No. 21-305

In the Supreme Court of the United States

ANGELA W. DEBOSE, PETITIONER

V.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, ET AL., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the agency records at issue in this case are exempt from disclosure under any of the nine exemptions under the FOIA.

2. Whether non-exempt agency records may be withheld when no FOIA fee is assessed or the fee has been waived or paid?

3. Whether the Florida Freedom of Information Act, Fla. Stat. §119 *et seq.*, violated the Privileges and Immunities Clause of Article IV of the Constitution by abridging access to public information in which the Petitioner had a direct, tangible, and personal interest.

PARTIES TO THE PROCEEDING

Petitioner Angela DeBose was the plaintiff-appellant below.

Respondent University of South Florida Board of Trustees ("USFBOT") was the defendant-appellee below.

Respondent Dr. Paul Dosal, was a defendant-appellee below, in his official capacity as Vice Provost, USFBOT.

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1. Eleven (11) requests were at issue

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4. Agency records existed for request #1 but were not provided until

5. Agency records existed for request #4 but were not provided until days later and an improper search scope cut-off date was used

6. Agency record(s) for request #5 existed but were not produced

7. Telephone records existed for request #6 but Respondent misrepresented the criteria it used to search and that no such agency records existed

8. Agency Records (witness address and phone information) for request #7 existed but was produced 43 days later to avoid the scheduled trial

9. Agency records for request #9 existed but were not provided until 227 days later. Only part of the record was provided, with a new demand to pay an additional charge for the complete record.

10. Agency records existed for Request #10 but were not provided; nor was a request for supervised inspection allowed

11. Agency records for Request #11 existed but were not provided to Petitioner but provided to other third parties. Petitioner told to get the contract documents from contractor, Ellucian, L.P.

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PETITION FOR A WRIT OF CERTIORARI

Angela DeBose ("Ms. DeBose") made Florida Freedom of Information Act ("FOIA") requests, a.k.a. Florida Public Records Act ("Act") requests, seeking public records (i.e. emails) related to her employment from her employer, the University of South Florida and/or its Board of Trustees ("USFBOT"), a state government public university or agency. Under Florida FOIA, any person can request records from an agency, and, unless the information is exempt from disclosure, the agency must provide the records within 10 days. Petitioner, a citizen of the State of Florida, unsuccessfully sought information under the Act, alleging improper withholding of agency records, and then brought this constitutional challenge because nonexempt agency records were withheld from Ms. DeBose. Although the State of Florida authorizes a FOIA fee, USFBOT did not historically charge but assessed high charges totaling $22,000.00 *for the first time*, after Ms. DeBose complained of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended ("Title VII") and the Florida Civil Rights Act of 1992, §760.01, Fla. Stat., *et seq.* ("FCRA"). USFBOT subsequently refused to produce records responsive to Ms. DeBose's requests, allegedly because she did not pay.

OPINIONS BELOW

Angela DeBose filed the Petition for Writ of Mandamus on June 4, 2015. An Alternative Writ was issued on June 25, 2015, finding Petitioner's Writ to be facially sufficient. **(App. 34)**. The Second Amended Petition for Writ of Mandamus was the petition under review. **(App. 36)**. In an unusual procedure, the Circuit Court ("the State") bifurcated the case into two separate proceedings over the Petitioner's objections[1]—Phase 1 concerning FOIA fees assessed but not charges Respondent waived or that the Petitioner paid; and Phase 2 concerning the withholding or delay in timely producing agency records for inspection/copying. The January 11, 2019 Order Denying the Second Amended Petition in Part for Writ of Mandamus/Phase 1 is in the Appendix, **(App. 14)**. The decision of the Florida Supreme Court denying Petitioner certiorari review of the Phase-1 opinion and order on jurisdictional grounds that the appeal was taken interlocutory is in the Appendix, **(App. 33)**. The January 21, 2020 Final Order Denying the Second Amended Petition for Writ of

[1] **[Evidentiary Hearing, 6/22/2018 pg. 4262: 11-25; 4263: 1-9]**

Mandamus/Phase 2 is in the Appendix, **(App. 1)**. The Florida Second District Court of Appeals March 10, 2021 per curiam affirmed ("PCA") order is in the Appendix, **(App. 12)**. The Florida Second District Court of Appeals order on April 21, 2021, denying the petition for rehearing, rehearing en banc, written opinion, and certification of important question(s) to the Florida Supreme Court is in the Appendix, **(App. 13)**.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(l). The PCA decision of the state court of appeals was entered on March 10, 2021. The court of appeals denied Petitioner's petition for rehearing and petition for rehearing *en banc* on April 21, 2021. Petitioner sought an extension of time and is accorded 150 days under the Court's March 19, 2020 Order (589 U.S.) for filing a petition for certiorari by September 18, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS AT ISSUE

THE FEDERAL FOIA

The relevant portion of The Freedom of Information Act, 5 U.S.C. § 552(a), requires federal agencies to disclose to the public a wide range of information unless the information at issue falls within one of the nine enumerated exemptions listed in § 522(b). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S.Ct. 1504, 1509, 44 L.Ed.2d 29 (1975) (noting that "[a]s the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions."). "[T]he mandate of the FOIA calls for broad disclosure of Government records, and for this reason [the Supreme Court has] consistently stated that FOIA exemptions are to be narrowly construed." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8, 108 S.Ct. 1606, 1611, 100 L.Ed.2d 1 (1988) (internal citations and quotations omitted).

THE FLORIDA FOIA

The Florida Public Records Law unequivocally states, "[i]t is the policy of this state that all state, county, and municipal records are open for a personal inspection and copying by any person." Fla. Stat. § 119.01(1) (2005). "[E]very person who has

custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." § 119.07(1)(a). The Public Records Act authorizes a custodian to collect a fee, prior to disclosing the records. § 119.07(4). The fees authorized under Chapter 119 are not meant to be a profit-making or revenue generating operation; nor are the fees to be punitive to frustrate access to public records. Social security numbers held by an agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. § 119.071(5)(b). When an exemption applies to a requested record, the person who has custody is to "redact that portion of the record to which an exemption is asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying." § 119.07(1)(d).

THE PRIVILEGES AND IMMUNITIES CLAUSE

The *Privileges and Immunities Clause* of Article IV, Section 2 of the Constitution states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Privileges and Immunities Clause protects only those privileges and immunities that are "fundamental." See *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U. S. 371, 382, 388. Pp. 3–12. Specifically, in protecting the fundamental rights of individual citizens, this clause restrains state efforts to discriminate.

The Supreme Court of the United States has held the right to access public information is not a "fundamental" privilege or immunity of citizenship, and a state may limit such access to its own citizens. However, in Florida, "[a] citizen's access to public records is a fundamental constitutional right ...." *Rhea v. Dist. Bd. of Trustees of Santa Fe Call.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013). Notably, there is no distinction between citizens and non-citizens as far as access to public records is concerned, and a former citizenship requirement was deleted from law in 1975. *Cf.* Op. Att'y Gen. Fla. 75-175 (1975). Though the Florida FOIA is a valid statute, the State of Florida's unconstitutional behavior is "capable of repetition..." *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *Turner v. Rogers*, 564 U.S. 431, 439–41 (2011). Additionally, due process attached to an asserted liberty or constitutional interest to access public records may declare the challenged statute unconstitutional as applied.

VAUGHN INDEX TO SHOW RESPONDENT'S IMPROPER WITHHOLDING

No.	Req. Date	Desc.	Resp. Date	Time Delay	Exempt?	Charge ?
1	6/23/14	Specific Email(s)	7/6/15	378 days	No	No
2	8/16/15	Group Emails			No	$2,439
3	8/31/15	Specific Email(s)			No	$5,203
4	8/8/14	Employee Emails	9/9/15	398 days	No	$4,726 waived
5	8/5/15	Employee-HR exit interview			No	No
6	8/12/15	Phone Records			No	No
7	7/23/15	Specific Current Employees Addresses	9/4/15	43 days	No	No
8	8/3/15	Specific Former Employee Addresses	8/5/15	2 days	No	No
9	8/13/14	Employee Statistical Data	3/27/15	227 days	No	$172 paid; $1206 later charged
10	5/19/15	DeBose's ESI			Yes	$9,083
11	6/2015	Vendor contracts			No	No

I. FACTS AND PROCEDURAL HISTORY

On June 4, 2015, Ms. DeBose sued the USFBOT, seeking disclosure under Florida FOIA. Specifically, Ms. DeBose filed a Petition for Writ of Mandamus to address the state agency's noncompliance with the Act, in refusing to allow Ms. DeBose to inspect/copy agency records that she requested. USFBOT did not claim that the agency records that Ms. DeBose requested were exempt from disclosure but nevertheless withheld the records, in bad faith, refusing to allow Ms. DeBose to inspect/copy the agency records she requested about her employment. Of the 11 requests in the above Vaughn Index, all were "withheld" within the meaning of Florida / Federal FOIA—except request #8. Only partial responses were provided for request #1, #4, and #9, well after the FOIA deadline for these requests. The Respondent otherwise refused to provide or partially withheld *nonexempt, no-charge* agency records. (See requests #1, #5, #6, #7, #8, and #11). Additionally, the Respondent withheld agency records where the charge had been waived or paid. (See request #4 and #9). The Respondent also charged or misapplied an excessive FOIA fee of $5,203.39, in bad faith, to a request for a single, discrete email, for which there was no applicable exemption. (See request #3).

- Request #1: Petitioner made request #1 on June 23, 2014. The Respondent refused to provide the email, **(App. 140**. The Respondent obtained the email from the custodians in mid-March 2015, **(App. 144)**, but did not provide the email to Ms. DeBose until June 2015. **(App. 153-54)**. Though Respondent was knowledgeable of disclosure requirements under Florida public records law, **(App. 130)**, the Respondent knowingly refused to comply and withheld other emails that matched the description for Request #1. **(App. 135)**. When asked if Ms. DeBose requested a copy of the emails for request #1, the Respondent was impermissibly *instructed not to answer* by USFBOT's lawyer. **(App. 179)**. When asked why it took one year to provide a single email, the Respondent answered that he produced the email when instructed to do so. **(App. 136)**. Though Respondent knew the original request for the agency record was on June 23, 2014, the Respondent sought to alter the date, in bad faith, to June 15, 2015, based on a second request for the agency record by Ms. DeBose. **(App. 153)**. However, the Petitioner's repeat request referred back to the Petitioner's original request on June 23, 2014. **(App. 79)** Respondent also claimed, in bad faith, that production of the record was delayed because the Outlook search required IT assistance; however, the custodians testified the search was

not difficult and was successfully completed, without IT. **(App. 122-123)**.

- Request #3: This request was made on August 31, 2015 and asked for what the State later referred to as the "smoking gun email," exposing the plan to fire Ms. DeBose. **(App. 82)**. The Petitioner challenged the excessive search charge of $5,203, **(App. 170)**, applied to this particular custodian's emails. However, the Respondent refused to waive or eliminate the charge. The nonexempt public record could have been provided at no cost. As true of the custodians of the record concerning request #1, the custodian of this email could have provided it, without IT assistance. The Respondent refused Ms. DeBose's request to ask the custodian to provide the email. **(App. 180)**.
- Request #4: Petitioner requested her supervisor's emails under request #4. **(App. 83)**. Respondent initially charged $4,726.00 to provide agency records for request #4, **(App. 156)**, claiming extensive IT and clerical support was required to remove student names or FERPA information. However, Ms. DeBose filed Notarized Expert Opinions from two Microsoft experts, **(App. 92; App. 99)**, that opined the search criteria was not so complex to require extensive IT and that hundreds of thousands of records could be compiled by a non-IT user in a matter of seconds. Ms. DeBose also filed the notarized opinion of a document management specialist that a review of the 2,735 pages estimated could be completed for potential redaction in substantially fewer hours and at a significantly lower cost than estimated by the Respondent. **(App. 94)**. Subsequently, the Respondent agreed to waive the FOIA fee following Ms. DeBose's objection and provided agency records. The correspondence from the Respondent expressed that Petitioner agreed to "*safeguard the FERPA records*" that inadvertently remained.[2] **(App. 104)**. However, Respondent used an improper cut-off date to exclude emails in March, April, and May 2015, in close temporal proximity or immediately prior to Ms. DeBose's termination date. **(App. 155)**. Petitioner retained a records auditing expert that reviewed and analyzed the data file. The expert opined that only 29 emails were produced for March 2015. **(App. 97)**. No emails were in the file for April or May 2015. (Id.). The 2,735 agency records in the file were repeated with 65-70%

[2] In her role as University Registrar, Ms. DeBose was the FERPA coordinator and Student Records Custodian. It was undisputed that she fulfilled these roles without breach or dereliction of duty. Additionally, Ms. DeBose undisputedly did not file any documents into the court record containing any student information.

duplication. (Id.). Ms. DeBose alerted the Respondent of the deficiency and asked the Respondent to identify the search criteria used. **(App. 171)**. Petitioner also continued to make multiple requests in pleadings and at hearing for the emails for March, April, and May 2015. At evidentiary hearing on June 22, 2018, the State determined the cut-off date should be through May 2015. **(App. 109)**. However, the Respondent refused and continued to withhold the records, with the State's knowledge.[3] These nonexempt agency records that potentially supported the allegations made by Petitioner in her EEOC complaint, were never provided.

- Request #5: Respondent claimed that the agency records requested for #5 did not exist or could not be located following a diligent search, in bad faith. The creator of the recorded event with HR, testified that the exit interview was held. **(App. 126)**. The Respondent filed an affidavit attesting that exit interviews are expected to be kept in the employee's file in HR. At evidentiary hearing on May 29, 2019, the State questioned the Respondent's counsel, forcing his admission on behalf of USFBOT that the exit interview in question for request #5 did in fact happen. **(App. 152)**. However, the State did not order the Respondent to produce the withheld records or identify the record's custodian.
- Request #6: The Respondent falsely alleged that the agency records responsive to request #6 were transitory and thus deleted, in bad faith. **(App. 106; App. 114; App. 160)**. The Respondent did not conduct a search for the records described by the Petitioner, as claimed. Instead the Respondent only searched for two of its own numbers. **(App. 173; App. 177)**. The numbers provided by Ms. DeBose were not searched. **(App. 113)**. The Respondent General Counsel for USFBOT knew or had reason to know that phone records must be kept if litigation is anticipated or when there is an employment dispute. **(App. 159-60)**. The record disclosed that Respondent had actual, first- hand knowledge of the employment dispute involving Petitioner, from her phone calls in June 2014, **(App. 85)**, and an email from Ms. DeBose's supervisor putting the Respondent on notice that Petitioner complained to him about possible employment discrimination on August 14, 2014. **(App. 166)**. The Respondent falsely claimed that no records were possible for request #6, failing to disclose that a report

[3] The State denied Petitioner's motion to compel, stating it would defeat the purpose of the Petition for Writ of Mandamus, though such a motion is contemplated to immediately issue the writ and produce the records. *Farmer v. State,* 927 So. 2d 1075, 1076 (Fla. 2d DCA 2006).

was generated and provided to the General Counsel's Office. **(App. 112; App. 118; App. 178)**. The Respondent misrepresented that phone logs could not be produced or were not available. **(App. 117; App. 161)**. The Respondent lied about its practice or policy of deleting / purging records. The Respondent had phone records going back to 2006 or 2007. **(App. 115; App. 16)**

- Request #7: Complete responses address and phone information for potential witnesses was provided for #7 (and #8); however, agency records for #7 were provided **43** days after the FOIA deadline. Therefore, subpoenas were not timely issued and the trial date to decide this matter in 2015 had to be continued—unforeseeably extending the litigation for 5 years.
- Request #9: The request for agency records for request #9 was submitted by the Petitioner on August 13, 2014. Petitioner received a charge document and paid $172 for the data she requested. The request was not acknowledged until March 27, 2015. **(App. 162-63)**. The Respondent requested that the FOIA request be made in a specific format. **(App. 164-65)**. Approximately **227** days later, on or around March 27, 2015, the Respondent knowingly provided a partial data set and asked Ms. DeBose to modify her request to add names to validate the data. The Petitioner complied with this request. On April 15, 2015, Respondent's lawyer forwarded a charge document for a new charge of $1,206.80. **(App. 157-58)**. The Respondent refused to provide the remaining agency records for request #9, alleging that the records were not provided because Ms. DeBose would not pay.
- Request #11: Petitioner made a verbal request for agency records for request #11 in June 2015. Respondent stated that Petitioner could obtain said agency records from the contractor/vendor, Ellucian, L.P., whom Ms. DeBose also subsequently pursued. On September 21, 2015, the Petitioner made a written request for the records. **(App. 91)**. The Respondent claimed that the contracts and agreements by and between USFBOT and Ellucian for #11 did not exist or could not be located following a diligent search, in bad faith. During all relevant times, the Respondent refused to produce the records to Ms. DeBose, as did Ellucian. The records would have potentially disclosed evidence of conspiracy and agreement between USFBOT and Ellucian to fire Ms. DeBose, using an Ellucian functional consultant brought in to evaluate Ms. DeBose. While the contracts/agreements were not

provided, Ms. DeBose was able to prove the documents existed and were provided by USFBOT to other requestors or third parties. **(App. 146-149)**. Ms. DeBose was therefore able to show that USFBOT specifically refused to provide the documents to her. (Id.), while USFBOT provided the agency records to others—as Ms. DeBose likewise obtained testimony that she was charged FOIA fees while others were provided agency records free of cost.

The Respondent never provided any responses for #2 and #10, allegedly because Ms. DeBose would not pay thousands of dollars in charges. Assuming that the agency records may be lawfully withheld based on unpaid advance charges, these are the only agency records that could potentially fall within this category. Petitioner challenged the FOIA fees associated with #2 and #10, asking for a waiver.

- Request #2: The custodians of the agency records for request #2 (i.e. group emails) were not in positions that would generally involve disclosure of FERPA information. **(App. 80)**. Therefore, extensive clerical support for redaction would not have been required. The FOIA fees were waived for request #4 for this same reason. However, Respondent declined to waive the cumulative or total fee for request #2.
- Request #10: Petitioner also objected to the $9,083 charge that the Respondent assessed pursuant to request #10 (i.e. the agency records that Ms. DeBose created or obtained). **(App. 168)**. Ms. DeBose made the request on May 19, 2015, the day of her separation/termination, and again on August 12, 2015. **(App. 90)**. Prior to Ms. DeBose's requests, USFBOT did not charge for agency records, although it was authorized to do so. Although Ms. DeBose's ESI would contain student information given her position as University Registrar, the Petitioner offered to have supervised inspections. **(App. 169)**. The State declined to allow Ms. DeBose to establish that USFBOT used redaction scripts to programmatically exclude ESI containing 9-digit numerics that might be student social security numbers. Petitioner also stated that she could be trusted to "*not use or disclose the FERPA Records...*" *and to "safeguard the FERPA Records...*," as stated by USFBOT in providing agency records for request #4. The Respondent declined to waive the charges and to provide the records.

On August 19, 2015, Petitioner filed a motion for summary judgment ("MSJ"), presenting affidavits, documents, exhibits, depositions, and expert opinions to prove Respondent withheld agency records. **(App. 62-77)**. The State denied summary judgment, though Respondent did not dispute that it was subject to Florida FOIA and withheld nonexempt agency records from the Petitioner, (Id.). Evidentiary hearings were held; however, in camera review of the requested records was not permitted and the Respondent produced no Vaughn Index or similar document to show its withholding or delay in producing the agency records requested was justified. Petitioner filed a motion for partial summary judgment again on July 23, 2018. However, the State failed to hear and rule on the motion.

Florida Rule of Judicial Administration 2.250 provides that non-jury civil case should take twelve (12) months. Florida FOIA requires an immediate or accelerated hearing and that records be timely produced within ten (10) days. Whenever an action is filed to enforce the provisions of Chapter 119, F.S., the court shall give the case priority over other pending cases.[4] The State failed to require production of documents within forty-eight hours of the date of the order or some reasonable time to make a judicial determination as to whether any of the records requested were exempt or contained exempt information requiring redaction. Hence procedurally, the State failed to conclude the litigation as soon as it could reasonably and justly do so—delaying approximately five (5) years to final disposition.[5] The Final Order expands and renumbers Petitioner's PRRs. [*See* **(App. 3)**, Order, ftn. 5 and 6]. The order created misalignment, confusion, and difficulty in analyzing the issues on appeal and also created a prejudicial effect on Ms. DeBose.

Petitioner contends the State's denial of Ms. DeBose's Petition for a Writ of Mandamus, under a de novo review, resulted in a miscarriage of justice. Therefore, Ms. DeBose seeks Certiorari review, pursuant to S. CT. R. 13.1. Petitioner's case interpreted, involves a fundamental legal or constitutional right to inspect/copy records. Under Florida law, a citizen's access to public records is a fundamental constitutional right.[6] Although

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[4] *See Town of Manalapan v. Rechler*, 674 So. 2d 789 (Fla. Dist. Ct. App. 1996).

[5] The Petitioner requested that the Circuit Court be recused pursuant to § 38.10, Fla.Stat. Though the Circuit Court denied the motion(s), it was recused without notice to Petitioner, prior to January 17, 2020 Order and as filed on January 21, 2020.

[6] Florida has a broad sweeping public policy mandating public access to governmental records codified in statutes and Florida's Constitution. "[E]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or

the Supreme Court of the United States has held the right to access public information is not a "fundamental" privilege or immunity of citizenship,[7] public records (FOIA) cases have reached the United States Supreme Court if presenting issues involving fundamental rights in statutory construction or application or where the remedies of grievously injured and unknowing victims would be jeopardized if the documents never entered the *public* domain.[8] Here, there is a compelling reason for review because the records of public/government agencies and proceedings are *essential in the determining of the rights of people".*[9] Furthermore, the State's unconstitutional behavior is capable of repetition.

II. ISSUES ON APPEAL

1. Whether the public records at issue in this case are exempt from disclosure under any of the nine exemptions under the FOIA.

2. Whether non-exempt agency records may be withheld when no FOIA fee is assessed or the fee has been waived or paid.

3. Whether the Florida Freedom of Information Act, Fla. Stat. §119 *et seq.*, violated the Privileges and Immunities Clause of Article IV of the Constitution by abridging access to public information in which the Petitioner had a direct, tangible, and personal interest.

REASONS FOR GRANTING THE PETITION

1. The public records at issue in this case are not exempt from disclosure under any of the nine exemptions under the FOIA.

Federal and Florida FOIA public policy prefers public disclosure and open government. Florida FOIA has a broad sweeping public policy mandating public access to governmental records codified in both its statutes and the Constitution. Under

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employee of the state, or persons acting on their behalf." *See* Art. I, § 24(a), Fla. Const. ... Providing access to public records is a *duty* of each agency." § 119.01, Fla. Stat. (2014). In Florida, "[a] citizen's access to public records is a fundamental constitutional right ...." *Rhea* v. *Dist. Bd. of Trustees of Santa Fe Call.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013).

[7] *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999).

[8] *See Johnson v. State*, 336 So.2d 93 (Fla. 1976).

[9] *Id.*

Florida's Constitution, "[e]very person has 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." *See* Art. I, § 24(a), Fla. Const. ... Providing access to public records is a *duty* of each agency." § 119.01, Fla. Stat. (2014). In Florida, "[a] citizen's access to public records is a fundamental constitutional right ...." *Rhea,* 109 So. 3d 851, 855 (Fla. 1st DCA 2013). At the federal level, a FOIA inquiry begins with a determination of whether the public record(s) exists. "[A]n agency first must either have created or obtained a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."- *Forsham v. Harris*, 445 U.S. 169, 182 (1980).

In the state court below, USFBOT's status as a state agency subject to the Florida FOIA was uncontested. The law defines "[a]gency" as "any state, county district, authority, or municipal officer, department division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, partnership, corporation, or business entity acting on behalf of any public agency." Fla. Stat. § 119.011(2) (2008). The fact that Ms. DeBose requested "agency" or "public" records within the meaning of Federal and Florida FOIA respectively, was uncontested. Therefore, the records were subject to a broad legislated public right of inspection. There are clear examples that Respondent knew that Ms. DeBose made requests for agency records subject to disclosure. The custodians of these agency records testified that they provided the records to the Respondent, expecting that USFBOT would comply. All of the records at issue were sufficiently described or would not be difficult to locate.

It is well settled that the only delay permitted by the Act is the limited reasonable time allowed for the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt. Delays beyond a limited reasonable time constitute an unlawful refusal to permit petitioners to have access to copy/inspect public records. The FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies. *See* 5 U.S.C. Â§ 552(a)(6)(C) (2000); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines."). Thus, when an agency does not respond to a perfected request within the twenty-

day (excepting Saturdays, Sundays, and legal public holidays) ~~statutory time limit set forth in the Act.~~ (See 5 U.S.C. Â§ 552(a)(6)(A)(i)). the requester is deemed to have exhausted her administrative remedies and can seek immediate judicial review, even though the requester has not filed an administrative appeal. *See, e.g., Pollack v. Dep't of Justice*, 49 F.3d 115, 118-19 (4th Cir. 1995) ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed.") Under Florida FOIA, an eight-day period is imposed. "Unlawful refusal under section 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them." *Lilker v. Suwannee Valley Transit Auth.*, 133 So.3d 654, 655–56 (Fla. 1st DCA 2014); *see also Office of State Attorney for Thirteenth Judicial Circuit of Fla. v. Gonzalez*, 953 So.2d 759, 760 (Fla. 2d DCA 2007) ; *Barfield v. Town of Eatonville*, 675 So.2d 223, 224 (Fla. 5th DCA 1996); *Brunson v. Dade Cnty. Sch. Bd.*, 525 So.2d 933 (Fla. 3d DCA 1988).

Petitioner's Vaughn Index shows Respondent refused to timely provide responsive records, with the least amount of time at 43 days and the most time up to 398 days. Additionally, the Respondent conducted questionable searches. For example, with request #4, the Respondent tactically identified and deployed a "scope-of-search cut-off," not pursuant to any policy but to withhold agency records created or obtained during a critical period of time in Petitioner's employment. Records that are created or come into the possession of an agency after a FOIA request is received but before the search for responsive records is conducted, are "agency records" for purposes of a FOIA request. The State's failure to consider the records in the months prior to the Petitioner's termination when responding to the FOIA request thus may be considered an improper withholding. *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002) (declaring that agency's "cut-off" policy for conducting FOIA record searches is unreasonable "both generally and as applied to [plaintiff's] request").

Additionally, there are numerous delays well beyond the 10-day deadline. The delays for more than one year do not meet the statutory definition of "limited" nor "reasonable". (See, e.g., requests #1, #4, #9). There are also examples where the Respondent never provided any agency records (i.e. request #3), though the record was described with sufficient specificity to permit the custodian to identify the requested record(s), free of an

IT search and a charge. *See Wootton v. Cook*, 590 So.2d 1039 (Fla. 1st DCA 1991). The Respondent refused to ask the custodian of #3 to locate and provide the record, in contravention of the holding in *Wootton*. Thus, the Respondent presumably applied an excessive charge to frustrate the Petitioner's request to copy/inspect such records.

The State decided an important federal question in a way that conflicts with the decisions of the Florida Supreme Court, a state court of last resort, and also in a way that conflicts with relevant decisions of this Court. The State's opinion and order rendered Florida FOIA unconstitutional as applied as to Ms. DeBose. The Respondent has relied on its own self-serving interpretation of the premise that, "No judgment shall be set aside or reversed...unless the error complained of has resulted in a miscarriage of justice." The State committed a material error in procedure and in applying incorrect interpretations of Florida Public Records law. *See Hamilton v. Title Insurance Agency of Tampa, Inc.*, 338 So. 2d 569 (Fla. 2d DCA 1976). The State's orders offend public policy and resulted in a miscarriage of justice against Ms. DeBose that is capable of repetition against other petitioners.

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions applies to the documents at issue. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (generalizing that "agency records which do not fall within one of the exemptions are improperly withheld"); *Abraham & Rose, P.L.C. v. United States*, 138 F.2d 1075, 1078 (6th Cir. 1998) (indicating that agency denying FOIA request bears burden of establishing that requested information falls within exemption and remanding case for consideration of appropriate exemptions). Therefore, the only justification for withholding a record is the custodian's assertion of a statutory exemption. *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984), supra. Any doubts about whether the records are exempt should have been decided in favor of disclosure. USFBOT did not invoke any such exemptions in refusing the agency records to Ms. DeBose. Notably, after waiving $4,726 it originally assessed for request #4, the Respondent provided the agency records and simply cautioned:

> **If any student names or identifying information inadvertently remain, that information is to be held in strict confidence. Except as required by law, or otherwise**

> **authorized by USF in writing, please do not use or disclose the FERPA Records. You agree to safeguard the FERPA Records according to commercially reasonable administrative, physical and technical standards that are no less rigorous than the standards by which you protect your own confidential information.**

However, in responding to request #10 for Petitioner's ESI, the Respondent used FERPA to imply a broad record exemption to withhold all of Ms. DeBose's ESI and other non-fee, paid, or waived requests for its agency records that should have been disclosed. For Ms. DeBose's ESI alone, the Respondent charged a $9,083 FOIA fee. Because Ms. DeBose was employed as University Registrar, her ESI would necessarily contain some student information. Access to student records is limited by FERPA and Fla. Stat. § 1002.221(1) (2014), which provides every student a right of privacy with respect to educational records relating to such student. *See, e.g., Fla. State Univ. v. Hatton*, 672 So. 2d 576 (Fla. 1st DCA 1996). Importantly, however, the Petitioner did not request any FERPA records but rather access to agency records she created or obtained. Additionally, the Petitioner did not oppose redaction of her agency records containing such information and, as with request #4, Ms. DeBose would have readily agreed not to disclose student information or identifiers in the court record(s). Therefore, the need to redact FERPA material did not allow USFBOT to refuse to produce the records. Under federal and Florida law, the agency must redact confidential and exempt information and release the remainder of the record.[10]

Exemptions from the inspection provisions of Federal FOIA must be specifically provided for by statute. *See Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997) ("We conclude that a district court lacks inherent power, equitable or otherwise, to exempt materials that FOIA itself does not exempt."); *Weber Aircraft Corp. v. United States*, 688 F.2d 638, 645 (9th Cir. 1982) ("The careful balancing of interests which Congress attempted to achieve in the FOIA would be upset if courts could exercise their general equity powers to authorize nondisclosure of material not covered by a specific exemption."), *rev'd on other grounds*, 465 U.S. 792 (1984); *see also Abraham & Rose*, 138 F.3d at 1077 ("Basing a denial of a

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Op. Att'y Gen. Fla. 9952 (1999); Op. Att'y Gen. Fla. 0273 (2002).

FOIA request on a factor unrelated to any of the[] nine exemptions clearly contravenes [the FOIA]."); *cf. Halperin v. United States Dep't of State*, 565 F.2d 699, 706 (D.C. Cir. 1977) Notably, ("[t]he power of a court to refuse to order the release of information that does not qualify for one of the nine statutory exemptions exists, if at all, only in "exceptional circumstances." (citing *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971))).

The same statutory restriction on exemptions applies to Florida FOIA. See *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420 (Fla. 1979); *Greater Orlando Aviation Auth. v. Nejame, LaFay, Jancha, Vara, Barker*, 4 So. 3d 41, 43 (Fla. 5th DCA 2009)("Courts are not authorized to create exemptions from disclosure or to read into laws exemptions not clearly created by Congress or by the State Legislature.") (quoting *Housing Auth. of Daytona Beach v. Gomillion*, 639 So. 2d 117, 121 (Fla. 5th DCA 1994)); *Miami Herald Publ'g Co. v. City of N. Miami*, 452 So. 2d 572 (Fla. 3d DCA 1984), *approved*, 468 So. 2d 218 (only public records provided by statute to be confidential or which are expressly exempt by general or special law from disclosure under the public records law are exempt); *Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *answering certified questions*, 464 So. 2d 545 (Fla. 1985); *News-Press Publ'g Co. v. Gadd*, 388 So. 2d 226 (Fla. 2d DCA 1980) (all documents falling within the scope of the public records law are subject to disclosure unless specifically exempt by statute; court may not consider public policy questions regarding relative significance of public interest in disclosure and damage resulting from such disclosure).

The State did not construe exemptions narrowly, to limit them to their stated purpose and did not construe them liberally in favor of open government.

2. Non-exempt agency records may not be withheld when no FOIA fee is assessed or the fee has been waived or paid.

FOIA fee waiver issues are reviewed under the *de novo* standard of review, but the scope of review is specifically limited by statute to the record before the agency. 5 U.S.C. Â§ 552(a)(4)(A)(vii); *see, e.g., Judicial Watch, Inc. v. United States Dep't of Justice*, 122 F. Supp. 2d 13, 16 (D.D.C. 2000). In the case below, Ms. DeBose requested a waiver of fees and received one pursuant to request #4. Petitioner also requested that the charges for other requests (e.g. #2, #3, and #10) to be waived. With request #2, Ms. DeBose sought waiver on the same basis as request #4. With regard to request #3, the charge was

inappropriately applied and should have been reversed or waived. No search was required, as the custodian was likely to recall and could find the email, without IT assistance. For request #10, the Petitioner asked for supervised inspections to avoid charges related to redaction. *See, e.g., Voinche v. United States Dep't of Air Force*, 983 F.2d 667, 669 (5th Cir. 1993). When Ms. DeBose's request for a fee waiver and inspection was denied, she appropriately challenged the State's response. See, e.g., *Mells v. IRS*, No. 99-2030, 2001 U.S. Dist. LEXIS 1262, at *5 (D.D.C. Jan. 23, 2001) (deciding that plaintiff must pay fee or seek waiver from agency before challenging government's response concerning fees), *subsequent opinion denying fee waiver*, No. 99-2030, 2002 U.S. Dist. LEXIS 24275 (D.D.C. Nov. 21, 2002); *Schwarz v. United States Dep't of Treasury*, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) ("Exhaustion of administrative remedies . . . includes payment of required fees or an appeal within the agency from a decision refusing to waive fees."), *summary affirmance granted*, No. 00-5453 (D.C. Cir. May 10, 2001); *Tinsley v. Comm'r*, No. 3:96-1769-P, 1998 WL 59481, at *4 (N.D. Tex. Feb. 9, 1998) (finding no exhaustion because plaintiff failed to appeal fee waiver denial). It was not practical nor economical for Ms. DeBose to pay the $9,083 charge. That said, the Petitioner did not fail to comply with fee requirements, as the Respondent agency and the State alleged. Of the eleven requests, six requests (#s 1, 5, 6, 7, 8, and 11) were not assessed a charge but records were nevertheless withheld beyond a reasonable time. For request #4, the charge was waived but records created or obtained close to Ms. DeBose's termination date were nevertheless withheld. For request #3, a charge was mistakenly applied but Respondent nevertheless elected to withhold the *smoking gun email.* The Petitioner paid the charge originally assessed for request #9. Therefore, unlike the plaintiff in *Pollack*, the Petitioner did not fail to pay any charge and did not make a novel argument that the untimeliness of the agency's response required it to provide documents free of charge. *See, e.g., Pollack*, 49 F.3d at 119-20; *see also, Dale v. IRS*, 238 F. Supp. 2d 99, 107 (D.D.C. 2002) (dismissing Complaint for failure to claim or establish entitlement to fee waiver or, alternatively, to commit to payment of fees). Also, there is no record that Ms. DeBose failed to pay authorized fees incurred in a prior request before making new requests. *See, e.g., Trenerry v. IRS*, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996); *Crooker v. United States Secret Serv.*, 577 F. Supp. 1218, 1219-20; *Mahler v. Dep't of Justice*, 2 Gov't Disclosure Serv. (P-H) Â¶ 82,032, at 82,262 (D.D.C. Sept.

29, 1981). The fact is that Petitioner was first charged for request #9 and paid it. Respondent than sought to apply an additional charge of $1,206 to justify withholding records that would expose the disparate impact on Ms. DeBose's race-gender classification from its employment practices. While the State sought to imply through its Order denying mandamus relief that Ms. DeBose deluged the Respondent with voluminous requests, the court record discloses that only 11 discrete requests in a finite period of time were at issue below and on appeal.[11] See *Open America v. Watergate Special Prosecution Force,* 547 F.2d 605 (D.C. Cir. 1976).

The nonexempt agency records should have been furnished without any charge or at a reduced charge below the fees assessed by the Respondent. The disclosure of the information was in the public's interest because it was likely to contribute significantly to public understanding of the operations or employment activities of the state government university and was not primarily in the financial interest of the requester.

3. The Florida Freedom of Information Act, Fla. Stat. §119 *et seq.*, violated the Privileges and Immunities Clause of Article IV of the Constitution by abridging access to agency records in which the Petitioner had a direct, tangible, and personal interest.

The State's denial of mandamus relief to access agency records impermissibly burdens the right of the public to agency records and abridges a Florida fundamental constitutional right. With the passage of Amendment 24 and the Public Records Act, Florida citizens are entitled to review the actions of government agencies. *See City of Riviera Beach* v. *Barfield,* 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994) (The general purpose of the Florida Public Records Act is to open public records so that Florida's citizens can discover the actions of their government."). Thus, public access goes beyond being a fundamental right of Florida's citizenry; public access is a check on governmental power, corruption, and abuse by exposing [those processes]" to public scrutiny. *Miami Herald Pub. Co.* v. *Lewis,* 426 So. 2d 1, 7 (Fla. 1982). The Respondent's refusal conflicts with the policy of Florida FOIA that all agency records shall at all times be open for personal inspection by any person for any reason. § 119.01 (2015). "In order to be entitled to

[11] See Final Order Denying Petition for Writ of Mandamus, pg. 3, ftn. 5, erroneously and unjustifiably expanding the number of requests.

a writ of mandamus, the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Putnam Cty. Envtl. Council v. Johns River Water Mgmt. Dist.*, 168 So. 3d 296, 298 (Fla. 1st DCA 2015) (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)). The duty of the respondent in a mandamus action must be ministerial in nature, and not discretionary. *Wuesthoff Mem'l Hosp. Inc. v. Florida Elections Comm'n*, 795 So. 2d 179, 180 (Fla. 1st DCA 2001). "[T]here is no room for the exercise of discretion, and the performance being required is directed by law." *Town of Manalaplan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996).

Under FOIA, the Petitioner had an established legal right to access the nonexempt agency records she requested, related to her employment. *Miami-Dade Cty. Bd. of Cty. Comm'rs v. An Accountable Miami-Dade,* 208 So. 3d 724 (Fla. 3d DCA 2016). Ms. DeBose exhausted her administrative remedies when the Respondent failed to comply with the applicable time limit provisions. The exhaustion requirement allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review. *See McKart v. United States,* 395 U.S. 185, 194, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969). Complete exhaustion occurred when the ten-day time limit under FOIA had expired and in every instance but one—was exceeded. *Information Acquisition Corp. v. Department of Justice,* 444 F.Supp. 458, 462 (D.D.C. 1978).

CONCLUSION

Our courts have recognized self-executing provisions of the constitution as providing an independent remedy, protecting privileges and immunities and providing equal protection. Florida also provides the "self-executing" right to open records and enforces this right through the Public Records Law, chapter 119 of the Florida Statutes. It is the duty of each State of Florida agency to provide access to such records.

The State unconstitutionally applied Florida FOIA by denying access to public employment information in which the Petitioner had a direct, tangible, and personal interest—offending the Privileges and Immunities Clause of Article IV of the Constitution. The State action should be disaffirmed and reversed.

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Respectfully,

/s/ *Angela DeBose*

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