IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

Third DCA Case No.: 3D20-1320

HUMAN RIGHTS DEFENSE CENTER,
Appellant,

vs.

ARMOR CORRECTIONAL HEALTH SERVICES, INC.
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
L.T. Case No.: 20-11010-CA-01

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, FIRST AMENDMENT FOUNDATION, AND SOUTHERN POVERTY LAW CENTER

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The Amici are organizations with longstanding interests in preserving an open and transparent government and protecting the public's right to access public records, including public records held by private companies that provide services to Florida's incarcerated population. The Amici submit this brief in support of the appeal of appellant Human Rights Defense Center ("HRDC") of an order dismissing a Petition for a Writ of Mandamus (the "Dismissal Order") to enforce Article I, Section 24(a) of the Florida Constitution as well as Florida Statutes, Chapter 119 (the "Public Records Act"). The Amici regularly rely on the Public Records Act to obtain information relating to public services provided by private contractors like appellee Armor Correctional Health Services, Inc. ("Armor"). The Amici are concerned that a ruling upholding the Dismissal Order will impede the public's right of access to public records, specifically public records in the possession of private contractors such as Armor.

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of nearly one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. The ACLU of Florida is the ACLU's state affiliate and has approximately 37,800 members in the State of Florida equally dedicated to the

principles of liberty and equality embodied in the United States and Florida Constitutions.

The First Amendment Foundation ("Foundation") is a Florida nonprofit corporation founded in 1984 by the Florida Press Association, the Florida Society of Newspaper Editors, and the Florida Association of Broadcasters and represents more than 200 members. The Foundation was established to educate and advocate on behalf of the public's interest in freedom of the press, access to governmental records and meetings, and to provide training on Florida's open government laws for citizens and officials.

The Southern Poverty Law Center is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society.

SUMMARY OF ARGUMENT

Florida has been a leader in open government laws and access to public records for decades. Florida has recognized the right to access public records as a constitutional right and codified that right in the Public Records Act. The Dismissal Order threatens to weaken the Public Records Act by requiring requestors seeking mandamus relief for public records in the possession of a private contractor, like Armor, to file a lawsuit against a public agency before seeking mandamus relief from the private contractor. This unprecedented

procedural framework is not supported by Florida law and threatens to impede critical monitoring that organizations such as Amici conduct to ensure that the constitutional rights of incarcerated people are being respected. The procedural framework proposed by the Dismissal Order will add unwarranted and undue delay to the process of enforcing a public records request, increase the cost of enforcing a records request, and will interfere with the ability of requestors to obtain attorneys' fees from private contractors that fail to comply with the Public Records Act.

In sum, the Public Records Act is essential to maintaining a transparent government and protecting Florida citizens' constitutional rights and also protecting the rights of an oft-forgotten group—incarcerated people. However, the Dismissal Order threatens to undermine the enforcement mechanism the Florida legislature enacted to protect the constitutional right to access public records.

ARGUMENT

A. The Public Records Act Is Critical To Protecting The Constitutional Rights Of Incarcerated People.

1. The Increase In Privatization Of Prison Services Warrants Robust Public Records Laws To Ensure Effective Monitoring And Protection Of Incarcerated People's Constitutional Rights.

As the United States Supreme Court has recognized, people in prison are dependent upon the government for their basic needs, including personal safety. Brown v. Plata, 563 U.S. 493, 510 (2011) ("To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the

State for food, clothing, and necessary medical care."). For decades, prisons have retained private companies to provide those basic needs, including medical care, to people in their care in an effort to reduce costs. The steady increase of privatization in the administration of medical care provided to incarcerated people, in turn, naturally calls for robust monitoring of prison conditions.

Over the last several decades, prison costs, including the costs of providing medical care to the prison population, have skyrocketed. The rise in medical care costs for incarcerated People can be traced back to the mid-1980s as the increasing American prison population and the lengthening of prison sentences resulted in the aging of the American prison populations. Dan Weiss, Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care, 86 U. COLO. L. REV. 725, 743 (2015). Notably, between "1986 to 1989, the percentage of people in prisons over the age of fifty more than doubled from 11.3 percent to 26 percent." Id. Accordingly, prison health care costs increased significantly and, between 2001 to 2008, spending on prison health care increased in the vast majority of states, including Florida. Id. As of 2005, approximately forty percent (40%) of all inmate care in the United States had been outsourced to for-profit companies. Id.

Prisons—even prisons providing medical services through private contractors—of course are required to provide incarcerated people with adequate

medical care pursuant to the Eight Amendment of the United States Constitution. Estelle v. Gamble, 429 U.S. 97, 103 (1976). Florida courts also have acknowledged the responsibility of the Florida Department of Corrections to protect the rights of incarcerated people and to provide adequate health services to state people. Crews v. Florida Pub. Employers Council 79, AFSCME, 113 So. 3d 1063, 1068 (Fla. 1st DCA 2013) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). Indeed, Florida law provides that each sheriff and chief correctional officer must adopt and employ model standards regarding the medical care provided to incarcerated people in county and municipal detention facilities. § 951.23(4)(a)1b, Fla. Stat.

Meanwhile, Florida has marched towards privatization of prison services and gone to great lengths to achieve increased privatization of the state prison system. The Florida Legislature has provided the Department of Corrections with broad statutory authority to retain private contractors to provide adequate health care to people in prisons. Crews, 113 So. 3d at 1068. Moreover, the Florida Legislature has facilitated arrangements between the Department of Corrections and private contractors through the use of various incentives, including providing contractors with exemptions from competitive bidding and extending sovereign immunity to health care providers that contract with the Department of Correction. See § 945.0259(4), Fla. Stat.; see also § 768.28(10), Fla. Stat.

Florida's efforts to retain private contractors to provide medical care to people in prisons has yielded partnerships with private companies accused of malpractice. In 2013, the state of Florida entered into a five-year, $1.2 billion contract with Corizon, a Tennessee company, to provide medical care to thousands of incarcerated people in Florida. See Dan Christensen, Florida Prison Officials Didn't Ask, Companies Didn't Tell About Hundreds of Malpractice Cases, BROWARD BULLDOG (Feb. 7, 2021, 5:00pm), http://www.browardbulldog.org/2013/10/florida-prison-officials-didnt-ask-companies-didnt-tell-about-hundreds-of-malpractice-cases/, *archived at* http://perma.cc/V76U-HE5F. In the five (5) years prior to Corizon's partnership, Corizon faced over 600 lawsuits stemming from allegations of malpractice. Id. In December 2012, the Florida Department of Corrections also entered into a $240 million contract with Wexford Health Sources, a Pennsylvania-based company, to provide medical services to incarcerated people in nine institutions throughout South Florida. Id. Between January 2008 through 2012, Wexford faced over 1,000 claims of malpractice from people in prisons. Id. The sheer number of lawsuits against private contractors providing prison services underscores the need for effective monitoring in prisons.[1]

[1] The proliferation of such medical services contracts are not limited to Florida's state prison system. Private contractors like Armor have entered into similar

In Brown, the United States Supreme Court recognized that the treatment of incarcerated people is a constitutional issue and the basic concept underlying the Eighth Amendment regarding the treatment of people in prisons is "nothing less than" human dignity. Brown, 563 U.S. at 510 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)). However, the task of effectively monitoring prisons and ensuring that prisons provide adequate medical care to incarcerated people is complicated by the very nature of prisons and the limited population within prisons. Typically, incarcerated people are the only individuals capable of evaluating the medical care provided, but often lack the resources or ability to challenge the systemic issues faced regarding the care received. As Justice Brennan once noted, people in prisons "exist in a shadow world that only dimly enters our awareness." O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting).

Thus, the burden of monitoring correctional facilities and protecting incarcerated people's rights typically falls on organizations such as the Amici, the press, and organizations devoted to protecting incarcerated people, like Appellant.

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contracts with county jails throughout Florida and been the subject of lawsuits concerning the adequacy of medical care to people in prisons. *See* Brittany Shamas, "A Miami-Based Jail Healthcare Company Profits While Patients Die," Miami New-Times (Sept. 17, 2019), https://www.miaminewtimes.com/news/jail-health-care-company-armor-correctional-accused-of-multiple-inmate-deaths-11268351.

And these organizations rely heavily on public records law to obtain information regarding the operation of prisons. See Paul von Zielbauer, As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence, N.Y. Times, Feb. 27, 2005 (noting that the paper reviewed "thousands of pages of public and internal company documents, state and city records, and every New York State report on deaths under [a private] company's care"). The Public Records Act therefore is critical to ensuring that Florida's state prison system and county jails—and the private contractors that they retain—are providing adequate health services to people in prisons. Mike Tartaglia, Private Prisons, Private Records, 94 B.U.L. Rev. 1689, 1723 (2014). The Dismissal Order threatens to stymie that important check on government authority as it relates to a population vulnerable to abuse.

2. Florida Law Has Developed To Apply The Public Records Act To Private Contractors Providing Services To Prisons.

Florida was the first state to apply its public records statute to a private company providing prison services. Mike Tartaglia, Private Prisons, Private Records, 94 B.U.L. Rev. 1689, 1727 (2014). As noted above, a Florida citizen's right of access to records of state and local governments is protected by the Florida Constitution. See Art. I, § 24, FLA. CONST. This Constitutional right of access is codified by Florida Statutes. The Public Records Act provides:

> Every 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.

§ 119.07(1)(a), Fla. Stat. And the Public Records Act sets forth a broad definition of public records:

> "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of 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.

Florida law then defines "agency" to including any private entities, such as contractors like Armor, acting on behalf of a state agency or local government, § 119.011, Fla. Stat., and the requirements of the Public Records Act apply to "contractor[s]" who contract with public agencies and are acting on behalf of the public agency in providing those services. § 119.0701, Fla. Stat. Moreover, developed Florida case law provides that the Public Records Act applies to private contractors providing services to correctional facilities. In Times Publishing Company v. Corrections Corporation of America, No. 91-429 CA 01 (Fla. 5th Cir. Ct. filed December 4, 1991), the court held that the Public Records Act applied to "any . . . private agency, person, partnership, corporation, or business entity acting on behalf of any public agency," including the defendant, a private company operating and maintaining a jail in Hernando County. The development of Florida case law on this issue continued with the holding in Prison Health Services, Inc. v. Lakeland Ledger Publishing Company, 718 So. 2d 204, 205 (Fla. 2d DCA 1998).

In Prison Health Services, Inc., the court held that records in the possession of the private contractor relating to a settlement agreement with an inmate would typically be considered a public record if they were in the possession of the public agency and, therefore, are subject to the Public Records Act. Id.

B. The Dismissal Order Will Frustrate The Purpose Of The Public Records Act.

Appellant's initial brief compellingly presents the law pertinent to its request pursuant to the Public Records Act and the Amici do not repeat it at length in this brief. Instead, the Amici write to highlight the impact of the Dismissal Order on public records requests submitted to third-party contractors and the devastating effect the court-created procedural mechanism in the Dismissal Order will have on efforts to enforce the Public Records Act to obtain public records held by private third-party contractors.

1. If Affirmed, The Lower Court Ruling Will Create A Two-Tier Framework To Obtain Records In Private Contractors' Possession That Does Not Exist In The Public Records Act.

The Dismissal Order is a departure from the spirit of the Public Records Act. To ensure compliance with the Public Records Act, a requestor may petition for a writ of mandamus to enforce its right to access court records. Blackshear v. State, 115 So. 3d 1093, 1094 (Fla. 1st DCA 2013). Mandamus relief is the most frequently used remedy in open records lawsuits. Daxton R. "Chip" Stewart, Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open

Meetings and Open Records Laws, 15 COMM. L. & POL'Y 265, 276 (2010). Pursuant to the Dismissal Order, prior to filing an action for mandamus relief, a requestor must first establish: (1) that the public agency directed the third-party private contractor to comply with the request for public records; or (2) that the private contractor failed to comply with an order from the public agency to produce records. (R. 206.)

In so doing, the Dismissal Order creates a two-tier procedural framework under which a requestor of public records that are in the sole possession of a third-party private contractor must seek mandamus relief from the public agency contracting with the private contractor—even though the public agency does not possess the records requested—before the requestor can meet the prerequisites for mandamus relief against the third-party contractor. This runs counter to decisions of another Florida appellate court that has found the enforcement of the Public Records Act to be "relatively straightforward" in a similar situation regarding the compelled disclosure of public records in the possession of a private agency. See Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1210 (Fla. 1st DCA 2009) ("[T]he public records law can be enforced against any person who has custody of public records . . . . It makes no difference that the records in question are in the hands of a private party. If they are public records, they are subject to compelled disclosure under the law.").

If this Court adopts the procedural framework set forth in the Dismissal Order, the Amici and other requestors of public records in the possession of third-party contractors of public agencies will face an unreasonable burden and undue delay in obtaining public records and an obstacle to holding private contractors accountable for such a delay. The law is clear "that unjustifiable 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). By requiring requestors to seek mandamus relief from a public agency and wait for a public agency to issue a directive to its private contractors regarding the documents requested, requestors will face months-long delays that are unjustifiable under Florida law. Moreover, the undue delay that will stem from the procedural mechanism outlined in the Dismissal Order will result in an increased risk of records being destroyed and will potentially subject the vulnerable inmate population to continued abuses that a requestor may be seeking to expose or thwart. Additionally, individuals and organizations seeking to enforce a public records request will face the increased financial burden of filing a separate lawsuit against a public agency for mandamus relief before filing an action against the private contractor, thereby increasing the costs of enforcing the Public Records Act. As a result, the procedural mechanism contemplated in the Dismissal Order

and its associated costs will likely discourage individuals and civic organization from seeking mandamus relief and will effectively prevent the public from learning how their tax dollars are being utilized by public agencies (and the private contractors retained by public agencies).

Finally, the lower court's ruling also sets a dangerous precedent by permitting private contractors to ignore contractual provisions that clearly set forth the contractor's obligations pursuant to the Public Records Act. Pursuant to the medical services contract between Appellee and the contracting agency—the Palm Beach County Sheriff's Office ("PBSO")—Appellee was responsible for maintaining PBSO's public records in relation to the medical care provided to people in prisons at the Palm Beach County Jail. (R.21-76). Specifically, the contract provided that Appellee would "[p]rovide the public with access to public records on the same terms and conditions that the Sheriff would" and that Appellee shall "handle the request in accordance with Chapter 119." (R.175). The Dismissal Order provides an avenue for private contractors like Armor to ignore clear and unambiguous contractual provisions like these that mandate contractors' compliance with the Public Records Act.

While many contracts with private companies offering prison services tend to omit public records request compliance provisions, the contract between

Appellee and PBSO was an exception to the rule.[2] See Mike Tartaglia, Private Prisons, Private Records, 94 B.U.L. REV. 1689, 1725 (2014). If this Court upholds the Dismissal Order it will undermine the ability of the public to request public records from a private contractor based on the purported failure to comply with a non-existent requirement under the statute as a basis to withhold records, despite its contractual obligation to comply.

2. The Lower Court Ruling Will Make The Public Records Act Less Effective And Hamper The Ability To Request Attorney's Fees in Accordance With The Statute.

To discourage delay in the production of public records, the Public Records Act provides that a party may obtain attorney's fees if there is an unjustified delay in the production of public records. § 119.12, Fla. Stat. Florida has a reputation as the jurisdiction with the strongest policy regarding attorney's fees in public record litigation. Daxton R. "Chip" Stewart, Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws, 15 COMM. L. & POL'Y 265, 283 (2010). The Amici contend, and the Florida Supreme Court has recognized, that attorney fees are a critical component of encouraging litigation that protects and vindicates societal rights, including the rights of incarcerated people. See N.Y. Times Co. v. PHH Mental Health Servs.,

[2] Notably, the contractual provisions of the medical services contract between Appellee and PBSO demonstrate PBSO's intent to require Appellee to comply with the Public Records Act. (R.175).

Inc., 616 So. 2d 27, 29 (Fla. 1993) ("If public agencies are required to pay attorney's fees . . . to parties who are wrongfully denied access to the records . . . then the agencies are less likely to deny proper requests for documents."). Attorneys' fees provisions are the "teeth" of open government laws, and without them most open government statutes, such as the Public Records Act, would lose their effectiveness. Daxton R. "Chip" Stewart, Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws, 15 COMM. L. & POL'Y 265, 283 (2010).

The Public Records Act allows for an award of attorneys' fees to a prevailing party who files a civil action against a public agency to enforce Florida's public records laws. § 119.011(12), Fla. Stat. The Florida Supreme Court has held that 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, 125 (Fla. 2016). As the Florida Supreme Court has recognized, a lawsuit is the primary method of enforcing the Public Records Act and the fee provision "has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records." Id. To that end, Florida courts have stated

that the attorney's fee provision of the Public Records Act "should . . . be liberally construed so as to best enforce the promotion of access to public records." Downs v. Austin, 559 So. 2d 246, 247 (Fla. 1st DCA 1990). Attorneys' fees have also been described as a "punitive remedy" meant to punish improper conduct of defendants and deter future improper conduct. Daxton R. "Chip" Stewart, Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws, 15 COMM. L. & POL'Y 265, 285–86 (2010).

The Dismissal Order and its imposed procedural framework runs counter to the liberal construction of Section 119.12 of the Florida Statutes mandated in Downs and the "punitive remedy" that the Public Records Act sets forth because it creates an added procedural step to an attorneys' fees award. A ruling affirming the Dismissal Order will amount to the adoption of a fee-shifting provision that results in requestors incurring fees and costs stemming from third-party contractors that fail to comply with a public records request directed to the public agency (even when it was simultaneously directed to the third-party contractor, as was the case here).

Also, while Section 119.0701(4)(a) of the Florida Statutes permits the recovery of fees and costs from contractors, the Public Records Act does not compensate a person who seeks mandamus relief against a public agency that does not possess the requested public records. Thus, the Dismissal Order may

incentivize private contractors to refrain from complying with a records request since the requestors will now have to take an additional and costly procedural step to seek—and obtain—mandamus relief against a private contractor in possession of public records.

CONCLUSION

For the foregoing reasons, this Court should reverse the Dismissal Order and grant the petition for writ of mandamus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 8, 2021, a copy of the foregoing was electronically filed through the Florida Courts E-Filing Portal which will send electronic notification of the above filing to all registered users, and by U.S. Mail and E-Mail to all counsel of record.

/s/Brian C. Frontino
Brian C. Frontino, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing comports with the font and spacing requirements of Florida Rules of Appellate Procedure.

/s/ Brian C. Frontino
Brian C. Frontino, Esq.