PUBLIC RECORDS & MEETINGS

Public Records & Meetings: Exemptions

***Greater Orlando Aviation Authority v. Nejame*,**
4 So. 3d 41 (Fla. 5th Dist. App. 2009)

Florida's Public Records Act requires government agencies to produce documents specified in a public-records request unless those documents are expressly exempt from disclosure. In reviewing documents to determine if they are exempt, courts must strictly construe applicable federal and state law.

FACTS AND PROCEDURAL HISTORY

Carol Hojeij, principal of Hojeij Branded Foods, Inc., submitted a statement of her personal net worth along with supporting documentation to the Greater Orlando Aviation Authority (GOAA), seeking certification as a Disadvantaged Business Enterprise (DBE). DBEs are entitled to contract preferences from agencies like the GOAA that receive federal funding. A DBE applicant must have a personal net worth of $750,000 or less in order to qualify.

The law firm Nejame, Lafay filed a public-records request with the GOAA in order to obtain certain documents related to the DBE application of Hojeij Branded Foods. The GOAA refused to produce one pertinent document in its possession, a legal memo written by a GOAA attorney with a letter from a bank attached. The GOAA cited to a federal regulation, 49 C.F.R. § 26.67(a)(2)(iv), which prohibits agencies from releasing an applicant's personal net worth statement or supporting documentation without written consent.

Nejame, Lafay filed a complaint alleging that the GOAA was obligated by Florida's Public Records Act to produce the memo. The GOAA requested an *in camera* review of the document so that the court might determine if the federal regulation exempted it from disclosure. The court completed its review and ordered the GOAA to produce the memo. The GOAA appealed. The Fifth District affirmed the trial court's order but remanded the case to de-

termine if the attached letter, which was largely illegible, was exempt from disclosure.

ANALYSIS

An agency may refuse to provide documents exempted by law when responding to a public records request, but the agency bears the burden of proof when the applicability of the exemption is challenged. Fla. Stat. § 119.07(1)(e) (2008). In this case, the Fifth District emphasized that the law strictly limits an agency's authority to deny a public records request. "Under the Florida Public Records Act and the Federal Freedom of Information Act, the public has a broad right to inspect the records of public bodies absent a clear and specific exemption from disclosure." *Greater Orlando Aviation Auth.*, 4 So. 3d at 43. Furthermore, the court reaffirmed its position in *Housing Authority of City of Daytona Beach v. Gomillion*, 639 So. 2d 117 (Fla. 5th Dist. App. 1994), where it held that the power to create and expand public records exemptions rests with the legislature, not the courts.

After reviewing the document at issue, the court found that the GOAA's internal legal memorandum did not constitute a personal statement of net worth or supporting documentation. The court remanded the case to the trial court to determine the nature and purpose of the attached bank letter, noting that it would be exempt from disclosure should the court deem it to be the sort of supporting documentation contemplated by the federal regulation.

SIGNIFICANCE

Greater Orlando Aviation Authority affirms the court's position that public records exemptions may not be judicially created or expanded. While Florida's Public Records Act and the Federal Freedom of Information Act allow government agencies to refuse to disclose documents that are exempted by federal or state law, courts must interpret such laws narrowly in reviewing public records requests.

RESEARCH REFERENCE

- 44 Fla. Jur. 2d *Records and Recording Acts* § 69 (2009).

Cheryl Cooper

Public Records & Meetings: Exemptions

***National Collegiate Athletic Association v. Associated Press*,**
18 So. 3d 1201 (Fla. 1st Dist. App. 2009)

Florida's Public Records Act broadly encompasses any documents received by a public agency and used in public business, irrespective of the means of transmission. Absent an express exemption from disclosure, public agencies must produce such records upon request, even if they are held by a private entity. Confidentiality agreements do not operate to exempt documents from disclosure.

FACTS AND PROCEDURAL HISTORY

In 2007, Florida State University launched an investigation into allegations that a learning specialist and academic tutor had improperly assisted student athletes. The University reported its findings to the National Collegiate Athletic Association (NCAA) in February 2008. In June 2008, the NCAA issued a notice of allegations to the University as a prelude to disciplinary proceedings. After the University responded to the allegations, the case was heard before the NCAA's Committee on Infractions. The transcript of the hearing was not made public.

The committee issued its report in March 2009, imposing penalties on the University for academic misconduct. Students' names were redacted from the report before it was made public. The University retained private counsel to file an appeal to the NCAA. The NCAA placed relevant records on a secure Web site so that the lawyers could access them. After the lawyers signed a confidentiality agreement, the NCAA gave them a password to the site. The NCAA uses this system with all of its member institutions in order to prevent public disclosure of confidential sources of information.

The lawyers retained by the University viewed the transcript of the hearing and used the information to prepare a brief as part of the University's appeal. The Committee on Infractions filed a response to the brief, which was not made public.

The Associated Press and other news organizations sought access to the hearing transcript and the committee's response to

the University's brief. When their request was denied, they filed suit under Florida's Public Records Act. The NCAA refused to disclose the documents, claiming that they were not public records or, alternatively, that they were exempted from disclosure by federal law. The trial court found that the documents were public records and ordered their immediate disclosure. The NCAA appealed. The First District affirmed the trial court's ruling and ordered disclosure of the documents.

ANALYSIS

After noting that access to public records is a constitutional right in Florida and that Florida's Public Records Act is to be construed broadly in favor of access, the court focused its analysis on interpretation of the public records statute. The definition of "public records" includes all materials "made or received pursuant to law or ordinance in connection with the transaction of official business." Fla. Stat. § 119.011(12) (2008). The court construed this language to mean that a document prepared by a private entity became a public record if it was "received" by a public agency and used for public business. The fact that the documents were stored on remote computer maintained by a private entity did not change the analysis; "the definition of a public record does not turn on the sender's method of transmission." *National Collegiate Athletic Assoc.*, 18 So. 3d at 1207. Furthermore, documents could be deemed public records even if the public agency did not modify them.

The NCAA argued that placing all documents viewed by a public agency within the ambit of the public record would result in the disclosure of all manner of confidential information. The court countered that the Public Records Act would apply to such documents only if they were used in the course of public business.

The court found that neither the confidentiality agreement signed by the lawyers nor the NCAA's expectation of privacy had any bearing on the analysis. Furthermore, the documents could be deemed public records even though they were maintained by a private entity. "[T]he public records law can be enforced against any person who has custody of public records, whether that person is employed by the public agency creating or receiving the records or not." *Id.* at 1210.

The court was not persuaded by the NCAA's argument that the records were exempted from disclosure by the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g (2000). Although FERPA does not directly prohibit the disclosure of education records, Florida law exempts education records as defined by FERPA from the Public Records Act. Fla. Stat. § 1006.52(1) (2009). Under FERPA, "education records" include "information directly related to a student." 20 U.S.C. § 1232g(a)(4)(A)(i). In this case, student information had been redacted from the documents in question. Thus, the court found that the FERPA exemption did not apply.

The NCAA also argued that the application of the public records law in this case violated the dormant Commerce Clause. State law violates the dormant Commerce Clause if it directly affects interstate commerce or prefers in-state economic interests. If not, the question turns on whether the state has a legitimate interest that supersedes any impact on interstate commerce. The court found that if Florida's public records law did affect interstate commerce, such effects were indirect and negligible and clearly outweighed by the state's interest in open government.

The NCAA argued that it had a legitimate need to protect confidential sources and could not function in the state of Florida if it were required to reveal such information. The court analyzed the public records statutes of other states and found that most imposed similar if not stronger burdens. Therefore, Florida's Public Records Act as applied in this case did not impair interstate commerce.

Finally, the court addressed the NCAA's contention that the application of the public records law in this case violated the NCAA's First Amendment right to freedom of association. The court found that the law's prohibition against secrecy with regard to public institutions did not inhibit the organization's right to associate with any particular institution.

SIGNIFICANCE

National Collegiate Athletic Association establishes that the term "received" in the Florida Public Records Act refers not only to the physical receipt of a document but to the access of a document on a remote computer, even if the document is prepared by a private entity. If a public agency receives a document and uses

it in the course of public business, then it becomes part of the public record and must be disclosed unless specifically exempted. The signing of a confidentiality agreement does not create such an exemption. Education records that contain no information directly related to a student are not exempted by the Family Educational Rights and Privacy Act.

RESEARCH REFERENCE

- 44 Fla. Jur. 2d *Records and Recording Acts* § 1 (2005).

Cheryl Cooper

Public Records & Meetings: Sunshine Law

***McDougall v. Culver*,**
3 So. 3d 391 (Fla. 2d Dist. App. 2009)

Memoranda that communicate the opinions and recommendations of senior staff to a decision-maker do not constitute a "meeting" of a "board or commission" under Florida's Sunshine Law and thus are not subject to public meeting requirements. Furthermore, memoranda related to the investigation of a complaint against a law enforcement officer are confidential and exempt from public records requirements until the investigation is concluded.

FACTS AND PROCEDURAL HISTORY

The Sheriff's Office of Lee County, Florida conducted internal affairs (IA) investigations of several deputies. During the course of the investigations, IA officers wrote memoranda containing their findings and recommendations, which were given to the deputies' commanding officers and then routed up the chain of command for review and comments. Ultimately, the memoranda were delivered to Sheriff John J. McDougall, who alone had final decision-making authority regarding any disciplinary action. The investigations were concluded after McDougall made his decision and provided the deputies with written notice. Only then were the memoranda made public. The deputies filed suit against the sheriff, claiming that he had violated the Florida Sunshine Law by waiting until the close of the investigation to make the memo-

randa public. The trial court found that the distribution of the memoranda constituted a "meeting" involving "official acts" as defined by Florida statute. Fla. Stat. § 286.011(1) (1999). As a result, the trial court issued a final judgment stating that McDougall's failure to publicly disclose the memoranda violated the Sunshine Law. McDougall appealed the final judgment.

On appeal, Florida's Second District Court of Appeal reversed, holding that the circulation of the memoranda did not constitute a meeting and thus did not violate Florida's Sunshine Law. In addition, the Second District held that the memoranda were exempted from public records requirements due to the confidential nature of the investigation.

ANALYSIS

Florida's Sunshine Law requires that "all meetings of any board or commission . . . at which official acts are to be taken" be held open to the public and provides that official actions are not binding unless made during an open meeting. Fla. Stat. § 286.011(1). The Second District held that the memoranda circulated in this case did not meet the definition of an official meeting because they only offered the opinions and comments of officers assisting the sheriff in making his final determination. The court compared this case to *Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th Dist. App. 2006), which similarly involved an IA investigation in which a group of officers reviewed investigative reports and made recommendations to the investigator general, who alone had final authority regarding any disciplinary action. The Fourth District held that because of the officers did not have decision-making authority their meetings did not violate the Sunshine Law.

The Second District also noted its own ruling in *Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d Dist. App. 1976), which held that fact-finding meetings conducted by an official are not subject to the Sunshine Law. In that case, the president of St. Petersburg Junior College assembled a group of career staffers in order to solicit feedback regarding work-related issues. The court held that the meeting was designed to assist the president with his duties and did not involve official deliberations.

In this case, the court found that "the senior officials provided only a recommendation to the Sheriff but they did not deliberate with him nor did they have decision-making authority. There-

fore . . . the use of the memoranda did not violate the Sunshine Law." *McDougall*, 3 So. 3d at 393. Even though the officials could make comments and offer their opinions, this fact alone did not elevate the distribution of the memoranda to the status of an official meeting.

Furthermore, the court cited the relevant Florida statute exempting from the public records law any information related to the investigation of a law enforcement officer due to its confidential nature until the investigation is no longer active or the subject officer is given written notice. Fla. Stat. § 112.533(2)(a) (2008). Based upon these findings, the Second District reversed the final judgment of the trial court.

SIGNIFICANCE

McDougall clarifies when public agency staff must make memoranda public under Florida's Sunshine Law. If the officials who write the memoranda do not have decision-making authority in the matter, a meeting that requires public notice has not taken place. In addition, memoranda discussing investigations of complaints filed against law enforcement officers are confidential and thus exempt from public records requirements until the investigation has concluded.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* §§ 38, 61 (2005 & Supp. 2009).

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