Filing # 200018774 E-Filed 06/06/2024 03:58:22 PM

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

CASE NO. 2D24-0788
Lower Tribunal Case No. 2022-CA-002366

CAIR FLORIDA, INC.
Appellant,
vs.
CHRISTOPHER NOCCO, SHERIFF OF
PASCO COUNTY, in his official capacity,

Appellee.

On Appeal from Final Judgment
of the Circuit Court for the Sixth Judicial Circuit of Florida
in and for Pasco County

INITIAL BRIEF OF THE APPELLANT

DANIEL MARSHALL, ESQ.
Southern Legal Counsel
1229 NW 12th Avenue
Gainesville, FL 32601
Dan.Marshall@southernlegal.org

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FLORIDA CONSTITUTION

FLORIDA RULES

FLORIDA STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from the Florida Sixth Judicial Circuit's denial of Appellant's Motion for Attorneys' Fees and Costs pursuant to the Florida Public Records Act, § 119.12, Fla. Stat. (2023) ("Public Records Act"). This case arose from the Pasco Sheriff's Office ("PSO") years-long wrongful refusal to respond to public records requests from Appellant CAIR-FL, Inc. ("CAIR-FL") for deidentified demographic information regarding PSO's "Predictive Policing Program." Under Sheriff Nocco's direction, the PSO created the Predictive Policing Program (also known as the "Intelligence-Led Policing Program") in an attempt "to eliminate crime before it happens" by focusing on "problem people, problem places, and problem groups." (R.32-34.)[1] In doing so, the PSO created lists of "Prolific Offenders" and "At-Risk Youth" upon which its Predictive Policing Program would focus.

CAIR-FL's public records requests at issue in this appeal asked only for documents containing de-identified demographic information about the people on these lists. (R.118-19, 135.) The existence of these programs was public knowledge through reporting from the Tampa Bay Times,[2] and the manner in which individuals

---

[1] In this brief, references to the trial court record will be cited as "(R.[page number].)"

[2] *See* Kathleen McGrory & Neil Bedi, *Pasco's sheriff uses grades and abuse histories to label schoolchildren potential criminals*, Tampa Bay Times, (Nov. 19, 2020) https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/school-data/.

were scored was readily available in the PSO's Intelligence-Led Policing Manual. (R.41, 94-97, 99.) In some cases, the PSO even sent letters to people on the lists informing them of that fact. Nevertheless, for more than a year, the PSO refused to produce these documents, citing numerous exemptions. (R.137, 139, 195.) CAIR-FL was forced to file a Petition for Writ of Mandamus to enforce the provisions of the Public Records Act. (R.1-22.)

After months of litigation, on the eve of the hearing on CAIR-FL's Petition and 23 months after the initial request, the PSO reversed course and agreed to produce the records at issue. (R.337 ¶¶ 2, 4.) Having received the records through this litigation, CAIR-FL moved for an award of its attorneys' fees and costs pursuant to the Public Records Act (R.318-335), which provides for fees and costs when records have been unlawfully withheld. § 119.12, Fla. Stat. (2023). In arguing against the motion, the PSO contended that its actions were not unlawful, because even though it ultimately produced the records, they were exempt during the time it refused to provide them. (R.339-53.) The trial court found that the records were exempt and denied the motion. (R.436-37.)

PSO's Prolific Offender Program

The Predictive Policing Program encompassed a range of purportedly data-driven policing programs, policies, and strategies including the Prolific Offender program and the At-Risk Youth program. (R.40-44, 94-99, 108-09.) Both the Prolific

Offender and the At-Risk Youth programs relied upon "algorithmic risk assessment" tools that purportedly enabled the PSO to predict which residents were most likely to commit or be victimized by future criminal offenses. (R.94-99.)

Individuals who met the preliminary criteria for inclusion constituted the Prolific Offender Pool. In a single reporting period, as Sheriff Nocco has previously stated, approximately 1,800 individuals made up the Pool. (R.115.) After developing the Prolific Offender Pool, the PSO scored all individuals in the Pool and then identified the top 100 individuals to place onto the Prolific Offender List. (R.41.) Importantly, the criteria for inclusion in the Prolific Offender Pool and Prolific Offender list did not require any showing that a person was involved in current or future criminal activity. (R.41, 99.)

Individuals selected for the Prolific Offender List were subject to the PSO's Prolific Offender Program for a minimum of two years, during which PSO law enforcement officers conducted persistent and intrusive monitoring of them through Prolific Offender Checks. (R.42, 114.) People who were placed on the Prolific Offender List were sent congratulatory letters by the PSO, informing them that they had been selected "to participate in a Prolific Offender Program run by the Pasco Sheriff's Office." (R.108-09.) The stated aim of the program was to make the individual "feel the pressure," (R.42), through "increased accountability." (R.108.)

PSO's At-Risk Youth Program

The PSO also operates an "At-Risk Youth" program, which is a related but independent program that conducts algorithmic risk assessments of minor students. (R.94.) The risk assessment tool assigns scores to a student's academic performance, school discipline records, histories of childhood trauma, and involvement with local law enforcement and, based on the assessment, it places middle and high school students on the At-Risk Youth List, alternatively referred to as the At-Risk Target List. (R.94-97); *see also* Kathleen McGrory & Neil Bedi, *Pasco's sheriff uses grades and abuse histories to label schoolchildren potential criminals*, Tampa Bay Times, (Nov. 19, 2020) https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/school-data/.

CAIR-FL's Public Records Requests

On or about April 8, 2021, CAIR-FL submitted public records requests to the PSO pursuant to the Public Records Act, and Article 1, Section 24 of the Florida Constitution. (R.117-25, 155.) Of the records requests submitted on April 8, 2021, some PSO provided records in response to, some it stated it lacked responsive records for, and others Plaintiffs agreed not to pursue. (R.135-51.) Request numbers 13 and 18 remained at issue between the parties. (R.137, 139-40.)

Request 13 sought the following records:

> For the For the Prolific Offender list, deidentified and disaggregated data as follows:
> A. Rows: Each row should reflect each of the deidentified individuals on the Prolific Offender List.
> B. Columns (for each person listed in the rows above):
> i. Case numbers.
> ii. Felony or misdemeanor levels.
> iii. Race.
> iv. Ethnicity.
> v. National origin.
> vi. Age.
> vii. Gender.
> viii. Disability type.
> ix. Zip code of their last-known residence.
> i. Prolific offender calculation scoring broken down by criminal history and enhancements.
> ii. School name.

(R.118-19.)

Request 18 sought the following records:

> For the prolific offender pool, deidentified and disaggregated data listing: race, ethnicity, national origin, age, gender, disability, zip code of their last-known residence, and prolific offender calculation scoring, broken down by criminal history and enhancements.

(R.119.)

On May 31, 2021, the PSO responded and asserted that Request numbers 13 and 18 were both exempt from disclosure pursuant to Section 119.071(2)(c), Fla. Stat. (2023), which refers to active criminal information and active criminal intelligence information. (R.137, 139.) The PSO also asserted that the records responsive to

Request 13 were exempt pursuant to Section 119.071(2)(d), Fla. Stat. (2023). (R.137.) The PSO had previously provided a list of more than 1000 names of people on the Prolific Offender List, including minors, to the Tampa Bay Times. *See Read the Pasco Sheriff's Office response to our investigation*, Tampa Bay Times, (Sept. 3, 2020) https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/sheriffs-response/.

On June 26, 2021, CAIR-FL submitted supplemental public records requests, including Request 60, and revised Request 13. (R.134-35.) Revised Request 13 added "school name" as an additional data set to be included alongside the previously requested material. (R.135.) Request 60 sought the following:

> For the At-Risk Target List(s) or At-Risk Youth Lists(s), deidentified and disaggregated data as follows:
> A. Rows: Each row should reflect each of the deidentified individuals on the At-Risk Targets List(s) or At-Risk Youth List(s).
> B. Columns (for each person listed in the rows above):
> i. Case numbers.
> ii. Felony or misdemeanor levels.
> iii. Race.
> iv. Ethnicity.
> v. National origin.
> vi. Age or DOB.
> vii. Gender.
> viii. Disability type.
> ix. Zip code of their last-known residence.
> x. Scoring and enhancements
> xi. School name.
> xii. Educational risk factors score, broken down by course performance, GPA, credits,

attendance, office discipline referrals, and overall scoring.

xiii. Criminogenic risk factors score, broken down by age of onset, crime type, number of convictions, drug or alcohol, lack of parental supervision (Truancy, curfew, 22J), victim of personal crime, delinquent friends, history of running away, custody disputes, certified gang member, and overall scoring.

xiv. Adverse childhood experiences, broken down by household member, incarceration, physical abuse, emotional abuse, witness household violence, physical neglect, household substance abuse, sexual abuse, and overall scoring.

(R.134.)

On September 8, 2021, the PSO sent a letter addressing Requests 13, 18, and 60 for the de-identified records from the Prolific Offender List, Prolific Offender Pool, and At-Risk Youth List. (R.164-65.) The PSO reiterated its previously asserted exemptions regarding Requests 13 and 18. *Id*. In addition, on September 24, 2021 the PSO sent another letter that claimed that the records responsive to Request 60 were exempt under a staggering array of additional state and federal theories. (R.170, 195.) On September 13, 2022, CAIR-FL filed the Petition for Writ of Mandamus (the "Petition") in this case to enforce the provisions of the Public Records Act. (R.1-22.) Only Requests 13, 18, and 60 were at issue. (R.4 ¶ 18.) As of the filing of the Petition, Sheriff Nocco and the PSO had not provided responsive records to Requests 13, 18

and 60, nor had they complied with the statutory duty to redact any exempt portion and produce the remainder of such record for inspection and copying. (R.5 ¶ 21.)

In its Response to Order to Show Cause Why Plaintiff's Petition for Writ of Mandamus Should Not Be Granted ("Response"), the PSO claimed that responding to requests for disaggregated information would require the creation of a new record, which it was not required to do. (R.239.) In addition, the PSO asserted that the records responsive to Requests 13 and 18 fell within the exemption for "criminal intelligence information" pursuant to Section 119.071(2)(c), Fla. Stat. (2023), and, for the first time, the exemption for policies and plans regarding emergency operations found in Section 119.071(2)(d), Fla. Stat. (2023). (R.239-44.) Finally, the PSO claimed that the records responsive to Request 60 were exempt under:

i. 20 U.S.C. § 1232g (Family Educational Rights and Privacy Act ("FERPA"));

ii. 34 C.F.R. Part 99 (FERPA regulations);

iii. § 1002.221(1), Fla. Stat. (Florida state educational privacy statute);

iv. § 1003.53(6), Fla. Stat. (Public Records Act exemption for certain records of "dropout prevention programs");

v. § 119.071(3)(a), Fla. Stat. (Public Records Act exemption for fire safety and security information);

vi. § 985.04(1)(a), Fla. Stat. (Public Records Act exemption for certain information systems on prolific juvenile offenders);

vii. § 943.053(3)(b), Fla. Stat. (Public Records Act exemption for certain information compiled by the Department of Law Enforcement about juveniles);

viii. § 985.047(2)(a), Fla. Stat. (Public Records Act exemption for certain centrally compiled criminal records); and

ix. Marsy's Law, Art. I, § 16(5), Fla. Const. (protection of crime victim's rights).

(R.244-50.)

The trial court set a hearing on the Petition for April 10, 2023. On March 30, 2023—11 days before the hearing—the PSO informed CAIR-FL that the Prolific Offender Program and the At-Risk Youth Program had been discontinued. (R.337 ¶ 2.) The hearing on the Petition in this case was canceled, and the PSO subsequently provided the records responsive to Requests 13, 18, and 60 to CAIR-FL (R.337 ¶ 4.) The PSO claimed the records were no longer protected under the previously cited exemptions because the programs had ceased to operate. (R.337 ¶¶ 2-3.) Notably, although the PSO only informed CAIR-FL that the Prolific Offender Program and At-Risk Youth Program were discontinued on March 30, 2023, in an affidavit in a separate case, PSO Captain Larry Kraus swore under oath on December 21, 2022, a

full three months prior to the PSO's notice to CAIR-FL, that the Prolific Offender Program was no longer in operation. (R.373-74 ¶ 4(a)-(b).)

CAIR-FL then filed a Motion for Attorneys' Fees and Costs, arguing that the PSO had improperly withheld production of responsive documents in violation of Florida's Public Records Act. (R.318-35.) The Court held a hearing on February 16, 2024, and heard argument from the parties on CAIR-FL's motion. (R.398-437.) At the end of the hearing, the Court orally indicated that it believed the records responsive to Requests 13, 18 and 60 were legally withheld pursuant to the exemptions raised by the PSO. (R.436.) Therefore, the trial court concluded that CAIR-FL was not entitled to its attorneys' fees and costs. (R.436-37.) The trial court entered a written order to that effect on February 27, 2024 (R.388), from which Appellant timely appealed. (R.389-90.)

SUMMARY OF THE ARGUMENT

The trial court erred when it denied Appellant's request for attorneys' fees and costs after the PSO wrongfully withheld documents about an important program for 23 months, abandoning that position only on the eve of a hearing to compel their production. Florida's Public Records Act, § 119.07(1)(d), Fla. Stat. (2023), provides for a mandatory award of attorneys' fees and costs to a party who brings suit to enforce the Act against a government agency that unlawfully fails to produce requested records. CAIR-FL is entitled to its fees and costs because the PSO unlawfully withheld public records that were responsive to CAIR-FL's public records requests, forcing CAIR-FL to bring this action in order to secure its rights under the Public Records Act.

Appellant submitted several public records requests to the PSO, pursuant to the Public Records Act and Article 1, Section 24 of the Florida Constitution, to ascertain information about the PSO's Intelligence-Led Policing Program. For over 23 months, the PSO refused to comply with CAIR-FL's requests for de-identified demographic information about the Offender Data, Prolific Offender Pool, and At-Risk Youth Lists, improperly asserting exemptions and—even if such exemptions did apply—refusing to redact the exempted information and produce the remainder of the requested documents as required by the Public Records Act. § 119.07(1)(d), Fla. Stat. (2023).

After nearly two years, the PSO finally produced the responsive documents, but only on the eve of the hearing in which the trial court was to rule on CAIR-FL's Petition for Writ of Mandamus. The PSO claimed that the information CAIR-FL sought was, in its view, no longer protected under its previously-cited exemptions because the programs were discontinued. But that position was inconsistent with its prior position that producing the records would have privacy implications, among other purported concerns.

The PSO's belated production did not render its prior refusal to produce the responsive documents lawful. The exemptions it asserted were never valid, even when the program was in effect. Further, the termination of the programs had no bearing on the applicability of the exemptions the PSO previously asserted, and, even if some of the exemptions were applicable, the PSO failed to provide redacted documents as required by the Public Records Act. Finally, the PSO continued to withhold the documents even after the programs had terminated, and beyond the point at which the information was still in use. The PSO's unjustifiable conduct severely delayed the final production of non-exempt information that CAIR-FL was entitled to all along under the Public Records Act. Thus, CAIR-FL is entitled to attorneys' fees.

ARGUMENT

I. LEGAL STANDARD

"[A] prevailing party is entitled to statutory attorney's fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied." *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 128 (Fla. 2016). An award of fees is mandatory if the statutory conditions are met. *Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000). "Whether a [party] is entitled to fees and costs under section 119.12, is a matter of law reviewed *de novo*." *Althouse v. Palm Bch. Cnty. Sheriff's Office*, 92 So. 3d 899, 901 (Fla. 4th DCA 2012); *see also Siegmeister v. Johnson*, 240 So. 3d 70, 73 (Fla. 1st DCA 2018).

II. THE PUBLIC RECORDS ACT MANDATES THE PRODUCTION OF NON-EXEMPT DOCUMENTS.

Florida's Public Records Act declares in unequivocal terms that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection by any person." § 119.01(1), Fla. Stat. (2023). "Public records" are: "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or

ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. (2023).

The Public Records Act requires that "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." § 119.07(1)(a), Fla. Stat. (2023). Though the Legislature has created statutory exemptions to disclosure in certain limited contexts, "the Public Records Act 'is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.'" *Lee*, 189 So. 3d at 125 (quoting *Lightbourne v. McCollum*, 969 So. 2d 326, 332-33 (Fla. 2007)). There is a presumption of disclosure. *See Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *rev. denied*, 37 So. 3d 848 (Fla. 2010). When asserting an exemption, a records custodian has the following statutory duties: (1) a duty to state in writing with particularity the reasons for their conclusions that the record is exempt, § 119.07(1)(f), Fla. Stat. (2023); and (2) a duty to produce any non-exempt portion of a record after redacting that portion which they claim is exempt. § 119.07(1)(d), Fla. Stat. (2023). As custodian of the PSO's records, Sheriff Nocco had a legal obligation to provide access to public records within the PSO's custody.

III. AN AGENCY THAT UNLAWFULLY REFUSES TO COMPLY WITH THE PUBLIC RECORDS ACT IS LIABLE FOR THE ATTORNEYS' FEES AND COSTS OF A PARTY WHO SUES TO ENFORCE THE ACT.

A court "shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency" if the court determines that: (a) the agency unlawfully refused to permit a public record to be inspected or copied; and (b) the complainant provided written notice to the agency's custodian of records at least five business days before filing the action.[3] § 119.12(1), Fla. Stat. (2023). "Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general policy is followed." *New York Times Co. v. PHH Mental Health Servs., Inc.*, 616 So. 2d 27, 29 (Fla. 1993). Public agencies are more likely to comply with their duties under the Public Records Act if they are required to pay the attorneys' fees and costs of parties who are wrongfully denied access to documents. *Id*.

When the reasons proffered to deny a public records request are improper, the governmental agency's refusal is unlawful. *Office of the State Attorney for the Thirteenth Judicial Circuit of Fla. v. Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007). This is true even if access to records was denied "based on a good faith but mistaken belief that the documents are exempt." *Times Pub. Co., Inc. v. City of St.*

[3] In the trial court, there was no dispute that Appellant complied with the notice requirement in Section 119.12(1)(b), Fla. Stat. (2023).

Petersburg, 558 So. 2d 487, 495 (Fla. 2d DCA 1990); *see also Lee*, 189 So. 3d at 128. Further, "[u]nlawful refusal under section 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them." *Roldan v. City of Hallandale Bch.*, 361 So. 3d 348, 352-53 (Fla. 4th DCA 2023); *see also Schweickert v. Citrus Cnty. Fla. Bd.*, 193 So. 3d 1075, 1079 (Fla. 5th DCA 2016). "[U]njustifiable delay to the point of forcing a requester to file an enforcement action is *by itself* tantamount to an unlawful refusal to provide public records in violation of the Act." *Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 984 (Fla. 1st DCA 2014) (emphasis in original). Thus, an agency cannot avoid an award of attorneys' fees by producing the requested records after a petition has been filed. *Mazer v. Orange Cnty.*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

IV. THE PSO'S WITHHOLDING OF RECORDS WAS UNLAWFUL BECAUSE IT DID NOT MEET ITS BURDEN TO SHOW THAT THE PROFERRED EXEMPTIONS APPLIED TO CAIR-FL'S REQUESTS.

The documents CAIR-FL requested were public records as they were created by a governmental agency—the PSO. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980). Unless a valid exemption existed, the PSO was required by law to permit inspection of the records.

The PSO has argued that its refusal to produce the records was lawful, arguing that a plethora of diverse exemptions applied to the documents requested. (R.339-53.) The PSO bears the burden of establishing the applicability of any exemption asserted

as the basis for withholding the records requested. *See Barfield v. Sch. Bd. of Manatee Cnty.*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014). As detailed below, the exemptions that the PSO asserted were not valid, either before or after the termination of the relevant programs. Moreover, even if some exemptions were applicable, the PSO unlawfully refused to produce non-exempt redacted records as required under the law. § 119.07(1)(d), Fla. Stat. (2023).

A. The Prolific Offender Lists Were Not Exempt from Disclosure (Requests 13 and 18)

1. The Prolific Offender Lists did not fall under the exemption for active criminal intelligence information.

The Public Records Act provides an exemption for "[a]ctive criminal intelligence information and active criminal investigative information."[4] § 119.071(2(c), Fla. Stat. (2023). The purpose of the exemption is to "not inhibit[] police efforts in investigating criminal acts which have not yet, or which are presently, occurring." *Downs v. Austin*, 522 So. 2d 931, 934 (Fla. 1st DCA 1988). Disclosure of documents containing lists of de-identified demographic information plainly does not inhibit investigations of criminal acts.

A record is exempt if it is both "active" and constitutes "criminal intelligence information" or "criminal investigative information." *See Woolling v. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000). This exemption was inapplicable to Request 13 for

[4] In its filings below, the PSO did not argue that the requested records were "active criminal investigative information."

two reasons: the de-identified records CAIR-FL requested do not fall within the definition of "criminal intelligence information," and the records at issue were not "active" because they did not pertain to ongoing or reasonably anticipated criminal activities.

The Legislature defines "criminal intelligence information" as "information with respect to an *identifiable* person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." § 119.011(3)(a), Fla. Stat. (2023) (emphasis added). CAIR-FL's record requests did not seek information about "an identifiable person or group," but instead specifically asked for de-identified information. (R.118-119, 135.) Thus, per the Legislature's definition, the requested records cannot constitute "criminal intelligence information."

In addition, the Public Records Act provides that "[c]riminal intelligence information shall be considered 'active' as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities." § 119.011(3)(d)(1), Fla. Stat. (2023). The clear import of the law is that "criminal intelligence information" must relate to specific criminal activities; it does not cover gathering information about individuals who have no known connection to current or future crimes. Such a reading is confirmed by the other references to "criminal intelligence information"

in the Public Records Act, which all cite "criminal intelligence information" in relation to specific crimes. *See* § 119.071(2)(h), Fla. Stat. (2023) (information that would reveal the identity of victims of child abuse or sexual offenses); § 119.071(2)(i), Fla. Stat. (2023) (information that reveals the assets of a victim of crime); § 119.071(2)(m), Fla. Stat. (2023) (information that reveals the identity of a witness to murder).

In this case, there is no evidence that the individuals on the Prolific Offender Lists were committing or about to commit a crime. Even if CAIR-FL had requested "criminal intelligence information," (which it did not), the requests do not pertain to specific criminal activities, so there was no basis for asserting the requested information was "active," as required to rely on Section 119.071(2)(c), Fla. Stat. (2023). *See Metro. Dade Cnty. v. San Pedro*, 632 So. 2d 196, 197 (Fla. 3d DCA 1994) ("reasonable, good faith anticipation of arresting or prosecuting" required for the exemption to be active). The PSO did not point to any ongoing or future crime that it was using the Prolific Offender Lists to investigate. Nor is the purpose of the criminal investigative exemption furthered by withholding the lists.

The objective of the exemption is to protect police investigations by preventing the targets from knowing that they are being investigated. Here, it is disingenuous for the PSO to claim that the Prolific Offender Lists should remain secret, when the PSO itself was sending condescending congratulatory letters to the people who were on

the lists. (R.108-09.) Moreover, some of the lists that CAIR-FL requested had already been given to the Tampa Bay Times. *See Read the Pasco Sheriff's Office response to our investigation*, Tampa Bay Times, (Sept. 3, 2020) https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/sheriffs-response/. In short, there was no confidential investigation to protect, and therefore no reason to invoke this exemption.

2. The Prolific Offender Lists did not fall under the exemption for emergency policies or plans.[5]

The PSO also argued that the exemption in Section 119.071(2)(d), Fla. Stat. (2023) for records regarding emergency preparedness applied to CAIR-FL's Requests 13 and 18. (R.344-46.)[6] This claim stretches the definition of "emergency" far beyond what the Legislature intended. This portion of Section 119.071(2)(d), Fla. Stat. (2023) provides an exemption for "any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical

---

[5] It is unclear whether the trial court found that this exemption also applied to CAIR-FL's requests, as the court did not analyze each exemption separately when it ruled. (R.436:5-23.)

[6] The PSO's argument regarding this exemption has been a moving target through the course of the litigation. Initially, in its response to CAIR-FL's Petition, the PSO only argued that the records were "comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency." (R.244.) Later, in its response to CAIR-FL's Motion for Attorneys' Fees and Costs, the PSO changed tactic and argued that the records were "law enforcement resources compiled pursuant to Florida Statutes, chapter 23." (R.346.) Neither of these arguments has merit.

operations involved in responding to an emergency, as defined in s. 252.34." § 119.071(2)(d), Fla. Stat. (2023). In turn, Section 252.34(4), Fla. Stat. (2023), which is found in the chapter entitled "Emergency Management," defines "emergency" as "any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property." § 252.34(4), Fla. Stat. (2023).

It is clear—based on the statute's definitions of specific types of emergencies—that the Legislature intended this term "emergency" to describe large-scale events that have systemic impacts on an entire community, not individual crimes. For instance, "'Manmade emergency' means an emergency caused by an action against persons or society, including, but not limited to, enemy attack, sabotage, terrorism, civil unrest, or other action impairing the orderly administration of government." § 252.34(7), Fla. Stat. (2023). "'Natural emergency' means an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake." § 252.34(8), Fla. Stat. (2023). "'Public health emergency' means any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents,

biological toxins, or situations involving mass casualties or natural disasters . . . ." § 252.34(11), Fla. Stat. (2023).

Exemptions to public records requests must satisfy a plain and narrowly-construed reading of the statutory language. *See, e.g., Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009) ("[l]egislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning."); *Marino v. Univ. of Fla.*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013) ("exemptions from disclosure are to be construed narrowly and limited to their stated purpose"). The Prolific Offender Lists at issue in Requests 13 and 18 had nothing to do with the types of emergencies articulated in the statute. Employing the principle of statutory construction *esjudem generis*, "where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned." *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1088-89 (Fla. 2005). Here, the examples given in the various definitions of "emergency" limit its extent to widespread, large-impact events. By its plain text and with a narrow construction, the "emergency preparedness" exemption is therefore inapplicable to Requests 13 and 18, which do not pertain to the type of emergencies encompassed by the exemption.

Further, even if the definition of emergency applied here, the exemption still did not support withholding the Prolific Offender Lists because those lists were not

"policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency . . . ." § 119.071(2)(d), Fla. Stat. (2023). They were instead lists of persons whom PSO flagged for monitoring. If the exemption covered any information used to mobilize and deploy law enforcement, virtually every document in the PSO's possession would be exempt, an outcome certainly unsupported by the Legislature's intent.

Finally, the PSO claimed below that the records responsive to Requests 13 and 18 were *also* exempt under Section 119.071(2)(d), Fla. Stat. (2023), as a "comprehensive inventory of state and local law enforcement resources compiled pursuant to part I, chapter 23." (R.346.) A narrow construction is not required to determine that a de-identified list of information pertaining to individuals outside of law enforcement does not constitute an inventory of law enforcement resources. Again, adopting the PSO's interpretation of this language would render all "resources"—an expansive term that could cover virtually any law enforcement document—immune from public records laws.

Moreover, the lists at issue in this case were not "compiled pursuant to part I, chapter 23." Part I, Chapter 23 of the Florida Statutes is the Florida Mutual Aid Act, whose purpose is to effectuate a coordinated response by law enforcement agencies to "natural or manmade disasters or emergencies and other major law enforcement

problems." § 23.121(1), Fla. Stat. (2023). To prepare for such disasters, one of the directives of the Florida Mutual Aid Act is "[t]o prescribe a procedure for the inventory of all law enforcement personnel, facilities, and equipment in the state." § 23.121(1)(d), Fla. Stat. (2023). To this end, inventories of law enforcement resources may be created by the Florida Department of Law Enforcement and local law enforcement agencies. § 23.1231(3)(a) & (b), Fla. Stat. (2023). These are the inventories that are exempt from the Public Records Act, which clearly does not exempt documents such as the Prolific Offender List.

For the foregoing reasons, the information in the Prolific Offender Lists sought by CAIR-FL in Requests 13 and 18 were not exempt pursuant to Sections 119.071(2)(c) or (2)(d), Fla. Stat. (2023). Applying the exemptions in this circumstance would thwart the Public Records Act's purpose of ensuring that "governmental officials and agencies remain accountable to the people." *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 52 (Fla. 5th DCA 2004). The PSO was gathering substantial amounts of information about thousands of individuals for whom there was no evidence of present or future involvement in a crime. Instead, persons were placed on the Prolific Offender Lists based on their prior involvement with the criminal justice system.[7] (R.41, 99.) The PSO's attempts to keep this program

[7] For the Prolific Offender Lists, individuals' prior history was not limited to convictions or arrests; the PSO also added an enhancement to individuals' scores if they reported crime, were the victim of or witness to a crime, or if they were an

in obscurity only reinforces the compelling public interest for disclosure to shed light upon the program.

B. The At-Risk Youth List was Not Exempt from Disclosure Under the Exemptions Asserted by the PSO (Request 60).

The PSO initially asserted that numerous exemptions precluded disclosure of data related to the At-Risk Youth List, including the security and firesafety exemption in Section 119.071(3)(a), Fla. Stat. (2023), the federal Family Educational Rights and Privacy Act (FERPA), Section 1003.53, Fla. Stat. (2023), concerning dropout prevention programs, statutes concerning the confidentiality of juvenile justice and law enforcement records, and the protection of victim's rights under Marsy's Law. (R.347-52.) However, at the hearing on Appellant's motion for fees, the PSO conceded that the only exemption that covered the At-Risk Youth Lists in their entirety was the exemption for security and firesafety.[8] (R.420:19-24, 421:2-5.) And for good reason: to the extent that the PSO could have met its burden of proving that any of the public records that CAIR-FL requested were partially exempt, it was

---

"active gang member," a term that the PSO's Intelligence-Led Policing Manual did not define. (R.41, 99.)

[8] The trial court did not address the other exemptions in its decision. CAIR-FL explained in its briefing below why the other exemptions did not apply, or, to the extent that they did cover some information in the requested documents, why that did not justify withholding the records in their entirety. The PSO now agrees with that position. Indeed, any argument that the other exemptions justified the complete withholding of documents would be inconsistent with the PSO's eventual decision to produce them.

obligated to identify and redact the exempt portion(s) and provide the rest of the records. § 119.07(1)(d), Fla. Stat. (2023). The trial court's finding that the security and firesafety exemption applied to the At-Risk Youth Lists was incorrect. (R.436.)

C. The Security and Firesafety Exemption

It bears repeating that the Public Records Act "is to be construed liberally in favor of openness and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose." *Lee*, 189 So. 3d at 125. Under this standard, the Security and Firesafety exemption in Section 119.071(3)(a), Fla. Stat. (2023), is inapplicable to the At-Risk Youth List. The Security and Firesafety exemption provides that:

> (3) Security and firesafety.--
> (a) 1. As used in this paragraph, the term "security or firesafety system plan" includes all:
> a. Records information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security or firesafety of the facility or revealing security or firesafety systems;
> b. Threat assessments conducted by any agency or any private entity;
> c. Threat response plans;
> d. Emergency evacuation plans;
> e. Sheltering arrangements; or
> f. Manuals for security or firesafety personnel, emergency equipment, or security or firesafety training.

The exemption's purpose is to protect public and private infrastructure. *Critical Intervention Servs., Inc. v. City of Clearwater*, 908 So. 2d 1195, 1196 (Fla. 2d DCA 2005). To that end, only security or firesafety plans dealing with public or private

property are covered. § 119.071(3)(a)(2), Fla. Stat. (2023). Therefore, the exemption bars disclosure of information that, if disclosed, would reveal the security capabilities and vulnerabilities of a physical location. *See*, *e.g.*, *State Attorney's Off. of 17th Jud. Cir. v. Cable News Network, Inc.*, 251 So. 3d 205, 213 (Fla. 4th DCA 2018) (finding the security and firesafety exemption applied to security camera footage); *Marino*, 107 So. 3d at 1233 (finding the security and firesafety exemption did not justify redacting the location of a public facility); *Critical Intervention Servs., Inc.*, 908 So. 2d at 1197 (finding the security exemption applied to residential and business alarm permits).

CAIR-FL's requests for de-identified demographic data of the At-Risk Youth List, on the other hand, had no relationship to security or safety plans for properties, nor did the PSO's eventual disclosure endanger the security of any physical property. (R.135.) The requested information simply did not fall within this public records exemption.

In asserting this exemption, the PSO argued, in conclusory fashion, that the At-Risk Youth list was "used by" the Pasco County Schools to conduct threat assessments in schools. (R.381 ¶¶ 5-6.) However, the PSO produced no evidence of how disclosure of the *de identified information* on the list would impair the safety or security of schools. It was already public knowledge that the At-Risk Youth program existed, and just like the Prolific Offender lists, the data used and the manner in

which children were scored was readily available in the PSO's Intelligence-Led Policing Manual. (R.94-97.) Producing demographic information, unconnected to any particular person, would not have had, and in fact did not have, any impact on safety. The PSO failed to carry its burden to prove otherwise.

CONCLUSION

The exemptions cited by the PSO do not support withholding the records CAIR-FL requested. This was true when the PSO refused to provide the requested records in 2021, when it maintained that position in its Response to Petitioner's Order to Show Cause, and when it reversed course on its position after responding to the Order to Show Cause. Moreover, even if some information contained in the requested records was exempt, the PSO failed to redact the exempt portions and produce the rest. Therefore, The PSO unlawfully refused to permit CAIR-FL to inspect or copy public records related to the Prolific Offender and At-Risk Youth programs.

Accordingly, the trial court erred when it ruled that CAIR-FL was not entitled to reasonable attorneys' fees and costs. Appellant respectfully requests that this Court reverse the trial court's order denying CAIR-FL's Motion for Attorneys' Fees and Costs, find that CAIR-FL is entitled to its reasonable attorneys' fees and costs, and remand this cause back to the trial court to determine the appropriate amount of fees and costs to be awarded.

Dated this 6th day of June, 2024.

Respectfully submitted,

SOUTHERN LEGAL COUNSEL

/s/ Daniel Marshall
Daniel Marshall, Esq.
Florida Bar No. 617210
Dan.Marshall@southernlegal.org
Jodi Siegel, Esq.
Florida Bar No. 511617
Jodi.Siegel@southernlegal.org
1229 NW 12th Ave.
Gainesville, FL 32601
Telephone: (352) 271-8890

SOUTHERN POVERTY LAW CENTER, INC.

/s/ *Sam Boyd*
Sam Boyd, Esq.
Florida Bar No. 1012141
Sam.Boyd@splcenter.org
Carli Raben, Esq.
Florida Bar No. 1036013
carli.raben@splcenter.org
2 Biscayne Blvd., Suite 3750
Miami, FL 33131
Telephone: (305) 537-0574

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND

/s/ *Amia L. Trigg*
Amia L. Trigg*
NAACP Legal Defense & Educational Fund, Inc.
700 14th Street NW, Ste. 600
Washington, DC 20005
Telephone: (202) 682-1300
atrigg@naacpldf.org

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Initial Brief of the Appellant was served via the Florida E-filing Portal this 6th day of June, 2024 on all counsel of record.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Daniel Marshall
Daniel Marshall, Esq.