

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION**

MARY LOU SMITH
an individual, and
SHARON DENSON,
an individual

Plaintiffs,

vs.

CASE NO.: 08 CA 11315
Division B

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district,
JANET JONES, an individual,
JOHN VANDERMOLEN, an individual,
JOSEPH SALERNO, an individual, and
MARY LOU MCNULTY, an individual

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT
TRAILER ESTATES PARK AND RECREATION DISTRICT'S
MOTION TO DETERMINE PUBLIC RECORDS STATUS OF DOCUMENT
PRODUCED DURING DISCOVERY**

COMES NOW, Plaintiffs MARY LOU SMITH and SHARON DENSON (hereinafter referred to as "Plaintiffs") by and through their undersigned counsel, and hereby file this Response to Defendant Trailer Estates Park and Recreation District's (hereinafter, the "District") Motion to Determine Public Records Status of Document Produced During Discovery, and states as follows:

BACKGROUND FACTS

1. The Plaintiffs' counsel became aware of an inadvertent disclosure of attorney-client privileged communication following its review of the Districts' Trial Exhibit List, which listed an email communication between the Plaintiff Mary Lou Smith ("Smith") and legal counsel (Maggie Mooney-Portale of Lewis Longman & Walker, PA). The email was solely between Ms. Smith and Ms. Mooney-Portale.
2. Upon discovering the inadvertent disclosure, Plaintiffs' counsel on October 20, 2009, wrote District counsel, Thomas Shults, notifying him of a mistaken disclosure of an attorney-client privileged communication and requested the return of all copies. A true and correct copy of the letter to Mr. Shults is attached hereto as Exhibit A.
3. The inadvertent disclosure of the attorney-client email apparently occurred during the production of over 1,700 pages of discovery documents in March 2009.
4. From March 2009 until the District's production of its Trial Exhibits, Plaintiffs' counsel was not aware of, or advised of the disclosure of an obvious attorney-client email in the Plaintiffs' discovery response. Instead, the District listed this document as its Exhibit 23 on its list of trial exhibits.
5. On October 30, 2009, Mr. Shults by letter, declined to return the document and asserted that his receipt of the document converted the document into a public record. A true and correct copy of Mr. Shults' letter is hereto attached hereto as Exhibit B.
6. Simultaneously, without prior consultation with Plaintiffs' counsel, Mr. Shults' filed and set for hearing this pending Motion requesting this Court declare the Plaintiffs' email to her attorney a public record.

ISSUE FOR COURT

7. The issue raised by the District's Motion is whether a document inadvertently disclosed in the course of litigation to counsel representing a government entity automatically becomes a public record, estopping a claim of privilege, negating counsel's responsibility to return the document, and further allowing its use as evidence in trial.

ANALYSIS

8. The District's Motion seeks to focus solely on a determination of whether the email is a public record, reserving its rights to argue issues of privilege, waiver, and admissibility at trial. Contrary to the District's assertion, the privileged nature of the email is fundamental to the Court's resolution of this issue and a determination of the obligations of the parties and counsel.

INADVERTENT DOCUMENT PRODUCTION

9. Rule 4-4.4(b) of the Florida Bar, entitled Respect for Rights of Third Persons, states:

A lawyer who receives a document relating to representation of the lawyers' client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

See also, *Inadvertent Document Productions and the Threat of Attorney Disqualification*, Mark Etan; Fla. Bar Journal, November 2009, Vol. 83, No. 10. Attached hereto as Exhibit C.

10. The Federal Rules of Civil Procedure also provides specific responsibilities upon a party receiving privileged documents inadvertently and procedures should that party dispute the privilege claim. See Rule, 26 (b) (5) (B) , Federal Rules of Civil Procedure.
11. Here there is no doubt that the document is a communication between client and lawyer. There is no indication that a third party was included in the email, thereby waiving the

privilege. The District does not dispute that Plaintiffs have asserted the privilege. The law is clear that only the client can waive the privilege, not counsel, or an employee of counsel. See Section 90.502, Florida Statutes; and *Neu v. Miami Herald Pub., Co.*, 462 So. 2d 821, 825 (Fla. 1985). Contents of confidential communication between attorney and client are privileged and not discoverable. See, *Burt v. Government Employees Ins. Co.*, 603 So. 2d 125 (Fla. 2d DCA 1992). Therefore, the only issue remaining is whether the document has become a public record.

12. The determination of what constitutes a public record is a question of law. *State v. City of Clearwater*, 863 So.2d 149, 151 (Fla. 2003).

13. “Public records” are defined by statute as:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Fla. Stat. 119.0011(12).

14. Under longstanding Florida law, a public record “is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (1980); see also, *Rogers v. Hood*, 906 So.2d 1220 (Fla. 1st DCA 2005)(finding that unused ballots are not a “public record”). The determining factor of whether a document is a public record subject to disclosure is the nature of the record, not its physical location. *State v. City of Clearwater*, 863 So.2d 149, 153 (Fla. 2003)(finding that private e-mails fall outside the definition of “public records”, since they are not

made or received pursuant to law or ordinance, and they were not created or received in connection with official business.”)

15. The email communication at issue in this Motion is an attorney-client communication between a private citizen, Ms. Smith, and her private counsel, Maggie Mooney-Portale. No third party was copied. At no point in time did Ms. Smith intend for the email to be released to anyone outside of the law firm of Lewis Longman & Walker, P.A.
16. Ms. Smith is not an “agency” as required by the public records statute, nor was she a person acting on behalf of an agency when she emailed her legal counsel. The communication between Ms. Smith and her counsel does not perpetuate, communicate, or formalize knowledge for the District, and therefore, it does not fall within the definition of “public record”.
17. The District relies upon a Florida Attorney General’s Opinion (AGO 99-43), and the cases cited therein, to support its contention that irrespective of a statutory declaration that a document is confidential or privileged the document is subject to the Public Records Laws absent a specific exemption under Chapter 119.
18. The Plaintiffs agree with the Attorney General’s Opinion in many respects. AGO 99-43 accurately describes the public records law as “broad in scope”, requiring production of non-exempt public records and declaring that disclosure of public records is mandatory, not discretionary. But the District’s reliance on this opinion is misplaced, because the opinion only concerns records created by an agency either pursuant to statute or to further official agency business.
19. AGO 99-43 concerns a statutory pre-suit notice a claimant must file with the Florida Department of Health prior to filing a medical malpractice civil claim. AGO 99-43


correctly holds that the document is a public record even if it is inadmissible for civil litigation purposes. Absent an exemption from the public records laws the notice was also subject to inspection and copying by the public.

20. Here there is no statutory requirement or obligation for the Ms. Smith to provide a copy of an email between her and her counsel to the District during the course of discovery. Ms. Smith is not a governmental entity and all of her communications are not public documents.
21. The submission of the document at issue to the District was an inadvertent mistake, a clerical error that frequently occurs in the course and scope of litigation, especially when voluminous discovery is exchanged between parties.
22. The District and its counsel have misconstrued the public records law, and seek to void the attorney-client privilege, in an effort to capitalize on an inadvertent disclosure of privileged information.
23. If the District's position is adopted by this Court, then any private individual would be penalized excessively for an inadvertent disclosure of an attorney-client communication by virtue of the fact that the private individual is litigating against a public body.
24. The District has cited no precedent supporting its position that the attorney-client privilege is waived by an inadvertent disclosure to a public body or that the District is entitled to use this privileged communication during trial.

WHEREFORE, the Plaintiff Smith respectfully requests this Court order the District and any other party receiving copies of document Bates stamped 1300-03, to immediately return such copies to counsel for the Plaintiffs, and further, requests entry of an order that such document is protected by attorney-client privilege and not admissible at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Daniel E. Scott, Esquire**, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by *facsimile*, this 7th day of December, 2009.


Kevin S. Hennessy, Esquire