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Bob Inzer

Clerk Circuit Court
Leon County, Florida

CLERK OF THE CIRCUIT COURT
FIRST DISTRICT

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR LEON COUNTY
By Marylene Bence U.C.

09-4385

8-28-2009
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.

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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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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 institution¹ 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.

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

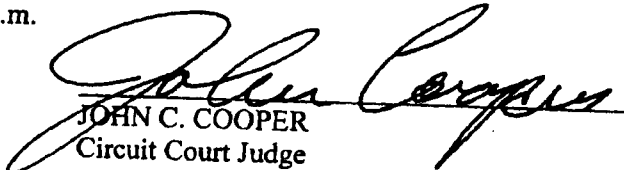
The June 2 Response and the Hearing Transcript are public records that are not exempt

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 28⁺⁴ 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