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CLERK ... FIRST DISTRICT ...

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

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellant,

vs.

Case No.: 1D09-4385

THE ASSOCIATED PRESS, et al.,

L.T. No.: 09-CA-2298

Appellees.

______________________________/

APPELLEES' OPPOSITION TO THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S MOTION FOR STAY AND RESPONSE TO SHOW CAUSE ORDER

Appellees oppose the Emergency Motion for Stay filed by Appellant National Collegiate Athletic Association ("NCAA"). As explained in greater detail below, this case is about the public's constitutional and statutory right of access to records received by a State-funded university in the course of its official business. This case is not, as the NCAA might lead the Court to believe, about the right of the public to rifle through the private files of the NCAA, or about "untold records requests from any citizen of Florida." Motion for Stay at 3. Instead, two documents are at stake. The NCAA provided those two documents to Florida State University and Florida State University received and utilized those documents in the conduct of its official business. Under well-established law, the two documents are undoubtedly public records. Moreover, the two documents are not exempt from disclosure under any statutory or other exemption.

In addition – and critically – the trial court has already entered a limited stay sufficient to protect any legitimate concerns of the NCAA. See Transcript of Proceedings, Aug. 21, 2009, at 283 – 285 (excerpts of the Transcript are attached hereto as Exhibit A). Under that limited stay, the two documents will be disclosed only in redacted form with information identifying any students redacted while still providing information focusing on the conduct the University and its employees. The granting of the broad stay sought by the NCAA in this case (a stay prohibiting any disclosure of the documents) would frustrate the purposes of the Public Records Act and of Article I, Section 24 of the Florida Constitution and, as explained below, is entirely unnecessary.

Moreover, the Motion for Stay is untimely. For all of these reasons, good cause exists for denying the Motion for Stay.

Background

Appellees include the Associated Press, the First Amendment Foundation, the Florida Press Association and nearly twenty newspapers, television stations and online publishers in Florida. (Hereinafter, Appellees are referred to as "Plaintiffs.") The NCAA is an unincorporated voluntary association of colleges and universities with over 1,288 members. This appeal concerns access to two public records.

The underlying case arose from the discovery of academic misconduct in the Athletic Academic Support Services program at Florida State University ("FSU") during the 2006/2007 school years, and from FSU's and the NCAA's investigation of that misconduct and the imposition of sanctions upon FSU. On October 28, 2008, the NCAA's Committee on Infractions conducted a hearing with respect to the purported misconduct at FSU. A transcript of the October 28, 2008 hearing (the "Hearing Transcript") is one of the two records at issue in this case. See Final Judgment at 2, dated August 28, 2009 (attached hereto as Exhibit B.)

On March 6, 2009, the NCAA's Committee on Infractions issued Infractions Report No. 294, which imposed various penalties against FSU, including the vacating of certain wins by FSU varsity sports teams. FSU retained the law firm GrayRobinson, P.A. ("GrayRobinson") to represent it in its appeal of the penalties imposed by the NCAA Committee on Infractions. An individual or institution appealing a decision of the Committee on Infractions (or representatives on behalf of such an individual or institution) may elect to view documents that comprise the record on appeal either at a physical, custodial location, or on the NCAA's secure custodial website. The NCAA's custodial website (the "Custodial Site") is a secure, password-protected website, and documents posted to the site are accessible in a read-only format and cannot be printed, saved or downloaded by the viewer. Strict confidentiality agreements must be signed as a condition to accessing the site. The main purpose of the Custodial Site is to maintain confidentiality of documents on the Custodial Site. Id. at 2-3.

On behalf of FSU, GrayRobinson accessed documents on the Custodial Site posted specifically for the FSU appeal and utilized them in assisting FSU in preparing its appeal of the NCAA sanctions. On April 23, 2009, FSU filed its initial brief in the appeal. The NCAA Committee on Infractions issued a written response to FSU's Appeal on June 2, 2009. The Committee on Infractions' June 2, 2009, Response (the "June 2 Response") is the second record at issue in this case. Id. at 3-4.

Plaintiffs made public records requests to FSU, GrayRobinson, and the NCAA for access to documents related to the FSU sanctions appeal, including documents that FSU (via GrayRobinson) reviewed on the Custodial Site. Thus, Plaintiffs' request included a request for access to the June 2 Response and the Hearing Transcript. FSU, GrayRobinson, and the NCAA failed to provide the public records. Id. at 4.

On June 15, 2009, Plaintiffs filed their initial complaint in this case. (On July 6, 2009, Plaintiffs filed an Amended Complaint.) Id.

On June 16, 2009, the NCAA indicated that it would not object to FSU's transcribing the June 2 Response from the Custodial Site and disclosing that transcript to Plaintiffs, provided that FSU redacted student identifying information from the transcript. But the NCAA refused FSU's request that it be permitted to provide the June 2 Response in a usable format. On June 18, 2009, FSU transcribed the response from the Custodial Site, redacted personally identifiable information of its students, and provided the redacted transcript of the June 2 Response to Plaintiffs and the public. (At the time the transcript of the June 2 Response was created, FSU had not yet discovered that it had the ability to "print screen" documents posted on the Custodial Site.) Id.

In response to Plaintiffs' lawsuit, the trial court reviewed voluminous briefs from the parties on the question of whether the June 2 Response and Hearing Transcript were public records and whether they were, for any reason, exempt from disclosure. The trial court also conducted several hearings, including a two-day non-jury trial on August 20-21, 2009. Prior to that trial, the court reviewed the Hearing Transcript in camera and found that the Hearing Transcript focused "primarily on the actions of FSU with respect to alleged academic fraud and the alleged failure of FSU to monitor its employees." (Final Judgment (Ex. B) at p. 10) The trial court, in a written Final Judgment issued at 11:03 a.m. on Friday, August 28, 2009, ruled that the June 2 Response and Hearing Transcript were received by FSU and GrayRobinson in connection with FSU's official business and were public records under Article I, Section 24 of the Florida Constitution and under the Public Records Act, Chapter 119, Florida Statutes. Id. at 5-7.

The trial court further held that the public records were not exempt from disclosure under Florida or federal law or by virtue of any contractual confidentiality provisions, and that FSU, the NCAA, and GrayRobinson were all custodians of the records. The court ordered the NCAA (and FSU and GrayRobinson) to produce the records to Plaintiffs.

Throughout this matter, Plaintiffs have taken the position that the NCAA, FSU, or GrayRobinson could redact any personally identifying student information from the records before disclosing them. The trial court's order requires the NCAA to disclose only such redacted copies of the June 2 Response and Hearing Transcript. Id. at 8-18. The court stayed the release of any unredacted versions of the June 2 Response or the Hearing Transcript.

The NCAA filed a notice of appeal at approximately 4:40 p.m. on Friday, August 28, 2009. The NCAA filed its Motion for Stay in this Court after 5:30 p.m. on Monday, August 31, and it was not received by Plaintiffs until after 5:30 p.m. The Motion for Stay seeks to prevent the disclosure of the redacted June 2 Response and the redacted Hearing Transcript.

Argument

I. The Motion For Stay Is Untimely.

Florida Statute Section 119.11 provides that

> 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.

§ 119.11(2) (emphasis added). Here, the trial court ordered the NCAA to disclose redacted copies of the June 2 Response and the Hearing Transcript at 11:03 a.m. on Friday, August 28. Pursuant to Section 119.11(2), the NCAA was required either to disclose those records within 48 hours (i.e., by Sunday, August 30, at 11:03 a.m.) or to move for a stay in this Court by that time.

The NCAA did neither. As a result, the NCAA's Motion for Stay is untimely and the NCAA is required by law to disclose the redacted June 2 Response and Hearing Transcript.[1]

The NCAA did file a notice of appeal at approximately 4:40 p.m. on Friday, August 28. Pursuant to Rule of Appellate Procedure 9.310(b)(2), "an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases." Thus, by filing its notice of appeal at 4:40 p.m. on Friday, August 28, the NCAA obtained a 48-hour automatic stay from this Court. But that stay expired 48 hours later, at approximately 4:40 p.m. on August 30. Because no stay was entered before 4:40 p.m. on August 30, the NCAA was required, under Section 119.11 and the trial Court's Final Judgment, to disclose the redacted June 2 Response and Hearing Transcript. The NCAA has not done so.

Because the NCAA's Motion for Stay is untimely, and because the NCAA is already required by law to disclose the redacted June 2 Response and Hearing Transcript, the NCAA's untimely Motion for Stay should be denied.[2]

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[1] Florida Rule of Civil Procedure 1.090(a) establishes the method for computing time in most instances, and provides that for time periods of less than 7 days, "intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." But this exclusion applies only when the statute or rule establishing the time period is silent on how to compute the time period. See Health Quest Corp. IV v. Dep't of Health & Rehabilitative Servs., 593 So. 2d 533, 536 (Fla. 1st DCA 1992) ("Florida Rule of Civil Procedure 1.090 governs computation of time in the absence of specific provisions to the contrary.") (emphasis added) (citation omitted). Here, Section 119.11(2) itself explains how to compute time because it requires disclosure of public records within a certain number of hours. When a rule establishes a time period in terms of hours, as opposed to days, Rule 1.090(a) is not applicable to compute the time period. See, e.g., In re Amendments to the Rules of Juvenile Procedure, 934 So. 438, 441 (Fla. 2006) (explaining, with respect to Florida Statute Section 390.01114(4)(b), that the term "48 hours" "means exactly 48 hours from the filing of the petition and specifically includes weekends, holidays, and times after regular business hours of the court"). Thus, "48 hours" as used in Section 119.11 means 48 hours.

[2] In contrast to the Motion for Stay, the NCAA's request for expedited review is not untimely. While Appellees do not oppose the NCAA's request for expedited review, the availability of expedited review should not be weighed in favor of granting a stay. The right of access to public records is a constitutional and statutory right, and it is a right whose value

II. The NCAA Cannot Demonstrate The Need For A Stay.

The NCAA's Motion for Stay also should be denied because the NCAA cannot demonstrate a need to stay disclosure of the redacted June 2 Response and Hearing Transcript. Indeed, in light of the trial court's Final Judgment requiring disclosure only of the redacted records, in light of the governing law, and in light of the standards for granting stays, the NCAA's Motion for Stay should be denied.

When considering whether to grant a stay, this Court should consider "the moving party's likelihood of success on the merits, and the likelihood of harm should a stay not be granted." Perez v. Perez, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999). Here, the NCAA is not likely to succeed on the merits of its appeal, and is not likely to suffer any real harm if the broad stay it seeks is denied.

A. The NCAA Is Not Likely To Succeed On The Merits.

With respect to the merits, it is essentially beyond dispute that the June 2 Response and the Hearing Transcript – which were posted on the Custodial Site for review by FSU's attorneys for use in FSU's appeal of the sanctions imposed by the NCAA – are public records. "Public records" include:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law

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depends in large measure on its immediacy. As the Florida Supreme Court has recognized: "[n]ews delayed is news denied. To be useful to the public, news events must be reported when they occur." State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976). The NCAA's Custodial Site has functioned as a means of impeding access to public records. A stay would further impede the constitutional right of access and would frustrate the important public policy concerns behind the Public Records Act and Article I, Section 24 of the Florida Constitution. And, of course, the trial court has already entered a limited stay that prohibits release of any student-identifying information contained the two public records at issue in this case. Expedited review of this case is appropriate; a broad stay is not.

or ordinance or in connection with the transaction of official business by any agency.

§ 119.011(12) Fla. Stat. The Florida Supreme Court has read this definition liberally to encompass all materials made or received by an agency in connection with official business, which are used to "perpetuate, communicate, or formalize knowledge." Shevin v. Byron, Harless Schaffer, Reid & Associates, 379 So.2d 633 (Fla. 1980). There is no dispute that the June 2 Response and the Hearing Transcript were accessed, viewed and used by FSU and its attorneys to perpetuate, communicate, or formalize knowledge (i.e., they were used in preparing FSU's appeal of the sanctions imposed by the NCAA).

Likewise, there is no real dispute that the June 2 Response and the Hearing Transcript were "received" by FSU. The NCAA has argued that the documents were not received by FSU because they were maintained on a web site from which FSU could not save or download them. But the NCAA's semantic argument is flatly contrary to the decision in Times Pulishing Co. v. City of St. Petersburg, 558 So. 2d 487, 494 (Fla. 2d DCA 1990). Times Publishing concerned the question of whether documents viewed and reviewed by representatives of the City of St. Petersburg were public records, even though the documents were at all times maintained in the possession of a third party. As the Second District explained, once the documents were presented to and reviewed by the City, they were public records. "To hold otherwise would make an artificially restrictive interpretation permitting public agencies to circumvent the purpose of the law and the public's 'right to know.'" Id. at 494. Citing Times Publishing, this Court more recently identified similar concerns over private entities controlling public records in B & S Utilities Inc. v. Baskerville-Donovan, Inc., 988 So.2d 17 (Fla. 1st DCA 2008).

For this reason, Florida courts do not tolerate the retention of public records by a private entity that denies the public access to such records. Wisner v. City of Tampa Police Dep't, 601

So. 2d 296, 298 (Fla. 2d DCA 1992); Wallace v. Guzman, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997). When a private entity retains custody and control of a public record, it assumes the responsibility as custodian of the public record, including the obligation to ensure that such records are accessible to the public.

Because the June 2 Response and the Hearing Transcript are public records, they are presumptively open to public review and must be made available for public inspection unless a specific statutory exemption permits the custodian to withhold the documents. See Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979) (holding that public records must be released unless a statute makes them exempt). A custodian asserting an exemption to the release of a public record has the burden of establishing entitlement to the exemption. Lightbourne v. McCollum, 969 So. 2d 326, 333 (Fla. 2007); Weeks v. Golden, 764 So. 2d 633, 635 (Fla. 1st DCA 2000). All exemptions must be narrowly construed in favor of access. Lightbourne, 969 So. 2d at 333-34.

No statutory exemption exists that permits withholding of the June 2 Response and the Hearing Transcript, as the trial court found. The NCAA argues that the documents are exempt from disclosure as "education records" under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), and Section 1006.52(1), Florida Statutes. FERPA defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A) (emphasis added).

After reviewing the documents, the trial court held that the June 2 Response and the Hearing Transcript are not "education records." As the trial court explained,

> This Court finds that the June 2 Response and the Hearing Transcript are not "education records" because those documents do not contain information directly relating to a student. Instead those documents focus primarily on the actions of FSU with respect to alleged academic fraud and the alleged failure of FSU to monitor its employees.

Final Judgment (Exh. B) at 10. Courts throughout the country have construed the definition of "education records" under FERPA in the same manner as the trial court, so that the mere mention of a student does not automatically turn a document into an "education record." See, e.g., Briggs v. Bd. of Trustees of Columbus State Cmty. Coll., No. 2:08-CV-644, 2009 WL 2047899 at *5 (S.D. Ohio July 8, 2009); Wallace v. Cranbrook Educ. Cmty., No. 05-73446, 2006 WL 2796135 at *4 (E.D. Mich. Sept. 27, 2006); Ellis v. Cleveland Municipal School District, 309 F. Supp. 2d 1019 (N.D. Ohio 2004); Hampton Bays Union Free Sch. Dist. v. Pub. Employment Relations Bd., 878 N.Y.S.2d 485, 488-89 (N.Y. App. Div. 2009); Baker v. Mitchell-Waters, 826 N.E.2d 894, 899 (Ohio Ct. App. 2005); Brouillet v. Cowles Publ'g Co., 791 P.2d 526, 533 (Was. 1990); Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998).

The trial court – after it conducted hearings on this issue, received extensive briefing from the parties, and conducted an in camera review of the Hearing Transcript – rejected the application of any exemption to the disclosure of the records at issue. (The confidentiality agreements were, of course, deemed unlawful because state agencies cannot by agreement make public records confidential in the absence of a statutory exemption. See Sepro Corp. v. Fla. Dep't of Environmental Protection, 839 So. 2d 781 (Fla. 1st DCA 2003).) The Motion for Stay presents no new basis for this Court to believe that the NCAA is likely to succeed on its arguments.

The NCAA also has asserted that application of the Public Records Act in this case would be unconstitutional. The NCAA's arguments are without substance. Indeed, the cases from other jurisdictions relied upon by the NCAA are not public records cases, but instead

generally involved protectionist laws targeted at a specific entity. Here, by contrast, Article I, Section 24 of the Florida Constitution and the Public Records Act are laws of general application that do not single out the NCAA for disparate treatment. Like many other organizations and businesses operating on a national level, the NCAA must operate within the laws of the states where it does business. The NCAA should not be permitted to interfere with the obligations of FSU (a tax payer-funded state university) to abide by our State's constitution and laws. Contrary to the laws at issue in the cases cited by the NCAA, the State's interest as embodied in the Florida Constitution and the Public Records Act is substantial, see Byron, Harless, 360 So. 2d at 97 ("Florida's public records law … promote[s] a state interest of the highest order.") (emphasis added), and clearly outweighs any purported imposition on the NCAA's rights by disclosure of the redacted June 2 Response and Hearing Transcript. For these reasons, the trial court easily rejected the NCAA's constitutional arguments. The NCAA has not presented any new arguments that would alter that conclusion.

In sum, the NCAA simply is not likely to succeed on the merits of its argument that the redacted June 2 Response and Hearing Transcript are not public records or are exempt from disclosure. For this reason alone, the Motion for Stay should be denied.

B. The NCAA Will Not Be Harmed By Release Of The Records.

The Motion for Stay should also be denied because the NCAA is not likely to suffer any real harm by disclosure of the redacted June 2 Response and the Hearing Transcript. See Boutwell v. Nichol's Alley of Jacksonville, Inc., 364 So. 2d 1246, 1248 (Fla. 1st DCA 1978) ("A stay order shall not be issued unless the court determines that there is a substantial probability that opening the records for inspection will result in significant damage.") (quotation omitted); § 119.11(3), Fla. Stat. (same). Indeed, the NCAA is unable to identify any purported irreparable

harm it will suffer from release of the two specific documents at issue in this case. It has not done so because it cannot do so. In fact, if there was any real likelihood of harm here, FSU would be the party seeking a stay. FSU is the primary organization charged with policing students and is the institution at the center of the Hearing Transcript and the June 2 Response.

Because it cannot identify any real harm from disclosure of the two documents, the NCAA appears to be arguing that in the appeal of any public records case, the potential for significant harm exists if a stay is not granted to prohibit disclosure of records while the case is pending on appeal. But this argument has already been rejected by Rule of Appellate Procedure 9.310(b)(2), which establishes only a 48-hour automatic stay in public records cases. After those 48 hours have passed, the records custodian must essentially satisfy the injunctive relief standard to obtain a stay. Otherwise, "[b]y the mere taking of an appeal, the agency could delay a person's right to examine public records until through the sheer lapse of time, the need expired. This would defeat the purpose of the Public Records Act." Boutwell, 364 So. 2d at 1248.

As the trial court explained, the June 2 Response and the Hearing Transcript primarily focus "on the performance of FSU and its employees and the academic fraud allegations involving the institution." Final Judgment (Ex. B) at 10. Disclosure of this information is highly unlikely to have any tangible impact on the NCAA. With respect to the June 2 Response, moreover, the substance of that document has already been publicly disclosed because the documents has already been transcribed and publicly released. It is inconceivable that the NCAA will suffer any harm from the disclosure of the actual (but redacted) June 2 Response.

Finally, the Motion for Stay should be denied because the trial court has already prohibited the release of any student identifying information that may be contained in the June 2 Response and the Hearing Transcript, which protects against any theoretical damage that could

occur to the NCAA from release of information relating to specific students. No broader stay is necessary in this case.

Conclusion

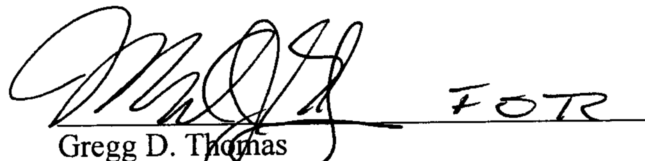
The June 2 Response and the Hearing Transcript are public records that should have been released to the public long ago. But because of the mechanisms that the NCAA set up to avoid and frustrate access under the Public Records Act, the documents were not released. Instead, Plaintiffs were forced to initiate litigation to obtain access to documents that clearly are public records and that relate to the management and functioning of a state university and its Athletic Academic Support Services program. The NCAA has not timely sought a stay in this Court and cannot establish that a stay is necessary. No further delay in release of the redacted June 2 Response and Hearing Transcript should be countenanced.

WHEREFORE, Appellees respectfully request that this Court deny the NCAA's Emergency Motion for Stay.

DATED this 1st day of September, 2009.

Respectfully submitted,

THOMAS, LOCICERO & BRALOW PL



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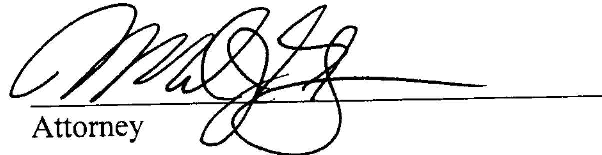
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Delivery and U.S. Mail to **William E. Williams, Esq.,** GRAYROBINSON, P.A., Post Office Box 11189, Tallahassee, FL 32302; **Peter Antonacci, Esq.,** GRAYROBINSON, P.A., 301 S. Bronough Street, Suite 600, Tallahassee, FL 32301; **E. Thom Rumberger, Esq., and Leonard J. Dietzen, Esq.,** RUMBERGER, KIRK & CALDWELL, 215 South Monroe Street, Suite 130 Post Office Box 10507, Tallahassee, FL 32302; **Jonathan F. Duncan, Esq., and Linda Salfrink, Esq.,** Spencer Fane Britt & Browne LLP, 1000 Walnut, Ste. 1400, Kansas City, MO 64106; and **Kent J. Perez, Esq., and Alexis Lambert, Esq.,** Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050 on this ___ day of September, 2009.



Attorney

1 IN THE CIRCUIT COURT OF
2 THE SECOND JUDICIAL
CIRCUIT IN FOR LEON
COUNTY, FLORIDA

3 CASE NO. 2009-CA-2298

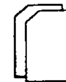
4

5 THE ASSOCIATED PRESS, et al.,

6 Plaintiffs,

7 vs.

8 FLORIDA STATE UNIVERSITY BOARD
OF TRUSTEES, T.K. WETHERELL,
9 in his official capacity as
President of Florida State
10 University; NATIONAL
COLLEGIATE ATHLETIC
11 ASSOCIATION, AND GRAYROBINSON,
P.A.,
12
Defendants.
13 ______________________________/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VOLUME II OF II
15
TRANSCRIPT OF PROCEEDINGS
16
DATE TAKEN: August 21, 2009
17
TIME: 10:30 a.m. to 2:28 p.m.
18
PLACE: Leon County Courthouse
19 301 S. Monroe Street
Tallahassee, Florida
20
BEFORE: John C. Cooper
21
This cause came on to be heard at the time and
22 place aforesaid, when and where the following
proceedings were reported by:
23
AUDRA M. SMITH, RPR, Court Reporter
24 For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
25 Tallahassee, Florida, 32308

1 a 119 claim. Just as if plaintiffs had a public
2 record already, I don't think they could request
3 the same thing they had and then sue under Chapter
4 119 if they didn't get it a second time, and I'm
5 not sure if that's the best analogy in the world,
6 but it's the best I can come up with now.
7 It does not dispose of FSU and GrayRobinson's
8 indemnity claim to the extent GrayRobinson still
9 has one or FSU still has one. That can be
10 determined later. But I'm going to have to
11 respectfully rule in favor of the NCAA on the
12 cross-claim on that basis.
13 Counsel for plaintiffs on that point, you
14 might want to closely consult with Mr. Williams to
15 get his input on how he would like that order
16 framed, and obviously with NCAA on the whole order.
17 But since you're sort of taking the lead drafting
18 responsibility, I'm sure Mr. William would want to
19 have some input at least -- or extra input put at
20 least on that point so that he can discuss with you
21 the way to phrase the language.
22 I think I'm required under Chapter 119 -- is
23 it 12? .12? -- that these records be produced
24 within 48 hours of the date I sign the order.
25 However, I grant a stay for a sufficient period of

1 time to allow an appeal to be filed by the parties
2 and decided, but the stay is granted only as to
3 issuing an unredacted version of the records.
4 This is what we discussed yesterday, but let
5 me try to make this clear: I'm staying the
6 requirement that FSU, GrayRobinson, or NCAA provide
7 you with documents that contain student identifying
8 information, but I'm not issuing a stay as to
9 anything else except that as to any other member of
10 the public. I am staying producing these records
11 with unredacted information during the pendency of
12 these appeals.
13 Is that what you're about to say?
14 MR. DIETZEN: No. If there is student
15 identifiable information, the term used by FERPA,
16 it is covered by FERPA. You ruled it was not
17 covered by FERPA --
18 THE COURT: No. We had this discussion
19 yesterday. I'm not ruling that these are covered
20 by FERPA.
21 MR. DIETZEN: No. Weren't.
22 THE COURT: 119.12 says that there can be
23 public policy considerations taken into account for
24 a stay order, and the reason --
25 MS. LoCICERO: Your Honor, just to keep your

1 record clear, it's 119.11.

2 THE COURT: Okay. Thank you. 119.11. The

3 reason I'm doing that is because presumptively one

4 party or the other may wish to, in addition to the

5 appeal of the public records' aspect, may wish to

6 appeal the FERPA decision, and what I am doing with

7 the stay is keeping the student identifying

8 information out of the public round at this time

9 until the FERPA decision has been decided also.

10 If the appellate court decides I'm right on

11 that decision, then that's a matter the parties can

12 address at that time. If the Court decides I'm

13 wrong on that point, the identity information will

14 not be in the public discourse. That's the purpose

15 of it.

16 Is there a request for any other stays other

17 than that?

18 But this is not a design to be a statement by

19 me that I'm retracting anything I've ruled on as

20 far as the student education records. It's simply

21 designed to protect the students whose names not be

22 mentioned in the event the appellate court

23 disagrees with me on that point.

24 MR. WILLIAMS: One thing we want to try to

25 clarify, Judge, is apparently you hold the

20090059385 ELECTRONICALLY RECORDED IN THE PUBLIC RECORDS OF LEON COUNTY, FL
BK: 4026 PG: 435 08/28/2009 at 11:40 AM BOB INZER, CLERK OF COURTS

A Certified Copy
Attest:
Bob Inzer
Clerk Circuit Court
Leon County, Florida
By Marlene Benee D.C.
8-28-2009

SCANNED

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR LEON COUNTY

THE ASSOCIATED PRESS; et al.,

Plaintiffs,

v.

Case No: 09-CA-2298

FLORIDA STATE UNIVERSITY BOARD
OF TRUSTEES; et al., T.K. WETHERELL, in his
official capacity as President of Florida State
University; NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION; and GRAYROBINSON, P.A.,

Defendants.
_______________________________/

FILED
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FINAL JUDGMENT

THIS CASE was tried before the Court on Plaintiffs' Amended Complaint to Enforce Public Records Act. This Court has conducted a non-jury trial on August 20-21, 2009; has considered the relevant portions of the court file, the evidence and the papers submitted by the parties; has reviewed the relevant records at issue; has heard arguments of counsel; and is otherwise fully advised in the matter. Based on the foregoing, the Court makes the following findings of fact and conclusions of law:

FACTUAL FINDINGS

The parties have entered into a Joint Pretrial Stipulation, including a statement of stipulated facts and stipulations as to authenticity and admissibility of documents. Unless otherwise noted, these factual findings are based on that stipulation.

Defendant National Collegiate Athletic Association (the "NCAA") is an unincorporated voluntary association with over 1,288 members. Florida State University ("FSU") is a public

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EXHIBIT B

university of the State of Florida and is administered by the Defendant Board of Trustees. FSU is a member of the NCAA. Defendant T.K. Wetherell is the President of FSU. Defendant GrayRobinson is a Florida corporation and the law firm which represents FSU in its appeal from NCAA Infractions Report No. 294. Plaintiffs include The Associated Press, the First Amendment Foundation, the Florida Press Association and almost twenty newspapers, television stations and online publishers in Florida. The Attorney General's Office has participated as an amicus curiae.

In March 2007, FSU became aware of allegations of academic misconduct affecting its athletic program. On February 14, 2008, after a comprehensive self-investigation, FSU reported its findings to the NCAA. (Joint Pretrial Stipulation Ex. 3.) On June 10, 2008, the NCAA issued a Notice of Allegations to FSU. (Joint Pretrial Stipulation Ex. 4.) On September 10, 2008, FSU provided the NCAA its Response to the NCAA Notice of Allegations. (Joint Pretrial Stipulation Ex. 5.) On October 28, 2008, the NCAA's Committee on Infractions conducted a hearing with respect to the allegations raised in the NCAA Notice of Allegations. That hearing was transcribed. In this litigation, Plaintiffs seek access to the transcript of this hearing (the "Hearing Transcript").

On March 6, 2009, the NCAA's Committee on Infractions issued Infractions Report No. 294, which imposed various penalties against FSU, including a vacation of certain wins. (Joint Pretrial Stipulation Ex. 6.) Exhibits 3, 4, 5 and 6 were available to FSU in paper form, and FSU released these documents to the public with personally identifiable information of FSU's students redacted.

On March 13, 2009, FSU retained GrayRobinson to represent it in its appeal of the penalties imposed in Infractions Report No. 294. (Joint Pretrial Stipulation Ex. 7.) On March

20, 2009, FSU filed its Notice of Appeal (Joint Pretrial Stipulation Ex. 8.) FSU's initial brief on appeal was due on April 23, 2009.

An individual or institution that has appealed a decision of the Committee on Infractions (or representatives on behalf of such an individual or institution) may elect to view documents that comprise the record on appeal either at a physical, custodial location, or on the NCAA's secure custodial website. The NCAA's secure custodial website (the "Custodial Site") is a secure, password protected web site specifically designed so as not to permit users to save, copy, download, or print any of the viewable documents.. The NCAA requires execution of a Web Custodial Confidentiality Agreement as a condition of access to the Custodial Site. The main purpose of the Custodial Site is to maintain confidentiality of documents on the Custodial Site.

On March 27, 2009, two GrayRobinson attorneys executed Web Custodial Confidentiality Agreements provided by the NCAA. (Joint Pretrial Stipulation Exs. 11-12.) GrayRobinson executed these agreements to gain access to the record on appeal via the Custodial Site. Access to records on the Custodial Site was "essential" for GrayRobinson to prepare the FSU appeal. (GrayRobinson Response to NCAA's First Request for Admissions # 1-2.) On March 27, 2009, the NCAA furnished the GrayRobinson attorneys with log-in instructions, including User IDs and Passwords.

On behalf of FSU, GrayRobinson accessed and reviewed documents posted on the Custodial Site and utilized them in assisting FSU in preparing its appeal of the NCAA sanctions. On April 23, 2009, FSU filed its initial brief. (Joint Pretrial Stipulation Ex. 14.) The NCAA Committee on Infractions issued a written response to FSU's Appeal on June 2, 2009 (the "June 2 Response"). (See Joint Pretrial Stipulation Ex. 24.) The NCAA informed FSU by email that

the Response was available for review on the Custodial Site. The June 2 Response is the second document at issue in this litigation.

By letter dated June 4, 2009, counsel for Plaintiffs requested documents, including the June 2 Committee on Infractions' Response, from FSU and the NCAA (the "First Request"). (Joint Pretrial Stipulation Ex. 17.) FSU responded to the First Request on June 5, 2009. (Joint Pretrial Stipulation Ex. 18.) The NCAA responded to the First Request on June 8, 2009. (Joint Pretrial Stipulation Ex. 19.) Neither FSU nor the NCAA provided the June 2 Response.

On June 15, 2009, Plaintiffs filed their initial complaint in this case.

On June 16, 2009, the NCAA indicated that it would not object to FSU's disclosure of a transcript of the June 2 Response, provided FSU "compl[ies] with applicable federal and state privacy laws and exemptions." (See Joint Pretrial Stipulation Ex. 23.) Nevertheless, the NCAA refused FSU's request that it be provide the June 2 Response in a usable format. On June 18, 2009, FSU transcribed the response from the Custodial Site, redacted personally identifiable information of its students and provided the redacted transcript to the public. (Joint Pretrial Stipulation Ex. 24.) At the time the transcript of the June 2 Response was created, FSU had not yet discovered that the capacity existed to "print screen" for documents posted on the Custodial Site. (FSU Answer 1, n.1; GrayRobinson Motion to Dismiss 6, n.5).

By letter dated July 1, 2009, Plaintiffs requested additional documents posted to the Custodial Site, which included the Hearing Transcript, from the NCAA, FSU and GrayRobinson (the "Second Request") (Joint Pretrial Stipulation Ex. 25.) On July 6, 2009, Plaintiffs filed their Amended Complaint in this case. FSU and GrayRobinson responded in writing to the Second Request on July 8, 2009. (Joint Pretrial Stipulation Ex. 26.) Neither FSU nor GrayRobinson provided the transcript. Separately, by letter of the same date, FSU's general counsel requested

from the NCAA the ability to obtain the documents referenced in the Second Request in a format that would enable it to release the documents to the public. (Joint Pretrial Stipulation Ex. 27.) By letter dated July 14, 2009, the NCAA responded to FSU's request and declined to provide the requested documents. (Joint Pretrial Stipulation Ex. 28.)

In this litigation, Plaintiffs seek the transcript of the hearing conducted by the Committee on Infractions on October 18, 2008, and an actual copy (as opposed to a transcription) of the NCAA Committee on Infractions' Response to Appeal of Infractions Report No. 294, in either paper or electronic format.

LEGAL CONCLUSIONS

The June 2 Response and the Hearing Transcript are Public Records.

Article I, Section 24 of the Florida Constitution grants:

> Every person . . . 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 . . .

Chapter 119 defines the term "public records" as:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

§ 119.011(12) Fla. Stat. The Florida Supreme Court has broadly construed this definition to encompass all materials made or received by an agency in connection with official business, which are used to "perpetuate, communicate, or formalize knowledge." Shevin v. Byron, Harless Schaffer, Reid & Associates, 379 So.2d 633 (Fla. 1980).

Florida's public records law promotes a "state interest of the highest order." Byron, Harless, Schaffer, Reid & Associates. v. State, 360 So. 2d 83, 97 (Fla. 1st DCA 1978), rev'd on

other grounds, 379 So. 2d 633 (Fla. 1980). It is well-settled that Florida's Public Records Act must be liberally construed in favor of open government. City of Miami v. Berns, 245 So.2d 38 (Fla. 1971). Florida courts do not permit attempts to circumvent the Act. Lightbourne v. McCollum, 969 So. 2d 326, 332-33 (Fla. 2007). "When there is any doubt, the court should find in favor of disclosure." Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 304 (Fla. 3d DCA 2001).

At issue here are the June 2 Response and the Hearing Transcript. These documents were prepared by the NCAA. The fact, however, that the NCAA created and retained physical possession of the original paper documents is not determinative of whether the documents at issue are public records. In connection with the FSU appeal, the NCAA transmitted the documents to FSU's agent, GrayRobinson, via the Custodial Site. Article I, Section 24 of the Florida Constitution and Chapter 119 both encompass documents "received" by a government agency or persons acting on its behalf.

The Court must determine what the term "received" means. The NCAA argues that, to be received, documents must be physically received or possessed, as opposed to being viewed via the Custodial Site. Plaintiffs argue that the NCAA's position on this issue is too narrow and that the term "received" does not require physical delivery of documents. Plaintiffs maintain that FSU's agents' viewing of the documents on the Custodial Site, in connection with the appeal, is sufficient to constitute receipt.

The NCAA's interpretation of the term "received" is contrary to the terms of the Public Records Act and too narrow a construction, particularly in light of the rules of construction governing the interpretation of this State's public records laws. The documents at issue were viewed by FSU's agents on behalf of FSU. See Times Pub'g Co. v. City of St. Petersburg, 558

So. 2d 487, 494 (Fla. 2d DCA 1990) (noting documents were "exhibited" to representatives of the City of St. Petersburg who were not permitted to keep paper copies). The documents at issue were also used by FSU's agents in representing FSU in the appeal. In addition, they were received in connection with the official business of FSU, because those documents relate to the allegations of academic cheating and related sports sanctions. Thus, the documents at issue were "received" and are public records pursuant to Article I, Section 24 and Chapter 119.

To adopt a narrow position that "received" requires physical delivery would emasculate the policy of open government embodied in the Public Records Act and Florida's Constitution and would provide clever proponents of secret communication with government an easy mechanism for avoiding the public's right to know what its government is doing. The definition of "public records" in the Act is clear and includes all documents or "other material, regardless of the physical form, characteristics, or means of transmission."

This ruling is not a determination that all records created by the NCAA constitute "public records" under Florida law. The only records at issue here are the two records received by FSU, via its agent.

Proper Requests Were Made But Denied.

Plaintiffs requested the documents at issue from each of the Defendants. The Defendants received and denied the requests, which covered the documents at issue in this case. The Defendants are proper parties to this litigation. B & S Utils., Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17 (Fla. 1st DCA 2008). The requested documents are public records, and as more fully discussed below, there is no exemption that precludes their release.

With respect to the June 2 Response, after the filing of this lawsuit and after seeking and receiving the NCAA's consent, FSU created a transcript of the contents of that response.

Providing a transcript of a public record is not sufficient compliance with Florida law. Davis v. Sarasota County Public Hosp. Bd., 480 So. 2d 203 (Fla. 2d DCA 1985); Op. Att'y Gen. Fla. 91-61 (Aug. 23, 1991). The version of the June 2 Response posted on the Custodial Site and viewed by FSU's agent is in a format at least somewhat different from the transcript. However, with respect to the form only of the June 2 Response, FSU and GrayRobinson did comply with the Act by producing to Plaintiffs what they believed they had available at the time. FSU's and GrayRobinson's capacity to "print screen" for documents posted on the Custodial Site was not discovered until later. (As explained more fully below, the parties have agreed that student identifying information may be redacted from the copy of the posted version of the June 2 Response, consistent with the redactions to the transcript of the June 2 Response provided to Plaintiffs after the filing of the lawsuit.)

Defendants must produce to Plaintiffs the version of the June 2 Response posted to the Custodial Site, containing the redactions agreed to by the parties as reflected in Exhibit 24. Defendants must likewise produce to Plaintiffs the Hearing Transcript.

The Requested Records Are Not Exempt.

This Court must also decide whether the June 2 Response and the Hearing Transcript are exempt from disclosure under Florida or federal law. Hill v. Prudential Ins. Co., 701 So. 2d 1218, 1219 (Fla. 1st DCA 1997). As explained below, the Court concludes that the June 2 Response and the Hearing Transcript are not exempt from disclosure either because of federal or Florida law concerning student educational records or because of any confidentiality agreements.

A public agency asserting an exemption to the release of a public record has the burden of establishing entitlement to the exemption. Lightbourne v. McCollum, 969 So. 2d 326, 333

(Fla. 2007); Weeks v. Golden, 764 So. 2d 633, 635 (Fla. 1st DCA 2000). All exemptions must be narrowly construed in favor of access. Lightbourne, 969 So. 2d at 333-34.

First, Defendants have argued that the June 2 Response and the Hearing Transcript are exempt from disclosure under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), and Section 1006.52(1), Florida Statutes.

FERPA is a federal law intended to protect the privacy of student "education records." It achieves this goal by conditioning a school's receipt of federal funds upon the school's compliance with FERPA's standards for, among other things, maintaining the confidentiality of "education records." See 20 U.S.C. § 1232g (a).

As of July 1, 2009, Florida adopted FERPA's definition of "education record" and made student "education records" confidential and exempt from the Public Records Act. § 1006.52(1), Fla. Stat. (2009). At the same time – and consistent with FERPA – Florida law provides for the release of "education records" if FERPA permits their release. § 1006.52(2), Fla. Stat. (2009).

FERPA defines "education records" as "those records, files, documents, and other materials which – (i) contain information *directly related to a student*; and (ii) are maintained by an educational agency or institution[1] or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A) (emphasis added). See also 34 C.F.R. § 99.3. Section 1006.52 is tied to FERPA and provides:

> A student's education records, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g, and the federal regulations issued pursuant thereto, and applicant records are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

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[1] The NCAA is not an "educational agency or institution" covered by FERPA. See, e.g., Ark. Gazette Co. v. Southern State College, 620 S.W.2d 258, 260 (Ark. 1981) (holding that an intercollegiate athletic conference was not an educational agency or institution subject to FERPA).

This Court reviewed Exhibit 24, the transcript of the June 2 Response. This Court also reviewed, in camera, the transcript of the October 28, 2008, hearing before the NCAA's Committee on Infractions, which is approximately 350 pages long. This Court finds that the June 2 Response and the Hearing Transcript are not "education records" because those documents do not contain information directly relating to a student. Instead those documents focus primarily on the actions of FSU with respect to alleged academic fraud and the alleged failure of FSU to monitor its employees.

Documents maintained by an educational institution like FSU do not qualify as "education records" merely because they mention, identify, or refer to a student. Here, the June 2 Response and the Hearing Transcript directly concern FSU as an institution and its employees' behavior. The documents only tangentially relate to students. As such, they are not "education records" within the meaning of FERPA or the corresponding Florida statute. See, e.g., Briggs v. Bd. of Trustees of Columbus State Cmty. Coll., No. 2:08-CV-644, 2009 WL 2047899 at *5 (S.D. Ohio July 8, 2009) ("records relating directly to school employees and only indirectly to students are not 'education records' within the meaning of FERPA"); Baker v. Mitchell-Waters, 826 N.E.2d 894, 899 (Ohio Ct. App. 2005) (explaining that student complaints concerning abuse by teachers "do not contain information directly relating to students" under FERPA, but instead "directly relate to the activities and behaviors of teachers").

Allowing universities to keep secret any record that mentions a student would allow universities to operate in secret and contrary to Florida law. FERPA and the Florida statute are designed to protect records directly relating to students – not records regarding teachers and educational institutions. Despite the Court's ruling, Plaintiffs have agreed that the names of

students and personally identifying student information may be redacted from the records at issue.

Likewise, the June 2 Response and the Hearing Transcript are not exempt from disclosure under the Public Records Act and the Florida Constitution as a result of the NCAA's Bylaws, policies, or procedures, or as a result of the confidentiality agreements entered into between the NCAA and GrayRobinson on FSU's behalf. The confidentiality agreements at issue here were a condition of access to the Custodial Site and are void and unenforceable under Florida law. Sepro Corp.v. Dept. of Environmental Protection, 839 So.2d 781 (Fla. 1st DCA 2003); Tribune Co. v. Hardee Memorial Hosp., 19 Media L. Rep (BNA) 1318 (Fla. 10th Cir. Ct. August 19, 1991) ("An agency simply cannot bargain away its Public Records Act duties with promises of confidentiality . . .").

FSU's counsel, GrayRobinson, signed the confidentiality agreements on FSU's behalf and then accessed documents via the Custodial Site. These facts made it difficult for FSU and GrayRobinson to provide public access for fear of penalties from the NCAA for violating the confidentiality agreements. The confidentiality agreements, however, are in the nature of self-imposed barriers and do not legally excuse the failure to comply with Article I, Section 24 or Chapter 119 and, again, are void and unenforceable..

Therefore, the June 2 Response and the Hearing Transcript are not exempt from disclosure under Florida law, FERPA, or NCAA Bylaws, policies, procedures or agreements.

Article I, Section 24 and Chapter 119 Are Constitutional As Applied Here.

This Court must determine whether any of the other defenses raised by Defendants prohibit disclosure of the June 2 Response and the Hearing Transcript. As explained below, the

Court concludes that none of the defenses raised by Defendants prohibit disclosure of the June 2 Response and the Hearing Transcript.

The NCAA raises several defenses based upon the United States Constitution. Specifically, the NCAA argues that application of Article I, Section 24 and Chapter 119 to the NCAA here violates the Commerce Clause, impairs the right to contract, is an unconstitutional taking without compensation, and violates the right to associate under the First Amendment to the United States Constitution. At the non-jury trial on this matter the NCAA's witness, David Berst, testified that any ruling that deemed records posted on the secure custodial site in the FSU appeal, including the documents at issue here, public would "rip the heart out" of the NCAA's uniform enforcement mechanisms. Without reviewing all the deficiencies in each of these defenses point by point, the Court notes that Article I, Section 24 and the Public Records Act are laws of general application that do not single out the NCAA for disparate treatment. The cases cited by the NCAA in support of these defenses generally involve protectionist laws targeted specifically at the NCAA and are not persuasive here. See, e.g., National Collegiate Athletic Association v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585 (N.D. Fla. 1994).

The Court also finds that the claimed imposition on the NCAA's rights is, at most, *de minimis*. By contrast, the State's interest as embodied in the Florida Constitution and the Public Records Act is substantial and clearly outweighs the purported imposition on the NCAA's rights. Byron, Harless, 360 So. 2d at 97 ("Florida's public records law ... promote[s] a state interest of the *highest order*.") (emphasis added). See also Columbia Hosp. Corp. v. Fain, 34 Fla. L. Weekly D1223, 2009 WL 1675924 (Fla. 4th DCA June 17, 2009) (holding that Article X, Section 25 of the Florida Constitution, which guarantees patients a right of access to hospital records relating to adverse medical incidents, does not impair contracts between hospital and

doctors containing a confidentiality provision, because permitting access to such records does not constitute a severe impairment of contract rights and access serves important public interests).

Finally, to the extent that the NCAA asserts various policy reasons supporting the asserted need for confidentiality in its dealings with public universities and the consequences if it is forced to comply with the Florida public records laws, this Court finds that those policy reasons cannot operate to deny access to the records requested here. The only basis to deny access to a public record is if the records are subject to a constitutional or statutory provision that specifically exempts them from disclosure. Hill, 701 So. 2d at 1219. Only the Legislature is empowered to enact specific exemptions that protect information contained within otherwise public records. As such, courts are not free to consider public policy considerations as a basis to withhold public records. News-Press Publ'g Co. v. Gadd, 388 So. 2d 276 (Fla. 2d DCA 1980).

Any remaining defenses asserted by the Defendants are addressed elsewhere or are otherwise insufficient to operate to deny access to the records at issue.

Each Defendant is a "Custodian" and an "Agency" under the Facts of this Case.

1. FSU is a Custodian and an "Agency."

As a government agency, FSU is an "agency" under the definition in Section 119.011(2) and is encompassed within Article I, Section 24 as a "public body." FSU is also a "custodian of public records," as defined in Section 119.011(5). FSU was charged with the legal obligation of maintaining the public records at issue here. The record shows that FSU employees themselves did not access documents on the NCAA Custodial Site. Instead, FSU avoided directly receiving documents related to its official business by designating GrayRobinson to receive those documents on its behalf, as more fully explained below.

In addition, even though FSU did not assist in the development of the Custodial Site or may have felt that it had no choice but to agree to the NCAA's demands, FSU did in fact sufficiently participate in a system designed and established by the NCAA to result in a denial of access to the records at issue. FSU's trustees, at least, were advised that the purpose of the transmission of the NCAA response via the Custodial Site was to reduce the likelihood that these documents would need to be released publicly by FSU. (See, e.g., Ex. 34.)

2. GrayRobinson is a Custodian and an "Agency."

The Florida Supreme Court has clearly stated that, when a public agency or official delegates an actual public function to a private entity, public access follows. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 381 (Fla. 1999). A public agency's receipt and retention of public records are core public functions. To ensure compliance with that duty, the law mandates that "[e]very person or 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. A public agency cannot allow a private entity to maintain custody of public records and thereby circumvent the Public Records Act and Florida Constitution. Wisner v. City of Tampa Police Dept., 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (public agency could not allow private entity to maintain physical custody of public record and circumvent Public Records Act); Tober v. Sanchez, 417 So. 2d 1053, 1054 (Fla. 3d DCA 1982) (public agency cannot avoid Public Records Act obligations by transferring public records to the County Attorney).

In Tober, the Court was presented with the issue of whether the official charged by law with maintenance of public records could transfer actual, physical custody of the records to the County Attorney to avoid compliance with a request for inspection pursuant to Chapter 119. In rejecting this scheme, the Court dismissed the argument that, because the public entity no longer

had actual possession of the records, it was no longer the custodian of the records for purposes of compliance with a Chapter 119 records request. It held that once someone is "the officer charged by law with the responsibility of maintaining the office and is consequently the custodian of the subject records," to "permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction."

FSU either delegated or acquiesced in GrayRobinson's assuming FSU's custodial duty to receive documents connected with the official business of FSU. With the acquiescence or delegation of FSU, GrayRobinson entered into the confidentiality agreements that allowed it access to the documents posted by the NCAA on the Custodial Site for the FSU appeal, specifically including the June 2 Response and the Hearing Transcript. FSU and GrayRobinson, by FSU's delegation and acquiescence, were charged by law with the responsibility of maintaining the records at issue and were, therefore, custodians of those records. While these actions did not occur with the intent of avoiding Florida public records mandates, the consequence of these actions was avoidance. It is not a defense to claim that, because FSU and GrayRobinson have limited their access and control of public documents at the insistence of the NCAA, they are no longer responsible for those records as custodians and are not subject to a request to inspect public records.

In addition, GrayRobinson is an "agency" under Section 119.011(2). For the limited public function that GrayRobinson performed in place of FSU in receiving public records from the NCAA, it was acting on behalf of FSU, and was thus an "agency" for the purposes of FSU's

custodial obligations concerning the records at issue here. The decision in Wallace v. Guzman, 687 So. 2d 1351 (Fla. 3d DCA 1997), is instructive. There, the Court found:

> In an attempt to prevent the public from viewing the disputed documents, Wallace provided them to the law firm of Alston and Bird, which firm was retained by Raymond James and Associates, the Authority's special financial consultant, to serve as special regulatory counsel relating to the creation of the savings bank as applied for by the Authority. Wallace apparently assumed that, by providing the documents to Alston and Bird, rather than to the Authority's director or clerk, the documents would be inaccessible to the public. His assumption clearly was wrong.

Id. at 1353-54. The Court then recognized the definition of "agency" encompasses private persons and private entities acting on behalf of any public agency. The decision in Wallace affirmed the trial court's order requiring the Authority and its private law firm to produce the records. Similarly, the Florida Supreme Court has held that documents provided to a consultant in relation to its acting on behalf of a public agency are public records. Shevin, 379 So.2d at 640-41 (recruiting consultant acted on behalf of the Jacksonville Electric Authority in search for new director).

Public records cannot be hidden from public scrutiny by transferring physical custody of them to an agency's attorneys. Florida's Public Records Act defines an agency broadly to ensure that a public agency cannot avoid disclosure by contractually delegating to a private entity that which otherwise would be an agency responsibility. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029, 1031 (Fla. 1992). FSU cannot avoid disclosure by delegating to its private law firm the authority to receive records related to FSU's official business.

GrayRobinson felt constrained from providing access to these records because of the confidentiality agreements and by the nature of the read-only Custodial Site. (Those agreements, as explained earlier, were unlawful.) Nevertheless, GrayRobinson did have an ability to access

the records electronically in a manner that no one other than the NCAA possessed. It also had the ability to "print screen" the documents, which was discovered after the filing of the lawsuit. (FSU Answer 1, n.1; GrayRobinson Motion to Dismiss 6, n.5.) For the reasons explained above, GrayRobinson is both an "agency" and a "custodian of public records."

3. The NCAA is a Custodian and an "Agency."

Whether voluntary or not, FSU improperly delegated its recordkeeping functions to the NCAA. The Court finds that the NCAA is a custodian of the public records requested, and that the NCAA is the entity primarily responsible for their production because it is the entity that has the primary, "original" copy of the records requested.

Florida courts have recognized that public records may be in the custody of private entities or individuals at times and the danger that exists if private entities are allowed to demand that they retain custody of documents as a condition of doing business with a governmental body. B & S Utilities, 988 So. 2d at 20-21; Times Publ'g, 558 So. 2d at 489-91. Florida courts do not tolerate the retention of public records by a private entity that denies public access to the records. When a private entity retains custody and control of a public record, it assumes the same responsibility under Florida law as the lawful custodian of the public record, including the obligation to ensure that such records are accessible to the public. Times Publ'g, 558 So. 2d at 494-95.

In this case the evidence demonstrates that the confidentiality agreements, the operation of the Custodial Site, and other NCAA policies relating to confidentiality with respect to these specific records circumvented the public records laws of Florida and were imposed on FSU and its agent, GrayRobinson. The NCAA insisted on transmitting public records to FSU in a manner

designed to impose artificial barriers to access. Therefore, the NCAA assumed custodial responsibilities and duties for these two public records.

The NCAA also meets the statutory definitions of an "agency" under the Public Records Act and the Florida Constitution because, by the NCAA's insistence, FSU delegated its recordkeeping functions to the NCAA. B & S Utils., 988 So. 2d at 18; Times Publ'g, 558 So. 2d at 489-91. See also § 119.011(2), Fla. Stat. When a private entity retains custody and control of a public record, it assumes the responsibility as the de facto custodian of the public record, including the obligation to ensure that such records are accessible to the public.

Regardless of the mechanism employed to prevent FSU from retaining records from the Custodial Site, those records accessed by FSU (either directly or through its agent, GrayRobinson) are public records within the meaning of Florida law and specifically include the June 2 Response and the Hearing Transcript.

FSU's Cross-Claim under Chapter 119 Against the NCAA Is Denied.

As a matter of law, no requirement exists that either FSU or GrayRobinson seek or obtain permission from the NCAA to produce public records. The confidentiality agreements at issue were void as being in violation of Florida law and could not constitute a lawful barrier to public access. Permission is not a proper exemption to the requirements of Article I, Section 24 or Chapter 119. The cross-claim must be denied.

CONCLUSION

The June 2 Response and the Hearing Transcript are public records that are not exempt

from disclosure. Those documents must be made available to Plaintiffs (and the public), consistent with this Order.

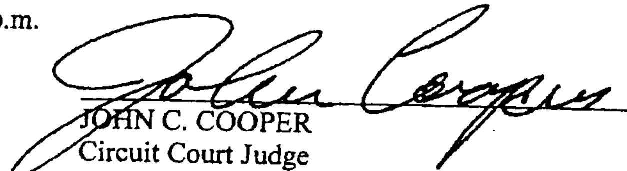
WHEREFORE, it is **ORDERED and ADJUDGED** that

(1) Plaintiffs' demand for access to public records as asserted in the Amended Complaint is **GRANTED** against each Defendant. Accordingly, Defendants shall immediately provide the requested public records (the June 2 Response and the Hearing Transcript) to Plaintiffs, as required under Section 119.11(2), Florida Statutes and as posted on the Custodial Site, with the limited redaction of FSU student names and student personally identifying information agreed to by the parties.

(2) The Court reserves and retains jurisdiction to determine any entitlement and award of attorneys' fees to Plaintiffs from FSU and the NCAA under Section 119.12, Florida Statutes. The Court accepts Plaintiff's withdrawal of the request for attorney's fees and costs as to GrayRobinson.

(3) The Court reserves and retains jurisdiction to hear FSU's and GrayRobinson's indemnity cross-claims against the NCAA, which claims do not impact Plaintiffs' substantive rights.

DONE and ORDERED in Chambers, at Tallahassee, Leon County, Florida this 28th day of August, 2009, at 11:07 o'clock a.m./p.m.



JOHN C. COOPER
Circuit Court Judge

Copies furnished to: Counsel of Record