

IN THE DISTRICT COURT OF APPEAL  
FOR THE FIRST DISTRICT, STATE OF FLORIDA

Case No. 1D09-4385  
L.T. No.: 09-CA-2298

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellant,

v.

THE ASSOCIATED PRESS, et al.,

Appellees.

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**AMICUS CURIAE BRIEF OF ATTORNEY GENERAL  
BILL MCCOLLUM**

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## **INTEREST OF THE AMICUS CURIAE**

Attorney General Bill McCollum respectfully submits that the State of Florida has an interest in maintaining its 100-year-old tradition of openness and transparency in government. Florida has long been a national leader in open government law, starting in 1909 with the passage of legislation recognizing that it is the policy of this state that all state, county, and municipal records are open for personal inspection and copying. The Public Records Act provides that any records made or received by any public agency in the course of its official business are available for inspection, unless specifically exempted by the Florida Legislature. Over the years, Florida has codified its principles of open government in both its statutes (Chapter 119) and the state Constitution (Article I, section 24). With advances in technology, the definition of what constitutes “public records” has been refined to include not just traditional written documents such as papers, maps, and books, but also tapes, photographs, film, sound recordings, and records stored in computers.

The instant case raises questions as to what constitutes an “agency,” what makes a document a “public record,” and whether a third party can cite an exemption to prevent the release of what is otherwise a public record. The Attorney General is concerned about the refusal of the National Collegiate Athletic Association (NCAA) to make certain records available. A ruling that allows non-

disclosure would be detrimental to this state's progressive Public Records Act. The Attorney General, in seeking to protect the interests of the public, has an interest in assisting the court regarding the applicability of the Public Records Act in this case.

### **SUMMARY OF ARGUMENT**

Public records are all materials made or received in connection with official government business. The physical format of the record is irrelevant; the material issue is whether the record was received in connection with the transaction of official business, in this case by Florida State University (FSU), a state agency subject to the provisions of Chapter 119, Florida Statutes. Where a public agency not only views a document, but uses that document in preparing a response, the document has been received by that agency and is subject to disclosure in the absence of a statute making the document or information contained therein confidential or exempt. FSU cannot allow the NCAA to dictate the accessibility of the records FSU uses in carrying out its official business.

The NCAA, by retaining control of documents submitted to FSU and used by that agency in carrying out its official duties, has subjected itself to the Public Records Act. In the absence of a statutory exemption making the record confidential or exempt, neither FSU nor the NCAA, as the *de facto* custodian of the public record, may refuse to allow public inspection and copying.

## ARGUMENT

### **I. The Documents at Issue Are Public Records.**

The Florida Supreme Court has interpreted the statutory definition in section 119.011(12), Florida Statutes, to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *See* Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure. *See* Wait v. Fla. Power & Light Co., 372 So. 2d 420 (Fla. 1979). The physical format of the record is irrelevant; the material issue is whether the record is made or received in connection with the transaction of official business by any agency. *See* Seigle v. Barry, 422 So. 2d 63, 65 (Fla. 4th DCA 1982) (information stored in an agency's computer "is as much a public record as a written page in a book or tabulation file stored in a filing cabinet.").

As a publicly funded university in the state university system, FSU belongs to and is a part of the executive branch of state government. *See* §1001.705(1)(a)4, Fla. Stat. (2008). FSU is clearly subject to the Florida Public Records laws. *See* §119.011(2), Fla. Stat. (2008) (defining "agency" to mean "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, person, partnership, corporation, or business entity acting on behalf of any public agency.”). Documents made or received by FSU in connection with the transaction of university business which are intended to perpetuate, communicate, or formalize knowledge are therefore public records in the absence of a statutory exemption.

This case does not involve the mere viewing of a private entity’s documents by a public agency, but rather the presentation to and utilization of those documents by the public agency in carrying out its official duties. In the instant case, FSU self-investigated and reported its findings to the NCAA in the wake of an academic cheating scandal involving dozens of student athletes and at least one FSU employee. The NCAA issued FSU a Notice of Allegations, and the NCAA Committee on Infractions conducted a hearing with respect to these allegations. This hearing was transcribed.

After this hearing, the NCAA Committee on Infractions imposed penalties against the FSU athletic department. FSU hired outside counsel to appeal these sanctions. In order to utilize the record on appeal, the NCAA required FSU’s outside counsel to sign a confidentiality agreement; access to critically important documents related to FSU’s appeal was impossible without signing this confidentiality agreement.

FSU responded to the statements in these documents in a letter to the NCAA dated July 1, 2009. Because these documents were utilized by FSU in preparing its appeal of the NCAA sanctions, they were received in connection with the transaction of official business regarding the FSU athletic department. Once these documents were displayed to FSU's agent in order to elicit a response in the appeals process, the documents became public records which are subject to mandatory disclosure in the absence of a statutory exemption. To permit a private entity which provides a document to a public agency for use by that agency in carrying out its official duties to dictate whether the document is a public record would create a significant loophole in the Public Records Act, irreparably damaging it.

**II. By Retaining Custody of the Document, the NCAA has Become an "Agency" for the Purposes of Chapter 119, Florida Statutes.**

As a private entity, the NCAA is not typically subject to the Public Records Act. However, pursuant to Chapter 119, Florida Statutes, a private entity acting on behalf of a public agency is also an "agency" for purposes of the Act.

In Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487, 492-493 (Fla. 2d DCA 1990), for example, the court found that a private corporation, the Chicago White Sox, violated the Public Records Act when it retained possession of negotiation documents reviewed and discussed by both parties, although city officials could review (but not make copies of) the documents in the White Sox

attorney's office. While recognizing that the White Sox was the business adversary of the city and not generally the city's agent, the court nonetheless held that the White Sox, which had insisted on retaining custody of the documents, was the *de facto* custodian of the records. The court highlighted the dangers that exist if private entities "are allowed to demand that they retain custody [and prevent inspection] of documents as a condition of doing business with a governmental body." Id. at 494.

This Court, in B&S Utilities, Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17, 20 (Fla. 1st DCA 2008), also recently reiterated this concern of the damage done to the Public Records Act if such an argument was successful. The Court recognized that "Florida's policy guaranteeing that public records are open for inspection contemplates the possibility that public records may sometimes be found in private hands." Id. In other words, the nature of the record and its use by a public agency dictates its status as a public record open for inspection.

In this instant case, the NCAA presented documents to FSU for use by FSU in preparing its appeal regarding imposition of sanctions. These documents were thus received in connection with the transaction of official business regarding the FSU athletic department and therefore become public records subject to inspection and copying by the public. Furthermore, by maintaining physical custody of the documents and refusing to release them to the public, the NCAA has become the

*de facto* custodian of those public records. To the extent the NCAA has retained possession of public records and is acting as custodian of those records, it is an “agency” for the purposes of the Public Records Act.

### **III. The NCAA May Not Designate Documents as Exempt in the Absence of a Statutory Exemption.**

FSU hired outside counsel to appeal the NCAA sanctions imposed in the wake of an academic cheating scandal. The firm, on behalf of FSU, signed a confidentiality agreement with the NCAA, which allows only the attorneys from the law firm to view the NCAA documents over a secure, password-protected website which does not allow copying, printing, or saving. This was an improper attempt to circumvent the Public Records Act and determine whether records should be disclosed.

The courts of this state have recognized that an agency cannot refuse to allow inspection or copying of a public record at the request of the maker or sender of the record. This would permit private parties, instead of the Legislature, to determine which records are public and which are not. Such a result would contravene the purpose and terms of Chapter 119, Florida Statutes. *See Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files); *see also City of Pinellas Park, Fla. v. Times*

Publ'g Co., No. 00-008234CI-19 (Fla. 6th Cir. Ct. Jan. 3, 2001) (“there is absolutely no doubt that promises of confidentiality [given to employees who were asked to respond to a survey] do not empower the Court to depart from the public records law”).

Moreover, public agencies cannot contractually agree to shield records from disclosure. *See Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 5th DCA 1981) (rejecting the argument that a collective bargaining agreement prohibited the disclosure of otherwise public records, stating that “to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act”). The determination as to when public records are confidential rests exclusively with the Legislature. *See Sepro Corp. v. Fla. Dep’t of Env’tl. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003) (private party cannot render public records exempt from disclosure merely by designating as confidential the material it furnishes to a state agency); *cf. State ex rel. Veale v. City of Boca Raton*, 335 So. 2d 1194 (Fla. 4th DCA 1977) (in the absence of specific legislative exemption, agency’s investigative records are open to public inspection). The bottom line is that unless the Legislature has expressly authorized the maker of documents received by an agency to keep the material confidential, the wishes of the sender cannot supersede the requirements of the law.

Importantly, public records are subject to disclosure in the absence of a statutory exemption regardless of their physical location. Public agencies may not transfer physical custody of public records to a private entity “to circumvent the public records chapter.” *See* Wisner v. City of Tampa Police Dep’t, 601 So. 2d 296, 298 (Fla. 2d DCA 1992). The records remain subject to disclosure. *See* Wallace v. Guzman, 687 So. 2d 1351 (Fla. 3d DCA 1997) (public records cannot be hidden from the public by transferring physical custody of the records to the agency’s attorneys). In Times Publishing Company v. City of St. Petersburg, 558 So. 2d at 494, for example, the court found that both the city and the Chicago White Sox violated the Public Records Act when the city avoided taking possession of negotiation documents reviewed and discussed by both parties and instead left them with the private entity’s attorney. *See also* Barfield v. Fla. Dep’t of Law Enforcement, No. 93-1701 (Fla. 2d Cir. Ct. May 19, 1994) (agency that received records from a private entity in the course of official business and did not make copies of the documents could not “return” them to the entity following receipt of a public records request; the agency had to demand return of the records so they could be copied for the requestor).

In short, the courts of this state have clearly recognized that agencies may not avoid compliance with the public records law by transferring custody of a document or refusing to take physical possession of a document used in the

transaction of its official business. The documents FSU utilized in carrying out its official business are public records subject to disclosure in the absence of a statutory exemption, regardless of who is in physical possession of the actual documents. Only the Legislature may enact exemptions from the disclosure requirements of the Public Records Act, and even if an exemption exists, the custodian is statutorily required to delete or excise only that portion or portions of the record for which an exemption is asserted and to provide the remainder of the record for examination. *See Ocala Star Banner Corp. v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994) (city may redact confidential identifying information from police report but must produce the rest for inspection); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994) (reasoning that police department authorized to withhold criminal investigative information which is statutorily exempt from disclosure, but must allow inspection of nonexempt portions of the records). Moreover, the custodian is required to state the basis of the exemption, including the statutory citation to an exemption created or afforded by statute, and if requested by the person seeking to inspect or copy the record, to state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential. *See* §§ 119.07(1)(e) & (f), Fla. Stat. (2008).

#### IV. The NCAA May Not Impose Conditions on the Release of the Documents.

Section 119.07(1)(a), Florida Statutes, establishes a right of access to public records in plain and unequivocal terms:

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, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

§ 119.07(1)(a), Fla. Stat. (2008). The “reasonable conditions” referred to in this section do not envision conditions a private party imposes on release of a record that would hamper or frustrate, directly or indirectly, a person’s right of inspection and copying; instead, they refer “to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review.” Wait v. Fla. Power & Light Co., 372 So. 2d 420, 425 (Fla. 1979); *see also* State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905); Tribune Co. v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984); DePerte v. Tribune Co., 471 U.S. 1096 (1985); State ex rel. Davidson v. Couch, 158 So. 103, 105 (Fla. 1934) (right of inspection was “hindered and obstructed” by the city “imposing conditions to the right of examination which were not reasonable nor permissible under the law”).

As the *de facto* custodian of public documents, the NCAA may not impose conditions that limit or obstruct the public's right of access to inspect and/or copy records received by FSU in carrying out its official business. A list of the contents of a public record does not constitute legally sufficient compliance with Florida's Public Records Act, nor is a transcript of a record a suitable substitute for access to the public record itself. See Davis v. Sarasota County Pub. Hosp. Bd., 480 So. 2d 203 (Fla. 2d DCA 1985) (actual records, and not extracts of the records, of a public body are open and subject to inspection). Here, the redacted transcription of the letter on the secure website, which FSU has made public, does not satisfy the requirements of section 119.071(1) of the Florida Statutes. FSU must disclose the full record provided by the NCAA unless a recognized exemption applies.

### **CONCLUSION**

The Florida Constitution safeguards the right of access to government records. The comprehensive breadth and scope of Florida's Sunshine Laws serve as a model for the rest of the nation. In Florida, disclosure is the presumption, unless the Legislature concludes that the public necessity compels an exemption from our strong open government laws. The documents in question were utilized by FSU in carrying out its official business and thus constitute public records subject to Chapter 119, Florida Statutes. To the extent that the NCAA has retained custody of such documents, it has become the *de facto* custodian of these records

and must comply with the disclosure provisions of the Public Records Act in the absence of a statute making such records, or portions thereof, confidential or exempt. The Attorney General, as amicus curiae, therefore urges this Court to uphold the order below, which compels the NCAA to fully disclose the requested documents.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE/COMPLIANCE**

I HEREBY CERTIFY that this brief was prepared with Times New Roman 14-point in compliance with Fla. R. App. P. 9.210(a)(2), and that a copy of the foregoing has been furnished by U.S. Mail on the 21st day of September 2009, to the following:

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