In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

[redacted]

Petitioner,

v.

CHIEF JUDGE OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

Respondent

PETITION FOR WRIT OF MANDAMUS[1]

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[redacted]

[1] Expedited review requested pursuant to Fla. R. Jud. Admin. 2.420(*l*).

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INTRODUCTION

This petition seeks review of the Fifteenth Circuit's redactions to documents it produced in response to a request by the Petitioner for access to administrative records of that court. The records request sought information related to the Fifteenth Circuit's Administrative Order 3.314-3/14 which created a new rule for foreclosure cases to automate the denials of motions directed to the pleadings. This Administrative Order preceded a similar order, which together with a Standing Order of the Foreclosure Division Judge, is currently under review by this Court, *sub nom, Katz v. Chief Circuit Judge, Fifteenth Judicial Circuit*, Case No. 4D14-1691.

The court's response consisted of twenty-six pages of emails[2] that appear to be heavily redacted. The cover letter to the production states that confidential and exempt information has been redacted and that "[s]uch information may include, but is not limited to, attorney-client privileged information, work product, and other information as set forth in Rule of Judicial Administration 2.420."[3]

This Petition asks this Court to determine whether the claimed exemptions are applicable and whether the method of redaction is proper.

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[2] The production included the Administrative Order itself—an additional two pages for which there was no copying charge.

[3] Letter from Amy Borman, General Counsel for the Fifteenth Judicial Circuit, dated June 3, 2014 (App 3).

STATEMENT OF JURISDICTION

Fla. R. Jud. Admin. 2.420 governs public access to all records of the judicial branch of government. Subsection (*l*) of that Rule provides that review of denials of access to administrative records of the judicial branch shall be by mandamus and that the review shall be expedited. *Mathis v. State*, 722 So. 2d 235, 236 (Fla. 2d DCA 1998) ("a petition for writ of mandamus is the proper vehicle to seek review of the denial of access to judicial records").

When, as here, a judge is the custodian of the records for which access is being denied, the action shall be filed in the court having appellate jurisdiction to review the decisions of that judge generally. Fla. R. Jud. Admin. 2.420(*l*)(1); *Tedesco v. State*, 807 So. 2d 804, 806 (Fla. 4th DCA 2002). Accordingly, this Court is the appropriate court to determine whether the Respondent's denial of access to administrative records is proper.

NATURE OF THE RELIEF SOUGHT

The Petitioner requests that this Court issue a writ ordering the Respondent to produce the information it redacted from the administrative records it produced.

STATEMENT OF THE CASE AND FACTS

On April 16, 2014, the Petitioner, [redacted] requested administrative records from the court. The request was designed to obtain background information related to the Chief Judge's issuance of Administrative Order 3.314-3/14 which had created a new rule to automate the denials of any motions in foreclosure cases that prevented the cases from being at issue. This Order was amended to become Administrative Order 3.314-4/14 which (along with a related Standing Order of the Foreclosure Division Judge) is currently under review by this Court.[4]

Specifically, the Petitioner's request sought email discussions about the Order and its key provisions:[5]

> Any and all email correspondence, including any documents attached to said email correspondence between the Honorable Jeffrey Colbath, and/or his judicial assistants and staff and/or any other Circuit Civil Judge, and/or their judicial assistants and staff, regarding:
>
> 1. Administrative Order: 3.314-3/14, including but not limited to, its conception, study, discussion, drafting, implementation and distribution;
>
> 2. The deeming of motions as "abandoned;"

[4] *Katz v. Chief Circuit Judge, Fifteenth Judicial Circuit*, Case No. 4D14-1691. Similar administrative records requests are pending with regard to the amended Administrative Order and the Standing Order (App. 32-35).

[5] Letter to Judge Colbath dated April 15, 2014 (App. 1).

3. The denial of motions "with or without a court order."

4. Any and all notes of meetings or agenda in which any one or more of the subject matters listed in Request No. 1 were discussed.

5. Any and all memoranda, including legal analysis in which any one or more of the subject matters listed in Request No. 1 is discussed.

6. Any and all email correspondence including any documents attached to said email correspondence between the Honorable Jeffrey Colbath, and/or his judicial assistants and staff and/or any other Chief Judge or Administrative Judge of another Circuit, and/or their judicial assistants and staff, regarding any of the subject matters listed in Request No. 1.

Over a month and half later, the Respondent produced twenty-six pages of redacted documents.[6] The cover letter asserted that confidential and exempt information had been redacted on grounds which the Circuit may or may not have specified:

> Such information may include, but is not limited to, attorney-client privileged information, work product, and other information as set forth in Rule of Judicial Administration 2.420.[7]

Although there appear to be a number of redactions, there is nothing that identifies which, if any, of these enumerated reasons (or unenumerated reasons) apply to each redaction.

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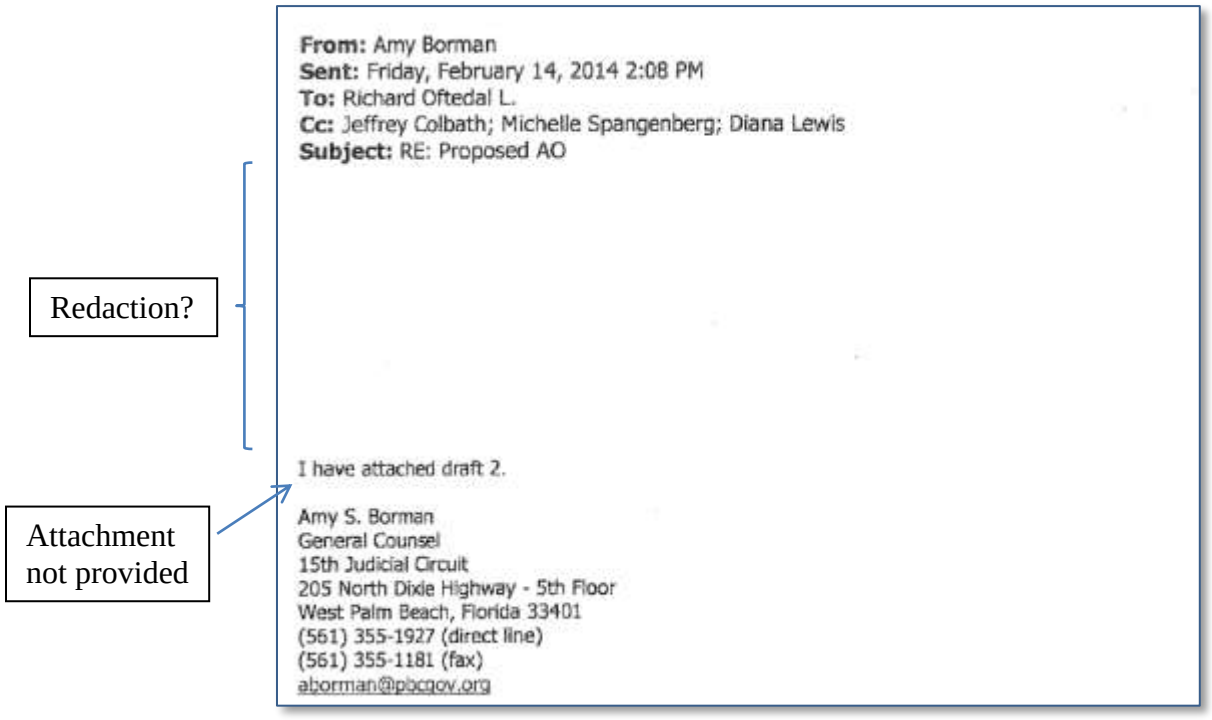
[6] Letter from Amy Borman, General Counsel for the Fifteenth Judicial Circuit, dated June 3, 2014 (App 3).

[7] *Id*.

Additionally, because the redacted text is hidden by a white, borderless masking, it is impossible to tell if certain emails are redacted. For those emails where the context suggests a redaction, it is impossible to determine how much text was redacted. The emails also refer to drafts that, although specifically requested, were not provided. For example:[8]



A verbal request for more detailed information regarding the redactions was unavailing. This petition ensued.

[8] App. 4.

SUMMARY OF THE ARGUMENT

The redactions were inappropriate because the subject matter of the request was limited to administrative records, rather than records relating to, and filed in, an individual case. The official administrative business of the court is precisely what the rule requiring public disclosure was designed to reach. By definition, the emails produced here would not reveal the thought processes of a judge deciding the outcome of a case in litigation. And because the emails discussing the Administrative Order would not touch upon a matter in litigation, the claims of attorney-client privilege or attorney work product (the only privileges specifically mentioned by the Respondent) are inapplicable.

The manner in which the redactions were made was also inappropriate. First, while making a laundry list of reasons for the redactions, the Respondent did not associate any particular privilege with any particular redaction. Second, because the text is concealed with a white, borderless masking, it is impossible to know whether (or how much) text has been redacted from certain emails. This impedes this Court's review of the propriety of the redactions and is contrary to the spirit of public disclosure embodied in the Florida Constitution.

Accordingly, the Petitioner asks this Court to issue a Writ of Mandamus compelling the Respondent to produce the redacted information.

ARGUMENT

I. The Claimed Exemptions Do Not Apply to This Request for Administrative Records.

"Article I, section 24(a), of the Florida Constitution provides that '[e]very person has 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 ... except with respect to records exempted pursuant to this section.'" *Tedesco v. State*, 807 So. 2d 804, 806 (Fla. 4th DCA 2002). The judicial branch is included in the terms of this provision and the Florida Supreme Court has implemented the requirement by adopting Fla. R. Jud. Admin. 2.420. *See id.*

Because Florida strongly disfavors concealing court records from public scrutiny, a heavy burden is placed on the party seeking nondisclosure. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 118-19 (Fla. 1988) ("This heavy burden is placed on the party seeking closure not only because of the strong presumption of openness but also because those challenging the order will generally have little or no knowledge of the specific grounds requiring closure."). All exemptions from disclosure are to be construed narrowly and limited to their designated purpose. *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994).

The Committee Notes to the 1995 Amendment to Rule 2.420 make it clear that emails are judicial records that, absent an exemption, must be disclosed to the public:

> The definition of "judicial records" also includes official business information transmitted via an electronic mail (e-mail) system. … [W]e recognize that not all e-mail sent and received within a particular court's jurisdiction will fall into an exception under rule 2.051(c). The fact that a non-exempt e-mail message made or received in connection with official court business is transmitted intra-court does not relieve judicial officials or employees from the obligation of properly having a record made of such messages so they will be available to the public similar to any other written communications.

Rule 2.420 defines "records of the judicial branch" as consisting of two types: "court records" and "administrative records." "Court records" are the contents of a court file including records that document activity in a case. Fla. R. Jud. Admin. 2.420(b)(1)(A). This is distinguished from "administrative records" defined as "all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity." Fla. R. Jud. Admin. 2.420(b)(1)(B).

The request here is for "administrative records"—documentation of the official business of the Fifteenth Circuit—not for documents in the clerk's file for an individual case. Accordingly, much of the procedural portion of the Rule

(designed to determine and maintain the confidentiality of "court records") is inapplicable. *See*, Fla. R. Jud. Admin. 2.420(d)-(h), (j),(k).

A. The attorney work product and attorney-client privilege are inapplicable.

Rule 2.420(c) designates what judicial branch information is confidential and exempt. The only exemptions specifically mentioned by the General Counsel for the Fifteenth Circuit to explain the redactions was attorney-client communications and attorney work product.[9] While these exemptions are not separately listed in subsection (c), they would fall within two catchall provisions, subsections (c)(7) and (c)(8). Those subsections adopt the confidentiality provisions that exist under Florida and Federal constitutions, statutes, and rules.[10] There are no cases, however, specifically applying the attorney-client and attorney work product privileges to judicial branch records and, on their face, these privileges would appear inapplicable to a request seeking purely administrative records.

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[9] Letter from Amy Borman, General Counsel for the Fifteenth Judicial Circuit, dated June 3, 2014 (App. 3).

[10] (7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission.

In the broader context of Florida's "Sunshine Laws," (Chapter 119, Public Records) it is abundantly clear that the attorney-client and work product privileges do not apply to exempt a document from disclosure merely because an attorney was involved in its creation. Historically, public entities had no protection under either the work product doctrine of the attorney-client privilege of §90.502, Fla. Stat. *City of N. Miami v. Miami Herald Pub. Co.*, 468 So. 2d 218, 220 (Fla. 1985); *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821 (Fla. 1985). As a result of these rulings, the legislature added an exemption to Chapter 119:

> A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. …

Section 119.071(1)(d)1, Fla. Stat. (emphasis added); *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986) (discussing legislative history).

Assuming this exemption for non-judicial records has been incorporated by indirect reference into the Rules of Judicial Administration, because the requested

email communications occurred when there was no actual or "imminent" litigation, this exemption could not apply. *See Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007) (stating that memoranda prepared by an attorney were not exempt from disclosure under Chapter 119 because "neither memorandum on its face relates to any pending litigation or appears to have been prepared "exclusively for litigation.")

Even if the Respondent could have predicted that the Administrative Order it was creating would be challenged by way of the now pending petition for a writ of certiorari in *Katz* (and even if that prediction could be considered "anticipation of imminent" litigation), the emails would have to contain a "mental impression, conclusion, litigation strategy, or legal theory of the attorney" to qualify for the exemption.

While it is exceedingly unlikely that the emails could contain such information, the rules provide a mechanism by which this Court may review the redacted material and make its own determination. Fla. R. Jud. Admin. 2.420(*l*)(1) ("Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court."); *see Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000) (when exemptions are

claimed by the party against whom the public records request has been filed the proper procedure is an *in camera* inspection of those documents by the court).

B. The redacted information does not relate to a judicial decision in a "case and controversy."

In addition to listing attorney-client and attorney work product privileges, the Respondent claimed that the emails were redacted due to other, unspecified exemptions "set forth in rule of Judicial Administration 2.420." The first of these is subsection (c)(1) which applies to documents used in a judge's decision-making process in an individual case:

> Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;

Fla. R. Jud. Admin 2.420(c)(1) (emphasis added).

Because the request relates only to an administrative order of the Chief Judge—which he issued in his administrative capacity—by definition, the responsive emails could not relate to his (or other judges') judicial decision-making in a pending case or controversy. Indeed, the intent of the Administrative Order is to bypass the judicial decision-making process that would normally be "utilized in disposing of cases and controversies."

The policy underpinnings of this provision echo those intended to protect the sanctity of the jury room—such as, prohibiting "any inquiry into any matter concerning the juror's mind, emotions, mental processes or mistaken beliefs which he received about the law in his determination of the verdict…" Law Revision Council Note—1976 for § 90.607(2)(b), Fla. Stat.; *State v. Hamilton*, 574 So. 2d 124, 129 (Fla. 1991) (discussing prohibition against inquiry relating to the jurors' thought process).

Here, nothing related to the drafting, discussion, and implementation of an administrative order (if it is truly administrative in nature)[11] can reveal the thought process or legal theories of a judge deciding an individual case. *See, Poole v. S. Dade Nursing & Rehab. Ctr.*, 3D14-227, 2014 WL 2199813, at *3 ___ So. 3d ___ (Fla. 3d DCA May 28, 2014) ("These records include trial and appellate court memoranda relating to cases…" [emphasis added]); Committee Notes to the 1995 Amendment to Fla. R. Jud. Admin. 2.420 (listing the types of information in

[11] It is not without irony that the Respondent would claim that judicial emails discussing the Administrative Order reveal the thought process behind decisions being made in individual cases when the pending petition before this Court in *Katz* asserts that as the very reason the Administrative Order is improper—i.e. that the Order exceeds the authority of the Chief Judge by interfering with the judicial discretion of judges deciding individual foreclosure cases. If these discussions are exempt under Rule 2.420(c)(1), then the Order is improper and should be quashed.

judicial email that would be exempt as those relating to the disposition of pending cases). This subpart, therefore, does not apply.

C. The redactions do not involve a compelling governmental interest.

Unlike the first group of confidential records related to judicial decision-making, the second group (subpart (c)(2)) is applicable to administrative records such as the emails requested—but exempts only those that jeopardize a compelling governmental interest:

> Memoranda or advisory opinions that relate to the administration of the court and that require confidentiality to protect a compelling governmental interest, including, but not limited to, maintaining court security, facilitating a criminal investigation, or protecting public safety, which cannot be adequately protected by less restrictive measures. … The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge;

Fla. R. Jud. Admin. 2.420(c)(2) (emphasis added).

The Respondent has made no claim that the emails produced here must be redacted to maintain court security, facilitate a criminal investigation or maintain public safety. If the emails and their attachments constitute "memoranda or advisory opinions," there is no indication that, as the Rule requires, the Chief Judge personally decided that the confidentiality of these emails must be maintained to protect these governmental interests.

D. The redactions presumably do not involve alleged misconduct of a judge or other entity, periodic judicial evaluations, unpaid volunteers, or arrest and search warrants.

The remaining exemptions listed in subparts (c)(3) through (c)(6)[12], (c)(9)[13] and (c)(10)[14] are also inapplicable. The response of counsel for the Fifteenth Circuit did not expressly assert that the redactions fall into one of these categories. Nor does the request seek any information that would be exempt under these subdivisions.

II. The Claims of Exemption Are Too Vague.

The Respondent's identification of the exemptions that would support its redactions of the public documents is overly vague for two reasons. First, the Respondent uses nebulous, over-inclusive language to identify the exemptions. As noted above, only two privileges are specifically identified. The remainder are referenced as "other [confidential] information as set forth in Rule of Judicial Administration 2.420." Although there does not appear to be anything in Rule

[12] Subsections (c)(3) through (c)(6) pertain to complaints alleging misconduct against judges or other entities, periodic judicial evaluations, information pertaining to volunteers, and copies of arrest and search warrants.

[13] Subsection (c)(9) is inapplicable because it applies only to "court records," not "administrative records."

[14] Subsection (c)(10) exempts names and any identifying information of judges mentioned in an advisory opinion of the Judicial Ethics Advisory Committee.

2.420 that would justify the redactions, it would be incumbent on the party with the burden to prove the applicability of the exemption to specifically identify the exemption being claimed. Additionally, the Respondent's use of the "not limited to" language implies that it is also asserting exemptions that are not found in Rule 2.420.

Second, the Respondent does not identify which exemptions apply to which redaction, preferring instead to use the disfavored blanket approach to making its objections. *See Carson v. City of Fort Lauderdale*, 173 So. 2d 743, 745 (Fla. 2d DCA 1965) (blanket objections to discovery did not meet burden of objecting party to clearly explain why the discovery was objectionable); *Christie v. Hixson*, 358 So. 2d 859 (Fla. 4th DCA 1978) (trial court erred in sustaining objections which were non-specific and insufficient); *see also Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000) (mandamus appropriate because attorney general's generic response that requested public records were exempt because they "related to the victim" was inadequate under specificity requirements of §119.07(2)(a), Fla. Stat.).

III. The Method of Redaction is Improper

The use of a borderless, colorless masking to redact the emails conceals information other than mere text. It also conceals the location and the size of the

redaction. Worse, it can conceal the fact that a redaction was made at all. Here, it is not possible to definitively determine the number of redactions that were made to the twenty-six pages of emails that were produced. *See*, 5 U.S.C. §552(b) (Public information; agency rules, opinions, orders, records, and proceedings—requiring disclosure of the amount of information deleted and the exemption under which the deletion is made); State of New Jersey Government Records Counsel, *Redacting Government Records* ("If a record contains material that must be redacted…redaction may be accomplished by using a visually obvious method that shows the requester the specific location of any redacted material in the record. .. The blacked out area shows where information was redacted…").[15]

To use a method of removing text that leaves no evidence of it having been deleted is not a redaction, but an implied representation that an altered public document has not been altered. It is misleading and does not comport with the goal of transparency in government embodied in the Florida Constitution. *See*, Mike Larsen, *Redaction in Black and White*, November 22, 2011 ("negative redaction"—replacing text with white spaces—"enhances the opacity of the

[15] Available at http://www.nj.gov/grc/custodians/redacting/.

document and makes the nature and extent of the redaction more difficult to establish."][16]

Moreover, when coupled with the failure to specify which exemption applies to each redaction, it impedes this Court's review. Like the Petitioner, the Court is left to guess whether a redaction has been made, and if so, what the basis of that redaction might be. Even if the Respondent provides the non-redacted documents for this Court's inspection, this Court would be required to comb through and compare each email to determine if a redaction has been made.

To provide the lower courts with guidance for the preparation of responses to future requests for public information, in addition to compelling production of the redacted material, this Court should issue an opinion that expressly disapproves of this method of redaction.

[16] Available at http://redfile.wordpress.com/tag/redaction/.

CONCLUSION

The Court should issue a writ of mandamus compelling production of the redacted information.

Dated: June 17, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this June 17, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this petition has been electronically filed this June 17, 2014.

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