IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

TIM CANOVA

Plaintiff,

CASE NO.: CACE-17-010904
Division: 21

IMMEDIATE HEARING REQUESTED PURSUANT TO Fla. Stat. § 119.11

v.

BRENDA SNIPES, IN HER OFFICIAL CAPACITY AS SUPERVISOR OF ELECTIONS, BROWARD COUNTY, FLORIDA

Defendant,
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, TIM CANOVA, pursuant to Fla.R.Civ.P. 1.510 moves for Summary Judgment As the remedy for the Chapter 119 violations, Plaintiff requests the only remaining relief, the award of reasonable costs and fees, pursuant to Section 119.12, Fla. Stat. (2016)[1], in support of Summary Judgment, and with regard to the requested relief Plaintiff states the following grounds and substantial matter of law to be argued:

SUMMARY OF ARGUMENT

This Motion for Summary Judgment seeks final judgment against the Defendant, Supervisor of Elections, for the (1) illegal and unlawful destruction of original voted paper ballots from a congressional race; and (2) unlawful refusal for over six months prior to their destruction

[1] It should be noted this action is governed by the 2016 version of this statute since the public records request was made before May 23, 2017. In 2017, there was an amendment to this statute, but in the adoption of such amendment there was a specific statement that "this act applies on to public records requests made on or after the effective date of this act." See Section 2, Ch. 2017-21, Florida Session Laws. The public records request at issue are the March 10, 2017 and restated and amended May 9, 2017 written requests.

to produce, and allow copying/scanning of those public records, pursuant to Article I, Section 24 of the Florida Constitution and Chapter 119, Florida Statutes, (herein collectively the "Public Records Act"). On March 10, 2017, the records were specifically requested and identified as follows:

> Request 1: We seek to examine all of the Broward County ballots of Florida's 23rd Congressional District from the August 30, 2016 Democratic Primary as they are stored. We request that they all be brought to the same location, with as minimal disruption to their current state as possible. We specifically request that the Supervisor of Elections office not re-count or sort them prior to our meeting.
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> Request 3: We request 100% of the ballots from the August 30, 2016 Democratic primary in the Broward County portion of Florida's 23rd Congressional District be produced: including early voting, election day voting, mail in voting, disabled voting, provisional or affidavit ballots, military or overseas ballots, void ballots, write-in ballots and any other ballot cast not mentioned.
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> (See Affidavit of Tim Canova, dated January 17, 2018, ¶ 8 and Exhibit A to Amended Complaint)

The Defendant, Broward County Supervisor of Elections Dr. Brenda Snipes, violated the law and unlawfully destroyed all ballots cast in the August 30, 2016 primary election (the public records sought by this lawsuit), months after this lawsuit was filed. She violated at least three categories of statutory and legal authority which prohibited such destruction.

First, she did so contrary to direct Federal and State statutory authority that requires her to maintain those original ballots for at least 22 months. She destroyed them after only 12 months. (See 52 U.S.C. § 20701, §§101.545, 119.021, and 257.36(6), Fla. Stat., and Rule 1B-24.003, F.A.C.).

Second, the destruction of such ballots was directly contrary to provisions of Chapter 119, Florida Statutes, which prohibited her from destroying such records while this action was pending. Florida Statute 119.11 unequivocally requires:

> (4) **Upon service of a complaint**, counterclaim, or cross-claim in a civil action brought to enforce the provisions of this chapter, **the custodian of the public record that is the subject matter of such civil action shall not** transfer custody, **alter, destroy,** or otherwise dispose of the public record sought to be inspected and examined, notwithstanding the applicability of an exemption or the assertion that the requested record is not a public record subject to inspection and examination under s. 119.07(1), **until the court directs otherwise.** The person who has custody of such public record may, however, at any time permit inspection of the requested record as provided in s. 119.07(1) and other provisions of law. (Emphasis added).

Further, Florida statute § 119.07(1)(h) provides that destruction of the record can only be pursuant to court order:

> (h) Even if an assertion is made by the custodian of public records that a requested record is not a public record subject to public inspection or copying under this subsection, **the requested record shall, nevertheless, not be disposed** of for a period of 30 days after the date on which a written request to inspect or copy the record was served on or otherwise made to the custodian of public records by the person seeking access to the record. **If a civil action is instituted within the 30-day period to enforce the provisions of this section with respect to the requested record, the custodian of public records may not dispose of the record except by order of a court of competent jurisdiction after notice to all affected parties.** (Emphasis added).

Despite the explicit requirements of Florida Statutes § 119.11(4) and § 119.07(1)(h), the ballots were destroyed after the filing of this lawsuit, and no order was sought or obtained from this Court prior to the public records being destroyed. Further, the Supervisor of Elections either in bad faith or through gross malfeasance personally and wrongfully signed a document stating that there was no pending litigation concerning the ballots so as to authorize her staff to perform the destruction.

Third, there are pending Requests for Production and a Motion to Compel filed in this lawsuit requiring production of the original paper ballots, (See the Transcript of the Nov. 6, 2017 hearing). Destroying documents which are the subject matter of litigation, and after the other side has a pending discovery request for such documents, is recognized as one of the most egregious violations that a party can engage in during litigation. Florida case law recognizes an affirmative

duty and responsibility to preserve any items or documents that are the subject of a duly served discovery request in litigation.

The documents attached to this Motion, the pleadings and affidavits filed in the Court file demonstrate that there are no genuine issues of material fact as to Defendants' liability to Plaintiff; and that Plaintiff is therefore entitled to a final summary judgment as a matter of law. In particular, all Plaintiff has to prove to make a *prima facie* case in this litigation is that the records sought are public records. Once Plaintiff has demonstrated that the documents requested for inspection and copying are a public record, he has an absolute right to inspect and copy those ballots. The court provides this relief under section 119.11(2), Florida Statutes which provides:

> (2) Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48-hour period.

There is no argument the Supervisor can make in good faith that original voter ballots are not public records or are exempt from the inspection and copying.[2] See, *Roger v. Hood*, 906, So.2d 1220 (Fla. 1st DCA, 2005)("Nothing could be more obvious than that a ballot becomes a public record once it is voted." Id at 1223)

The other relief that is available in a Public Records Act litigation is to obtain attorney's fees. See, §119.12, Fla. Stat. (2016). To make out a *prima facie* case for attorney's fees -- section 119.12 provides as follows:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public

[2] Had the original ballots not been destroyed during the pendency of this lawsuit, the legal issues would have focused on what are reasonable manner restrictions by which the ballots could have been copied, i.e. paper copies only, or electronic copies by a scanner, and what rights of inspection does Canova have to observe the copying/scanning process to ensure that there is no alteration or manipulation of the ballots occurring while the copying is being conducted.

> record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

Thus, there is an additional requirement to obtain attorney's fees. The Plaintiff must show that he was "unlawfully refused" his right to inspect and copy the public record. As demonstrated below, the destruction of original voter ballots as occurred in this action is unlawful on several legal principles. The destruction in violation of the legal requirements is so egregious that Plaintiff has a companion request for sanctions for such destruction. The destruction of the original voter ballots is the most extreme and unequivocal type of refusal. Plaintiff has made his *prima facie* showing that he is entitled to attorney's fees.

Lastly, Plaintiff also demonstrates by this motion, that summary judgment is appropriate as to the affirmative defenses raised by the Supervisor. With the destruction of the originals, the affirmative defenses are no longer legally relevant nor germane to the issue of an attorney's fee award under §119.12. Even if one or more of the affirmative defenses should still be legally sufficient or relevant, Plaintiff, by this motion and the accompanying affidavits has demonstrated that there are no genuine issues of material fact which would effectively bar Plaintiff from the relief under §119.12.

LIST OF SUPPORTING AFFIDAVITS and DOCUMENTS

Pursuant to Rule 1.510, Fla. R. Civ. P., Plaintiff hereby designates the following items as supporting affidavits which support this Motion for Summary Judgment"

1. Verified Amended Complaint, in court file.
2. Affidavit of Tim Canova, dated January 17, 2018, (hereinafter "Canova Aff.")
3. Affidavit of Connie Smekens, dated January 18, 2018, (hereinafter " Smekens Aff.")
4. Motion to Compel Dated August 28, 2017, in court file.

5. Records Disposition Document, dated September 1, 2017, attached to the Notice of Filing Supporting Affidavits and Documents, dated January 19, 2018.

6. Transcript of Hearing held on November 6, 2017, attached to the Notice of Filing Supporting Affidavits and Documents, dated January 19, 2018.

7. Portions of GS3 11, attached to the Notice of Filing Supporting Affidavits and Documents, dated January 19, 2018.

8. May 23, 2017 email correspondence from Mr. Norris-Weeks, in Court file as "Exhibit F" to the Verified Amended Complaint.

UNDISPUTED FACTS

1. The August 30, 2016 election between Tim Canova and Debbie Wasserman Schultz, in Florida's 23rd Congressional District, was a federal election. (Canova Aff. ¶ 2).

2. A public records request to Defendant for records to be produced pursuant to Chapter 119, Florida Statutes. The requests were numbered 1 through 22. (Please see the March 10, 2017 public records request attached as "Exhibit A" to the Amended Complaint, Canova Aff. ¶ 8).

3. The Defendant's office opened a public records request upon receiving the March 10, 2017 public records request and assigned it a case number, i.e. Public Records Request #2077. (Exhibit "2" to Canova Aff. And ¶ 9)

4. Public Records Request #2077 was re-noticed and reasserted on May 9, 2017 (See attached Exhibit B)[3]. The amendment stated:

> We simply seek to observe the scanning process and do not propose to touch any ballots. We stated that to the extent that your office sought a reasonable accommodation, in order to provide for scanning/copying of the public records to advise and that we would work out the issue. Specifically, if your objection is to scanning images as opposed to photocopying them, we would work to resolve the matter and would accept photocopies. Our understanding of your response is simply no--- there are no circumstances where we may obtain copies/scans of ballots cast in the August 30, 2016 primary election.
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> (Exhibit C to the Amended Complaint, and Canova Aff. ¶ 13)

[3] While counsel for the Supervisor of Elections denies that she received on May 9, 2017 the correspondence from Mr. Canova's counsel---the irrefutable evidence is that she did receive such correspondence prior to the filing of this action. See discussion on pages 22 – 24, infra of this Motion. (Smekens Aff. ¶ 4-11).

5. This lawsuit was filed on June 7, 2017. (Judicial Notice)

6. After this lawsuit was filed, Plaintiff served Requests for Production on Defendant, dated July 14, 2017. Request for Production number 1 sought to inspect and potentially duplicate:

   > All ballots cast (including early voting, election day voting, mail-in voting, handicapped voting, provisional or affidavit ballots, military ballots or overseas ballots, void ballots, blank ballots, write-in ballots, and any other form of ballot not mentioned) during the August 30, 2016 primary election in Broward County precincts of Florida's 23rd congressional district. (Motion to Compel, Exhibit A)

7. Defendant did not timely reply to Requests for Production at all[4].

8. Plaintiff moved to compel production on August 28, 2017.

9. The records sought by this lawsuit were destroyed by the Supervisor of Elections between September 1 and 19, 2017. (See Attachment 5 to Notice of Filing Supporting Affidavits and Documents, and transcript of Nov. 6, 2017 Hearing on Motion to Compel pgs. 16-21).

10. The Broward County Supervisor of Elections, Dr. Brenda Snipes, personally ordered the destruction of the paper ballots. She wrongfully certified in the authorization to destroy that the records, i.e., ballots cast in the August 30, 2016 election, were not the subject of litigation. (Doc. 5 as attachment 5 to the Notice of Filing Supporting Affidavits and Documents).

11. Defendant never sought leave of Court to permit the destruction of the records in question. (Court Docket and Judicial Notice)

MEMORANDUM OF LAW

I. STANDARD OF REVIEW

A summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c); *Moore v. Moore*, 475 So. 2d

[4] Defendant did ultimately file a Response to the Request to Produce on or about November 13, 2017.

666, 668 (Fla. 1985). The movant has the initial burden to offer sufficient admissible evidence to support his claim of the non-existence of a genuine issue. *See Harvey Bldg., Inc. v. Hailey,* 175 So. 2d 780, 783 (Fla. 1965). If affirmative defenses are raised, they must be legally sufficient and the subject of material and genuine factual dispute. (*Cufferi v. Royal Palm Development Co., Inc.*, 516 So.2d 983, 984 (Fla. 4th DCA, 1987). Any affirmative defenses pled by Defendant thus must be legally sufficient as a matter of law and there must be material evidence to support such affirmative defenses.

Once a movant tenders competent evidence to support its motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. *See Landers v. Milton,* 370 So. 2d 368, 370 (Fla. 1979). It is not enough for the opposing parties to merely assert that an issue does exist. (*See Landers*, 370 So. 2d at 370; *Harvey Bldg., Inc.*, 175 So. 2d at 782). General denials in an answer are insufficient to defeat a motion for summary judgment. *See City of Anna Maria v. Hackney,* 75 So. 2d 693, 694 (Fla. 1954).

When the liability for a Chapter 119 violation is clear, the primary remedies are (1) The court ordering the agency to open its records for inspection, pursuant to Chapter 119, Florida Statutes, see, § 119.11(2), Fla. Stat.; and (2) awarding attorney's fees under section 119.12, Fla. Stat. The Fourth District Court of Appeal in the case of *Citizens Awareness Foundation, Inc. v. Wantman Group, Inc.*, 195 So.3d 396, 399 (Fla. 4th DCA, 2016) stated that the standard of review under section 119.12, Fla. Stat. is as follows:

> [A]ttorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper; and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.

II. PLAINTIFF'S PRIMA FACIE CASE

a. STATUTORY DUTIES

i. PAPER BALLOT INSPECTION AND RETENTION STANDARDS

Under Federal law, 52 U.S.C. § 20701[5], **Defendant has a statutory duty to retain** "all records and papers" related to federal elections (like the case at hand) for a period of 22 months. The objective of the retention requirements as to paper ballots, and other voting records, is to preserve the original documents to avoid authenticity objections, and to aid in investigative activities as to elections. (*Kennedy v. Lynd*, 306 F.2d 222, 225 (C.A.5th, 1962). Mr. Canova, as a candidate for the election of which ballots are sought, is exactly a person with standing to seek review of those papers and engage in investigative activities; 52 USCA § 20510 (Civil enforcement and private right of action); *True the Vote v. Hoseman*, 29 F.Supp.3d 870, 873 (N.D.Miss.,2014)(As to the right to obtain original voting records), *Scott v. Schedler*, 771 F.3d 831, 841 (C.A.5 (La.),2014)(as to investigative activities).

Likewise, under Florida law, Defendant has a statutory obligation to maintain the paper ballots[6] cast in a federal election for 22 months. See, §§101.545, 119.021, and 257.36(6), Fla. Stat., and Rule 1B-24.003, F.A.C. Furthermore, Florida Statute § 101.572 provides for public

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[5] The entire text of the statute is as follows:
Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, **all records and papers** which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[6] Florida no longer allows electronic voting and all votes must be cast on a paper ballot. See, 101.151, 101.20, 101.56042, 101.56075 Fla. Stat.

inspection of cast ballots at any reasonable time under reasonable conditions. Lastly, under the Public Records Act, copying of the ballots is permitted. The Florida Attorney General in an issued opinion -- concerning whether the public has a right **to inspect and obtain copies** of cast ballots, *See* Fla. AGO 2004-11, 2004 WL 608778. --- stated:

> While section 119.07(1)(c)[7], Florida Statutes, places restrictions on who may handle the ballots, it does not remove the ballots from the inspection requirement of section 119.07(1), Florida Statutes. Nor am I aware of any provision restricting full inspection or copying of the ballots other than the restriction contained in section 119.07(1)(c), Florida Statutes, that no persons other than the supervisor of elections or his or her employees may touch the ballots. This office has previously stated that a custodian of public records may not impose a rule or condition on inspection that operates to restrict or circumvent a person's right of access.

There is really no legal dispute that Plaintiff has a statutory right to inspect and copy the original ballots.

ii. FLORIDA PUBLIC RECORDS ACT

The Florida Constitution provides individuals with "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution," (Art. I, §24(a), Fla. Const.). The legislative implementation of this constitutional mandate is codified in Chapter 119, Florida Statutes, the "Public Records Act." The Public Records Act declares that "it is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person," (§119.01(1), Fla. Stat.). As provided in the Public Records Act, "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," (§ 119.07(1)(a), Fla. Stat.). Florida courts have articulated that the

[7] Florida Statute 119.07(1)(C)(2004) contains the same language as 119.07(5)(2017).

purpose of the Public Records Act, in broad terms, is "to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach Cty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 2010).

As any member of the public[8] , Mr. Canova had a right under the Florida Constitution to inspect the ballots cast in this election. See *Times Publ'g Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990) (See also, *Chandler v. City of Stanford*, 121 So. 3d 657, 660). Mr. Canova simply wanted to audit certain precincts where he was a candidate for office. Regardless, a Plaintiff's motivation is not relevant to a public records case under Chapter 119. See *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010).

This case as a public records lawsuit, invoked a statutory "litigation hold" on destroying any of the records at issue. See § 119.11(4). As provided by subsection (4) of the statute, no destruction of any public record that is the subject of the civil suit shall be destroyed. There is also § 119.07(1)(h), Florida Statutes, to consider. The legislature directed that public records could not be lawfully destroyed during litigation without a Court Order. The Supervisor of Elections, whether deliberate or negligent, has violated these provisions of law.

b. <u>DUTY TO PRESERVE EVIDENCE UNDER PENDING DISCOVERY REQUESTS</u>

A duty to preserve evidence can arise by contract, by statute, **or by a properly served discovery request (after a lawsuit has already been filed)**. *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1311 (N.D.Fla. 2002). Florida law recognizes a heightened duty to preserve evidence. "[A] party does have an affirmative responsibility to preserve any items or documents

[8] Mr. Canova's standing in this proceeding is even more robust than any member of the public. He has standing as a Candidate on the original ballots for the election records, which are the subject of this Public Records Lawsuit.

that are the subject of a duly served discovery request." *Strasser v. Yalamanchi,* 783 So.2d 1087, 1093 (Fla. 4th DCA 2001). The Fourth District recognizes that striking of defenses is an appropriate sanction for failure to preserve evidence after a lawsuit is filed, even if the destruction of the evidence may have resulted from negligence. *Nationwide Lift Trucks, Inc. v. Smith,* 832 So.2d 824, 826 (Fla. 4th DCA. 2002).

There is no question in this instance that the paper ballots were the subject of a Request to Produce and Motion to Compel enforcement, prior to their destruction. (See Motion to Compel, dated August 28, 2017, Transcript November 6 2017 hearing) There can really be no justification for the Supervisor destroying the paper ballots with the pending discovery request. To make the matter even more alarming, is the obvious inappropriate certification of the Supervisor on the instruction for destruction, in that there was no pending litigation involving the paper ballots, (Doc. J, attached Notice of Filing Supporting Affidavits and Documents). There is no doubt that the discovery process in this lawsuit required retention of such paper ballots. The Supervisor has achieved the "ultimate" unlawful refusal to permit a public record to be inspected and copied by a blatant destruction of the records at issue, three months after the lawsuit was filed.

c. <u>PLAINTIFF HAS DEMONSTRATED HIS PRIMA FACIE CASE</u>

To allege a civil cause of action under Chapter 119, Florida Statutes, there is simply one requirement. The documents sought are public records, which must be produced to the member of the public upon request. *Poole v. City of Port Orange*, 33 So.3d 739, 741 (Fla.5th DCA. 2010) The Courts have considered the issue as to whether ballots are public records and explicitly stated, "Voted ballots are public records because they memorialize the act of voting." *Rogers v. Hood*, 906 So.2d 1220, 1223 (Fla. 1st DCA 2005). Additionally, there is no doubt the paper ballots are public records for which public inspection is to be permitted, (See § 101.572 and 119.07(5), Fla.

Stat.). Therefore, this court can easily issue a Final Judgment, under 119.11(2), Fla. Stat. to require the inspection and copying of the original ballots, but for the illegal destruction of the ballots themselves.

Once the above showing is made, then there is the consideration of whether Plaintiff is entitled to Attorney's Fees under section 119.12, Fla. Stat. To meet this statutory basis for relief, Plaintiff has to show that the agency unlawfully refused to permit a public record to be inspected or copied, §119.12, Fla. Stat. (2016). The Supreme Court in *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So.3d 120, 128 (Fla.,2016) in interpreting section 119.12, Fla. Stat held

> 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. There is no additional requirement, before awarding attorney's fees under the Public Records Act, that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably. Accordingly, we approve *Lee* **(1st DCA)** and *Gonzalez* **(2nd DCA)** to the extent they are consistent with our analysis and disapprove *Althouse* **(4th DCA)**, *Greater Orlando*, **(5th DCA)** and *Knight Ridder* (**3rd DCA)** to the extent that those cases require a showing that the public agency acted unreasonably or in bad faith before allowing recovery of attorney's fees under the Public Records Act. (DCA designations and bolding added)

As to the 119.12 criteria -- Defendant has clearly breached her duty to preserve the records. She, by State and Federal law, has an obligation to maintain the paper ballots for 22 months. (52 U.S.C. § 20701, 101.545, and 119.021, Fla. Stat., and Rule 1B-24.003, F.A.C.). Defendant also had two separate independent duties to maintain the ballots -- under The Public Records Act, 119.11(4) and 119.07(1)(h). Lastly, Defendant had a duty to preserve the ballots pursuant to a pending discovery request in this civil action. It is undisputed that the Supervisor nevertheless destroyed the paper ballots. Destruction of the original paper ballot, contrary to State and Federal statutory obligation to maintain the paper ballots for 22 months, the "litigation hold" requirements

under Public Records Act, and duty to preserve the ballots pursuant to a pending discovery request in this civil action litigation, are sufficient to find that the Supervisor has violated the Public Records Act. Neither the reason for the destruction occurred nor the motives for the destruction are legally relevant. Defendant, by all of her violations of her statutory and other legal duties to preserve the ballots, has essentially put herself in the position of "unlawfully refusing" to supply the original ballots. Nevertheless, the destruction that occurred here is so violative of law that a finding that the Supervisor acted unreasonably is easy to make.

In addition, there is no doubt that the Plaintiff, Tim Canova has been requesting to examine the paper ballots since March 2017 until their destruction, and provided several written notices prior to filing this lawsuit. (Canova Aff. ¶¶ 7-13 Exhibits 1 and 2, and Exhibits A, D, E, and F Amended Complaint). The record in this instance is overflowing with correspondences and emails of discussions between the Supervisor's office and Plaintiff's agents, consisting of his attorney, Mr. Collins, and an expert consultant, Ms. Friesdat. One of the primary points of contention was always how the original paper ballots would be made available, and then whether there would be any scanning or copying of the original ballots permitted. (Canova Aff. ¶ 10, 11, 12. Exhibits B, C, D, E, and F Amended Complaint). The Supervisor would not make the ballots available for inspection until there was an acquiescence to the exclusive procedures that the Supervisor insisted be followed for inspection and copying, (See, Defendant's Affirmative Defense No. 3). The Supervisor cannot in good faith state that she was unaware that Mr. Canova was making a Public Records Request for the production and copying of the original paper ballots before the filing of this lawsuit. (Canova Aff. ¶ 13, 14, Smekens Aff. ¶ 12, Exhibit 9). Now with the destruction of the paper ballots, Canova has been completely deprived of his ability to inspect and copy the original ballots.

III. AFFIRMATIVE DEFENSES

It is important to note that Defendant first filed her answer and affirmative defenses, on October 31, 2017. This is more than one month after the destruction of the original paper ballots. Defendant's eight affirmative defenses mostly all revolve around trying to escape attorneys' fee liability under section 119.12, Fla. Stat. There can be no doubt that any of the affirmative defenses, in any way, would have thwarted or obviated the need to produce the records for inspection and copying to Canova, and the court awarding relief under 119.11(2), Florida Statutes.

Plaintiff has filed with this Motion, a Motion to Strike the Affirmative Defenses. Nevertheless, Plaintiff provides this argument in support of the position that the affirmative defenses are likewise invalid as either, legally insufficient, or not supported by any facts, so that they are subject to summary judgment.

An affirmative defense is not a denial of any of the facts of the opposing party's claim, but raises some new matter. An affirmative defense is defined as:

> "a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So.3d 1071, 1079 (Fla. 2014) (citation omitted).

Mancinelli v. Davis, 217 So.3d 1034, 1038 (Fla.App. 4 Dist., 2017).

Under the case law, an affirmative defense must be legally sufficient, and contain specificity and supporting facts underlying the affirmative defense. See, *Southwart v. Bank of New York*, 204 So.3d 134, 136 (Fla. 4th DCA, 2016). Affirmative defenses which "on the whole [are] conclusory in their content, and lacking in any real allegations of ultimate fact demonstrating a good defense

to the complaint" are considered legally insufficient. See, *Cady v. Chevy Chase Sav. and Loan, Inc.*, 528 So.2d 136, 137–38 (Fla. 4th DCA, 1988).

a. <u>Individual Affirmative Defenses</u>

Affirmative Defense 1 states: "Plaintiff has failed to state a cause of action upon which relief may be granted."

The Plaintiff has plainly stated a cause of action under Chapter 119, Florida Statutes. The pleading requirement for a Public Records case is quite simple and Plaintiff has amply pleaded and demonstrated the elements. (See, *Poole v. City of Port Orange*, 33 So.3d 739, 741 (Fla.5th DCA., 2010). The test for this affirmative defense is whether "the pleader sets forth facts in his complaint upon which relief can be granted on any theory." See, *Orlovsky v. Solid Surf, Inc*., 405 So.2d 1363, 1364 (Fla. 4th DCA, 1981). Rather it is Defendant who has failed to plead, with any specificity, what Plaintiff has failed to plead so that a cause of action has not been stated.

Affirmative Defense 2 states: "At all relevant times, Plaintiff requested that public records be duplicated through a scanning process utilizing equipment that would be provided by Plaintiff."

This is an admission that the Plaintiff did request to inspect, examine, and copy the original paper ballots. Had the records not been destroyed, this issue would have been a central point of contention and a request for resolution by the court would have been sought. Now that the records have been destroyed, this affirmative defense is not legally sufficient to explain why the records are not to be made available.

Affirmative Defense 3 states: "Plaintiff has operated in bad faith by refusing to accept public records in the manner available at the time the request was made."

This is not a legally cognizable affirmative defense. There is no such provision under Florida Public Records law, that a party has to accept records as offered to be produced by the agency. To the contrary, there are numerous cases that a records custodian may not establish unreasonable time or manner, and place restrictions on producing public records. The standard is set forth in the case of *Promenade D'Iberville, LLC v. Sundy*, 145 So.3d 980, 983 (Fla.App. 1st DCA, 2014), (initially an anonymous requester) which states:

> Delay in making public records available is permissible under very limited circumstances. A records custodian may delay production to determine whether the records exist, § 119.07(1)(c); if the custodian believes that some or all of the record is exempt under the Act, § 119.07(1)(d)-(e); or if the requesting party fails to remit the appropriate fees, § 119.07(4). Otherwise, "[t]he only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Tribune Co. v. Cannella*, 458 So.2d 1075, 1079 (Fla.1984). *Unjustified* delay in making non-exempt public records available violates Florida's public records law. *Id.*
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> . . .the case 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. *See Weeks v. Golden*, 764 So.2d 633, 635 (Fla. 1st DCA 2000) ("An unjustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal for purposes of section 119.12(1)[.]"); *see also Althouse v. Palm Beach County Sheriff's Office*, 92 So.3d 899, 902 (Fla. 4th DCA 2012) ("[T]he Sheriff's delay in complying with Althouse's request until after the filing of his suit amounted to an 'unlawful refusal' under section 119.12, for which fees and costs are to be awarded.").

While questions of whether there were unreasonable restrictions being insisted on by the Supervisor may at one point have been a basis for this court to rule upon, the destruction of the records supersede these issues and ipso facto requires a finding of unlawful refusal. The Supervisor has imposed the ultimate delay in this action – forever -- by destroying the original documents.

Affirmative Defense 4 states: "Defendant has an obligation to protect exempt public records documents by disallowing duplication methods (suggested by Plaintiff) that would demand substantial amount of manipulation or programming."

Affirmative Defense 4 is not a legally cognizable affirmative defense. Nowhere in Chapter 119, Florida Statutes does it provide a "manipulation or programming" standard to thwart a public records request. The case law cited above makes plain that cast ballots are public records that are subject to being inspected and duplicated. This issue is addressed in the 2004 Attorney General Opinion, cited above, i.e. *See* Fla. AGO 2004-11, 2004 WL 608778, the opinion provides the following analysis:

> During the 2000 election and subsequent judicial proceedings arising from requests for recounts of the ballots, the courts of this state were asked to allow ballots to be rerun through optical scanners in order to segregate overvoted or undervoted ballots. In *Sentinel Communications, Inc., v. Anderson,* Case No. 01-48 CA-SW, 12th Judicial Circuit in and for Charlotte County, January 19, 2001, the supervisor of elections argued that rescanning the ballots and segregating those requested by the newspaper could result in "ballot degradation." The court rejected the supervisor's argument and concluded that "[t]he limited evidence offered by the Supervisor of the possibility of degradation of the ballots failed to show that the alleged degradation would be other than de minimus."[10] This office has not been provided with any evidence that photo copying would damage or potentially alter optically scanned ballots.
>
> It is clear that the Legislature has addressed the sensitive nature of voted ballots by restricting the handling of such to the supervisor of elections or the supervisor's employees. Absent a legislative or constitutional provision prohibiting or exempting voted ballots from being copied, however, such a restriction does not preclude the designated persons from copying optically scanned ballots to comply with a public records request pursuant to Chapter 119, Florida Statutes.

Further, such affirmative defense does not justify the destruction of such documents.

Affirmative Defense 5 states: Plaintiff failed to mitigate damages by refusing to conduct and (sic) inspection when said inspection was made available.

First, this is factually inaccurate—at no time were the original ballots available for inspection and copying. Defendant asserts this "affirmative defense" without stating any facts or alleging the required elements to discern the basis of the purported "affirmative defense." To the extent that Defendant contends that she made any such offer at any time, it should be demonstrated with specific evidence in her response to this motion for Summary Judgment.

Affirmative Defense 6 states: "Damages if any have been caused fully and completely by Plaintiff. Plaintiff has been purposely confusing and misleading, stating that scanning and copying were intended to mean the same thing; refusing hard copies and then later claiming that copying and scanning did not mean the same thing."

There are no specific facts that support this allegation. Defendant asserts her "affirmative defenses" without stating any specific facts or alleging the required elements to discern the basis of the purported "affirmative defense." In addition, with the illegal destruction of the paper ballots, this affirmative defense is now a *non sequitur*.

Affirmative Defense 7 states: "Any damages caused by Plaintiff has been the result of Plaintiff's own actions or omissions."

Once again, there are no specific facts that support this allegation. Defendant asserts this "affirmative defense" without stating any specific facts or alleging the required elements to discern the basis of the purported "affirmative defense." Either the records were produced, pursuant to the statute, or they were not; there is no such affirmative defense available to Defendant. To the extent that damages resulted, such inquiry is not necessary for the Court to make a finding that Defendant improperly failed to produce public records under Chapter 119.

Affirmative Defense 8 states: "Defendant has fully complied with its obligations, if any, to Plaintiff and the issues raised by Plaintiff are now moot."

There are no specific facts that support this allegation. Further, as discussed above, Defendant had an obligation to preserve the records during this litigation; Defendant admits that she did not do so. This affirmative defense is legally insufficient and is directly refuted by the Supervisor's unlawful destruction of the original paper ballots.

The issue of mootness was addressed in the case of *Grapski v. City of Alachua,* 31 So.3d 193, 198 (Fla. 1 DCA., 2010) where the court stated:

> Looking to well-established law, we note the doctrine of mootness does not apply to situations where an ongoing procedure violates the law or the violation is capable of repetition but evades proper review. *See Sims v. State,* 998 So.2d 494, 503–04 n. 8 (Fla.2008); *Holly v. Auld,* 450 So.2d 217, 218 n. 1 (Fla.1984). Moreover, because the damage occurred when the City refused to produce the Minutes, production after the fact did nothing to mollify appellants' injury, the deprivation of constitutional and statutory rights. *See Daniels v. Bryson,* 548 So.2d 679, 680 (Fla. 3d DCA 1989) ("The impermissible withholding of documents otherwise required to be disclosed constitutes, in and of itself, irreparable injury to the person making the public records request."). A holding otherwise would allow a covered body to delay meaningful access to public records, only to disclose them belatedly and after the utility of such records had faded. In that instance, an assertion of mootness because the violation had been "cured" once the requesting party gained access to the records would disguise a breach of public records law. The express language in the statutes and Florida Constitution demonstrates the City failed to comply with public records law, and the damage to appellants was not mooted.

In this case, it is undisputed that the Supervisor did not allow for copying/scanning of the original paper ballots prior to filing the lawsuit, and now has made the possibility of doing so impossible by the destruction of the originals.

Affirmative Defense 9 states: "Plaintiff lacks standing to assert the claims for (sic) outlined in his Amended Complaint."

Defendant asserts her "affirmative defenses" without stating any specific facts or alleging the required elements to discern the basis of the purported "affirmative defense." The law is well settled that standing for a public records request is "any person," (See, §119.01(1), Fla. Stat.). A requestor is not required to explain the purpose for the request; See *Curry v. State*, 811 So.2d 736,

742 (Fla. 4 DCA, 2002), and a requestor can even be anonymous. See, *Chandler v. City Of Greenacres*, 140 So.3d 1080, 1084 (Fla.App. 4 DCA, 2014).

In the recent decision of *Llano Financing Group, LLC v. Yespy*, 228 So.3d 108, 111 (Fla. 4th DCA, 2017), the court analyzed the pleading requirement for a standing affirmative defense and described the trial court's function as:

> In determining whether a party has standing, the court must determine "whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Wexler v. Lepore*, 878 So.2d 1276, 1280 (Fla. 4th DCA 2004).

Mr. Canova has sought the records that were part of an election of which he was a candidate. As previously noted, some of the primary objectives of the ballot retention law are to allow for investigative activities post-election and to avoid authenticity issues as to ballots. While Mr. Canova's motive and purposes for examining the ballots is irrelevant, it is easy to acknowledge that he has the requisite standing to pursue a public records request, especially of these documents, which constitute an election of which he was on the ballot. If anything, Mr. Canova has more at stake in the outcome of this proceeding than an ordinary member of the public.

b. <u>Response to Miscellaneous Denials.</u>

i. <u>Defendant's claim that the records were scanned.</u>

While the Defendant has not plead so, she may claim that the records were scanned prior to their destruction; and therefore, the destruction of public records is permissible because the original cast ballots are duplicates. First, this is a violation of federal and state law, that all records related to federal elections must be retained for a period of 22 months; this also violates Florida Records Retention requirements under GS3 11, (See Doc. 7 Notice of Filing Supporting Affidavits and Documents). But most importantly, the Defendant's argument concedes a violation of § 119.011(4), 119.01(7)(h), Florida Statutes.

Additionally, this claim is specious for the following reasons: 1.) prior to this lawsuit being filed, Defendant sought $30,933.60 to physically remove the cast ballots from storage, claiming that 8 people would have to work for six hours a day for four weeks to complete this task over the course of 960 hours—this lawsuit was filed in order to obtain access to the original cast ballots (Exhibit B to Amended Complaint); 2.) The records disposition document states that the records were destroyed because they were on a 12 month records retention schedule for state and local elections (the public records sought in this case are for a federal election and must be retained for 22 months)—not because the original records were duplicates of the scanned master copy records. (See Doc. 5 to Notice of Filing Supporting Affidavit and Documents); 3.) the scan of the records was not even available at the time this lawsuit was filed. Moreover, could not be viewed until October 19, 2017, weeks after the ballots were destroyed, (November 6, 2017 Hearing Transcript); and after the Supervisor of Elections paid a vendor $15,000.00 to reorganize the ballots and then scan them.

The Supervisor of Elections internal documents acknowledge that the records should not have been destroyed if there was pending litigation. The Supervisor's claims with regard to scanning are specious, and regardless, are immaterial given the plain language of § 119.11(4) and 119.07(1)(h), Florida Statutes. Accordingly, the Supervisor of Elections, Broward County violated § 119.07(1) Fla. Stat. and should be held liable for reasonable attorneys' fees and costs under § 119.12, Florida Statutes. This is a non-viable affirmative defense, excuse or justification that even if the Court were not to strike the Defendant's pleadings would not defeat summary judgment.

ii. Defendant's Assertion that she did not receive Canova's May 9, 2017 Correspondence.

Counsel for the Supervisor of Elections, Ms. Norris Weeks, has asserted that she did not receive the May 9, 2017 correspondence from the undersigned counsel. Paragraph 10 of the Answer to the Amended Complaint states, "The May 9, 2017 letter attached to the Plaintiff's Amended Complaint as "Exhibit E" was not received on May 9, 2017." This denial is insufficient to find that section 119.12(1)(b)'s requirement of a written request was not made prior to the filing of the public records lawsuit.

First, it is not legally relevant. The only question for consideration under section 119.12 (2016) is whether the Supervisor has "unlawfully refused to permit a public record to be inspected or copied." Defendant does not deny that a public records request concerning the production of the original paper ballots was received on or about March 10, 2017. (See ¶ 9 of the Verified Amended Complaint, and the Answer). With the illegal destruction of the originals, she has essentially now refused to permit the records to be copied.

Second, the evidence is replete with email between March 10, 2017 and May 23, 2017 by Mr. Canova's attorney, and the Supervisor's attorney, regarding various aspects of the public records request. (See Canova Aff., Smekens Aff., and all Exhibits to the Amended Complaint). All the emails reveal that there was a disagreement between Mr. Canova's attorney and Ms. Weeks as to whether original records could be duplicated. Most importantly, the Supervisor's office acknowledged receipt of the March 10, 2017 public records request and actually assigned it a case number (i.e. PR #2077). (Exhibit B to Amended Complaint).

Third and lastly, Plaintiff states one of the well-known evidentiary presumptions is that -- proof of mailing of a document to the correct address creates a rebuttable presumption that the item mailed was, in fact, received. *W.T. Holding, Inc. v. State Agency for Health Care Admin.*, 682

So.2d 1224, 1225 (Fla. 4th DCA 1996). It can be an abuse of discretion for the court to not enforce the presumption when the record is absent substantial and competent evidence that the "document" at issue was not delivered. See, *Frady v. Deringer,* 76 So.3d 1024, 1026 (Fla. 4th DCA,2011); see also, *CitiBank, N.A. for WAMU Series 2007-HE2 Trust v. Manning*, 221 So.3d 677, 682 (Fla. 4th DCA, 2017). The irrefutable evidence demonstrates that Ms. Norris-Weeks was e-mailed the letter of May 9, 2017 and the Supervisor's agent, Ms. Norris-Weeks, received it.

The evidence is un-rebuttable that Ms. Norris Weeks responded to the May 9, 2017 correspondence, (Smekens Aff. ¶ 4, Exhibit 1). Ms. Norris Weeks forwarded the undersigned counsel's May 9, 2017 correspondence to Broward Supervisor of Elections employee, Dolly Gibson, (Smekens Aff. ¶ 6, Exhibit 3).[9] The undersigned counsel also sent emails to the Defendant's counsel asking for a written response to the May 9, 2017 correspondence. (Smekens Aff. ¶¶ 7 – 9, Exhibits 4 – 6). The May 9, 2017 letter argues that the Supervisor of Elections should reduce her demand for $71,868.87 in fees because 1.) request 15 was amended seeking only inspection of vote by mail ballots; and 2.) requestors should not be charged for retrieving original ballots from storage. Ms. Norris Weeks' May 23, 2017 email (Smekens Aff. ¶ 7, Exhibit 4). (Doc. 8 to Notice of Filing Supplementary Affidavits and Documents) responds to the May 9, 2017 letter by removing costs for requests 1, 3 and 15, and reducing the fees sought by the Supervisor of Elections from $71,868.87 to $3,936.00, (as requested by the May 9, 2017 correspondence and multiple emails requesting a written response to the May 9, 2017, see Smekens Aff. ¶ 7, Exhibits 5-10).

[9] In matter of fact, Mr. Collins was copied on that email. Mr. Collins then made the request inadvertent disclosure of privileged materials notice to Ms. Week, as described in Rule 1.285, Fla. R. Civ. P.

IV. APPROPRIATE REMEDIES/ATTORNEYS FEES/JUDGMENT

Section 119.12, Florida Statutes, provides that if a civil action is filed against an agency to enforce the provisions of this chapter and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorney's fees.[10] Section 119.12, Florida Statutes, is designed to encourage voluntary compliance with the requirements of Chapter 119, Florida Statutes "If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents." *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993). Stated another way, the statute "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." *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee,* 189 So. 3d 120, 125 (Fla. 2016).

"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. There is no additional requirement, before awarding attorney's fees under the Public Records Act, that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably." *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee,* at 122. As pointed out above,

[10] Florida Statute 119.12 was changed in 2017, however the changes to the statute only apply to Public Records Requests made on or after May 23, 2017—the changes do not apply to the public records request that is the subject of this lawsuit (See Exhibit J, the Laws of Florida, Ch. 2017-21).

the Supervisor has violated the following sections of Chapter 119: 119.07(5); 119.021, 119.07(1)(h), 119.11(4), Florida Statutes.

WHEREFORE, Plaintiff, Tim Canova, requests the Court GRANT Plaintiff's Motion for Summary Judgment:

A. Finding that

   a. The original ballots are public records, which the Defendant has an obligation to produce for inspection and copying, 101.572 and 119.07(5).

   b. Defendant violated § 119.11(4) and 119.07(1)(h), Florida Statutes by destroying the original ballots.

   c. The Defendant has unlawfully refused to allow the inspection and copying of the original ballots.

B. Determining that Plaintiff is entitled to attorney's fees, under 119.12, Fla. Stat., and scheduling a subsequent hearing to determine the amount of fees due.

C. Enter a Final Judgment in favor of Plaintiff.

D. Such other relief as the court deems appropriate.

Respectfully submitted this 19th day of January, 2018.

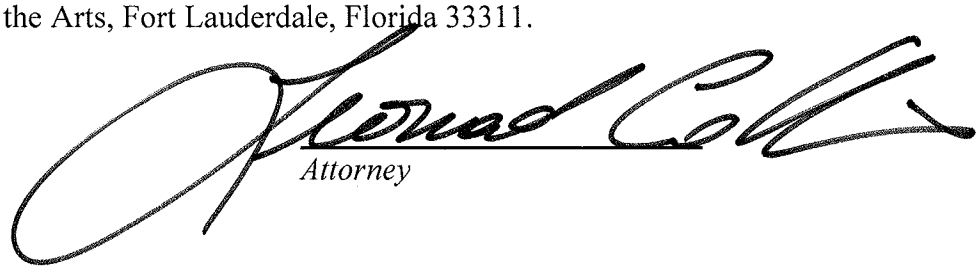
BROAD AND CASSEL LLP

BY: _____

LEONARD M. COLLINS, ESQ.
FBN: #423210
lcollins@broadandcassel.com
sbaxter@broadandcassel.com
FRANK P. RAINER, ESQ.
FBN: #436518
frainer@broadandcassel.com
kdilworth@broadandcassel.com
215 S. Monroe Street, Suite 400
Tallahassee, FL 32301
Attorneys for Tim Canova

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 19th day of January, 2018 by Electronic Mail to**: Burnadette Norris Weeks,** Burnadette Norris-Weeks P.A., 401 North Avenue of the Arts, Fort Lauderdale, Florida 33311.



Attorney