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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., and MICHAEL BARFIELD,

Petitioners,

v. Case No. 2014-CA-_____

CITY OF SARASOTA, and MICHAEL JACKSON,

Respondents.
_____/

VERIFIED EMERGENCY MOTION FOR TEMPORARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

Petitioners, through counsel, and pursuant to Fla. R. Civ. P. 1.610, file this emergency motion for temporary injunction seeking to enjoin the City of Sarasota and Michael Jackson from disposing of records in contravention of § 119.07(1)(h), Fla. Stat., and to require certain records to be filed under seal with the Clerk of the Court. In support, Petitioners would show the following:

Introduction

1. This is an action seeking a writ of mandamus to compel the production from Detective Michael Jackson of the Sarasota Police Department of public records related to the application for and orders approving the using of Stingray devices. In an effort to shield records relating to a controversial tool used to spy on Floridians without a warrant, the City and Detective Jackson transferred public records to the federal government within days after Petitioners' records request and despite the clear statutory command under § 119.07(1)(h) to preserve records in their possession pending the Court's determination of this controversy. The transferred records also constitute court or judicial records and included applications and orders

submitted to a state court judge without any copies provided to the Clerk of the Court or otherwise retained by the judiciary. To prevent additional records from being disposed of or transferred, emergency relief is necessary.

Facts

2. Respondent, CITY OF SARASOTA, ("City"), is a Florida municipal corporation. The Sarasota Police Department ("SPD") is an administrative agency of the City.

3. Respondent, MICHAEL JACKSON, ("Detective Jackson"), is a detective employed at SPD and has possession of certain records sought by Petitioners.

4. In connection with the transaction of official agency business of SPD, Detective Jackson has made or received certain records relating to applications tendered to the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, for judicial orders to be entered pursuant to the provisions of §§ 934.32 and 934.33, Fla. Stat. ("the records" or "requested records").

5. Based on information and belief, the records are titled "Application Under Seal" and seek authorization from a judge of the Twelfth Judicial Circuit for the installation and use of a pen register and a trap and trace device.

6. Based on information and belief, orders authorizing the use of a trap and trace device are utilized by law enforcement officers, including Detective Jackson, to collect information in criminal investigations, including, but not limited to, cell phone records and cell site information both historical and prospectively in real-time.

7. In addition, trap and trace orders are used to obtain authority to use another device known as a cell site simulator, or "Stingray," to conduct live location tracking of cell phones,

collect identifying information about cell phones including their electronic serial numbers, and intercept certain information pertaining to cell phone communications.

8. Stingray devices are manufactured and sold to law enforcement agencies by the Melbourne, Florida, based Harris Corporation. Stingrays mimic cell service providers' towers and broadcast electronic signals that force cell phones in the area to register their identifying information and location. Stingrays collect information not only about specific targets of investigations, but also about hundreds or thousands of innocent third parties.

9. Based on information and belief, the records are never filed with the Clerk of the Court or retained by any judicial officer. Rather, Detective Jackson maintains exclusive physical custody and control of the records at SPD.

10. On May 19, 2014, Barfield made a request of SPD for records relating to cell phone tracking and sought the following records:

a. Any records made or received by SPD related to the use of cell phone tracking equipment, including, but not limited to, any device known as Stingray or Stingray II;

b. All email communications concerning the use of cell phone tracking equipment, including, but not limited to, any device known as Stingray or Stingray II;

c. Any record relating to equipment or electronic devices used to track or locate cell phones, including, but not limited to, any device known as Stingray or Stingray II;

d. Any purchase orders or financial transactions related to the purchase of cell phone tracking equipment, including, but not limited to, purchases or lease agreements from the Harris Corporation, its agents or subsidiaries;

e. Any record indicating that cell phone tracking equipment, including, but not limited to any device known as Stingray or Stingray II; and

f. Any non-disclosure agreement between the SPD and any entity relating to cell phone tracking equipment, including, but not limited to, any device known as Stingray or Stingray II.

See Exhibit 1, attached hereto.

11. On or about May 22, 2014, Mr. Barfield contacted Detective Jackson and requested an appointment to inspect records in his possession relating to cell phone tracking, including the trap and trace applications and orders.

12. Detective Jackson acknowledged to Mr. Barfield that he had sole possession, custody and control of the trap and trace applications and orders and scheduled an appointment for Mr. Barfield to inspect same at SPD on Tuesday, May 27, 2014, at 2:30 p.m.

13. On Tuesday, May 27, 2014, just a few hours before the scheduled inspection of the records, Assistant City Attorney Eric Werbeck sent Mr. Barfield an email stating that a federal agency instructed the City not to release the requested records because any "trap and trace" orders kept by Detective Jackson were pursuant to his duties as a Special Deputy with the U.S. Marshal's Service. See Exhibit 2, attached hereto.

14. On May 28, 2014, Mr. Barfield requested Mr. Werbeck to comply with the provisions of § 119.07(1)(h), Fla. Stat., to maintain the records until such time as a court of competent jurisdiction could determine whether or not the records are public records subject to inspection under Chapter 119. See Exhibit 3, attached hereto.

15. In a telephone conversation with Mr. Barfield on May 28, 2014, and again on May 29, 2014, Mr. Werbeck stated that he could not guarantee that the requested records would be maintained exclusively in the custody of Detective Jackson or that the provisions of § 119.07(1)(h), Fla. Stat., apply to the records.

16. § 119.07(1)(h) provides as follows:

> Even if an assertion is made by the custodian of public records that a requested record is not a public record subject to public inspection or copying under this subsection, the requested record shall, nevertheless, not be disposed of for a

> period of 30 days after the date on which a written request to inspect or copy the record was served on or otherwise made to the custodian of public records by the person seeking access to the record. If a civil action is instituted within the 30-day period to enforce the provisions of this section with respect to the requested record, the custodian of public records may not dispose of the record except by order of a court of competent jurisdiction after notice to all affected parties.

17. § 119.07(1)(h) is absolute and the City and Detective Jackson have no discretion in complying with its explicit terms. Even if the records are not considered "public records" within the meaning of Chapter 119, there is a duty not to dispose of the records once a request has been to the custodian.

18. On or about May 30, 2014, the City notified Petitioners that a federal agency had physically moved the records in Detective Jackson's possession from Sarasota to an unknown location. See Exhibit 4, attached hereto.

19. In a second email dated May 30, 2014, the City sought clarification on the remaining records identified in response to the original May 19th request.[1] See Exhibit 5, attached hereto.

20. Based on information and belief, the City and Detective Jackson have possession of digital records relating to the trap and trace applications. For example, when Detective Jackson drafted any applications and proposed orders, SPD's servers would likely retain an electronic version of the documents. Additionally, when Detective Jackson sent a signed order to any cell phone service provider, the record would have been transmitted via email or facsimile. The transmission via email or facsimile would remain on SPD's servers or Detective Jackson's individual computer.

21. Petitioners reasonably believe that if the City or Detective Jackson identify any additional records relating to the Stingray technology or trap and trace applications and orders

[1] As indicated in the email, the original records request was supplemented with keyword search terms.

submitted to a state court judge, they will notify the federal government, who will again take custody of public records as well as judicial court records not maintained anywhere else.

22. Under these circumstances, there is a legitimate concern that any additional records identified in response to Petitioners' records request will be transferred to the custody of federal agents before this Court makes a determination of whether they are or are not a public record or alternatively, a court or judicial record.

23. The applications and orders submitted to a judge under §§ 934.32 and 934.33, Fla. Stat., are records of the judicial branch within the meaning of Fla. R. Jud. Admin. Rule 2.420(1).

24. The proper custodian of records of the judicial branch is the Clerk of Court pursuant to § 28.13, Fla. Stat. and Rule 2.420(d)(1), Fla. R. Jud. Admin. Alternatively, the Chief Judge or each individual judge is the custodian under Rule 2.420(3).

25. Petitioners have a substantial likelihood of success on the merits. As set forth in the accompanying Memorandum of Law, § 119.07(1)(h) is absolute and bars the disposition or transfer of any record once a records request is made, even if the custodian contends that it is not a public record or otherwise subject to inspection.

26. Petitioners will suffer irreparable injury to their constitutional right to inspect public records or, alternatively, judicial records, unless the Court acts to restrain the unlawful disposition of such records.

27. Petitioners have no other adequate remedy at law. Once records are transferred to a federal agency, a state court is powerless to order their return.

28. The requested relief advances a public interest as enforcement of the Public Records Act promotes a public interest of the highest order.

29. For these reasons, the City and Detective Jackson should be enjoined from violating the provisions of § 119.07(1)(h) and not dispose of or transfer the records except by court order.

30. Petitioners further seek the entry of an Order requiring the City and Detective Jackson to deposit the requested records into the custody of the Clerk of the Court under seal until further order of the Court.

31. Pursuant to rule 1.610(a)(1)(B), the undersigned certify that a copy of this motion was furnished electronically and via hand delivery to the City Attorney, Robert Fournier, (Robert.fournier@sarasotagov.com), 1 S. School Avenue, Suite 700, Sarasota, Florida 34237, simultaneously upon filing with the Clerk of the Court via the e-Portal. No additional notice should be required given the likelihood that Respondents will improperly dispose of public records in their possession.

WHEREFORE, Petitioners request the following relief:

A. enter an Order enjoining the City and Detective Jackson from refusing to comply with the provisions of § 119.07(1)(h) and not dispose of or transfer the records except by court order; and

B. enter an Order requiring the City and Detective Jackson to deliver the requested records into the custody of the Clerk of the Court to be maintained under seal until further order of the Court.

Memorandum of Law

Under Rule 1.610, a temporary injunction may be granted only if the movant establishes: (1) a substantial likelihood of success on the merits; (2) likelihood of irreparable harm; (3) unavailability of an adequate legal remedy; and (4) considerations of the public interest which

support the entry of the injunction. *Masters Freight, Inc. v. Servco, Inc.*, 915 So. 2d 666 (Fla. 2d DCA 2005). As demonstrated below, Petitioners have met the requirements for entry of the requested injunction.

1. Substantial likelihood of success

Petitioners have a substantial likelihood of success on the merits. § 119.07(1)(h), Fla. Stat., is absolute and requires an agency to refrain from disposing of records in its possession even when it contends that the records are not a public record once a request has been made. After a court action is filed, a custodian may not dispose of the records until such time as a court of competent jurisdiction enters an order. Transferring records to a federal agency without retaining copies of same would be an unlawful disposition of such records within the meaning of § 119.07(1)(h).

Numerous Florida appellate decisions have held that it is improper for an agency to transfer records in its possession that are the subject of a public records request. The public's ability to access records inherently turn on the maintenance of those records. The constitutional mandate of access is meaningless if government actors can simply dispose of the records.

Most recently, in *Chandler v. City of Sanford*, 121 So. 3d 657 (Fla. 5th DCA 2013), the Fifth District Court of Appeal held that an agency who is the custodian of records may not avoid compliance with Chapter 119 by transferring the records to another agency. In *Chandler*, the state attorney instructed the Sanford Police Department not to release records in its possession relating to the George Zimmerman case. Chandler brought a mandamus action but the trial court dismissed the petition because the state attorney, not the city, had possession of the records. The appellate court reversed, holding that instructions not to release records by another agency was

not a valid defense to an action seeking the production of records in the city's possession at the time the records request was made. The Court stated:

> Given the aggressive nature of the public's right to inspect and duplicate public records, a governmental agency may not avoid a public records request by transferring custody of its records to another agency. *See Tober v. Sanchez*, 417 So.2d 1053, 1054 (Fla. 3d DCA 1982). In the case at bar, the City asserts that it was under an order from the executive branch, specifically the State Attorney, not to produce the original, unredacted email. However, despite this instruction from the State Attorney, as a matter of law, the City remained the governmental entity responsible for the public records. While the court is sympathetic that the City was placed between a proverbial "rock and a hard place," the City cannot be relieved of its legal responsibility for the public records by transferring the records to another agency.

121 So. 3d at 660.

Similarly, in *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), records relating to bus accidents were transferred to another agency after receipt of a public records request. The Third District rejected the suggestion that a custodian may transfer actual physical custody of the records and thereby avoid compliance with a request for inspection under the Public Records Act. The Court stated:

> To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction.

Id. at 1054. See also *Wallace v. Guzman*, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) ("public records cannot be hidden from public scrutiny by transferring physical custody of them to the Agency's attorneys."); *In re Grand Jury Investigation Spring Term 1988*, 543 So. 2d 757, 759 (Fla. 2d DCA 1989) ("we cannot allow the governmental agencies involved to avoid disclosure merely by transferring [public records] away."); *Tribune Co. v. Cannella*, 438 So. 2d 516, 523 (Fla. 2d DCA 1983) *decision quashed on other grounds*, 458 So. 2d 1075 (Fla. 1984) (city

improperly played a "shell game" by transferring the requested records to the state attorney's office).

Here, the City and Detective Jackson claim that the records are not a public record and belong to the U.S. Marshal. Assuming, arguendo, the Court ultimately agrees with this assertion, that does not relieve the City and Detective Jackson from their obligation under § 119.07(1)(h) as that statute makes it clear the duty to retain possession of the records applies even if the custodian believes the records are not a public record.

2. Irreparable injury

Petitioners have a constitutional right to inspect public records. The deprivation of that right constitutes irreparable injury. Respondents' failure to comply with the provisions of Chapter 119, constitutes irreparable injury, including: 1) denying Petitioners the right to inspect public records; 2) refusing to assert statutory exemptions as the basis for withholding records, and 3) not disposing of records subject to a records request even when the custodian asserts that the records are not a public record. See *Grapski v. City of Alachua*, 31 So. 3d 193, 198 (Fla. 1st DCA 2010) (citing *Daniels v. Bryson*, 548 So.2d 679, 680 (Fla. 3d DCA 1989) ("The impermissible withholding of documents otherwise required to be disclosed constitutes, in and of itself, irreparable injury to the person making the public records request.")).

3. No adequate remedy

Petitioners have no other adequate remedy at law. While this Court has jurisdiction and authority over the City and Detective Jackson to enter orders enforcing the Public Records Act and requiring judicial records to be delivered to the custody of the Clerk, it has no authority to order a federal agent to produce records. See *State v. Tascarella*, 580 So. 2d 154, 156 (Fla. 1991)

("Federal employees may not be compelled to obey subpoenas contrary to their federal employer's instructions under valid agency regulations.").

4. Public interest

The requested relief advances a public interest. "Florida courts construe the public records law liberally in favor of the state's policy of open government." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009). "Florida's public records law and its companion, the open public meetings law, promote a state interest of the highest order." *Byron, Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg*, 360 So. 2d 83, 97 (Fla. 1st DCA 1978), *reversed on other grounds sub nom. Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).

5. Judicial records

To the extent that a portion of the requested records constitutes applications submitted to a state court judge of the 12th Judicial Circuit, and orders entered thereon, they constitute records of the judicial branch. Fla.R.Jud.Admin. 2.420(b)(1) (defining "Records of the judicial branch" to be "all records … made or received in connection with the transaction of official business by any judicial branch entity"); Fla.R.Jud.Admin. 2.420(c)(6) (listing "[c]opies of arrest and search warrants and supporting affidavits" among the "records of the judicial branch," which are confidential); Fla.R.Jud.Admin. 2.420(b)(1)(A) (defining "court records" as "the contents of the court file"). Having invoked judicial authority and process, the government should not be allowed to hide the ball or play a shell game with the very judicial records authorizing it to take official governmental action.

With few closely guarded exceptions, the public has the right to access judicial records. *See* Art. I, § 24(a), Fla. Const. ("Every person has the right to inspect or copy any public record

made or received in connection with the official business of any …officer [within the] judicial branch[] of government."). The Florida Supreme Court affirmed this constitutional mandate and "strongly disfavor[s] court records that are hidden from public scrutiny." *In re Amendments to Florida Rule of Judicial Admin. 2.420-Sealing of Court Records & Dockets*, 954 So. 2d 16 (Fla. 2007). Generally, the "public shall have access to all records of the judicial branch of government" unless they are deemed confidential. Fla.R.Jud.Admin. 2.420(a).

Section 934.33(1), Fla. Stat., the vehicle by which Detective Jackson applied for and obtained court order(s) allowing him to intercept cellular transmissions using a Stingray, provides that "[u]pon application made under s. 934.32, the court *shall enter an ex parte order* authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the applicant specified in s. 934.32(1) has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." Furthermore, "*[a]n order* authorizing or approving the installation and use of a pen register or a trap and trace device must direct that: (a) *The order be sealed* until otherwise ordered by the court…" § 934.33 (4)(a), Fla. Stat. (emphasis added). Thus, chapter 934 clearly provides that (1) an order shall be entered, and (2) that the order be sealed. However, neither the applications for nor orders approving Stingray use are in fact maintained by the Court as judicial records.

Moreover, there is not even a case number assigned to the application and order, so there is no "docket" created. Without a case number or docket, there is no point of entry to the proceeding. Courts' dockets are often the public's sole window into court proceedings, even when the filings themselves remain shielded from view. The docket is the entry point for the public and press to our courts' proceedings. *See, e.g.*, *United States v. Valenti*, 987 F.2d 708, 715

(11th Cir. 1993) (holding a public docket was necessary to protect the public's and the media's constitutional rights of access to criminal proceedings); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (holding that motions to seal plea agreements, for which there is a First Amendment right of access, must be publicly docketed); *In re State Record Co*., 917 F.2d 124, 128-29 (4th Cir. 1990) (requiring public docketing of a criminal proceeding because of the constitutional right of access); *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co*., 898 F.2d 1371, 1377 (8th Cir. 1990) (ordering court to produce a redacted public docket of a sealed case to protect at least a common law right of access); *Stone v. Univ. of Maryland Med. Sys. Cor*p., 855 F.2d 178, 181 (4th Cir. 1988) (requiring district court to maintain a public docket where parties have at least a common law right of access to proceedings); *In re Knoxville News-Sentinel Co*., 723 F.2d 470, 475-76 (6th Cir. 1983) (admonishing district court to publicly docket motions to seal proceedings where there is at least a common law right of access).

The appearance of an entry on a docket provides public notice that something has occurred, allowing the opportunity for an interested observer to take steps to be heard or at least to follow the proceeding. As early as the 17th century, it was recognized that public access to criminal trials was necessary for the proper functioning of the process because it ensured that the proceedings were conducted fairly. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). Access discouraged misconduct by participants and decisions based on secret bias or partiality. *Id*. In this regard, it has long been recognized that "sunlight is . . . the best of disinfectants; electric light the most efficient policeman." L. Brandeis, Other People's Money 62 (1933). Public scrutiny enhances the quality and safeguards the integrity of the criminal trial process. *See Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982).

Even if section 934.33 presumes the sealing of the order, the act of sealing itself must be public so that the public knows that *something* has been made secret by the court. "Public scrutiny of the judicial process is essential 'not because the controversies of one citizen with another [were] of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility .... '" Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to Be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 Fla. Coastal L. Rev. 163, 169 (2009) (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884)).

Under the procedures of this Court challenged here, all traces of occurrence of the Stingray applications and orders vanish into the hands of law enforcement. The unprecedented level of secrecy that shrouds law enforcement's use of the judicial process to intercept our private cellular transmissions through these devices violates the foundation of the Rules of Judicial Administration: if the Court and its Clerk maintain no judicial records of proceedings that lead to the wholesale and surreptitious capture of personal cellular transmissions, then there is no accountability for the process, and no meaningful opportunity for review. Local secret FISA[2] courts will spring up wherever law enforcement wishes, and will remain free from scrutiny or accountability, even as the technology that allows secretive interception of private communications and surveillance of private citizens grows exponentially.

Courts have no authority to conduct judicial proceedings in secret absent strict compliance with Rule 2.420, Fla. R. Jud. Admin. And nothing in the rule authorizes a court to dispense *altogether* with maintaining court records, and allowing the documents to remain in the sole custody and control of the law enforcement officer who applied for the trap and trace order.

[2] The United States Foreign Intelligence Surveillance Court, FISC, commonly called "FISA," was established pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a.

In 2007, and in response to media reports of "hidden cases and secret dockets" referred to as "supersealing,"[3] the Florida Supreme Court adopted rules relating to confidential court records and the process by which those records are designated as confidential. *See In re Amendments to Florida Rule of Judicial Admin. 2.420-Sealing of Court Records & Dockets,* 954 So. 2d 16, 17 (Fla. 2007) *("Sealing of Court Records & Dockets").* The Court noted that "our rules strongly disfavor court records that are hidden from public scrutiny." *Id.*

Failing to maintain court records is even more offensive than sealing; the practice keeps the public from even knowing that this court acted in the first place. The Florida Supreme Court determined that the practice of supersealing is "clearly offensive to the spirit of laws and rules that ultimately rest on Florida's well-established public policy of government in the sunshine." *Sealing of Court Records & Dockets* at 17. In response to the practice of supersealing, the Florida Supreme Court adopted emergency procedures which, among other requirements, mandated that "[a] sealing order issued by a court must state with specificity the grounds for sealing and the findings of the court that justify sealing [and] [a]ll sealing orders must be published to the public." *Sealing of Court Records & Dockets* at 17-18. *See also* Rule 2.420(e)(3)(A)-(H) and Rule 2.420(e)(4).

But even before there can be records that are "supersealed," there must first be court records that are maintained within the court's jurisdiction, and not in the sole possession of the law enforcement agent who sought and obtained them. Here, however, there is nothing to seal, because no records were maintained. But for Mr. Barfield's inquiry, it is unlikely anyone would

[3] See Dan Christensen & Patrick Danner, *Concealed Cases Must Get Review, Chief Justice Says,* Miami Herald, Oct. 5, 2006, at lA, available at 2006 WLNR 17233826; see Patrick Danner & Dan Christensen, *Three Broward Judges Failed to Obey Law with Sealed Cases,* Miami Herald, Apr. 21, 2006, at 3B (explaining that supersealing is the "practice of hiding all traces of a case by removing it from the public docket").

have known that court records were missing in action. Florida's public policy, as reflected by that rule, disfavors secret dockets. See 34 FLA. BAR NEWS 7 (April 1, 2007) ("A docket or case number should never be made confidential - dubbed 'super-sealing' - even if the entire court file sealing is supported by law. There should always be an unsealed order associated with the case number to ensure the public is always aware a case file exists and why a judge ordered the record or portions of the record made confidential.").

Courts around the country are learning about law enforcement abuses involving lack of candor in applications for judicial orders that the government seeks to rely on to conduct Stingray surveillance. For example, documents obtained by the ACLU from the United States Attorney's Office for the Northern District of California reveal that federal law enforcement agents had been routinely using Stingray technology once pen register/trap and trace orders were obtained, but not disclosing their intent to use Stingrays to federal magistrate judges when applying for the orders. *See* Email from Miranda Kane to USACAN-Attorneys-Criminal (May 23, 2011 11:55 AM), *available at* http://goo.gl/4ClHMB ("It has recently come to my attention that many agents are still using [Stingray] technology in the field although the pen register application does not make that explicit."). Magistrate judges in the district expressed concerns after learning of this practice, leading the local U.S. Attorney's office to revise its policy. *Id.*

When courts are apprised of the government's intent to use a Stingray, they have denied the government's application for a statutory order to do so. Thus, a federal district court in Texas held that the government's use of Stingray equipment under a pen register/trap and trace application was improper because a warrant was required. See *In re the Application of the U.S. for an Order Authorizing the Installation & Use of a Pen Register & Trap & Trace Device*, 890 F. Supp. 2d 747, 752 (S.D. Tex. 2012). That court also criticized the government's application

for failing to "explain the technology, or the process by which the technology will be used to engage in the electronic surveillance to gather the Subject's cell phone number." *Id.* at 749. In another case, a federal district court in California denied a government application for a pen register/trap and trace order to use an earlier version of a Stingray device. *In re Application for an Order Authorizing Use of a Cellular Telephone Digital Analyzer*, 885 F. Supp. 197, 201 (C.D. Cal. 1995) ("The order sought … would not insure sufficient accountability. . . . [D]epending upon the effective range of the digital analyzer, telephone numbers and calls made by others than the subjects of the investigation could be inadvertently intercepted").

The proper standard upon which law enforcement can engage in real-time tracking of cell phones is an issue of significant public concern, and is currently before the Florida Supreme Court. In *Tracey v. State*, 69 So. 3d 992, 1000 (Fla. 4th DCA 2011), *review granted*, 116 So. 3d 1264 (Fla. 2013), the Fourth District Court of Appeal held that a court order on a trap and trace application did not authorize the collection of real time cell site location information (CSLI), but violation of the statute did not allow for any exclusionary remedy. *Id*. at 1000. The Fourth District noted the split among federal courts over whether probable cause or some less evidentiary showing was required for technology that went beyond the collection of traditional pen register/trap and trace information. *Id*. at 999. The question of government candor in seeking pen register orders is also implicated in *Tracey*, as the government applied for a pen register/trap and trace order without disclosing that it intended to conduct real-time tracking of the suspect's phone.

Without access to properly filed judicial records—or at least to dockets indicating the existence of those records—the public lacks information about invasive government surveillance practices that are raising difficult questions for courts. As the Fourth District observed,

"[t]echnology evolves faster than the law can keep up, extending the search capabilities of law enforcement and transforming our concept of privacy." *Tracey*, 69 So. 3d at 996. The threats to individual privacy posed by emerging technologies call for robust public and judicial debate, but that debate cannot take place in the midst of gross violations of open records laws. The debate over legal limits on the government's use of Stingray technology is NOT at issue in this proceeding. What is at stake is the integrity of records belonging to the judicial branch in that debate, which cannot be compromised by the government's desire to keep Stingray technology secret.

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VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing Emergency Petition for Writ of Mandamus and that the facts stated in it are true to the best of my knowledge and belief.

MICHAEL BARFIELD

STATE OF FLORIDA

COUNTY OF SARASOTA

Sworn to (or affirmed) and subscribed before me this 3RD day of JUNE, 2014, by Michael Barfield.

Signature of Notary Public – State of Florida

ERIC J. ROSSI

Name of Notary Typed, Printed, or Stamped

NOTARY PUBLIC STATE OF FLORIDA (NOTARY SEAL) ERIC J. ROSSI MY COMMISSION # FF 083554 EXPIRES: January 15, 2018 Bonded Thru Budget Notary Services

Personally Known X OR Produced Identification _____

Type of Identification Produced _____

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Respectfully submitted,

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Attorney for Michael Barfield

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was filed with the Clerk of Court via the e-Portal on June 3, 2014, and served electronically and via Hand Delivery to: City Attorney, Robert Fournier, (Robert.fournier@sarasotagov.com), 1 S. School Avenue, Suite 700, Sarasota, Florida 34237, simultaneously upon filing with the Clerk of the Court via the e-Portal.

/s/ Andrea Flynn Mogensen
ANDREA FLYNN MOGENSEN