IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,

Plaintiff,

v. CASE NO. 2020 CA 00854

FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant.
_____/

FLORIDA DEPARTMENT OF CORRECTIONS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY FINAL JUDGMENT

Defendant, Florida Department of Corrections (the Department or DOC) submits this response to Plaintiff, American Civil Liberties Union ("ACLU") Motion for Summary Final Judgment. In support thereof, the Department states as follows:

ACLU's motion, sans reference to or reliance upon any affidavit, deposition, or discovery response, requests this court to summarily find that certain documents which ACLU contends are in the possession of the Department are public records which must be disclosed under Chapter 119, Florida Statutes. More specifically, ACLU requests that the Department produce "… any record (or a sufficient combination of records) that reflects the formula or calculation DOC uses to determine inmates' tentative release dates pursuant to § 944.275(3)(a), Fla. Stat." (2/12/20 request) and "any record (or a sufficient combination of records) that reflects the formula or calculation DOC uses to determine inmates' "Overall Term" (prison term) reflected in the DC□ 14." (2/13/20 request).

The Standard On Summary Judgment

The fundamental foundation of the Motion is that no exemption protects the requested documentation from public disclosure, and ACLU argues that the exemption expressly referenced in DOC's Answer does not apply. However, the issues to be considered on a motion for summary judgment are not those set forth in the pleadings but rather are those presented by the materials submitted in support of the summary judgment motion. The applicable rules of procedure neither contemplate nor structurally allow for the setting forth of every defense in an answer. Additionally, this case will turn not just on the existence or nonexistence of any exemption to the public records law, but also whether the information is confidential.

Chapter 119 makes clear that not every document in the possession of the state agency is a document that should or can be disclosed to the public. There are exemptions from disclosure, and then there are those documents which are confidential. There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential. *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied, 892 So. 2d 1015 (Fla. 2004). And see *State v. Wooten*, 260 So. 3d 1060, 1069-1070 (Fla. 4th DCA 2018) (Ch. 119 refers to both "exempt" records and records which are "confidential and exempt"). If records are not made confidential but are simply exempt from the mandatory disclosure requirements in § 119.07(1), F.S., the agency is not prohibited from disclosing the documents in all circumstances. See, *e.g., Florida Government-In-The-Sunshine Manual*, at p. 172 (2020). In this case, it is the position of DOC the requested records both are confidential and exempt.

Florida law is clear that this court should be extremely hesitant, at a minimum, to summarily declare without an evidentiary hearing, that this sensitive and vital information (as

described more fully infra and in the attached affidavit) must be produced. "To establish entitlement to a summary judgment, the moving party must demonstrate conclusively that no genuine issue exists as to any material fact, even after all reasonable inferences are drawn in favor of the party opposing the summary judgment." *See Johnson v. Circle K. Corp.*, 734 So.2d 536 (Fla. 1st DCA 1999), *citing Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Holl v. Alcott*, 191 So.2d 40, 43 (Fla. 1966). If the record raises "any issue of material fact, if it would permit different reasonable inferences, or if it tends to prove the issues, it should be submitted... as a question of fact [.]" *See Moore* at 668. (*emphasis added*). The movant "must carry the burden of negating the existence of any basis of liability asserted against it." *See Dept. of Tramp., v. Spioch*, 642 So.2d 788, 791 (Fla, 1st DCA 1994). The burden on the moving party has, since the adoption of the modern rules of civil procedure, been stated in accordance with the Florida Supreme Court's opinion in *Holl v. Talcott:* It is the movant's burden on summary judgment "to prove the non-existence of genuine triable issues." *Holl v. Talcott,* 191 So. 2d 40 (Fla.1966). Only if the moving party produces information establishing that no factual dispute exists will the burden shift to the nonmoving party to show that there is indeed a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). "If the evidence raises any issues of material fact, if it is conflicting, if it will permit different inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." Id. Every possible inference must be weighed in favor of the non-moving party and summary judgment should not be granted unless "the facts are so crystallized that nothing remains but questions of law" *Id.*

The Information Demanded To Be Produced By ACLU Is Protected Information By Statute

Certainly, as the affidavits filed contemporaneously with the filing of this Response establish, "the facts are not so crystallized that nothing remains but the question of law ". See Celotex Corp., Id. As described in the attached affidavits, ACLU's request is for a formula which cannot be produced without also exposing intertwined highly-sensitive information. This intertwined information controls and directs access authorizations and security measures for the Department's automated systems. Additionally, as the affidavits attest, to attempt to pull all of these individual factors out of the system or combine them into a single "formula" that could be provided to someone outside of the Department would be to create an entirely new record or set of records that do not currently exist within the Department's possession. *See Commentary, In re Report of the Supreme Court Workgroup on Public Records*, 825 So. 2d 889, 898 (Fla. 2002) ("The custodian is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request.")

Section 119.071, entitled General Exemptions From Inspection Or Copying Of Public Record, provides, in part:

(1) Agency Administration

...

(f) Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, and agency-produced data processing software that is sensitive are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The designation of agency-produced software as sensitive does not prohibit an agency head from sharing or exchanging such software with another public agency.

119.011(14) defines "sensitive" as:

"Sensitive," for purposes of defining agency-produced software that is sensitive, means only those portions of data processing software, including the specifications and documentation, which are used to:

...

(c) Control and direct access authorizations and security measures for automated systems.

Additionally, Section 282.318, the Information Technology Security Act provides, provides that certain secured technological information is both confidential and exempt from disclosure. The statute provides, in relevant part:

...

(5) The portions of risk assessments, evaluations, external audits, and other reports of a state agency's information technology security program for the data, information, and information technology resources of the state agency which are held by a state agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution if the disclosure of such portions of records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

(b) Information technology resources, which include:

1. Information relating to the security of the agency's technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

In this case, as described in the attached affidavit, the information requested to be produced by ACLU is both a) protected by each of these subsections, and b) is inextricably intertwined with information protected by this subsection, as described in the provided affidavits. These statutes, for which no case law apparently exists, clearly establish that the Legislature understands that certain information in the possession of agencies such as DOC is entitled to the highest protection from public disclosure bestowed by statute (in the case of the Information Technology Security Act, its designation as both confidential *and* exempt). At a minimum, the disposition of the records request of ACLU, the complexity of the statutes implicated, and the

nature of the information that would have to be produced, all strongly support the exercise of the caution that should be applied before a court summarily adjudicates a case, without the further benefit that an evidentiary presentation and/or *in camera* review will provide. Certainly, the facts and applicable law of some cases lend themselves to summary disposition. This case is not one of those cases.

In this case, the affidavits establish disputed issues of material fact whether the requested information is confidential or exempt (by satisfaction of the factual predicate required in statute) and/or whether producing this information (a highly problematic exercise in and of itself given the nature of the related data, programs, and related statutes that are applied uniquely in the case of every individual) could be or would be the *de facto* facilitation of access to other sensitive and protected information. DOC has a long history of addressing these issues in a complex and comprehensive manner, and nothing about these public records requests is so time sensitive that the appropriate presentation of more comprehensive evidence to the Court should be dispensed of in favor of summary judgment.

Conclusion

Summary judgment is not to be granted as a matter of routine trial court procedure. Rather, the party seeking summary judgment must "conclusively demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510; *Holl v. Talcott,* 191 So.2d 40, 43 (Fla. 1966). Here, Plaintiff has not met that burden. Further evidence, and if appropriate discovery, will be necessary to establish as a matter of fact whether the requested formula is exempt and/or confidential under Chapter 119, and to assess the security threat that release of the documents and information would create or impose.

WHEREFORE, DOC respectfully request that this Court deny ACLU's Motion for Summary Judgment.

Respectfully submitted this 17th day of July 2020.

/s/ John L. Wharton
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished this 17th day of July 2020, via electronic mail through the Florida E-Filing Portal to the following:

Benjamin James Stevenson
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/s/ John L. Wharton

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FLORIDA DEPARTMENT OF CORRECTIONS,

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AFFIDAVIT OF JOSEPH C. AJHAR

The undersigned authority, JOSEPH C. AJHAR, who, being first duly sworn, deposes and states:

1) I am Joseph C. Ajhar and I'm the Deputy Chief Information Officer for the Department of Correction. I assist the Chief Information Officer with technical projects, strategic planning and operational activities. I have been at the Department of Corrections for over two years. I have 27 years of IT experience including mainframe application development, infrastructure management, ITIL foundation certifications, IT Service Management (ITSM) including ISO 2000:2007 and 2011 certifications.

2) I have been asked to review and consider whether ACLU's public records request, if it is determined that the requested information should be produced, could be produced in a paper form or format. For the reasons set forth in this affidavit, that would not be possible.

3) There is not one "formula" that applies to all inmates. There is branching programming logic that is built into the system that allow for an unlimited number of scenarios. The programming logic needs to accommodate numerous factors that change for each individual inmate and that inmate's specific circumstances while incarcerated. To attempt to pull all of

these individual factors out of the system or combine them into a single "formula" that could be provided to someone outside of the Department would be to create an entirely new record or set of records that do not currently exist within the Department's possession.

4) In comparison, this would be like requesting the single "formula" for how the Internal Revenue Service calculates all tax returns.

5) The source code that is used to calculate the release date is located within many different components of the Offender Based Information System (OBIS). The computer programs/software (screens, batch processes, subroutines and data sources) used to derive the release date are intermingled with other programming logic related to inmate Admissions and Release Classifications, Population Management and other sections within the department. The code related to any of these areas could expose sensitive processes and insight on how to manipulate data and system outcomes.

I, Joseph C. Ajhar, hereby swear under penalty of perjury that this Affidavit and the information contained herein is truthful and accurate to the best of my knowledge, information, and belief. I declare that the above facts and statements are true and correct to the best of my knowledge:

Signature
Florida Department of Corrections

7/17/20
Date

STATE OF FLORIDA)
)
COUNTY OF Leon)

The foregoing instrument was acknowledged before me by means of ☑ physical presence or

☐ online notarization, this 17th day of July, 2020, by Joseph C. Ajhar

☐ Personally Known or ☑ Produced Identification

Type of Identification Produced: FL DL

Notary Public
Commission Expires:

HOLLY S. SCHACK
Commission # GG 922719
Expires February 12, 2024
Bonded Thru Troy Fain Insurance 800-385-7019

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AFFIDAVIT OF DENNIS COOK

The undersigned authority, DENNIS COOK, who, being first duly sworn, deposes and states:

1) My name is Dennis Cook. I serve officially as the Information Security Manager (ISM) and Local Agency Security Officer (LASO) for the Florida Department of Corrections (DOC).

2) As the ISM, I am responsible for day-to-day IT Security Operations and Management, IT Security Risk Management, Annual Agency Security Operations Plan (ASOP), Agency Disaster Recover and Computer Security Event Response.

3) As the LASO, I serve as the direct liaison to the FDLE for Criminal Justice Information Services (CJIS).

4) One of my primary responsibilities in this capacity is to ensure the approved and appropriate security measures are in place and working as expected to protect Criminal Justice Information (CJI). Another primary responsibility as LASO is to continually guide DOC Information Systems towards complete CJIS Security Policy (CSP) compliance and auditability.

5) I hold ISACA Certified Information Security Manager (CISM) and ITIL (Formerly known as Information Technology Infrastructure Library) Foundations certifications.

6) As Florida's largest state agency, and the third largest prison system in the country, DOC incarcerates approximately 94,000 inmates and supervises nearly 161,000 offenders in the community.

7) DOC provides and maintains on its website a portal to facilitate access to information which is either confidential or exempt in the Department's Offender Based Information System (OBIS).

8) On Feb. 12, 2020, the ACLU requested DOC provide the ACLU with "any record (or a sufficient combination of records) that reflects the formula or calculation FDOC uses to determine inmates' tentative release dates pursuant to§ 944.275(3)(a), Fla. Stat."

9) On Feb. 13, 2020, the ACLU requested DOC provide the ACLU with "any record (or a sufficient combination of records) that reflects the formula or calculation FDOC uses to determine inmates' "Overall Term" (prison term) reflected in the DC- 14."

10) Based on my knowledge and experience, and serving with these responsibilities at DOC, the computer programming code used to calculate tentative release dates and overall terms is inextricably intertwined with the CDC/OBIS computer system. The code on its own will not serve the purposes sought unless it can be compiled and run as a system. The CDC/OBIS system, which would have to be provided to the ACLU to fulfill these requests, is by its nature and content sensitive information which should not be publically disclosed, and whose public disclosure could have serious security implications for DOC.

11) Based on my knowledge of the request of ACLU and the potentially responsive information at DOC, the requested access to public records sought in this matter would require the disclosure of are confidential and exempt documents or information.

Based on my knowledge and experience as described hereinabove, that public disclosure as requested by ACLU would require public disclosure of information facilitating unauthorized access to or the unauthorized modification, disclosure, or destruction of data, information, or information technology resources in the following ways:

12) To supply the CDC/OBIS system or any code from it to any party outside of DOC would introduce a significant security risk by exposing the detailed logic behind system functionality and leaves DOC vulnerable to exploitation. As DOC ISM and LASO, if I discovered all or any of the code used within the distributed OBIS system had been disseminated to any person or entity other than those within DOC OIT that are tasked with the system's modification, upkeep and management, I would have no choice and in fact the obligation to immediately declare that a Computer Security incident had occurred.

I would also be bound to notify the State Chief Information Security Officer at DMS, the FDLE CJIS Chief Information Security Officer, the DOC CIO and the DOC Secretary (or delegate) of the incident.

13) Risks of this programming code being disseminated outside the DOC team entrusted with its security could severely disrupt and/or corrupt day-to-day Florida State Prisons inmate management. This includes inmate Criminal History Records Information (CHRI), Personal Health Information (PHI), transfer, movement and location information.

14) Similarly, and additionally, from an IT Security standpoint, based on my knowledge of the information requested by ACLU and experience as set forth hereinabove, the requested information is highly sensitive and is data processing software which is used to control and direct access authorizations and security measures for automated systems.

I, DENNIS COOK, hereby swear under penalty of perjury that this Affidavit and the information contained herein is truthful and accurate to the best of my knowledge, information, and belief. I declare that the above facts and statements are true and correct to the best of my knowledge:

Signature
Florida Department of Corrections

7-17-20
Date

STATE OF FLORIDA)
)
COUNTY OF Leon)

The foregoing instrument was acknowledged before me by means of ☑ physical presence or

☐ online notarization, this 17th day of July, 2020, by Dennis Cook.

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