UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 14-10028-CIV-MARTINEZ/GOODMAN

TREAVOR EIMERS,

Plaintiff,

v.

CITY OF KEY WEST, et al.,

Defendants.
_____/

POST-HEARING ORDER REQUIRING ADDITIONAL BRIEFING BY PLAINTIFF AND DEFENDANTS LOVETTE AND THE CITY REGARDING ALLEGEDLY SPOLIATED TEXT MESSAGES AND EMAILS

Plaintiff's motion for spoliation sanctions [ECF No. 96] is based, in part, on the theory that Defendant Gary Lovette ("Officer Lovette") destroyed text messages and emails and that the City of Key West (the "City") failed to advise him to retain these materials.

In his reply memorandum [ECF No. 125, p. 9], Plaintiff relies upon a December 27, 2013 letter which Plaintiff's then-attorney wrote to the Key West Police Department as the reason why Defendants "were on notice and had a duty to preserve the evidence for what was unquestionably, 'reasonably anticipated litigation.'" Plaintiff also relies upon Chapter 119, Florida Statutes, as a basis for the preservation duty.

But the December 27, 2013 letter [ECF No. 125-4] did not ask for all evidence concerning the November 28, 2013 on-the-beach detention of Mr. Eimers. It did not ask

for text messages or emails either. Instead, it was a "formal request," made pursuant to Chapter 119, for (1) "any and all audio footage and/or video footage" related to the traffic stop, pursuit and arrest" of Mr. Eimers, (2) "any and all recordings and transcripts of 911 calls," (3) "any and all police communications" relating to the traffic stop, pursuit and arrest, including communications on "channel 1" and all "rescue/EMS audio communications," and (4) "any and all dispatch reports associated with the alleged chase, pursuit and arrest of Mr. Eimers which lead to his 'asphyxiation.'" [*Id.* at p. 1].

Much later (on November 14, 201**4**), Plaintiff submitted an informal request for copies of Officer Lovette's emails and text messages concerning Eimers from November 28 through November 30, 2013. Lovette responded on December 5, 2014 by producing to Plaintiff some work emails but he advised that he did not have any responsive text messages or personal emails in his possession. [ECF Nos. 111, p. 15; 111-4].

Given this history, Plaintiff shall file a double-spaced memorandum of no more than 8 pages, excluding signature block and certificate of service, by January 23, 2015, addressing the following issues:

1. What is the **precise** authority (e.g., statute, regulation, written police department policy, written memo from police department supervisors, oral notice from police department supervisors, written demand from Plaintiff's counsel, oral request

from Plaintiff's counsel, etc.) which supports the theory that Office Lovette was under a duty to preserve text messages on his cell phone and his personal emails?

2. What is the precise authority supporting the contention that the City was required (i.e., under a duty) to specifically advise Officer Lovette to preserve these materials?

3. What case law authority supports Plaintiff's under-a-duty-to-preserve theories against Officer Lovette and the City concerning these specific materials?

4. Did the City in fact ever instruct (or suggest) Officer Lovette or any other officer involved in the Eimers incident to preserve their text messages and personal emails? If so, when, and what were the circumstances? If not, was that improper and what authority supports that conclusion?

5. Did the City issue the cell phone to Officer Lovette? If not, did it pay for his cell phone service?

6. Does the City provide internet service to Officer Lovette for his personal emails? Does it otherwise pay or reimburse him for his internet service?

7. Who controls Officer Lovette's personal email account, and does anyone from the City have access to it other than him?

8. Exactly when (i.e., the specific day) did Officer Lovette become subject to a duty to preserve text messages on his cell phone and his personal emails?

9. Exactly when (i.e., the specific day) did the City become subject to a duty to instruct Officer Lovette to preserve text messages on his cell phone and his personal emails?

Plaintiff's memorandum should also discuss the applicability of *Swofford v. Eslinger,* 671 F. Supp. 2d 1274 (M.D. Fla. 2009); *U.S. ex rel. King v. DSE, Inc.,* No. 8:08-CV-2416-T, 2013 WL 610531 (M.D. Fla. Jan. 17, 2013); *Simon Prop. Grp., Inc. v. Lauria,* No. 6:11-cv-01598, 2012 WL 6859404 (M.D. Fla. Dec. 13, 2012); and *Britton v. Wal-Mart Stores E., L.P.,* No. 4:11cv32, 2011 WL 3236189 (N.D. Fla. June 8, 2011). In discussing these cases, Plaintiff should anticipate the arguments which the City and Officer Lovette would likely make about these authorities and respond to them.

The City and Officer Lovette shall file a double-spaced response memorandum by January 30, 2015. These two defendants may file a joint response or two separate responses. If a joint response is filed, then it may be up to 12 double-spaced pages, excluding signature block and certificate of service. If the City and Officer Lovette file separate responses, then each shall be no longer than 8 double-spaced pages, excluding signature block and certificate of service.

DONE AND ORDERED, in Chambers, Miami, Florida, January 15, 2015.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Jose E. Martinez
All Counsel of Record