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BROWARD COUNTY COURTHOUSE
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CLOSE-0UT MEMORANDUM

TO: SAO FILE
Special Prosecutions Unit

FROM: Deborah Zimet
Assistant State Attorney

DATE: 17 July 2012

RE: David Freeman
Laurence Christopher
Christopher Cuddeback
SP12-03-023

Reason for closeout:

This case should be declined and returned to the City of Coconut Creek Police Department for whatever administrative action they deem appropriate.

The allegations in this cause revolve around the accessing by on-duty officers of computer data bases storing NCIC/FCIC data as well as motor vehicle data. Inquiries were made by Officers David Freeman and Laurence Christopher about a particular vehicle that had been purchased by a former law enforcement colleague, Chris Cuddeback. Mr. Cuddeback had been terminated by the City of Coconut Creek Police Department shortly before this event. [After a

four month absence and after arbitration, he was reinstated and assigned back to a desk job.] Telephone records suggested *a/* that inquiries were prompted by Chris Cuddeback and *b/* that some data retrieved was received by/conveyed to Chris Cuddeback by the other officers in question. As Chris Cuddeback was initially designated a target when this Assistant State Attorney received the file, a statement was not taken from him to ascertain the details of this event. This Assistant State Attorney did invite all three individuals to appear and give a statement. Consistent with their rights, the officers elected not to appear pursuant to the letters of invitation. Consequently, the decision was made to subpoena Christopher Cuddeback. On June 1, 2012, he appeared pursuant to the subpoena and was thereby granted use and derivative use immunity with the caveat that the subpoena did not protect him from perjury.

In his sworn statement, Officer Cuddeback conveyed that at the time of this event, he was purchasing a vehicle from one Mark Freseman. Mr. Freseman had himself only recently purchased the vehicle from a prior owner. Therefore, at the time of Officer Cuddeback's purchase, there was a question of whether sufficient time had passed to allow the transfer of title into Mr. Freseman's name. Officer Cuddeback explained that in light of this issue, he asked Officer Freeman to run a check on the vehicle on January 21, 2011; the only information passed to Officer Cuddeback was that Mr. Freseman's title had not yet been perfected in the State records. On February 4th and 5th, Officer Cuddeback again requested a check be done and so, Officer Laurence ran checks for him. At this point, Officer Cuddeback learned only that title was now in the name of Mark Freseman. Officer Cuddeback testified that the information passed to him related solely to the issue of the title being or not being in Mr. Freseman's name.

During the statement, Officer Cuddeback was questioned as to his knowledge about accessing State data bases. He acknowledged that he has received training in the use of the data bases. He further stated that it is not uncommon for private citizens to come to the Coconut Creek Police Department and make a request for similar information under similar circumstances and the requests are honored. Consequently, he did not think this would present a problem.

LAW

If one approaches this case from the perspective of Section 815.06, Florida Statutes, the following conclusions arise. The issue presented is that of whether these officers were "authorized" under Section 815.06(1)(a) to make these inquiries or whether they merely "exceeded their authorized access" under the circumstances and thus fall outside of the statute's parameters. The resolution to this query is initially governed by the Fourth District Court of Appeal's interpretation of Section 815.06, Florida Statutes, in Gallagher v. State, 618 So.2d 757(Fla. 4th DCA 1993), wherein a public service aide employed by the Sunrise Police Department accessed the Department's computer system to check if her boyfriend had a criminal record. She discovered that there was an outstanding warrant on file for him. At no time did she disclose this discovery to her superiors; the appellate court's opinion does not reflect whether she disclosed her findings to her boyfriend. Shortly after the computer accessing, the aide resigned at the Department's request.

Subsequent to her resignation, Gallagher was charged with a violation of Section 815.06, Florida Statutes. Through counsel, she filed a sworn motion to dismiss which was denied by the trial court. In the said motion and on appeal, Gallagher claimed that the statute addressed "unauthorized access" as opposed to the

"exceeding of one's authorized use" of the computer system. Gallagher pointed out that both the federal and Florida statutes "regulate ***access*** of computer systems without proper authorization." [Emphasis added] Neither regulated the "***exceeding of one's authorized use***" of the computer. [Emphasis added]

The appellate court reversed the trial court's denial of the sworn motion to dismiss and remanded the case to the circuit court with the direction that the said motion should be granted. In so ruling, the court was silent as to whether its decision turned on the issue of dissemination of the information. The appellate court held:

> "Moreover, appellant points to the legislative history of the federal statute, where the United States Congress specifically expressed that an employee's exceeding authorized access, while technically wrong, does not warrant criminal sanctions because administrative sanctions are more appropriate.....I agree with appellant's argument that this court should adopt the same view when interpreting Section 815.06 and determine that her conduct should not be punished by criminal means. Administrative sanctions, such as firing appellant, seem more appropriate in the instant case in that appellant was a public employee who merely *exceeded her authorization* by inputting her boyfriend's name into the computer. The legislature prohibited "access," not "use." It is free to change the statute." [Emphasis added]

In the instant cause, Officers Freeman and Christopher were authorized to access the computer systems in question. While they may have "exceeded that authorization," as Gallagher did, by accessing and retrieving data for *apparently* non-case related purposes, Section 815.06(1)(a), according to judicial interpretation, does not proscribe "exceeding" one's authority.

Upon reading Section 815.06(6), one might conclude that the Legislature addressed this issue. Paragraph (6) dictates that "[t]his section does not apply to any person who accesses his or her employer's computer system, computer network, computer program, or computer data *when acting within the scope of his or her lawful employment."* [emphasis added]. Just what does that emphasized language connote? Can one assume that it encompasses those situations where access is made for non-case related purposes or, in other words, situations where the authority is exceeded? Based on a reading of Rodriguez v. State, 956 So.2d 1226 (Fla. 4th DCA 2007), this Assistant State Attorney would submit that the answer is "no."

In 2007, the Fourth District Court of Appeal addressed this issue in Rodriguez v. State, 956 So.2d 1226 (Fla. 4th DCA 2007). In the Rodriguez case, the appellant had been charged with one count of organized scheme to defraud, thirty-two counts of grand theft cargo and seventeen counts of offense against computer under Section 815.06, Florida Statutes. Rodgriguez worked for Tropicana Products, Inc. and was responsible for warehouse operations. In that capacity, he had authority to access the computer's inventory computer data base. He did not have, however, the authority to alter data within the data base. When it was discovered that he did alter the data, this became the basis of a charge under Section 815.06(6). The argument was that since he was not authorized to change data, he, therefore, was not "acting within the scope of his lawful employment."

The decision reached in the Rodriguez case appears to indicate that this language is not tantamount to one "exceeding one's authority to access computers." Indeed the appellate court a/ pointed out the language in a parallel federal statute which would cover the factual scenario presented and b/ stated that "[Florida's] statute makes no provision addressing such conduct." Thus, it is

this Assistant State Attorney's opinion that the statute is not applicable as that statute has thus far been interpreted by this judicial circuit's appellate court, the Fourth District Court of Appeal.

One final point vis-à-vis Section 815.06(6). Neither the statute's language nor the judicial interpretation, thus far, indicates that a violation of the statute pivots on an element of dissemination of the data retrieved. Whether the appellate court would rule such is speculation at this juncture. Absent a statutory amendment, the Gallagher decision suggests the court would reiterate its position, i.e., that the statute needs to be more artfully defined to give adequate notice of what is prohibited. Moreover, that position is consistent with the rules of statutory construction which mandate that statutes are to be interpreted in the light most favorable to the accused; the onus is on the State to draft statutes with specificity so as to delineate the actions it seeks to prohibit.

If this case is analyzed from the perspective of Sections 119.0712(2) and 119.10(2)(a), Florida Statutes, the query would revolve around the type of information that was disseminated as well as the use for which it was sought. Section 119 provides that certain types of information are deemed public records, but it further protects certain information from disclosure. Personal information maintained with the Florida Highway Safety and Motor Vehicle Information Database benefits from this disclosure protection. Thus, in the instant cause, one must ask the following questions:

a/ What information was accessed?

b/ Was protected information disseminated?

c/ To whom was it disclosed?

d/ What proof do we have that "protected" information was disclosed?

In the instant cause, we know that the two officers accessed the NCIC/FCIC and DMV databases at the request of Christopher Cuddeback. We know that they called him back. The only information that purportedly was passed to him was that title had not yet passed into the name of Mark Freseman, the seller, until the time of the second request. Other personal data was not passed and some data, e.g., address, was already known to Officer Cuddeback. Officer Cuddeback's testimony regarding the release of this type of data to persons coming to the station needs to be taken into consideration. An examination of Section 119 would suggest that a citizen could come to the station under similar circumstances and seek similar information.

Having considered the premises of this cause and having researched the appertaining statutes and case law, it is the opinion of the undersigned that no charges should follow and that the case be returned to the Department for administrative remedies consistent with the Fourth District Court of Appeal's opinion discussed above.

APPROVED: Timothy L Donnelly DATE: 7-17-2012