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

CASE NO. 1D09-4385
L.T. No. 09-CA-2298

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellant,

v.

THE ASSOCIATED PRESS, ET AL.,

Appellees.

ON REVIEW FROM THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES

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INTRODUCTION

Appellant's brief is unduly melodramatic. It tells of a trial court's ruling that reaches the "farthest boundaries of Florida's Public Records Act" and "creates new, but unworkable definitions . . . never before recognized by a Florida Court." Initial Brief at 2. Appellant argues that the trial court rewrote the plain meaning of the statue and characterizes the ruling as doing "more than violence" to the Public Records Act. Initial Brief at 33.

Contrary to Appellant's dire warnings, this case does not even approach the outer boundaries of Florida law and is actually quite basic:

- Appellant electronically provided documents to a public university related to the university's official business.
- To frustrate public access, Appellant attempted to impose confidentiality by retaining electronic control and interfering with a public university's compliance with public records laws.

When a private entity transmits documents to a public agency related to the agency's official business, the documents become public records. The private entity cannot then dictate the confidentiality of the records and erect barriers to public access. This result is far from remarkable.

This case merely presents a high tech twist to an old story: A private entity wants to keep documents provided to a public agency secret, so the entity imposes draconian sanctions for violating a confidentiality agreement and constructs artificial barriers preventing the agency from physically "possessing" documents.

Here, Appellant simply used a web-based "mailbox" where a public university could access documents, but not print, save, download, or reproduce them. There is nothing unique about the plot of this story – or the trial court's refusal to rewrite the tale's ending.

STATEMENT OF THE CASE AND FACTS

Factual Background

In February 2008, the Florida State University ("FSU" or the "University") reported to the National Collegiate Athletic Association ("NCAA") the results of an internal investigation that uncovered an academic cheating scandal permeating its athletic department. (R.X at 1792 ¶ 15; R.X at 1807; J.E. 3.[1]) The investigation determined that sixty-one (61) student athletes had received improper assistance on examinations for an online music course. (J.E. 3.) Both FSU's and the NCAA's investigations and reports focused on the FSU employees who facilitated the cheating and the lack of institutional control. The cheating scandal undermined the core mission of the University – to educate students – and called into question the integrity of FSU's Athletic Academic Support Program.

In October 2008, the NCAA's Committee on Infractions conducted a hearing involving FSU officials, which was transcribed. (R.X at 1792 ¶ 18; R.X at

[1] The documents admitted into evidence during the bench trial are included at the end of the Record on Appeal as "Joint Exhibits." These exhibits are not paginated with the Record on Appeal and will be cited throughout the brief as "J.E. __."

1807.) Five months later, on March 6, 2009, that committee issued its report, finding that FSU had committed "major violations" and recommending harsh penalties. (R.X at 1792 ¶ 19; R.X at 1807; J.E. 6.) A week later, FSU retained GrayRobinson, P.A. ("GrayRobinson") to represent the University in its appeal to the NCAA Infractions Appeal Committee.[2] (R.X at 1807; J.E. 7.)

Two GrayRobinson lawyers each executed NCAA Web Custodial Confidentiality Agreements. (R.X at 1793 ¶ 25; R.X at 1808; J.E. 11-12.) The agreements were a condition of access to documents posted to the NCAA's secure Web-based custodial site ("Custodial Site") for the FSU appeal. GrayRobinson warranted that it had "access to the Custodial Site under the direction of [its] client." (R.X at 1791 ¶ 9; R.X at 1808; J.E. 11-12.) The Custodial Site is a secure, password-protected web site. (R.X at 1790-91 ¶ 8; R.X at 1808.) Documents on the site are accessible in read-only format and cannot be saved, downloaded or printed. Id. GrayRobinson signed the confidentiality agreements because it needed prompt access to the record on appeal, which was essential to GrayRobinson's ability to assist FSU in the appeal. (R.X at 1808; Supp. R. at

[2] The engagement letter implicitly acknowledges the public nature of records relating to the representation by requiring GrayRobinson to identify records covered by the work product exemption to Chapter 119. (J.E. 7 ¶ h.)

1854-55 ¶¶ 1-2.)[3] The NCAA then provided log-in information and passwords to GrayRobinson. (R.X at 1793 ¶ 26; R.X at 1808.)

On April 23, 2009, FSU submitted its brief to the NCAA and argued the penalty requiring FSU to forfeit wins in football and nine other sports was too severe. (R.X at 1794 ¶ 28; R.X at 1808; J.E. 14.) To prepare that brief, GrayRobinson accessed the transcript of the October 2008 hearing before the Committee on Infractions (the "Hearing Transcript"). (R.X at 1793-94 ¶¶ 26-27; R.X at 1808.) The NCAA responded to FSU's appeal on June 2, 2009 ("June 2 Response"), and posted that response to the Custodial Site. (R.X at 1794 ¶ 29; R.X at 1808-09.) No hard copy of the June 2 Response was provided (R.X at 1794 ¶¶ 29-31), even though FSU and the NCAA had previously exchanged hard copies of documents. (R.X at 1792 ¶ 20). FSU's Communications Director explained to the FSU Trustees why they would not receive a copy of the June 2 Response:

> Information from the Enforcement Staff and the Committee on Infractions is always on the custodial site, and the University does not receive any hard copy. The purpose was to reduce the likelihood that these documents would need to be released publicly by the institution.

[3] There are two Supplemental Records on Appeal. The initial Supplemental Record on Appeal will be cited as "Supp. R. at __" and the second Supplemental Record on Appeal will be cited as "2d Supp. R. at __."

(J.E. 34; R.X at 1819.) GrayRobinson, however, did access the June 2 Response posted on the Custodial Site and used the information contained in the Response to prepare FSU's rebuttal. (R.X at 1794 ¶ 32; R.X at 1808; J.E. 33.)

Public Records Requests

Pursuant to Article I, Section 24 of the Florida Constitution (the "Sunshine Amendment") and Chapter 119, Florida Statutes, Appellees (hereinafter referred to as "Media Entities") made public records requests to FSU, GrayRobinson and the NCAA. Initially, the Media Entities requested a copy of the June 2 Response from FSU and the NCAA. (R.X at 1794 ¶ 34; R.X at 1809; J.E. 17.) FSU declined to provide access and explained the NCAA retained custody and control of the record so the University was unable to comply. (R.X at 1795 ¶ 35; R.X at 1809; J.E. 18.) FSU also stated it had asked the NCAA to make the June 2 Response public, but it had declined to do so. (J.E. 18.) The NCAA responded to the public records request asserting it was not subject to public records requests pursuant to the Sunshine Amendment or Chapter 119. (R.X at 1795 ¶ 36; R.X at 1809; J.E. 19.)

Unable to obtain the June 2 Response, the Media Entities filed the underlying lawsuit. The NCAA then allowed FSU to release the contents of the response by permitting FSU to create a transcript of the document. (R.X at 1795 ¶ 39; R.X at 1809; J.E. 23.) An FSU agent logged onto the Custodial Site, permitting an FSU employee to transcribe the contents of the June 2 Response for

public disclosure.[4] (R.X at 1795 ¶ 40; R.X at 1809; J.E. 24.) A copy of the actual record, however, has not been produced because the NCAA would not provide the document to FSU in a form capable of reproduction and redaction.[5] (R.X at 1795 ¶¶ 39-40; R.X at 1812-13.)

On July 1, 2009, the Media Entities requested from the NCAA, FSU and GrayRobinson any transcripts or other documents that had been placed on the Custodial Site. (R.X at 1795 ¶ 41; RX at 1809; J.E. 25.) FSU and GrayRobinson again responded that they did not have custody or control over the requested records. (R.X at 1795 ¶ 43; R.X at 1809; J.E. 26.) FSU then wrote the NCAA, requesting it provide the records so that FSU could comply with Florida law:

> As pointed out to you by Attorney General Bill McCollum, documents you have placed on your website, that are transmitted to a Florida public university or its agents, are subject to the Florida public records law. By making the documents accessible to FSU in the FSU infractions case, the NCAA has caused FSU to receive these documents in connection with official business, thereby making these documents public records subject

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[4] The agent was FSU's consultant, the Compliance Group, which also executed a confidentiality agreement and accessed documents on the Custodial Site to assist FSU in its investigation and appeal. (Supp. R. at Tr. of Proceedings on Aug. 19-20, 2009, Vol. I at 38.) (The transcript of the bench trial is contained in the Supplemental Record on Appeal, but not paginated with the record. The transcript of the bench trial will hereinafter be cited to as "Tr. at __.")

[5] The Media Entities have always agreed that any student names or identifying information could be redacted from the records. The Media Entities are interested in the records as they relate to FSU and its employees' actions.

> to inspection and copying by the public. The NCAA therefore must make these documents available in a usable form to FSU, either by providing hard copies or making it possible to download or otherwise copy the documents in order for FSU to fulfill its obligation to make its records available to the public.

(J.E. 27; R.X at 1795 ¶ 43; R.X at 1809-10.) The NCAA also declined this request. (R.X at 1796 ¶ 44; R.X at 1810; J.E. 28.)

Procedural History

When the June 2 Response was not provided, the Media Entities filed their Complaint on June 15, 2009. (R.I at 1-200.) On July 6, the Complaint was amended to encompass the second public records request for any transcripts or other documents placed on the Custodial Site, including the October 2008 Hearing Transcript. (R.II-III at 330-601.) Upon learning that FSU's agent did not access all documents on the Custodial Site, the Media Entities limited their request to just the items GrayRobinson reviewed.[6] The only documents now at issue are the June 2 Response and Hearing Transcript. (R.X at 1796 ¶ 45.)

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[6] The following documents were accessed on the Custodial Site (R.X at 1793-94 ¶ 27):

- The Hearing Transcript: Has not been produced in any format.
- The June 2 Response: FSU transcribed (with the NCAA's permission) from the Custodial Site and provided public access, with student identifying information redacted. (R.X at 1795 ¶ 40; R.X at 1809; J.E. 24.)
- FSU's reinstatement requests for student athletes: FSU provided public access, with student identifying information redacted. (J.E. 29.)

Footnote continued on next page.

FSU answered the Complaint on July 24, 2009. (R.IV at 613-40.) FSU asserted that some of the documents accessed on the Custodial Site were exempt from disclosure under the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA") and its state counterpart, Section 1006.52(1), Florida Statutes. (R.IV at 621.) At the time, however, discovery had not yet revealed the specific documents accessed through the Custodial Site. FSU also cross-claimed against the NCAA, alleging the NCAA retained illegal possession of FSU public records. (R.IV at 623-31.) That same day, GrayRobinson moved to dismiss the Media Entities' Amended Complaint. (R.IV at 641-55.) Three days later, the NCAA filed its motion to dismiss. (R.V at 675-732.) The NCAA argued that documents accessed on its Custodial Site were not public records, that it was not subject to Florida's Public Records Act or the Sunshine Amendment, and that, as applied to the NCAA, those laws were unconstitutional. Id.

On August 6, 2009, the trial court conducted a hearing on those motions. (Supp. R. at Tr. of Hr'g on Aug. 6, 2009.)[7] The court denied GrayRobinson's and the NCAA's motions to dismiss. (R.VIII at 1577-78.) The court also requested

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- Reinstatement statements prepared by students and transcripts of two student interviews: Media Entities withdrew request for these documents.

[7] The transcript is contained in the Supplemental Record on Appeal, but not paginated with the record.

additional briefing on the applicability of FERPA and Section 1006.52. Id. GrayRobinson and the NCAA answered the Amended Complaint on August 12 and 14, 2009, respectively. (R.IV at 1595-1613, 1724-34.)

The parties then filed briefs on FERPA and Section 1006.52. (R.IX at 1624-27, 1715-23, 1740-50.) The trial court conducted an *in camera* review of the Hearing Transcript. (R.X at 1815.) On August 18, 2009, the court held a telephonic hearing to issue its oral finding that FERPA and Section 1006.52 did not apply to the Hearing Transcript. (2d Supp. R. at 1865-94.)

Later that week, on August 20 and 21, the court conducted a non-jury trial. The court entered a written Final Judgment on August 28, 2009. (R.X at 1806-24.)

The court ruled that the June 2 Response and Hearing Transcript were public records that were not exempt from the disclosure requirements of either Florida's Constitution or Public Records Act. (R.X at 1810-16.) Specifically, the court found that the NCAA transmitted documents to FSU's agent via the Custodial Site, which FSU's agents viewed, and that those documents were then used in FSU's appeal of the NCAA's proposed sanctions. (R.X at 1811-12.) The court concluded that the documents related to FSU's official business, were designed to communicate information and were received by FSU. Therefore, the documents were "public records" under Florida law. (R.X at 1812.)

In finding that the June 2 Response and Hearing Transcript were not exempt, the court noted that both FERPA and its Florida counterpart protect education records that "contain information *directly related to a student*." (R.X at 1814.) After an *in camera* inspection of both records, the court held they were not "education records" because they did not contain information directly related to students. (R.X at 1815.) Instead, those records focused primarily on allegations involving University employees and the University's failure to monitor them. (R.X at 1815.)

The trial court also found that each of the defendants below was a custodian of the requested records and each was responsible for denying access to public records. (R.X at 1818-23.) The court determined FSU was responsible because it was the public agency charged with the duty of maintaining records, but "avoided directly receiving documents related to its official business by designating GrayRobinson to receive those documents on its behalf . . ." (R.X at 1818.) FSU was also found to have participated in a system designed and established by the NCAA that resulted in the denial of public access to records. (R.X at 1819.) The court found GrayRobinson responsible because FSU either delegated to the law firm the authority to receive records related to the University's official business or acquiesced in the firm's assuming FSU's custodial obligations. Id. The court found the NCAA responsible because it "insisted on transmitting pubic records to

FSU in a manner designed to impose artificial barriers to access." (R.X 1822-23.) Like the White Sox organization in Times Publishing Company, Inc. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990) (discussed in detail below), the NCAA assumed custodial responsibilities and duties for the public records at issue by retaining custody and control of them. (R.X 1822-23.) FSU also delegated its recordkeeping functions to the NCAA so that the NCAA met the definition of an "agency" pursuant to Florida's public records laws. (R.X at 1823.)

The court found that the Sunshine Amendment and Chapter 119 were constitutional as applied and rejected the NCAA's four federal constitutional challenges under the commerce, impairment of contracts, takings and freedom of association clauses. (R.X at 1816-18.) The cases argued by the NCAA generally involved facial constitutional challenges and protectionist state legislation targeted specifically at the NCAA and, therefore, were not applicable. (R.X at 1917.) Further, the court found the claimed imposition on the NCAA's rights was at most, *de minimis*, while the State's interest in access to public records under the Florida Constitution and Public Records Act was substantial and clearly outweighed the purported imposition on the NCAA's rights. Id.

Finally, the court denied FSU's cross claim against the NCAA because FSU was not required to seek permission from the NCAA to produce public records.

(R.X at 1823.) The confidentiality agreements that attempted to restrict disclosure of FSU's public records were deemed void and unenforceable. Id.

On August 28, 2009, the NCAA filed its notice of appeal. (R.X at 1825-46.) Neither FSU nor GrayRobinson have yet appealed the decision below. This Court granted expedited consideration of this appeal.

SUMMARY OF THE ARGUMENT

The NCAA wants this Court to believe that a parade of horrible, "virtually impossible, statutory obligations" will irreparably harm the NCAA's "basic ability to function" if the trial court's decision stands. However, countless private companies face these perceived dire consequences (of turning private documents into public records) and prosper daily as they do business with state agencies. Dire consequences result only if this Court accepts the NCAA's reasoning. The NCAA's approach would create a heretofore unknown "look-but-don't-touch" confidentiality exemption to the Florida's public records laws and a roadmap for other private companies and individuals to avoid Florida's Sunshine.

The legal issues confronting this Court are not new, unique, or extraordinary. When an agency reviews a document in the course of agency business, it receives it. There is nothing "newly minted" about this proposition of law, whether the record is reviewed electronically or in a private law office. The NCAA has not met its burden of demonstrating the existence of a valid statutory

exemption to disclosure. The Family Education Rights and Privacy Act and its Florida counterpart do not exempt the June 2 Response and Hearing Transcript because these documents do not contain *information directly related to students* as courts throughout the country have already observed. Furthermore, no matter what policy arguments the NCAA wishes to make for confidentiality, the overriding policy of this State is that without a valid exemption created by the Legislature, public records are public.

What remains are the NCAA's tenuous efforts to avoid the effects of its evasive scheme. The NCAA cannot deflect responsibility by saying it is not the "custodian" under Chapter 119 when it intentionally assumed dominant custody and control of the records at issue and refused to allow FSU to disgorge them upon request. Nor can the NCAA prevail on its hollow constitutional claims. It did not meet its burden of demonstrating any burden on interstate commerce – much less one that overrides Florida's compelling constitutional interest in open records. It did not begin to show the trial court how the First Amendment right of association is even implicated, much less prove a significant affect on that right.

For these reasons, more fully set forth below, this Court should uphold the trial court's judgment.

ARGUMENT

I. A MIXED STANDARD OF REVIEW APPLIES.

When purely legal questions of whether a document is a public record and subject to disclosure are involved, the matter is subject to a *de novo* standard of review. State v. City of Clearwater, 863 So. 2d 149, 151 (Fla. 2003). However, the order here does not concern purely legal questions. The trial court's determination as to the status of the records and the defendants below hinges on factual findings. Any factual determinations must be affirmed if supported by competent, substantial evidence. See State v. Wilford, 720 So. 2d 617, 618 (Fla. 1st DCA 1998). When deciding a mixed question of law and fact, "an appellate court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo." Hamner v. State, 13 So. 3d 529, 532 (Fla. 4th DCA 2009) (citing Bates v. State, 3 So. 3d 1091, 1100 (Fla. 2009)). In this case, most of the factual findings are not in dispute and contained in a Joint Pretrial Stipulation. (R.X at 1787-97.)

Moreover, Florida's Public Records Act is to be liberally construed in favor of public access and in a manner that frustrates all evasive devises. Lightbourne v. McCollum, 969 So. 2d 326, 332-33 (Fla. 2007); Weeks v. Golden, 846 So. 2d 1247, 1249 (Fla. 1st DCA 2003). "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).

II. THE DOCUMENTS PROVIDED TO FSU VIA THE CUSTODIAL SITE ARE PUBLIC RECORDS.

The Sunshine Amendment grants every person a right of access to "any public records made or received in connection with the official business of any public body, officer, or employee of the state, or any persons acting on their behalf . . ." Art. I, § 24, Fla. Const. Chapter 119 similarly defines 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. (2009) (emphasis added). The Florida Supreme Court has recognized these definitions 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 & Assoc., 379 So. 2d 633, 640 (Fla. 1980) (finding documents made or received by a private consultant in the course of its contract with a public agency public records); see also City of Clearwater, 863 So. 2d at 154 (public records are "materials that have been prepared with the intent of perpetuating or formalizing knowledge"). All the elements of the definition are present here. The NCAA

posted documents to its Custodial Site specifically to communicate information to FSU for use in the University's appeal. (R.X at 1790 ¶ 7, 1793 ¶¶ 24-27.) The only disputed aspect of the definition is what the single word "received" means.

The NCAA argues that the Custodial Site was technologically constructed to prevent any documents from being "received." It equates receipt with mailing, faxing, e-mailing or hand delivering to a public agency. See Initial Brief at 18-20. Most everything, except posting documents to an agency's "cyber mailbox," makes the list. Receipt, therefore, rests in the sender's chosen method of transmission. The NCAA argues that FSU must have some form of physical possession of a document for it to be "received" and that the trial court somehow disregarded the plain meaning of the word "received." See Initial Brief at 17-20.

So what is the plain meaning of the word "received"? *The American Heritage College Dictionary (Third Edition)* defines "receive" as: "1. To take or acquire (something given, offered, or transmitted); get. 2. to hear or see (information for example)." This definition does not require the physical taking of a document. Rather, as FSU did here, an entity can "receive" a document when it is transmitted to it or by acquiring, getting or seeing the document and its contents.

The plain meaning of "receive" is consistent with the statutory definition of a "public record," which encompasses all documents made or received in connection with an agency's official business "*regardless of the physical form,*

characteristics, or means of transmission." § 119.011(12), Fla. Stat. (emphasis added"). Indeed, the genius of Florida's Public Records Act is that it recognizes that with new technology come new avenues to skirt its requirements. Therefore the explicit policy of the Act is that electronic recordkeeping systems cannot impede the right of access to public records. See, e.g., § 119.01(2)(a)-(f), Fla. Stat. (outlining policy that automation of public records cannot erode right of access and imposing strict obligations on public agencies for electronic recordkeeping).

Examination of the actual definition reveals that the sender's method of transmission has no impact on determining whether a record is a public record. Likewise, the characteristics of the document plays no role. Both are to be disregarded. Thus, the chosen method of transmission – here, the posting on a secret site – and the digital characteristics of the documents simply have no bearing on the public nature of the requested records. The records here were accessed, viewed, read, referred to, used. It is hard to imagine how such documents were somehow not really received.

Twenty years ago, the court in Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990), was faced with similarly strained arguments in a paper context and had no problem finding that documents shown to employees of the City of St. Petersburg were public records. There, lease

documents were shown to City employees, though the employees were prohibited from making or retaining copies. The court noted:

> Once exhibited to city officials as part of the bargaining process, where the documents were revised as a result of the mutual negotiations between the parties, the draft leases and other related documents became public records. To hold otherwise would be to 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. Despite the NCAA's attempts to distinguish the Times Publishing case, there is no material difference here.

Documents were exhibited to FSU as part of the back and forth with the NCAA concerning the appropriate sanctions for the academic cheating scandal. Regardless of whether the documents were revised by FSU, it is undisputed that the University utilized the information contained in the documents and prepared specific responses to the allegations and arguments contained therein. As in Times Publishing, the documents in this case have acquired the character of public records. The June 2 Response and the Hearing Transcript were clearly "received."

The NCAA repeatedly argues the trial court erred in finding these documents where received when they were "viewed" by FSU's agent and characterizes the court's ruling as unprecedented. The trial court actually found:

> The documents at issue were viewed by FSU's agents on behalf of FSU. See Times Publ'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.

(R.X at 1811-12.) This ruling is not novel, unique or surprising. It is just common sense. Under Shevin, Times Publishing and the plain meaning of the Sunshine Amendment and the Public Records Act, the documents were received by FSU (through its agent) in connection with the University's official business (student education and athletic programs), and were intended to (and actually did) perpetuate and communicate knowledge to FSU. They are public records. The trial court's ruling is firmly grounded in precedent and rooted in the facts and the plain meaning of Florida law. The only ruling that would be unprecedented would be one that carves out a special exception for the NCAA and allows it to electronically transmit secret documents to a Florida public university.

III. THERE IS NO BASIS FOR WITHHOLDING THE REQUESTED RECORDS.

Because the documents at issue were received by FSU in connection with the transaction of official business, they are public records under the Sunshine Amendment and Chapter 119. Only a statutory exemption can preclude their

release. Hill v. Prudential Ins. Co., 701 So. 2d 1218, 1219 (Fla. 1st DCA 1997). No statutory exemption exists. The NCAA's confidentiality agreements and policy arguments favoring secrecy provide no legitimate basis for nondisclosure.

A. No Statutory Exemption Applies.

The NCAA briefly argues that the June 2 Response and Hearing Transcript are exempt from disclosure under the Family Education Rights and Privacy Act ("FERPA") and Section 1006.52, Florida Statutes. See Initial Brief at 30-32. FERPA is a federal law intended to protect against the improper disclosure of student "education records." Recently, the Florida Legislature amended Section 1006.52(1) to track FERPA's definition of "education records" and make such records exempt and confidential. § 1006.52(1), Fla. Stat. 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). See also 34 C.F.R. § 99.3. Neither FERPA nor Section 1006.52 have any bearing on records that do not fit within this definition of "education records."

Consequently, the key issue for the trial court was whether the June 2 Response and Hearing Transcript were "education records." The court reviewed the June 2 Response and Hearing Transcript *in camera* and found neither were

exempt "education records" because "those documents *do not contain information directly relating to a student.*" (R.X at 1815 (emphasis added).) Of course, this factual finding is entitled to deference. E.g., Wilford, 720 So. 2d at 618.

The NCAA never explicitly states that the June 2 Response and Hearing Transcript "directly relate" to any student. Instead, it argues the records "directly address issues related to an investigation of student academic misconduct and contain detailed information of just that." Initial Brief at 31. To construe FERPA and Section 1006.52 so broadly would violate basic canons of statutory interpretation and would be contrary to the policies underlying Florida's public records laws.

Federal and state courts have recognized a critical distinction between documents that "contain information directly related to a student" and those that only indirectly or tangentially include information about a student.[8] The latter are

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[8] Numerous courts have recognized and endorsed this critical distinction. See, e.g., Briggs v. Bd. of Trs. of Columbus State Cmty. Coll., No. 2:08-CV-644, 2009 WL 2047899 at *5 (S.D. Ohio July 8, 2009) (complaints made by students about a teacher did not directly relate to students: "records relating directly to school employees and only indirectly to students are not 'education records' within the meaning of FERPA"); Hampton Bays Union Free Sch. Dist. v. Pub. Employment Relations Bd., 878 N.Y.S.2d 485, 488-89 (N.Y. App. Div. 2009) ("In our view, teacher disciplinary records and/or records pertaining to allegations of teacher misconduct cannot be equated with student disciplinary records...and do not contain 'information directly related to a student' . . ."); Baker v. Mitchell-Waters, 826 N.E.2d 894, 899 (Ohio Ct. App. 2005) (student complaints concerning abuse by teachers "do not contain information directly relating to students" but instead

Footnote continued on next page.

not "education records." The NCAA suggests the trial court erroneously relied upon FERPA cases that were concerned only with teacher or staff misconduct, rather than student misconduct. See Initial Brief at 31. In the NCAA's view, the presence of student misconduct makes this case distinguishable from the decisions in other jurisdiction rejecting FERPA claims. But the NCAA is mistaken.

For example, in Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998), Maryland's highest court refused to apply FERPA's "education record" exemption to documents concerning students and NCAA violations. Id. at 198. In that case, the University of Maryland campus newspaper sought copies of all correspondence between the University and the NCAA involving *a student-athlete who was suspended for accepting money from a coach to pay parking tickets* (which constituted an NCAA violation). Id. The University claimed that the documents were "education records" and that FERPA prohibited their release. Id at 199. The court disagreed, however, concluding that "correspondence between the NCAA and the University regarding a student-athlete accepting a loan to pay parking tickets" simply did not constitute "education records." Id. at 206. In other words,

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"directly relate to the activities and behaviors of teachers"); Brouillet v. Cowles Publ'g Co., 791 P.2d 526, 533 (Was. 1990) (rejecting FERPA as a basis for withholding records of teacher certification revocations that included references to students – including information about sexual relations between teachers and students – because FERPA "protects student records, not teacher records").

in circumstances strikingly similar to those involved here, the fact that a student-athlete who violated NCAA rules was discussed in a document did not transform that document into an "education record" under FERPA.

Like the correspondence between the University of Maryland and the NCAA, the June 2 Response and Hearing Transcript are not primarily focused on students. It is inevitable that documents analyzing teacher and institutional behavior will at least tangentially touch on the effect of that behavior on the students they are charged with educating. Like the Kirwan correspondence, such documents should not be shielded as "education records." Here, however, no speculation about the fundamental character of the documents is required. FSU, with the NCAA's blessing, has already disclosed a transcribed version of the June 2 Response. That document is twenty-three (23) single-spaced pages long and contains some 9,600 words. Two students and one student tutor are identified. It appears that approximately 20 words – less than one half of one percent of the entire document – identify these individuals. Thus, any information concerning students constitutes a miniscule portion of the June 2 Response and the trial court correctly found it only tangentially related to students. The trial court reviewed the Hearing Transcript *in camera* and reached a similar conclusion. The documents at issue focus on the behavior of FSU and its employees, and not its students.

Ellis v. Cleveland Municipal School District, 309 F. Supp. 2d 1019 (N.D. Ohio 2004), likewise involved documents that only tangentially related to students. There, the plaintiff sought discovery of incident reports of altercations between substitute teachers and students, as well as student and employee witness statements related to those altercations. Id. at 1021. The court conducted an *in camera* review of the documents and determined that they were not "education records" because the records directly related to teachers and only tangentially to students. Id. at 1021-22.

> Such records do not implicate FERPA because they do not contain information 'directly related to a student.' While these records clearly *involve students* as alleged victims and witnesses, the records themselves are *directly related* to the activities and behaviors of the *teachers* themselves and are therefore not governed by FERPA.

Id. at 1023 (emphasis added).

What is fundamentally at stake in FSU's appeal of the NCAA sanctions is the institution's and its employees' behavior. FSU and the NCAA investigated FSU's athletic department and concluded that FSU and three former FSU staff members violated NCAA regulations and facilitated academic cheating. The investigation related directly to institutional and staff misconduct, and resulted in the institution being penalized and in employee resignations. In these circumstances, the fact that the records may reference some student-athletes does not convert them into "education records." Any other result would shield teacher

and institutional misconduct from public scrutiny – at the expense of students. See Ellis, 309 F. Supp. 2d at 1022.

Common sense dictates that not every record maintained by a school that mentions a student is an "education record." In Owasso Independent School District v. Falvo, 534 U.S. 426 (2002), the Supreme Court rejected an argument that student tests and assignments graded by other students were "education records" under FERPA – even though, under the facts of that case, a student's *grade* was disclosed to another student. If grades can be disclosed to third parties without violating FERPA, it makes little sense to protect documents related to the investigation of a university's staff. As the trial court concluded after reviewing the records, the June 2 Response and Hearing Transcript are not the type of sensitive, student-centric documents Congress intended to protect.

Florida law requires that statutes be interpreted to avoid absurd results. E.g., State v. Presidential Women's Ctr., 937 So. 2d 114, 119 (Fla. 2006). Reading FERPA and its Florida counterpart to exempt any document mentioning a student violates this basic canon of construction. A public university could easily avoid Florida's public records laws merely by including a student name in any document it wants to keep secret. This would make public monitoring of public school administrators and teachers virtually impossible.

Additionally, a broad reading of the exemption provided under Section 1006.52(1) would make it impossible to read the statute *in pari materia* with Section 1012.91(b), Florida Statutes. See Fla. Dep't of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.") (citation omitted). Section 1012.91(b) concerns access to personnel records of public university employees and specifically provides for the disclosure of certain records that could qualify as "education records" under the NCAA's proposed broad reading of that term. The statute makes records of any investigation of misconduct by a public university employee confidential, but only "*until* the investigation ceases to be active." § 1012.91(b), Fla. Stat. (emphasis added.) This provision would be rendered meaningless if every investigation of employee misconduct that references a student's name was *permanently* secret under Section 1006.52(1).

Here, the investigation of the academic cheating scandal at FSU focused primarily on and related directly to the unethical conduct of staff members of FSU's Athletic Academic Support Services Department. (E.g., J.E. 3-4.) Once the investigation of that misconduct ended, the records relating to the investigation – including June 2 Response and Hearing Transcript – should have been released

pursuant to Section 1012.91(1). That section cannot be read *in pari materia* with Section 1006.52 if the NCAA's construction of student "education records" is adopted; resulting in Section 1012.91(1)'s being read out of existence. The more logical and legally correct result is to recognize that a record relating to an investigation of employee misconduct does not become a confidential and exempt "education record" merely because it mentions a student.[9]

The June 2 Response and Hearing Transcript are public records under Florida law. Because neither FERPA nor any other exemption prohibits their disclosure, the trial court was correct to order their release.

B. Policy Concerns and Confidentiality Agreements do not Provide a Legitimate Basis for Withholding the Requested Records.

The only basis for denying access to a public record is a constitutional or statutory provision that specifically exempts the record from disclosure. Hill, 701 So. 2d at 1219. Only the Legislature is empowered to enact exemptions that protect information contained within otherwise public records. E.g., Art. I, § 24, Fla. Const.; Wait v. Fla. Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979)

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[9] A similarly sound result was reached in Johnson v. Deluz, 875 So. 2d 1 (Fla. 4th DCA 2004). The Johnson court considered whether to release an 8,000-page investigative report about a school principal that incidentally contained student identifying information. Id. at 2. After reviewing various statutory provisions governing the release of staff investigation records and student confidentiality, the court harmonized the provisions and permitted release of the investigative record, with student identifying information redacted. Id. at 3-4.

(recognizing no attorney-client policy exemption for public records). Courts are not free to consider public policy considerations as a basis for withholding a public record. E.g., Tribune Co. v. Cannella, 458 So. 2d 1075, 1078-79 (Fla. 1984) ("The only challenge permitted by the [Public Records] Act at the time a request for records is made is the assertion of a statutory exemption . . ."); News-Press Publ'g Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("Absent a statutory exemption, a court is not free to consider public policy questions . . .").

Throughout its Initial Brief, the NCAA continually stresses the need for confidentiality of its documents. The Custodial Site was specifically designed to impose confidentiality. (R.X at 1790-91 ¶¶ 7-9, 12-13.) As a condition of access, the NCAA requires execution of a confidentiality agreement that prohibits disclosure of any documents accessed on the Custodial Site and threatens civil, criminal and grievance proceedings for any violations. (R.X at 1791 ¶ 9; JE 11, 12.) Prior to instituting the Custodial Site, the NCAA required institutions to review documents at a secure location, again denying copies to public institutions.[10] (R.X at 1790 ¶ 7). The flaw with the NCAA's concerns about

[10] The NCAA seems to suggest that the long-term existence of a custodial location for review of paper documents somehow justifies its use of a custodial web site for the convenience of its members. What the NCAA does not appear to understand is that the paper scheme also violates Florida law and is identical to the scheme condemned in Times Publishing. The NCAA's "paper" system was equally subject to challenge, and there is no excuse under Florida law for either system.

secrecy, however, is that when the NCAA transmits documents to a Florida public university related to the university's official business, such documents become public records – without regard to the NCAA's desire to keep such records confidential.

Concerns over confidentiality – even promises of confidentiality or confidentiality agreements – have no impact on whether a public record must be disclosed. See Sepro Corp. v. Fla. Dep't of Envtl. Prot., 839 So. 2d 781, 784 (Fla. 1st DCA 2003) (confidential designation by private party of material submitted to government agency did not create an exemption); Gadd v. News-Press Publ'g Co., 412 So. 2d 894, 896 (Fla. 2d DCA 1982) (noting that hospital peer review standards regarding confidentiality do not provide an exemption); Browning v. Walton, 351 So. 2d 380, 381 (Fla. 4th DCA 1977) (city's promises of confidentiality related to city personnel files did not create exemption). As this Court noted in Sepro:

> Initially, it is clear that a private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential. Neither the desire nor the expectation of non-disclosure is determinative.

839 So. 2d at 784. A public agency cannot bargain away its obligations under Florida's Public Records Act with promises of confidentiality. Tribune Co. v.

Hardee Mem'l Hosp., 19 Media L. Rep. (BNA) 1318, 1319 (Fla. 10th Cir. Ct. Aug. 19, 1991).

Neither the NCAA's concerns for confidentiality nor the confidentiality agreements themselves provide a lawful basis for withholding the public records at issue and must not be allowed to obstruct compliance with Florida law. The trial court correctly found that public access could not be frustrated by any confidentiality provision in the NCAA's bylaws, policies, procedures, or agreements. (R.X at 1816.) Following this Court's guidance in Sepro, the trial court recognized the confidentiality agreements "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 . . . are void and unenforceable." Id.

IV. THE TRIAL COURT CORRECTLY FOUND THAT THE NCAA IS A CUSTODIAN OF FSU'S PUBLIC RECORDS AND, THEREFORE, WAS ACTING ON BEHALF OF FSU FOR PURPOSES OF FLORIDA'S PUBLIC RECORDS ACT.

As this Court knows, public records may be found in private hands:

> "The Public Records Act recognizes the danger that exists if private entities are allowed to demand that they retain custody [*and prevent inspection*] of documents as a condition of doing business with a governmental body."

B & S Utils., Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17, 20-21 (Fla. 1st DCA 2008), rev. denied, 4 So. 3d 1220 (Fla. 2009) (quoting Times Publ'g, 558 So. 2d at 494) (emphasis added). Florida courts do not tolerate the retention of public

records by a private entity that frustrates public access to records. Wisner v. City of Tampa Police Dep't, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (polygraph records maintained by consultant for the City of Tampa were public records); Wallace v. Guzman, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) (individuals' tax returns submitted to Alston & Byrd law firm, special counsel to agency's financial advisor, public record).

A. The NCAA intentionally interfered with FSU's custodial obligations and by its own actions assumed custodial responsibility for the public records at issue.

The NCAA provided documents to FSU, but placed restrictions on the documents in an attempt to keep them secret. The trial court found:

> 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.

(R.X at 1822-23.) When a private entity controls a public record, it assumes the responsibility as custodian of the record, including the obligation to provide access.

The "paper version" of this case was decided two decades ago by the Second District Court of Appeal in Times Publishing. There, the City of St. Petersburg and the Chicago White Sox baseball team negotiated for the White Sox to use the

Florida Suncoast Dome, now Tropicana Field. Times Publ'g, 558 So. 2d at 489. To keep the terms of the potential lease confidential, the City (at the White Sox's insistence) did not take physical possession of the proposed lease agreements. Id. Rather, City officials inspected documents at the White Sox's office in Chicago or at the office of David Robbins, the White Sox's local counsel in St. Petersburg, but made no copies. Id. The Court found that both the City and the White Sox violated Florida's Public Records Act, that both unlawfully withheld public records and that both were liable for the newspaper's attorneys' fees. Id. at 492-93, 495.

The White Sox and the City asserted defenses similar to those raised by the NCAA in this case – that the documents in the custody of the White Sox were not received by the City and were not public records, and that the White Sox did not act on behalf of the City. Id. at 491. In finding the White Sox subject to Florida's Public Records Act, the court stressed that "[i]t was the White Sox that demanded that it retain custody of all proposed lease documents and other negotiation records in order to insure that negotiations would be confidential." Id. at 494. Therefore, by its own actions, the White Sox assumed custody of the public records and was responsible for the unlawful denial of access to such records. Id. at 494-95.

There is no material difference between the actions of the NCAA and those of the White Sox. Regardless of whether the defendants below conspired to devise the plan for the Custodial Site, they all assisted in implementing a mechanism that

evaded Florida law. The NCAA insisted on transmitting public records to FSU in a manner designed to impose artificial barriers to access. And FSU and GrayRobinson participated in it. In fact, FSU's trustees were advised that the very purpose of the transmission of the June 2 Response via the Custodial Site was to "reduce the likelihood that these documents would need to be released publicly by the institution." (R.X at 1819; J.E. 34.) By its own actions, the NCAA assumed custodial responsibility for public records and the concomitant duty to ensure access. Times Publ'g, 558 So. 2d at 494-95.

Despite the clear import of the Times Publishing case, the NCAA argues that it cannot be a custodian of the June 2 Response and Hearing Transcript because FSU was in possession of the public records in the same form. See Initial Brief at 28-29. If the NCAA truly believed that FSU had custody and control of the public records at issue and was able to comply with records requests, it would have taken that position from the inception of the litigation. Instead throughout the entire proceeding below, the NCAA argued vigorously that it controlled the records at issue, but was not subject to the Sunshine Amendment or Chapter 119.[11] (R.IV at 675-732; R.IX at 1681-1708.) The NCAA actively prevented FSU from

[11] FSU and GrayRobinson echoed the NCAA's position with respect to custody of public records, arguing that the NCAA *alone* retained complete custody and control. (R.IX at 1632, 1662-63.)

possessing the documents in the same form as the NCAA. (R.X at 1790-91 ¶¶ 7-9, 12-13; R.X at 1822.) It did everything in its power not only to prevent FSU from having the document in *any* form, but also to block public release. Now, the NCAA questions its involvement in this matter – asserting FSU can produce the documents too.

The fact that, subsequent to the filing of this lawsuit, FSU accidentally discovered a flaw in the NCAA's mandated confidentiality that allowed it to "print screen"[12] documents does not excuse the NCAA's deliberate efforts to thwart FSU from having custody of the public records at issue. First, the ability to "print screen" is contrary to how the NCAA intended the Custodial Site to operate:

- The NCAA does not permit users of the Custodial Site to make or retain copies of documents. (R. X at 1790 ¶ 7.)
- The Custodial Site permits only ocular inspection. (R. X at 1790 ¶ 8.)
- The Custodial Site does not allow users to save, download, copy, or print documents. (R. X at 1790 ¶ 8.)
- The NCAA retains physical custody of the documents on the Custodial Site. (R. X at 1791 ¶ 12.)

[12] In its Answer, FSU indicated that "[t]he technical capacity to capture individual screenshots was discovered on July 23, 2009, long after litigation commenced." (R.IV at 613 n.1.) Importantly, even though FSU and GrayRobinson discovered the ability to "print screen" this does not provide them access to the public records in the same form as the NCAA. The NCAA retains the documents in their original form, with the ability to save, copy, download, and print. (R.X at 1790-91 ¶ 8.)

Second, the NCAA knew that FSU believed it did not have the capability to reproduce the public records at issue. To produce a copy of the June 2 Response, FSU first had to obtain permission from the NCAA and then transcribe the contents of the document because the NCAA would not provide FSU with a copy of the June 2 Response in a reproducible format. (R.X at 1795 ¶¶ 39-40; J.E. 23-24.) Third, the NCAA interfered with FSU's execution of its obligations as a records custodian by overtly threatening sanctions by the very terms of the confidentiality agreement and its suggestion at trial that "due process" rights might be denied FSU if the University did not honor NCAA bylaws over Florida law. (J.E. 11-12; Tr. 118-19.) Finally, access to the Custodial Site is contingent on the NCAA's permission, which it can revoke at any time. (R.X at 1791 ¶ 13.)

It is disingenuous for the NCAA to argue for the first time on appeal that it is not a proper defendant because FSU was equally capable of providing the public records – especially when its entire system was designed to prevent FSU from retaining the records in a reproducible format and when it vigorously opposed disclosure in its communications with FSU and before the trial court by asserting exemptions and otherwise acting like a records custodian. FSU repeatedly demanded that the NCAA provide to the University its own public records in a reproducible format. (R.X at 1794-95 ¶¶ 30, 39, 43; J.E. 27.) The NCAA flatly refused. (R.IV at 623-31; R.X at 1794-96 ¶¶ 31, 39, 44; J.E. 23, 28.) The trial

court correctly found that the NCAA's actions circumvented Florida's public records laws and were specifically designed to impose artificial barriers to access. (R.X at 1822-23.)

B. The NCAA was delegated – and improperly assumed – FSU's custodial responsibilities.

The Florida Supreme Court has made clear that when a public agency or official delegates an actual public function to a private entity, "public access follows." Memorial Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 381 (Fla. 1999). The trial court found, "by the NCAA's insistence, FSU delegated its recordkeeping functions to the NCAA." (R.X at 1823.) The NCAA, however, argues that there is no delegation of any public function in this case because the NCAA was not acting on behalf of FSU during the NCAA's infractions proceedings. See Initial Brief at 21-22. The NCAA misconstrues the public function at issue.

Appellees never argued – and the trial court never found – that the NCAA was acting on behalf of FSU during the infractions proceedings. Rather, the precise and very limited public function at issue is FSU's custodial obligation pursuant to Chapter 119 with respect to FSU's public records retained by the NCAA. Florida's Public Records Act imposes strict custodial obligations on agencies regarding the retention, maintenance and preservation of public records. See, e.g., § 119.021, Fla. Stat. It is equally beyond dispute that a public agency's

receipt and retention of public records are core, statutory public functions. § 119.01(1), Fla. Stat. ("[p]roviding access to public records is a duty of each agency"). Indeed, the Act mandates that "[e]very person who has custody of a public record shall permit the record to be inspected and copied . . ." § 119.07(1)(a), Fla. Stat.

Based on the facts of this case, FSU improperly delegated its custodial responsibilities. See Times Publ'g, 558 So. 2d at 492 (finding that City purposely avoided taking possession of public records and improperly delegated its recordkeeping function to the White Sox). The fact that FSU may have felt coerced to do so is a distinction without a difference. And by the NCAA's own actions – insisting on transmitting documents in a manner designed to impose artificial barriers to access – the NCAA voluntarily assumed FSU's custodial responsibilities. Id. at 494-95 ("by its own actions, the White Sox assumed custody of the public records sought to be reviewed"). As such, the NCAA acted on behalf of FSU and is both an "agency" and a "custodian" for the purpose of Florida's Public Records Act.[13]

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[13] The NCAA repeatedly refers to the trial court's finding that it was a "public agency" – which it uses as a term of art in quotation marks. See Initial Brief at 2, 20-24. The accurate statutory term is "agency." The definition of "agency" includes governmental bodies, in addition to "any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." § 119.011(2), Fla. Stat. The trial court correctly found the NCAA an

Footnote continued on next page.

The NCAA contends that the Supreme Court's decision in National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), precludes any finding that the NCAA was delegated a recordkeeping function in this case. In Tarkanian, the NCAA placed UNLV's basketball team on probation and UNLV subsequently suspended its basketball coach, Jerry Tarkanian. Id. at 180-81. Tarkanian then sued the NCAA for deprivation of his civil rights in violation of 42 U.S.C. § 1983. Id. at 181. Ultimately, the Supreme Court found that the NCAA was not a "state actor" for purposes of Section 1983 liability because UNLV had not delegated personnel matters to the NCAA. Id. at 192-96. The Supreme Court determined that, although UNLV's actions may have been influenced by the NCAA, its compliance with the NCAA's rules and recommendations did not convert the NCAA into a "state actor." Id.

The determination of when an entity is an "agency" or "custodian" under the Public Records Act is not the equivalent of a "state actor" determination for purposes of Section 1983 litigation. The respective statutory definitions and case law standards are different. A private entity can be an "agency" under Florida's public records laws by being delegated (or assuming) a public function – without being a "state actor" for purposes of Section 1983 liability. The "agency"

"agency" because, for limited records custodian purposes, it acted on behalf of FSU.

determination in this case has nothing to do with the legal standards involved in the Tarkanian case.

The NCAA next argues that FSU could not have delegated its recordkeeping functions to the NCAA because FSU and the NCAA had adversarial interests. See Initial Brief at 26-27. This argument, however, was considered and rejected in Times Publishing. The Second District opined:

> The White Sox forcefully argue that it was a business adversary of the City and not its agent. We agree with the basic proposition. Nevertheless, the White Sox shared with the City the common goal of negotiating for the relocation of its baseball team to St. Petersburg. It was the White Sox that demanded it retain custody of all proposed lease documents and other negotiation records in order to insure that negotiations would be confidential.

Times Publ'g, 558 So. 2d at 494. The fact that the NCAA and FSU are adversarial in relation to the academic cheating scandal does not change the fact that, just as in Times Publishing, the NCAA demanded it retain custody of documents provided to the public agency to ensure secrecy.

Regardless of whether the defendants below had adversarial interests or whether all of them conspired to devise the Custodial Site, they were all active and

necessary participants in a system that resulted in an evasion of Florida law.[14] The trial court made the factual determination that:

> [E]ven though FSU did not assist in the development of the Custodial Site or may have felt 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.

(R.X at 1819.) The actions of the Defendants have had the same effect as those in Times Publishing – the evasion of Florida's public records mandates. The result here should mirror that in Times Publishing.

The NCAA fears vast, ongoing custodial obligations and warns that the ruling below could turn any private citizen into a custodian of public records simply by a public employee's viewing of the citizen's documents. See Initial Brief at 15, 19, 29. The NCAA's fears are overly dramatic. The trial court's ruling is limited to the specific records at issue and is based on the NCAA's actions (in conjunction with FSU and GrayRobinson) with respect to those documents. The trial court did not find that all of the NCAA's documents were public records; it did not even find that all of the NCAA's documents related to the FSU academic

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[14] The NCAA contends that Appellees abandoned any claim that the defendants below devised a scheme to deny public access to the documents at issue. See Initial Brief at 18 n.3. Appellees acknowledge that neither FSU nor GrayRobinson participated in creating or designing the NCAA's Custodial Site. All of the defendants below did, however, actively implement and participate in a scheme that resulted in the denial of access to public records, which is equally problematic.

cheating scandal were public. Rather, the trial court's ruling was limited to two documents transmitted to and received by FSU for which the NCAA, at its own insistence, retained custody.

Second, if the NCAA wants to avoid any continuing custodial obligations, it can easily do so. FSU is the proper and lawful public custodian of the records at issue. If the NCAA had simply allowed FSU to meet its custodial obligations, the NCAA would not have been deemed the custodian of public records. Rather, at every turn, the NCAA intentionally placed restrictions on FSU's access to the documents designed to prevent FSU from fulfilling its duties. The NCAA can avoid the plethora of harmful consequences it fears by ceasing to interfere with Florida law.

V. THE NCAA'S CONSTITUTIONAL ARGUMENTS ARE BASELESS.

The NCAA contends that the trial court's Final Judgment is "fraught with constitutional infirmities" and "threaten[s] to disrupt and irreparably injure the NCAA's ability to enforce its rules, uniformly conduct its affairs and serve its membership." Initial Brief at 33. The NCAA is wrong on both grounds. Application of the Public Records Act here raises no legitimate constitutional concerns and will not truly harm, let alone incapacitate, the NCAA.

A. The Trial Court's Application of the Public Records Act does not Violate the Commerce Clause.

The NCAA's first constitutional argument is that "local attempts to intrude" upon NCAA rules violate the Commerce Clause of the United States Constitution. See Initial Brief at 36. This argument misapprehends the purpose of the Public Records Act and the workings of the Commerce Clause.

The Commerce Clause authorizes Congress to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3, U.S. Const. Although the Constitution does not specifically prohibit the states themselves from regulating commerce, the Supreme Court has read the Commerce Clause to contain an implicit limit on the states' regulating authority. This implicit limit is known as the "dormant Commerce Clause." Without expressly saying so, the NCAA's argument is that the Florida's public records laws, as applied to the June 2 Response and Hearing Transcript, violate the dormant Commerce Clause. The NCAA is wrong.

The purpose of the dormant Commerce Clause is to prevent "*economic protectionism* – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988) (emphasis added). Given this purpose, it becomes immediately apparent that the Public Records Act does not violate the Commerce Clause because it plainly is not a regulatory measure designed to benefit in-state economic interests by burdening out-of-state competitors. Indeed,

Florida public records laws are not concerned with any in-state or out-of-state economic interests; they are concerned with public oversight of government.

The Supreme Court has established a two-step test for determining whether a statute survives dormant Commerce Clause analysis. First, a court must ask whether the statute "directly regulates or discriminates against interstate commerce," or has the effect of favoring "in-state economic interests." Bainbridge v. Turner, 311 F.3d 1104, 1109 (11th Cir. 2002) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986)). The Sunshine Amendment and Chapter 119 do not regulate or discriminate against interstate commerce or favor in-state economic interests. The NCAA makes no effort to argue they do. Without regard to residence, Florida provides that "*[e]very* person 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. (emphasis added). The Act refuses to discriminate between in and out-of-state persons and plainly was not enacted for the purpose of discriminating against the NCAA – or any other organizations, for that matter.[15]

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[15] The fact that the Public Records Act was not enacted for the purpose of discriminating against or imposing a burden on the NCAA means that the NCAA's reliance on National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993) and National Collegiate Athletic Association v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994) is misplaced. In Miller, the court found that the Nevada statute at issue directly regulated interstate commerce

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Where, as here, a statute does not discriminate against interstate commerce, the Court moves on to the second step of the analysis and asks whether the burdens on interstate commerce imposed by the statute clearly outweigh the statute's benefits. See, e.g., Dep't of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, 1817 (2008). To succeed on its dormant Commerce Clause argument, then, the NCAA must demonstrate that the purported burden on interstate commerce clearly outweighs the substantial benefits of Florida's constitutional and statutory public records laws. The NCAA has not come close to doing so because (1) the benefits of the Public Records Act are substantial and (2) the burdens imposed on interstate commerce are non-existent.[16]

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because it was designed specifically to control the NCAA. Miller, 10 F.3d at 638. Likewise, the Florida statute in Roberts was enacted to control the NCAA. Roberts, 1994 WL 750585, at *1. Here, by contrast, the Public Records Act was enacted to guarantee everyone access to records of State agencies and their delegates.

[16] The NCAA contends that the trial court conducted only a facial review of the constitutionality of Florida's laws, and did not conduct the as-applied review requested by the NCAA. See Initial Brief at 35-36. But the NCAA is mistaken. Plaintiffs argued below that the NCAA's dormant Commerce Clause argument could succeed only if the NCAA demonstrated that the burdens imposed by the public records laws were excessive in relation to their benefits, and the trial court analyzed the burdens and benefits. (R.X at 1817.) This is precisely how an as-applied dormant Commerce Clause assessment is conducted. See, e.g., S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 471 (9th Cir. 2001).

The Public Records Act's benefits are clear – the statute promotes democracy by ensuring the public's awareness of and participation in the workings of state government. See, e.g., Barfield v. City of Fort Lauderdale Police Dep't, 639 So. 2d 1012, 1014 (Fla. 4th DCA 1994) (explaining that purpose of the Public Records Act is "to open public records so Florida's citizens can directly observe the actions of their government."). The right of access to Florida public records is of such paramount importance that it is constitutionally guaranteed. See Art. I, § 24(a), Fla. Const. Consequently, the trial court properly found that the State's interests as embodied in the Florida Constitution and the Public Records Act are "substantial." (R.X at 1817.)

By contrast, no real burdens are imposed on the NCAA's activities in interstate commerce. For this reason, the NCAA has great difficulty articulating any constitutionally cognizable impact. It declares with much hyperbole that if the June 2 Response and Hearing Transcript are disclosed, it would "tear [the] heart out" of the NCAA and that it will be unable "to thrive, or even exist." See Initial Brief at 38 (quoting David Berst, NCAA Vice President for Division I).[17]

[17] The NCAA implies that the trial court believed Mr. Berst's testimony about the purported damage the NCAA would suffer if records were disclosed. See Initial Brief at 34 (claiming that the trial court "did not discredit Mr. Berst's testimony"). In reality, the trial court did discredit Mr. Berst's testimony, because the court concluded, contrary to that testimony, that "the claimed imposition on the NCAA's rights is, at most, *de minimis*." (R.X at 1817.)

If the NCAA's fears were true, one would expect the NCAA's existence to be in peril already. A transcript of the June 2 Response has been publicly available now for nearly ten (10) weeks. But there is no evidence in the record to suggest that the NCAA has been diverted from its core mission or unable to function. College football goes on.

And the Hearing Transcript can reveal information only from sources who agreed to waive confidentiality, alleviating the NCAA's concerns about discouraging confidential sources from disclosing information. See Initial Brief at 42-43. Article 32.8.7.4.1 of the NCAA's Administrative Bylaws provides:

> **Information from Confidential Sources.** In presenting information and evidence for consideration by the Committee on Infractions during an infractions hearing, the enforcement staff shall present *only information that can be attributed to individuals who are willing to be identified.* Information obtained from individuals not wishing to be identified *shall not be relied* on by the Committee on Infractions in making findings of violations. Such confidential sources *shall not be identified to either the Committee on Infractions or the institution.*

(J.E. 1 at 403 (emphasis added).) Under the NCAA's own rules, FSU was not provided – nor can the transcript at issue contain – information identifying confidential sources.

Viewed objectively then, Florida's Public Records Act imposes essentially no burden on the NCAA's activities in interstate commerce. It will not undermine

the fairness of NCAA sporting events. Compliance will not compel the NCAA to break off its relationships with public schools in Florida. It will have no economic impact on the organization. Even after both records are disclosed, the NCAA will continue to function. Like all multi-state organizations, the NCAA is bound by the laws of the states in which it operates. The NCAA's Commerce Clause challenge is groundless and must be rejected.

B. Florida's Public Records Laws Do Not Infringe Any Purported NCAA Right to Associate.

The NCAA next argues that application of the Sunshine Amendment and Chapter 119 to the NCAA would violate its First Amendment right to associate. This argument is also contrary to the facts and controlling law.

The First Amendment does not specifically mention the right to associate, but the Supreme Court has concluded that freedom of association is a fundamental component of the freedom of speech guaranteed by the First Amendment. See NAACP v. Alabama, 357 U.S. 449 (1958). The Supreme Court has established a three-step test to determine whether a private association's constitutional right to associate has been violated:

1. Is the private association engaged in expressive activity?
2. Is the private association's ability to advocate its perspective significantly affected by the state law?
3. Does the state's interest outweigh the burden imposed on the associational expression?

Boy Scouts of Am. v. Dale, 530 U.S. 640, 648-53 (2000). Assuming, *arguendo*, that the NCAA qualifies as an association that engages in expressive activity, the right-of-association defense fails at both steps two and three.

With respect to step two, application of Florida's public records laws here will not affect – let alone *significantly affect* – the NCAA's ability to advocate its perspective. The NCAA claims that those laws will interfere with its objective of promoting "fair competition among its member institutions by maintaining uniform standards of scholarship, sportsmanship and amateurism." Initial Brief at 40 (quoting Karmanos v. Baker, 816 F.2d 258, 259 (9th Cir. 1987)). Specifically, the NCAA asserts that it will be forced to "modify [its] confidentiality rules" and that this "would significantly affect" its ability to carry out its central expressive mission. Id. at 40-41. This assertion is belied by the facts.

As explained above, the NCAA's Constitution, Operating Bylaws, and Administrative Bylaws do not permit the NCAA to disclose confidential sources to schools under investigation. Moreover, the NCAA does not explain – and it is far from obvious to an objective observer – *how* disclosure of the June 2 Response and Hearing Transcript will interfere with the NCAA's promotion of fair competition or the maintenance of uniform standards of scholarship, sportsmanship, or amateurism. In truth, disclosure of the records will have no such effect and the NCAA's right-to-associate argument fails under the second step of the test.

The NCAA's argument also fails the third step of the test because Florida has a compelling state interest in open records made or received by state agencies, such as FSU, in the conduct of state business. As discussed with respect to the Commerce Clause, it is beyond dispute that Florida's public records law promotes a state interest of the highest order. A right conferred by Florida's Constitution outweighs any purported impact on the NCAA's associational rights, as the trial court properly found. (R.X at 1817.)

Nonetheless, the NCAA attempts to dismiss the State's interest in open government by suggesting that the only interest served is one of "[m]edia curiosity." Initial Brief at 41. The NCAA is, of course, entitled to its disdain for the media and Florida's commitment to an open, democratic system of government. But that disdain does not alter the fact that the right of access to public records is fundamental to Florida's system of government, as Florida courts have repeatedly recognized. The NCAA's freedom-of-association argument fails to satisfy the third step of the Supreme Court's test and must be rejected.

Because the NCAA's constitutional arguments lack any sound legal or factual basis, the NCAA attempts to shift the focus from its ineffectual constitutional arguments to the trial court's purported misunderstanding of those arguments and the law. According to the NCAA, the trial court opined that "the United States Constitution is subordinate to the Public Records Act," and this

finding "alone illustrates how, at best, the trial court profoundly misconceived the federal constitutional rights at issue." Initial Brief at 45-46. This argument is a gross misrepresentation of the trial court's handling of the NCAA's constitutional arguments. The trial court never suggested that the United States Constitution is subordinate to the Public Records Act. Instead, after reviewing extensive briefing on the issues from all parties and hearing hours of testimony from NCAA witnesses about its constitutional injuries (Tr. at 94-134), the trial court rightly concluded that the NCAA's constitutional arguments simply failed.

CONCLUSION

If an agency reviews a record and uses it for agency business, it is a public record. That holding is neither new nor unprecedented. Finding that a private company cannot avoid Florida's public records laws by requiring a state agency to accept a "look-but-don't-touch" scheme is well-worn precedent. Rejecting *ad hoc* secrecy justifications offered up by private entities serving their sole has been the task of courts since the inception of the Florida statutory and constitutional rights to government information. Put simply, the NCAA has failed to present this Court with any legal argument – from Commerce Clause to the First Amendment right of association – that would override the fundamental principles of open government. For these reasons, the judgment of the trial court should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Overnight Delivery and Electronic Mail to **Leonard J. Dietzen, Esq.**, and **Matthew J. Carson, Esq.**, RUMBERGER, KIRK & CALDWELL, 215 South Monroe Street, Suite 130, Tallahassee, Florida 32302; **Jonathan F. Duncan, Esq.**, and **Linda Salfrank, Esq.,** Spencer Fane Britt & Browne LLP, 1000 Walnut, Ste. 1400, Kansas City, Missouri 64106; **William E. Williams, Esq.**, GRAYROBINSON, P.A., 301 S. Bronough Street, Suite 600, Tallahassee, Florida 32302; **Peter Antonacci, Esq.,** GRAYROBINSON, P.A., 301 S. Bronough Street, Suite 600, Tallahassee, Florida 32301; and **Kent J. Perez, Esq.**, and **Alexis**

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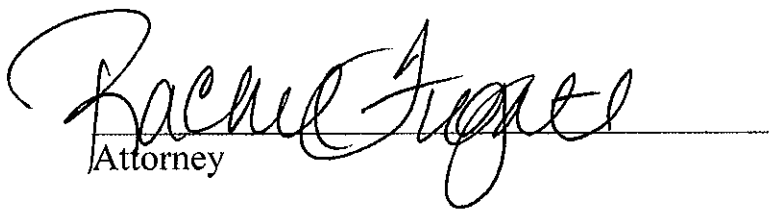
CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point and otherwise meets the requirements of the rule.



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