

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

ANTHONY LORENZO,

Plaintiff,

v.

CASE NO.: 2008 CA 8108 SC

CITY OF VENICE, et al.,

Defendants.

**AMENDMENT TO SECOND EMERGENCY MOTION TO PRESERVE
EVIDENCE AND ALLOW INSPECTION OF PUBLIC RECORDS**

Plaintiff, ANTHONY LORENZO, by and through undersigned counsel, and pursuant to Rule 1.610, Fla. R. Civ. P. (2008), files this amendment to the second motion for emergency relief to require Airport Advisory Board members to preserve evidence and allow the inspection of public records, and in support thereof would state as follows:

1. Plaintiff has made two separate requests to inspect public records. The first request was dated May 20, 2008, and directed to members of the City Council. See Exhibit A, attached hereto. The second request was dated June 12, 2008, and directed to members of the Airport Advisory Board. See Exhibit B, attached hereto.

2. In an email to the City Clerk dated May 31, 2008, former Airport Advisory Board member Nicholas Carlucci acknowledged that he deleted electronic public records in his custody and control, stating:

I regret that I am unable to comply with your request as I routinely delete my emails. I do this at least once a month and more often than not on a weekly basis.

See Exhibit C, attached hereto.

3. In an email to the City Clerk dated May 29, 2008, former Airport Advisory Board member Robert Bartanowicz stated “I routinely delete my email files.” See Exhibit D, attached hereto.

4. In an email to the City Clerk dated May 27, 2008, Airport Advisory Board member Susan Balsinger stated that she could not comply with the request to produce public records because the emails “cannot be forwarded or restored due to the age.” See Exhibit E, attached hereto. Ms. Balsinger requested the City’s IS department to assist her in retrieving those public records.

5. Based on the responses of other current and former members of the Airport Advisory Board, as well as former Mayor Fred Hammett, it is unclear whether those individuals are unable to comply with the request to inspect public records because they deleted emails or simply because there are no emails responsive to the records request.

6. State law and the written policy of the City of Venice require all board members to retain custody of email for at least three years.

7. To avoid piecemeal adjudication, the undersigned has attempted to identify any and all individuals associated with the City of Venice who have failed to preserve public records that are the subject of this lawsuit. At this writing, at least two members of the City Council have publicly admitted to violating the Sunshine Law. In addition, at least three individuals who are either City Council members or Airport Advisory Board members have admitted in writing to deleting public records. The preservation of public records is critical to this lawsuit. Lorenzo has alleged that City Council members and others have routinely violated the Sunshine Law by communicating via email on public business pending before the City Council and various City boards. The spoliation of evidence will significantly impede Plaintiff’s ability to identify each

and every Sunshine violation. Unless this Court takes immediate action to require the City to locate and preserve all public records,¹ evidence of additional Sunshine Law violations will be forever lost. Moreover, Plaintiff and the public will be irreparably injured by the spoliation of evidence and destruction of public records. Indeed, substantial evidence and public records may have already been lost.

8. Because public records have already been destroyed, Plaintiff seeks the entry of an Order requiring the City Clerk to take possession of all computers utilized by Airport Advisory Board member Nicholas Carlucci and Robert Bartanowicz. Notwithstanding the fact that an email may have been deleted through a software program, it is possible for a forensic computer technician to recover the deleted emails. In a separate Order dated June 13, 2008, this Court entered an Order requiring various members of the City Council to immediately surrender their personal computers for a forensic examination. Given the admissions relating to the destruction of public records and violations of the Sunshine Law, it is both necessary and appropriate for the Court to enter an Order preserving any evidence and public records that might be retrieved from computers in order to allow the City Clerk and the public the opportunity to recover the lost emails.

9. The granting of the requested relief furthers a substantial public interest. Plaintiff has a likelihood of prevailing on the merits in that the law clearly requires public officials to maintain public records under section 119.021, Fla. Stat. Additionally, the evidence shows a

¹Although the records request included those emails maintained on the board members non-City email accounts, those records are clearly “public records” within the meaning of section 119.011(11), Fla. Stat., because it is undisputed that many, if not all, of the board members have utilized non-City email accounts to discuss public business. *See State v. City of Clearwater*, 862 So. 2d 149, 154 (Fla. 2003) (in evaluating what is a public record, “[t]he determining factor is the nature of the record, not its physical location.”).

substantial likelihood of success on the merits in that it is clear that evidence and public records have already been destroyed.

10. Defendants have been placed on notice of the alleged Sunshine violations, Plaintiff's Verified Emergency Motion for Temporary Injunction, and Plaintiff's public records request, additional notice should not be required before the Court grants emergency relief in that additional public records may be destroyed before this Court can schedule a hearing with notice to all affected parties.

11. This Court has jurisdiction to compel a custodian of public records to make such records available for inspection under section 119.07, Fla. Stat., and its power to issue a writ of mandamus under art V, sec. 5(b), Fla. Const., and Rule 1.630, Fla. R. Civ. P. (2008). *See Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2005). Plaintiff has a clear legal right to the performance of the act requested (inspection of public records), and no other adequate remedy at law. This Court also has jurisdiction to enter a temporary injunction under Rule 1.610, Fla. R. Civ. P. (2008), to prevent the irreparable injury that would be caused to the public if additional public records are destroyed.

12. No bond should be required for the entry of the requested Order. It is the duty of public agencies, and those acting on behalf of public agencies, to provide access to public records. *Timoney v. City of Miami Civilian Investigative Panel*, 917 So.2d 885, 886 (Fla. 3d DCA 2005). Plaintiff should not be required to post a bond to exercise his right to inspect public records. For that matter, plaintiff should not be obligated to incur expense to forensically recover public records that were deleted in violation of state law, as well as the City's express written policy governing retention of such records. If a citizen were obligated to pay such

expenses merely to exercise his right to inspect public records, it would frustrate the express purpose behind the statute.

13. Plaintiff has retained the undersigned counsel for the purpose of bringing this motion and seeking injunctive, declaratory, mandamus, and emergency relief before the Court. Plaintiff is entitled to an award of attorney's fees and costs pursuant to section 119.12, Fla. Stat.

WHEREFORE, Plaintiff respectfully prays this Honorable Court grant the following relief:

A. Hold an accelerated and immediate emergency hearing pursuant to section 119.11, Fla. Stat.;

B. Enter an order requiring the Clerk of the City of Venice to take immediate possession of all computers, laptops, or other electronic devices utilized by Airport Advisory Board members Nicholas Carlucci, Robert Bartanowicz, and to preserve such equipment pending further Order of the Court;

C. Enter an order prohibiting all board members from deleting or destroying any electronic records and email communications;

D. Enter an order requiring the Clerk of the City of Venice and all board members to make available all public records in their possession, custody or control which is the subject of Plaintiff's June 12, 2008, public records request;

E. Enter an Order requiring all former and current Airport Advisory Board members to immediately state in writing:

1. whether there are any records in their custody, control or possession which are responsive to the public records request dated June 12, 2008;

2. whether there are any records which are responsive to the public records request dated June 12, 2008, that have been deleted;

3. the location and description of any computers utilized by such individuals for the purpose of making or receiving any records pursuant to law or ordinance or in connection with the transaction of official business by the Airport Advisory Board;

F. Entering an order reserving jurisdiction to determine attorneys fees and costs; and

G. Such further relief as the Court deems necessary.

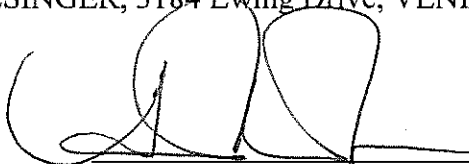
Respectfully submitted,



ANDREA FLYNN MOGENSEN, Esquire
The Law Office of Andrea Flynn Mogensen, P.A.
200 South Washington Boulevard, Suite 5
Sarasota FL 34236
Telephone: 941.955.1066
Fax: 941.955.1008
Florida Bar No. 0549681

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile and by Regular U.S. Mail on June 18, 2008, to: DALE SCOTT, Bell, Roper & Kohlmyer, P.A., 2707 E. Jefferson Street, Orlando, FL 32803; JON PREIKSAT, 17 Gulf Manor Drive, Venice, FL 34285; DAN BOONE, 1001 Avenida Del Circo, Venice, FL 34285; NICHOLAS CARLUCCI, 1335 Horizon Road, Venice, FL 34293-6229; ROBERT BARTANOWICZ, 1237 Sleepy Hollow Rd., Venice, FL 34285; SUSAN BALSINGER, 3184 Ewing Drive, VENICE, FL 34292.



ANDREA FLYNN MOGENSEN, Esquire

THE LAW OFFICE OF
ANDREA FLYNN MOGENSEN, P.A.

200 SOUTH WASHINGTON BOULEVARD - SUITE 5 - SARASOTA, FLORIDA 34236

TELEPHONE: 941-955-1066

ANDREA@SARASOTACRIMINALLAWYER.COM

FACSIMILE: 941-955-1008

May 20, 2008

VIA EMAIL & FACSIMILE

Lstelzer.ci.venice.fl.us
(941) 480-3031

Lori Stelzer, City Clerk
City of Venice
401 W Venice Avenue
Venice, FL 34285

Dear Clerk:

This letter shall constitute our request under section 119.07, Fla. Stat., for the following records:

1. All email communications to and from council members, including non-city account emails utilized by council members, for the period beginning November 14, 2007, through the date of receipt of this letter, including any email attachments.

For purposes of this request, the term "records" shall have the statutory definition set forth in section 119.011(11), Fla. Stat.

If you are contend that any record, or portion thereof, is exempt from inspection, please state in writing the basis for the exemption and include the applicable statutory exemption. See section 119.07(1)(c), Fla. Stat. Additionally, pursuant to the requirements of section 119.07(1)(d), Fla. Stat., we hereby request that you explain in writing and with particularity the reasons for your conclusion that the record is confidential or exempt.

We would direct your attention to the following statutory requirements set forth in section 119.07(1), Fla. Stat.:

(f) 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.

Exhibit A

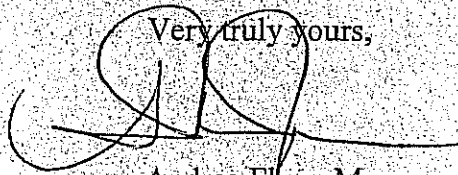
(g) The absence of a civil action instituted for the purpose stated in paragraph (e) does not relieve the custodian of public records of the duty to maintain the record as a public record if the record is in fact a public record subject to public inspection and copying under this subsection and does not otherwise excuse or exonerate the custodian of public records from any unauthorized or unlawful disposition of such record.

If any of the requested documents are maintained in a common-format electronic-medium, please provide these documents in such electronic medium and not in paper form. For purposes of this request, common electronic-formats include (1) American Standard Code for Information Interchange ("ASCII"), (2) email files formatted in Microsoft Outlook known as a .pst file; (3) files formatted in one of the Microsoft Office Suite, Corel Suite, OpenOffice Suite, or IBM's Lotus Suite applications (.doc, .xls, .ppt, .mdb, .wpd, etc.); (4) a text file (.txt), or (5) hypertext markup language (.html) or similar web page language. This is the preferred format. However, if any of the requested documents are only maintained or can only be produced as electronic images, for example a portable document format (.pdf), then as an alternative, we request this electronic-image format. See §119.01(2), Fla. Stat.

By copy of this letter to the City Attorney and all council members, we are requesting that all emails, including emails sent to and from non-city email accounts, be preserved

If you have any questions about the nature or extent of this request, please do not hesitate to contact our office.

Very truly yours,



Andrea Flynn Mogensen

cc: Mayor Ed Martin (emartin.ci.venice.fl.us)
Sue Lang (slang.ci.venice.fl.us)
Vicki Noren (vnoren.ci.venice.fl.us)
Ernie Zavodnyik (ezavodnyik.ci.venice.fl.us)
John Simmonds (jsimmonds.ci.venice.fl.us)
John K. Moore (jmoore.ci.venice.fl.us)
Ricky Tacy (rtacy.ci.venice.fl.us)
Martin Black (mblack.ci.venice.fl.us)

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ANDREA@SARASOTACRIMINALLAWYER.COM

FACSIMILE: 941-955-1008

June 12, 2008

VIA EMAIL & FACSIMILE

Lstelzer@ci.venice.fl.us

(941) 480-3031

Eori Stelzer, City Clerk
City of Venice
401 W. Venice Avenue
Venice, FL 34285

Dear Clerk:

This letter shall constitute a request under section 119.07, Fla. Stat., for the following records:

1. All email communications to and from members of the Airport Advisory Board, including non-city account emails utilized by board members, for the period beginning July 1, 2005, through the date of receipt of this letter, including any email attachments.

For purposes of this request, the term "records" shall have the statutory definition set forth in section 119.011(11), Fla. Stat.

If you are contend that any record, or portion thereof, is exempt from inspection, please state in writing the basis for the exemption and include the applicable statutory exemption. See section 119.07(1)(e), Fla. Stat. Additionally, pursuant to the requirements of section 119.07(1)(f), Fla. Stat., we hereby request that you explain in writing and with particularity the reasons for your conclusion that the record is confidential or exempt.

We would direct your attention to the following statutory requirements set forth in section 119.07(1), Fla. Stat.:

(h) 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.

Exhibit B

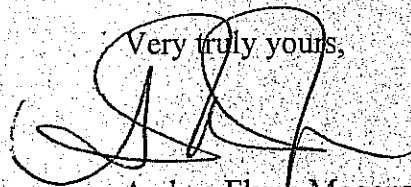
(i) The absence of a civil action instituted for the purpose stated in paragraph (g) does not relieve the custodian of public records of the duty to maintain the record as a public record if the record is in fact a public record subject to public inspection and copying under this subsection and does not otherwise excuse or exonerate the custodian of public records from any unauthorized or unlawful disposition of such record.

If any of the requested documents are maintained in a common-format electronic-medium, please provide these documents in such electronic medium and not in paper form. For purposes of this request, common electronic-formats include (1) American Standard Code for Information Interchange ("ASCII"), (2) email files formatted in Microsoft Outlook known as a .pst file; (3) files formatted in one of the Microsoft Office Suite, Corel Suite, OpenOffice Suite, or IBM's Lotus Suite applications (.doc, .xls, .ppt, .mdb, .wpd, etc.), (4) a text file (.txt), or (5) hypertext markup language (.html) or similar web page language. This is the preferred format. However, if any of the requested documents are only maintained or can only be produced as electronic images, for example a portable document format (.pdf), then as an alternative, we request this electronic-image format. See §119.01(2), Fla. Stat.

By copy of this letter to the City Attorney and all current board members, we are requesting that all emails, including emails sent to and from non-city email accounts, be preserved. Additionally, we are requesting that you notify all prior board members during the time period specified of this request.

If you have any questions about the nature or extent of this request, please do not hesitate to contact our office.

Very truly yours,



Andrea Flynn Mogensen

cc: Robert Anderson (randerson@hall-anderson.com)
Martin Black (mblack@ci.venice.fl.us)
Walter Hake (whake@comcast.net)
Susan Balsinger (Ssb519@aol.com)
Paul Hollowell (turbo171@verizon.net)
James Marble (jimbythesea@yahoo.com)
Jim Leis (jleis445@comcast.net)
Kim Stephens (kim@homesofvenice.com)
John Yurosko (jjyurosko@aol.com)
John Simmonds (jsimmonds@ci.venice.fl.us)

Lori Stelzer - *FILTERED:* Re: Public Records Request

From: Nicholas Carlucci <jocessna72@verizon.net>
To: Lori Stelzer <lstelze@ci.venice.fl.us>
Date: 5/31/2008 1:24 PM
Subject: *FILTERED:* Re: Public Records Request

I regret that I am unable to comply with your request as I routinely delete my e-mails. I do this at least once a month and more often than not on a weekly basis. The AAB was never tasked by City Council to review any of the airport land development proposals. The AAB reviews of the Master Plan Update/ALP were extensive and open to the public. Hangar discussions were part of the AAB airport budget/fair market value MPU public review process. T- hangar rent increases (to bring those rents up to full fair market value) for the past two years were unanimously approved while I was on the AAB. Those rent increases were preceded by a third rent increase that occurred the year before I was on the board. The Airport Manager (Director) sends AAB members FYI e-mails over a wide variety of subjects. Some of his FYI e-mails may have contained some of the key words but I have no record to support that claim.

Yours Truly, Nick Carlucci

Lori Stelzer <lstelze@ci.venice.fl.us> wrote:

Pursuant to our discussion today, please provide me with the following documents:

1. All e-mails from your personal e-mail account from 1/1/06 to 2/22/08 with other airport advisory board members, John Simmonds and/or Fred Hammett, with the following key words: Marriott, Golf, lease, and hanger/hangar (both spellings).
2. All e-mails in your personal e-mail account from 1/1/06 to 1/1/08 with John Simmonds, the city manager and/or airport manager, with the key words: Marriott, airport layout plan, VGA or marina.

Also, if you believe you have deleted any e-mails that may fall under this request, please indicate so.

You may forward these e-mails to me or print them out and provide hard copies to my office. Thank you so much for your assistance.

file://C:\Documents and Settings\lstelze\Local Settings\Temp\XPgrpwise\484151A8Venice-... 6/2/2008

Exhibit C

Lori Stelzer - *FILTERED:* Request for EMails

From: "Bartanowicz" <rbartano@verizon.net>
To: <lstelze@ci.venice.fl.us>
Date: 5/29/2008 3:21 PM
Subject: *FILTERED:* Request for EMails

Dear Ms Stelzer;

Per your telephone request of May 29, 2008 requesting copies of Email pertaining to the airport: I routinely delete my Email files. I have Emails on record from 3/20/2008 to the present. I was not reappointed to the Airport Advisory Board and I believe my last official meeting was on Feb 13, 2008.

As such The period from 3/20/2008 to present covers a period when I was no longer on the Airport Advisory Board.

Robert S. "Bart" Bartanowicz

Linda Depew - Public Records Request

From: <SSB519@aol.com>
To: <ldepew@ci.venice.fl.us>
Date: 5/27/2008 5:12 PM
Subject: Public Records Request

Hi Linda:

I'll be out of town until Saturday, so I cannot comply with your request at this time. In checking my e-mail on AOL, the messages I've found in that time frame cannot be forwarded or restored due to the age. Was wondering if your IS department may know of a way to garner them without me having to print them for you.

Please give me a call on Monday at 650-3741 to discuss my options.

Thanks and have a great weekend.

Susan Balsinger
941-488-1542 (Home)
941-650-3741 (Cell)

Get trade secrets for amazing burgers. [Watch "Cooking with Tyler Florence" on AOL Food.](#)

Exhibit E