

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

MATTHEW FLOETER,

Plaintiff,

vs.

CASE NO.: 6:05-cv-400-ORL-22KRS

THE CITY OF ORLANDO

Defendant.

_____ /

**DEFENDANT'S RESPONSE
TO PLAINTIFF'S COMBINED EMERGENCY MOTION
FOR SANCTIONS FOR SPOILIATION OF EVIDENCE
AND MOTION TO STRIKE PLEADINGS AND DEFENSES**

COMES NOW, Defendant THE CITY OF ORLANDO ("City"), by and through its undersigned counsel and pursuant to Local Rule 3.01(b), hereby files its Response to Plaintiff MATTHEW FLOETER's ("Plaintiff") Combined Emergency Motion for Sanctions for Spoliation of Evidence and Motion to Strike Pleadings and Defenses, and states the following¹:

I. INTRODUCTION

On December 22, 2006, Plaintiff filed his Combined Emergency Motion for Sanctions for Spoliation of Evidence and Motion to Strike Pleadings and Defenses ("Combined Motion"), essentially alleging that the City engaged in spoliation of evidence by allegedly "losing" the

¹ Pursuant to this Court's Case Management and Scheduling Order on June 1, 2005, and Local Rule 3.01(e), the parties have been advised that the designation "emergency" may cause a judge to abandon other pending matters in order to immediately address the "emergency," and that this Court will sanction any counsel or party who designates a motion as an "emergency" in the absence of a true emergency. While counsel for Plaintiff claims that Plaintiff's Combined Motion is an emergency motion "because of [the City's] egregious conduct in providing the subject report and letter," the City contends that there is no "true emergency," where as here, Plaintiff's motion is based on alleged actions that already occurred. Hence, there was no such "emergency," and Plaintiff should be sanctioned for

computer of Lieutenant Victor Uvalle, former Section Commander of the Orlando Police Department's Undercover Drug Unit. According to Plaintiff, the City was put on notice after Plaintiff's deposition was taken by the City on December 15, 2005, that Lieutenant Uvalle's computer allegedly contained pornographic e-mails, the finding of which would have supposedly justified Plaintiff's failure to complain to Lieutenant Uvalle about alleged sexual harassment. After Plaintiff's deposition was taken, Plaintiff propounded to the City a request for the production of copies of all e-mails with sexually explicit or pornographic materials from the computer of Lieutenant Uvalle. Plaintiff claims that the City thereafter "lost" Lieutenant Uvalle's computer, and failed to inform Plaintiff and/or this Court that Lieutenant Uvalle's computer had been "lost." Plaintiff therefore accuses the City of "spoiling" evidence and seeks sanctions against the City for allegedly doing so.

The City emphatically denies engaging in any "spoliation" of evidence. As set forth below, the City was placed on notice for the first time through Plaintiff's deposition on December 15, 2005, of his contention that Lieutenant Uvalle allegedly viewed and disseminated pornographic material via e-mail. The next day, December 16, 2005, the City received a request for production of any pornographic e-mails from Lieutenant Uvalle. The City immediately inspected the City's e-mail server and backup tapes for any pornographic e-mails from Lieutenant Uvalle's computer and found none. The City's e-mail server is the location where City employees ordinarily store e-mails. In addition, the City took the added step of scanning the hard drive of Lieutenant Uvalle's City-issued computer, even though that is not where e-mails are typically stored. Again, this search produced no pornographic e-mails. Counsel for the City

labeling his motion as such.

therefore accurately responded to Plaintiff's discovery request by stating that the City possessed no documents responsive to the request.

Plaintiff contends that the City "lost" Lt. Uvalle's computer. To support this allegation, Plaintiff points to the statement of Vernon Greene, the City's Information Security Administrator who was assigned to inspect the City's e-mail server and Lieutenant Uvalle's computer, that Lieutenant Uvalle's computer "was also changed, whereabouts unknown." Plaintiff, however, has taken this statement completely out of context. As explained in greater detail below, this statement by Mr. Greene simply referred to the fact that Lieutenant Uvalle's computer had been changed out in July of 2005, some five (5) months before the City was placed on notice of any issue related to his computer. The City has attached an affidavit to this Response to demonstrate: (1) that Lieutenant Uvalle's previously assigned computer had been changed and reformatted in July of 2005 so that any examination of its hard drive, if in fact it could have been located, would have been fruitless; and (2) the City had no duty to preserve the alleged evidence that may have been in the previously assigned computer, given that it had no notice at the time of this computer being changed that it would likely be the subject of a discovery request. Thus, the City has made no untruthful representations to Plaintiff or this Court in its various discovery responses and pleadings.

Because Plaintiff cannot present any proof that the City acted in bad faith in responding to its discovery requests, and did not engage in "spoliation" of any evidence, Plaintiff's Combined Motion must be denied in its entirety.

II. RELEVANT FACTS

1. On December 15, 2005, the City took Plaintiff's deposition, during which he alleged that he could not complain of sexual harassment by Sergeant Barbara Jones to Lieutenant Victor Uvalle, because Lieutenant Uvalle allegedly watched pornographic videos on his (Lieutenant Uvalle's) computer and e-mailed such videos to other officers within the Orlando Police Department ("OPD").

2. On December 16, 2005, Plaintiff propounded his First Request to Produce on the City, which included among other Requests:

- a) Request No. 15: A copy of all emails with sexually explicit or pornographic materials emailed from the computer of [Lieutenant] Uvalle to anyone from 2000 to the present; and
- b) Request No. 18: A copy of all emails with sexually explicit or pornographic materials emailed from and received at any computer of anyone employed at OPD from 2000 to the present.

3. Upon reviewing Plaintiff's deposition testimony and receiving Plaintiff's First Request to Produce, the City learned that Lieutenant Uvalle and other officers within OPD may have violated its policy regarding proper use of City computers. Consequently, on or about December 20, 2005, the City tasked Vernon Greene, the City's Information Security Administrator, to conduct an audit of the following officers within OPD to determine whether their computers contained any e-mails of the type described in Plaintiff's First Request to

Produce: Lieutenant Uvalle, Sergeant Jones, Shawn Hayden, Matthew Floeter, Alex Faberlle, Kevin Easterling, and Anthony Moreschi. (Security Audit Report²).

4. The City's e-mail system consists of two main programs: (1) Lotus Notes, a program that is directly installed onto an employee's hard drive, and (2) iNotes, an internet-based program which stores all City employees' e-mails on the City's e-mail server. E-mails generated by City employees are customarily stored on the City's e-mail server via iNotes, and are not typically stored on a computer's hard drive unless an employee has Lotus Notes installed on his computer, and he or she takes a specific, affirmative action to store an e-mail on the hard drive.

5. Mr. Greene began his audit on December 21, 2005, by reviewing the e-mail server, including the server's backup tapes. (Greene Memorandum³). Mr. Greene found no e-mails of the type described in Plaintiff's First Request to Produce on the City's e-mail server or its backup tapes. *Id.*

6. Mr. Greene then widened his search to include an examination of Lieutenant Uvalle's hard drive on his current computer, Asset A0500454, which again yielded no sexually explicit or pornographic e-mails as sought by Plaintiff's First Request to Produce. *Id.*

7. Recognizing that Asset A0500454 had been assigned to Lieutenant Uvalle in 2005, Mr. Greene informed John Matelski, Deputy Chief Information Officer, during his audit that Lieutenant Uvalle's computer had been "changed, whereabouts unknown," meaning that

² "Security Audit Report" refers to the Security Audit Report written by Vernon Greene, the City's Information Security Administrator, attached hereto as Exhibit 1.

³ "Greene Memorandum" refers to the June 9, 2006, memorandum written by Mr. Greene regarding his audit findings, attached hereto as Exhibit 2.

Lieutenant Uvalle's computer had been changed out sometime prior to the audit, but that Mr. Greene did not know the whereabouts of Lieutenant Uvalle's previously issued computer. *Id.*

8. Lieutenant Uvalle's previously issued computer, Asset A0001173, was in fact changed to Asset A0500454 (the computer that was audited by Mr. Greene) on or about July 19, 2005. Significantly, this change occurred approximately five (5) months prior to Plaintiff's deposition testimony regarding Lieutenant Uvalle's allegedly viewing pornographic e-mails. At the time Lieutenant Uvalle's computer was changed out, the previously issued computer was transferred to the Technology Management Section, where it was re-imaged (i.e., reformatted) to serve as a test machine. (Matelski Aff., ¶ 3⁴).

9. On January 18, 2006, the City objected to Plaintiff's Request No.'s 15 and 18 on the grounds that they were vague, overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

10. On March 27, 2006, Plaintiff filed a Motion to Compel the City's production of documents responsive to his First Request to Produce, including Request No.'s 15 and 18.

11. On April 14, 2006, this Court granted Plaintiff's Motion to Compel in part and denied his Motion to Compel in part. Specifically, this Court granted Plaintiff's Motion to Compel the City's production of documents responsive to Request No. 15, stating that emails of the type described would be "relevant to corroborate Floeter's testimony that [Lieutenant] Uvalle contributed to the sexually harassing environment on which Floeter's claims are based." However, this Court denied Plaintiff's Motion to Compel the City's production of documents

⁴ "Matelski Aff., ¶ ____" refers to the appropriate paragraph of the affidavit of John Matelski, current Chief Security Officer and Deputy Chief Information Officer for the City, attached hereto as Exhibit 3.

responsive to Request No. 18, stating that Plaintiff failed to explain why e-mails of the type described would lead to discovery of admissible evidence in the instant case.

12. Pursuant to the Court's April 14, 2006, Order, the City amended its Response to Plaintiff's First Request to Produce, which included in relevant part: "In response to Request to Produce No. 15, [the City] has no documents in its custody, possession, or control that are responsive to this Request." This Response was based on Mr. Greene's examination of the City's e-mail server, as well as his examination of Lieutenant Uvalle's City issued computer.

13. On August 15, 2006, Plaintiff and the City attended a mediation conference in this case, during which Plaintiff advised the City that he had certain pornographic materials which had allegedly been downloaded and sent from Lieutenant Uvalle's computer. (Combined Motion, 3⁵). The same day, the City propounded its First Request for Production of Documents, seeking among other documents, those "in Plaintiff's possession which support or may support the claims that he was subject to a hostile work environment, including but not limited to: e-mails, recordings, videos, and any other type of correspondence."

14. On September 5, 2006, the City filed a Motion to Compel Plaintiff's production of documents responsive to its First Request for Production of Documents in the face of Plaintiff's Response that "the information [sought] was disclosed at the August 15, 2006 mediation and is therefore, confidential and privileged as work-product. Additionally, in accordance with the applicable Federal Rules of Civil Procedure and Local Rules regarding

⁵ "Combined Motion, ____" refers to the appropriate page of Plaintiff's Combined Emergency Motion for Sanctions for Spoliation of Evidence and Motion to Strike Pleadings and Defenses ("Combined Motion").

information disclosed at mediation, the information requested remains confidential.” (Plaintiff’s Response⁶).

15. On September 29, 2006, this Court ordered counsel for the City to file and serve a reply to Plaintiff’s Response to the City’s Motion to Compel, stating whether the City possessed the documents that were the subject of the Motion to Compel. Counsel for the City complied with the Court’s Order on October 4, 2006, stating that “after a long and exhaustive search of Lieutenant Uvalle’s computer,” the City denied Plaintiff’s claim that it already possessed the documents that were the subject of its Motion to Compel. This, again, was based on Mr. Greene’s examination of the City’s e-mail server, as well as his examination of the computer that had been assigned to Lieutenant Uvalle by the City.

16. On October 6, 2006, this Court granted the City’s Motion to Compel Plaintiff’s production of documents responsive to the City’s First Request for Production, stating that: (1) it knew of no law “that would clothe documents with a privilege merely because they were first disclosed during mediation”; and (2) Plaintiff “had an obligation to disclose all documents he intends to use at trial pursuant to Federal Rule of Civil Procedure 26(a) and (e) without the need of a formal discovery request.” Plaintiff was also assessed one-hundred-and-fifty (150) dollars in attorney’s fees and costs payable to the City’s counsel for the City’s having to file its Motion to Compel discoverable documents.

⁶ “Plaintiff’s Response” refers to Plaintiff’s Response to the City’s First Request for Production, attached hereto as Exhibit 4.

17. To this day, the City maintains that it had no documents within its custody, possession, or control responsive to Plaintiff's Request No.15 until Plaintiff himself produced such documents to the City after the Court granted the City's Motion to Compel.

III. MEMORANDUM OF LAW

"Spoliation" is the "intentional destruction, mutilation, alteration, or concealment of evidence." *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006) (citing *Black's Law Dictionary* 1437 (8th ed.2004) (internal quotations omitted)). In the Eleventh Circuit, sanctions are deemed appropriate "only when the absence of [the alleged missing evidence] is predicated on *bad faith*... 'Mere negligence' in losing or destroying the records is not enough for an inference of consciousness of a weak case.'" *Kimbrough v. City of Cocoa*, 2006 WL 3500873, 3 (M.D.Fla. 2006) (quoting *Bashir v. Amtrack*, 119 F.3d 929, 931 (11th Cir. 1997) (quoting *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (emphasis added))).

There is not a shred of evidence which suggests that the City "spoiled" any evidence or acted in bad faith in response to Plaintiff's First Request to Produce. Rather, the facts show that upon reviewing Plaintiff's December 15, 2005, deposition testimony and receiving Plaintiff's December 16, 2005, First Request to Produce, the City undertook an exhaustive search to locate and identify "[a] copy of all emails with sexually explicit or pornographic materials emailed from the computer of [Lieutenant Victor] Uvalle to anyone from 2000 to the present." As evinced by Vernon Greene's June 9, 2006, memorandum, Mr. Greene scanned all of Lieutenant Uvalle's e-mails that were stored on the City's e-mail server, the place where all City employees' e-mails were customarily stored. (Greene Memorandum). Although this search alone would have likely

sufficed to meet any good faith requirement, Mr. Greene expanded his search to include Lieutenant Uvalle's actual computer at the time, Asset A0500454, to determine whether Lieutenant Uvalle had taken the extra step of storing pornographic e-mails on his hard drive. *Id.* This additional examination was done *twice* even though City employees do not customarily store e-mails on their individual hard drives. *Id.* Yet despite Mr. Greene's best efforts at finding e-mails of the type described in Plaintiff's First Request to Produce, all of his searches yielded no such e-mails. *Id.*

As for Lieutenant Uvalle's previously issued computer, Asset A0001173, the evidence shows that this computer was changed out on or about July 19, 2005, approximately five (5) months before Plaintiff testified during his deposition that Lieutenant Uvalle allegedly viewed pornographic materials on his computer. (Matelski Aff., ¶ 3). As Mr. Greene stated in his June 9, 2006, memorandum, he did not know the location of this previously issued computer during his audit. *Id.* Consequently, Mr. Greene could not review any e-mails that may have been stored onto its hard drive. According to the affidavit of John Matelski, the City's Chief Security Officer and Deputy Chief Information Officer, old computers that are replaced by new computers are re-imaged approximately two (2) weeks after being replaced so that their hard drives may be reused. (Matelski Aff., ¶ 2-3). In the case of Lieutenant Uvalle's previously issued computer, Asset A0001173, the evidence shows that it was taken from Lieutenant Uvalle on or about July 19, 2005, and within weeks, its hard drive was reformatted. *Id.* This was all done well before Plaintiff revealed in his deposition on December 15, 2005, that Lieutenant Uvalle was allegedly disseminating pornographic e-mails.

Given these incontrovertible facts, it is clear that Plaintiff cannot prove the existence of any bad faith on the part of the City during the discovery process. As Plaintiff himself recognizes, the City “was placed on notice that [Lieutenant Uvalle’s “original” computer] would be central to [] Plaintiff’s case on *December 15, 2005* (deposition of Plaintiff) and *December 16, 2005* (request for production from Plaintiff).” (Combined Motion, 9) (emphasis added). However, Plaintiff completely mischaracterizes Mr. Greene’s statement that Lieutenant Uvalle’s previously issued computer was “changed, whereabouts unknown” when he states that within five to fifteen days of the City’s notice that “the computer and its contents were inexplicably missing.” *Id.* That is simply untrue. The fact is that once the City was put on notice that Lieutenant Uvalle’s e-mails would be an issue in this case (i.e., on December 15, 2005), and was served with Plaintiff’s First Request to Produce, the following occurred: (1) the City inspected its e-mail server, the device where e-mails are customarily stored, and found no e-mails responsive to Plaintiff’s Request; (2) the City inspected Lieutenant Uvalle’s computer hard drive and found no e-mails responsive to Plaintiff’s Request; and (3) the City responded to Plaintiff’s Request, stating that it had no documents in its custody, possession, or control responsive to this Request. While it is true that Lieutenant Uvalle had been previously issued a different computer and was in possession of that computer until July 19, 2005, Lieutenant Uvalle did not have that computer at the time of Plaintiff’s First Request to Produce (some five months later), and that computer’s hard drive had been, pursuant to the City’s policy, re-imaged. Thus, this previously issued computer was not even traceable to inspect.

Mr. Greene’s June 9, 2006, memorandum clearly shows that his search of Lieutenant Uvalle and the other officers’ computers produced no sexually explicit or pornographic e-mails

which could be linked to any individual responsible for their download. (Greene Memorandum). Thus, the City propounded its own First Request for Production seeking such documents upon which Plaintiff sought to rely to redress his claims. On September 29, 2006, this Court ordered counsel for the City to state whether the City possessed the documents that were the subject of its Motion to Compel production of documents responsive to its First Request for Production. One could hardly imagine a more accurate statement than that the City did not already possess such documents in light of Mr. Greene's conclusions.

In seeking sanctions for the alleged spoliation of evidence, Plaintiff must prove: (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to Plaintiff's being able to prove his *prima facie* case or defense. *Optowave Co., Ltd. v. Nikitin*, 2006 WL 3231422, 8 (M.D.Fla. 2006 (citing *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006)). As set forth in detail above, the City had no knowledge of Plaintiff's claims that Lieutenant Uvalle allegedly sent pornographic e-mails within OPD until after Plaintiff testified to such during his deposition on December 15, 2005. Plaintiff alleges that the City "spoiled" evidence by "losing" Lieutenant Uvalle's computer. That is simply not the case. Rather, the facts demonstrate that Lieutenant Uvalle did have a computer at the time of Plaintiff's First Request to Produce, and that computer was thoroughly inspected. The City did not inspect Lieutenant Uvalle's previously issued computer, because the hard drive had been re-imaged long before the City was, by Plaintiff's

own admission, placed on notice that Lieutenant Uvalle's e-mails would be at issue in adjudicating Plaintiff's claims.⁷

Plaintiff states in his Combined Motion, "[A] party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request." (Combined Motion, 8) (quoting *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303 (N.D.Fla. 2002) (citing *Strasser v. Yalamanchi*, 783 So.2d 1087, 1093 (Fla. 4th DCA 2001)). The City wholeheartedly agrees that it had such an affirmative responsibility in handling Plaintiff's First Request to Produce. However, the City could not possibly have been aware that it would bear this responsibility on July 19, 2005, the day that Lieutenant Uvalle's previously issued computer was "changed, whereabouts unknown." (Greene Memorandum). Plaintiff himself acknowledges that the City had no notice that Lieutenant Uvalle's "original" computer would have any bearing on his sexual harassment and retaliation claims until his deposition on December 15, 2005. (Combined Motion, 9). Hence, the City had no duty to preserve any "evidence" on Lieutenant Uvalle's previously issued computer, because it had no knowledge that any of the computer's contents would even be considered evidence until several months later. *See Optowave* at 7-8 ("While a litigant is under no duty to keep or retain every document in its

⁷ As explained in further detail in its Motion for Summary Judgment and its Amended Motion in Limine, the City continues to maintain that Lieutenant Uvalle's alleged viewing and dissemination of pornography should be deemed largely irrelevant to this case. As is clear from his Amended Complaint and his deposition testimony, Plaintiff primarily contends that he suffered unwelcome sexual harassment by Sergeant Barbara Jones and later suffered retaliation for complaints regarding same. The record shows that Plaintiff never complained about the alleged pornography. Plaintiff states in his Combined Motion that given the nature of the City's *Faragher* defense, "[Lieutenant] Uvalle's computer and the emails he sent and received was the most critical piece of physical evidence in the case since it would have demonstrated Plaintiff's fears were reasonable." (Combined Motion, 12). Even assuming *arguendo* that the City knew that Plaintiff would make such a contention during the litigation of this case, which Plaintiff himself admits that the City did not, there is absolutely no case law to support Plaintiff's strident theory that Lieutenant Uvalle's alleged viewing and dissemination of pornographic materials mitigated Plaintiff's own obligation to report alleged sexual harassment.

possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request”) (citing *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D.Fla. 1987) (quoting *Wm. T. Thompson v. General Nutrition*, 593 F.Supp. 1443, 1455 (C.D.Cal. 1984))).

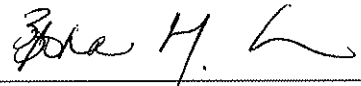
While Plaintiff repeatedly insinuates that the City lost, concealed, or even destroyed evidence, there is absolutely no proof of any of these claims other than his own speculation and his clear frustration that “there is very little other physical evidence to support [] Plaintiff’s claims of the complete nature of the work environment with respect to the emails and pornographic images being disseminated therein.” (Combined Motion, 12). The City concedes that it had an affirmative duty to preserve physical evidence regarding alleged pornographic e-mails in connection with Lieutenant Uvalle once Plaintiff testified as to the existence of such. The City maintains that it fulfilled this duty.

Given that Plaintiff has utterly failed to prove that the City acted in bad faith throughout the course of discovery in the instant case, and that the City had the duty to preserve alleged missing evidence as is required to warrant sanctions for spoliation of evidence, the City respectfully requests that this Court deny Plaintiff’s motion for sanctions. In addition, because Plaintiff’s Combined Motion also calls for this Court to strike the City’s Answer or Fifth and Sixth Affirmative Defenses and its Motion for Summary Judgment based on Plaintiff’s argument that the City’s alleged spoliation of evidence has “undermined” his case, the City also

respectfully requests that this Court deny Plaintiff's motion to strike these pleadings as well, thereby denying Plaintiff's entire Combined Motion.

WHEREFORE, for the foregoing reasons, the City respectfully requests that Plaintiff's Combined Emergency Motion for Sanctions for Spoliation of Evidence and Motion to Strike Pleadings and Defenses be denied, and that the City be awarded its own attorneys' fees and costs in filing this Response. The City further requests this Court to impose any sanctions that this Court may deem appropriate in light of the fact that Plaintiff's Combined Motion should clearly not have been designated as "emergency."

Respectfully submitted,



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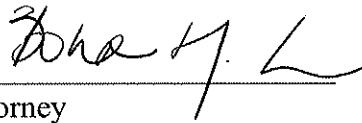
(407) 571-2152

(407) 571-1496 Facsimile

Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January, 2007, I electronically filed the foregoing Response to Plaintiff's Combined Emergency Motion for Sanctions for Spoliation of Evidence and Motion to Strike Pleadings and Defenses with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following: Frank T. Allen, Esq., The Allen Firm, P.A., 605 East Robinson Street, Suite 130, Orlando, Florida 32801, and Michael H. Lefay, Esq., Nejame, Harrington, Barker, et al., 1 South Orange Avenue, Suite 304, Orlando, Florida 32801.



Attorney



CITY OF ORLANDO

Security Audit Report

To: John Matelski, Deputy Chief Information Officer
Mark Crain

From: Vernon Greene, Information Security Administrator

Date: 20 December 2005

Subject: Legal Request

Policy in Effect (List all affected policies)

City of Orlando policy , Section , Paragraph

Directive

I have been directed by Legal (JL) to locate and document emails for the following officers, including employee number and assets assigned to them:

• Victor Uvalle	#1136	a0500454
• Shawn Hayden	#5834	a0201659
• Matthew Floetter	#2965	a0001824*
• Alex Faberlle	#11315	a0100137
• Kevin Easterling	#8279	a0001103*
• Anthony Moreschi (also known as Tony)	#6265	a0001852*
• Barbara Jones	#4586	a0001447 and a0400358

Names of the officers included in this document and details of this audit may not be released to anyone other than those needed to facilitate the request due to pending litigation.

This transmission may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or use of the information contained herein (including any reliance thereon) is STRICTLY PROHIBITED. If you received this transmission in error, please immediately contact the sender and destroy the material in its entirety, whether in electronic or hard copy format. Thank you.

The names of the officers are documented here for the purpose of collecting the necessary information and may

Participants

- Legal (JL)
- Information Security (VG)
- Systems & Networks (Used to collect and recover data) (BJ), (GW)
- Operations (CK)

EXHIBIT

1

tabbies

Actions taken by the ISO

- 051221 Requested the restoration of email from the 2005 backup tapes of which we back up quarterly
Restored information was collected and given to me for storage as well as physical tapes
- 051221 – 051227 Performing localized email capture
Was only able to capture locally stored email of those persons with the Lotus Notes Client
Uvalle collection from asset a0500454
Jones collection from asset a0400358
- 060103 Resuming data collection
Lotus Notes Administrator Bowers advises me that a request for Barbara Jones Lotus Notes ID was made by CSSA Ketteler.
After asking CSSA Ketteler the reasoning for requesting the Lotus Notes ID for Barbara Jones and she advised me that Barbara's computer suffered a hard-drive crash.
I advised the CSSA to deliver the dead hard-drive to my office.
- 060104 Receipt of hard-drive
CSSA delivers hard-drive along with copy of work order
- Reviewing emails to meet criteria requested by legal
- 060113 Break for personal leave
- 060120 Pete Spurgeon receives 10 copies of DED hard drives from Daly & Cindy and stores for me.
Each hard drive is marked with a green label identifying the asset number from which it comes from.
- 060130 Received hard drives from Pete Spurgeon to me at 0930 hours. Please note that based on the information of what machines each user possesses, it would appear that I have not received hard drives for Uvalle, Hayden, Faberlle and Jones.
Data-mining initiated by myself
A0001783
Deleted content recovered from drive
Adult content found in
 "iNotes Web Access" folder, dated 29 May 2003, from 0719 to 0729 hours.
No profile attached to content found that would indicate who retrieved the file
Profiles associated with this asset
 HAL07895
 HIR12271
 MAS11766
 RAN04451
 RUT10044
 THO10766
Recovered Notes NSF files
 Dathomas.nsf (not reviewed yet)
- A0001718
Deleted content recovered from drive
Adult content found in
 Browser cache
No profile attached to indicate who retrieved the file
Profiles associated with this asset
 PEN08459
 WIL04570
 GRI12463
- A0001334
Deleted content recovered from drive
Light adult content found in
 Browser cache
No profile attached to indicate who retrieved the file
- A0001824 (Assigned to Floetter)
A Lotus Note folder was present, but no content exists
- 060203 Temporary reassignment
Secured hard drives and notes until audit can continue.

060306 Restart of search

Data-mining initiated

A0001852 (Assigned to Moreschi)

Deleted content recovered from drive

Heavy adult content found

"LDVPScan" folder, dated 18 September 2003, from 0923 hours.

Adult humor content found

"LDVPScan" folder, dated 18 September 2003 through 24 September 2003.

Profiles associated with this asset

BEA14639

BRA04587

BUR12073

CHA13299

ELL14773

FAB11315

HAY05834

LOP12145

MOR06265

NAM12909

RAN04451

060309 Search ended

060310 Start of search

Data mining initiated

A0001103 (Assigned to Easterling)

Deleted content recovered from drive

Light adult content found under Easterling profile

Browser cache

Profiles associated with this asset

CAR12272

EAS08279

HAL07895

KET11544

MAL11765

RAN04451

RUH07608

060321 Start of search

Data mining initiated

Evidence drive crashes at 1128 hours

Evidence drive is restored at 2130 hours

A0001831

Deleted content recovered from drive

Light adult content

Browser cache

Profiles associated with this asset

BEA14639

BRU08439

FAW05267

GRA11576

HAL07895

HER10211

POL08575

RAN04451

SMI107600

060321 Evidence drive backed up secured until search restarts
060321 Search ended
060327 Start of search
Data mining initiated

A0001673

Deleted content recovered from drive
Extreme adult content
Browser cache
Profiles associated with this asset
BRA04587
BRU08439
GRA11576
MAS12274
RAN04451

060327 Drives secured searches stopped
060330 Break for personal leave
060404 Search resumed

A0001840

Recovered Notes .NSF file for Henry Wilson, but contents were empty
Deleted content recovered from drive
No adult content found
Profiles associated with this asset
LEO13871
AND11324
NAM12909
WIL02604
RAN04451

060406 Search suspended

Two hard drives are remaining to scan and will resume April 25, 2006 to be completed by close of business April 26, 2006.

060426 Search resumed

A0001815

Deleted content recovered from drive
Some adult content found
Profiles associated with this asset
BRO03028
BRU08439
GLI01233
POW01915
RAN04451
RUT10044

Items in possession

- 6 PS Lotus Backup Tapes
 - Tape cartridges (which can only be access through a specific model IBM tape drive)
- 1 Western Digital hard drive (p/n : 165140-001)
 - Reference: copy of hard drive picture attached
- 1 Laptop hard drive (MK4019GAX)
 - Obtained from Barbara Jones' laptop

Security Officer's Closing Remarks

To date, the projects or tasks that have interfered with the steady progression of this audit where, OPD Access Control Management and troubleshooting, Primrose review, Ernest Page equipment seizure and public records request, Daisy Lynum's laptop theft (later recovered as misplaced), Intelligence Internet resolution, policy and procedure development and daily information protection routine followed by scheduled personal leave April 6, 2006. As noted in notes above, there was an unforeseen hardware failure when the evidence drive crashed (logical drive error).

All drives have been reviewed and have produced the fact that adult content existed on several of the computers. However, there was no substantial evidence indicating an individual person responsible for downloading. In regard to email accounts, only a few of those listed in this report had what we call "fat clients", the Lotus Notes application installed. The rest, if they had email at all utilized "iNotes", which is the Internet version of Lotus Notes. Of the available email files reviewed, I found nothing to meet the requested criteria.

As mentioned above, there was a hard drive removed from Barbara Jones' laptop by CSSA and surrendered to me as damaged. The CSSA's did receive a helpdesk call to replace the failed drive, which they did. I requested the damaged drive be brought to me in hopes of possible recovery.

I was asked on 24 April 2006 to narrow the search down to Uvalle's email, which was done in the earlier part of the search and yielded no results. I have rescanned the mail again and the result remains the same.

To: John Matelski, Deputy Chief Information Officer
From: Vernon Greene, Information Security Administrator
Date: June 9, 2006
Subject: Legal Request

On December 20, 2005, at the request of Attorney Jody Litchford, Vernon Greene initiated a computerized audit of the following officers, Victor Uvalle, Shawn Hayden, Matthew Floetter, Kevin Easterling, Anthony Moreschi, and Barbara Jones.

Due to the nature of this particular audit and the fact that the people being audited were sworn officers, the transmission of this document and its finding has been copied to only my superior, John Matelski, who is the Deputy Chief of Information, Jody Litchford, the attorney requesting the documentation and Internal Affairs.

Additional persons used to execute the retrieval of information were, Gary Wade, Lotus Notes Administrator (responsible for collecting any backups of email that may be present on Lotus Notes servers), Bill Jacobus (responsible for pulling all backup tapes and forwarding the information to me), Cindy Ketteler and Daly Mulero (collected and duplicated the hard drives used to perform searches).

Vernon began the audit on December 21, 2005 by requesting all email from the 2005 backup tapes of which TM backs up quarterly. Any information that was retrievable was forwarded to the Security Server and the physical tapes were brought to Vernon Greene, keeping them out of rotation, which would have been eventually destroyed or erased.

Vernon performed a remote search on both Uvalle's asset (A0500454) and Jones' asset (A0400358) for a local copy of email which would be present if they used a Lotus Notes client. Vernon was able to collect a copy of Uvalle's email and copy it to the Security server for later viewing, but was unable to retrieve any information from Jones' computer (later identified as a laptop).

The audit collection process had stopped and resumed on January 3, 2006, where Vernon was advised by Melody Bowers (Lotus Notes Administrator) that a request was made to get a copy of Barbara Jones Lotus Notes ID, by Cindy Ketteler. After questioning the reasoning for this request Vernon was advised by Cindy Ketteler that Jones' hard drive had crashed and that Cindy was merely setting up Lotus Notes for Jones again. Vernon initially thought that it was "convenient" for this hard drive to crash while he was collecting and reviewing emails for content pertaining to the request. Still, he asked Cindy Ketteler to bring the damaged hard drive to his office in then hopes that he could restore the drive as he has done to others in the past.

During an update with Jodi Litchford, he advised that one hard drive was damaged and that he came to learn that Uvalle's computer was also changed, whereabouts unknown. Vernon mentioned that the search would move quicker and without threat of accidentally damaging hard drives or computer reassignments if duplicates were made of all the computers in question. On Vernon's return from personal leave January 30, 2006, he received ten hard drives from Security Officer, Pete Spurgeon that were collected by both Daly Mulero and Cindy Ketteler. Each hard drive was marked with a green label identifying the computer assets

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that they come from. Vernon still had not received any working hard drives from Uvalle's, Hayden's, Fabrelle's or Jones' computers or laptops.

Vernon began the data-mining portion of his audit which consists of retrieving deleted data, email searches, keyword searches, profile identification, Internet history review and picture or video retrieval. The first hard drive he evaluated was A0001783.

From asset A0001783, Vernon was able to recover partially deleted information from this computer's hard drive and found some adult content on the drive, located in an iNotes¹ web access folder dated May 29 2003, from 0719 to 0729 hours, but the associated profile (sign-on) information was not recovered making it difficult to isolate whose iNotes account was used to view, send or receive the adult content. The same can be said about asset A0001718 and A0001334, where some adult content was recovered, but not enough information was restored to indicate or implicate the profile that viewed it. Also there were no Lotus Notes clients installed on these computers, which means that if email was sent or received by the users of these computers it would have had to been sent via iNotes. In addition, there were no other email applications such as Outlook or Eudora on these devices.

On the hard drive that was assigned to Floetter, asset A0001824, a Lotus Notes folder was present, but it did not have anything in it. It would appear that the Lotus Notes client was simply uninstalled, but does not explain missing data that would have been left behind, such as the DATA folder in Lotus Notes which holds the profile (NSF) of the intended user. Unfortunately, there was still no way to prove whether this was a malicious act.

Relating to Moreschi's computer (asset #A0001852), heavy adult content was found in a folder labeled "LDVPScan", dated September 18, 2003 0923 hours. The folder name is identified as a virus scanning folder and is located in the root directory of the computer and not under Moreschi's profile, meaning anyone - or a system process such as an anti-virus application - could have placed that folder on the computer.

Deleted content was also recovered off of Easterling's computer (asset A0001103), where some adult content was found under his profile, meaning the device would have had to been logged in under his signon - however, it would be difficult to prove from a legal standpoint that he did it.

Asset A0001673 revealed extreme adult content recovered in the browser cache (Internet History), but no specific profile was used. A0001815 revealed some adult content, but no specific profile was used.

Asset A0001840 revealed no adult content, but did have a Lotus Notes email profile for a Henry Wilson, but the contents of the email were empty.

On April 24, 2006 I was asked to focus on Uvalle's email of which I rescanned with nothing to add to the report.

¹ iNotes is a web based version of Lotus Notes

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MATTHEW FLOETER,

Plaintiff,

vs.

CASE NO.: 6:05-cv-400-ORL-22KRS

THE CITY OF ORLANDO,

Defendant.

AFFIDAVIT OF JOHN A. MATELSKI

STATE OF FLORIDA)

COUNTY OF ORANGE)

BEFORE ME, the undersigned NOTARY PUBLIC, duly authorized to take acknowledgements and administer oaths, this day personally appeared John Matelski, who, being first duly sworn, deposes and says as follows:

1. My name is John Matelski. I am over eighteen (18) years of age, and I have personal knowledge of the facts set forth in this affidavit.
2. I am currently employed by the City of Orlando as its Chief Security Officer and Deputy Chief Information Officer. I have been employed by the City since 1997.
3. The City's inventory records indicate that on July 19, 2005, Lt. Victor Uvalle's City issued computer (Asset # A0001173) was replaced with a new computer (Asset #0500454). This was done in the standard course of business. When computers are replaced, Technology Management's standard procedure is to transfer data from the hard drive of the old computer to the new computer, wait for approximately two weeks to ensure that the employee has all of the data that they need from the old device, and then

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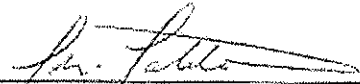
ALLEN, NORTON & BLUE, P.A.
PROFESSIONAL ASSOCIATION

EXHIBIT

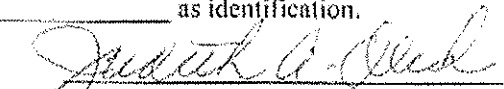
3


re-image the old drive for reuse when other hard drives on similar computers stop working. Asset #A0001173 is currently being used as a test computer for use by Technology Management desktop support personnel to trouble-shoot issues that occur on other similarly configured computers. There is no permanent hard drive allocated to this device, further confirming the fact that the hard drive was re-imaged, pulled and reallocated for use as a spare part for another computer. It is also important to note that hard drives and other internal computer components are not individually tracked, as current City policy stipulates that only items with a value equal to or greater than \$1000 dollars are asset tagged and tracked by the City. The only hard drives that are currently tracked are those that become subject to an investigation, and are retained by TM Security personnel. At the time this hard drive was replaced (July 2005), Technology Management was not aware of any special handling requirements, and thus, used normal Technology Management operating procedures to re-image and reallocate.

I have read the foregoing consisting of two pages, and swear it is true.


John Matelski

SWORN TO AND SUBSCRIBED before me this 29th day of December, 2006, by John Matelski, who
is personally known to me or has produced a _____ as identification.


Notary Public, State of Florida

	Print Name
	Notary Public State of Florida
	My Commission DD436963
	Ex. Commission No. / Exp. Date

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

MATHEW FLOETER

Plaintiff,

vs.

Case No.:6:05-CV-400-ORL-22KRS

THE CITY OF ORLANDO

Defendant

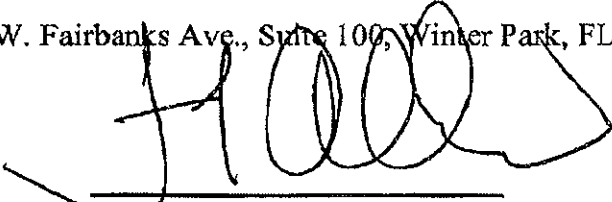
PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUEST FOR PRODUCTION

Plaintiff, MATHEW FLOETER, responds to Defendant's Request for Production dated August 15, 2006 as follows:

1. Plaintiff objects to this request for production to the extent that the information was disclosed at the August 15, 2006 mediation and is therefore, confidential and privileged as work-product. Additionally, in accordance with the applicable Federal Rules of Civil Procedure and Local Rules regarding information disclosed at mediation, the information requested remains confidential.

2. Plaintiff objects to this request for production 2 (a-f) to the extent that the information was disclosed at the August 15, 2006 mediation and is therefore, confidential and privileged as work-product. Additionally, in accordance with the applicable Federal Rules of Civil Procedure and Local Rules regarding information disclosed at mediation, the information requested remains confidential.

I CERTIFY THAT a true and correct copy of the forgoing was furnished on this the 18th day of August 2006 to Bona M. Kim, Esq., 1477 W. Fairbanks Ave., Suite 100, Winter Park, FL 32789.



FRANK T. ALLEN, ESQUIRE
FBN-0033464
THE ALLEN FIRM, P.A.
605 E. Robinson Street

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Orlando, FL 32801
(407) 481-8103
(407) 481-0009
For the Plaintiff.