE OF EMAILS, WILL YOU MEET ME IN THE HALL BY THE WATER COOLER. THOSE ARE PUBLIC RECORDS FOR THE REASONS ALREADY SET FORTH BUT THEY ARE ZERO RETENTION AND WOULD NOT HAVE TO BE MAINTAINED BY THE AGENCY FOR ANY LENGTH OF TIME, UNLESS SUBJECTED TO A SPECIFIC PUBLIC RECORDS REQUEST, AND THEN UNDER 119.0 7 SUBSECTION 2, AND THEY WOULD HAVE TO BE RETAINED ONLY UNTIL THE CONTROVERSEY IS RESOLVED.

CHIEF JUSTICE: WE WILL HAVE TO TAKE THE REST ON THE BRIEF. THANK YOU VERY MUCH.