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

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellant,

vs.

THE ASSOCIATED PRESS, ET AL,

Appellees.

Case No.: 1D09-4385
L.T. Case No.: 2009-CA-2298

REPLY BRIEF OF APPELLANT, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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I. INTRODUCTION

The NCAA has not engaged in any plot to evade the Sunshine law. FSU delegated no public function to the NCAA and Appellees concede the NCAA never acted on behalf of FSU. These facts foreclose applying the Public Records Act to the NCAA under well-established Florida law. Like the trial court, Appellees' solution is to create a new rule that virtually anything viewed by a public official becomes a public record. Unlike the trial court, which at least conceded its ruling has no precedent[1], Appellees stubbornly deny this decision is novel, but a mere "high tech twist to an old story," Answer Brief, at 1 ("Br."), even though the "viewing is receiving" rule is not found in the Public Records Act or the case law. Inherently overbroad, the trial court's strained holding needlessly injures the NCAA's national membership for the sake of media curiosity about one member's high-profile athletics program.

II. ARGUMENT

A. Neither the Public Records Act nor Florida Cases Support Appellees' Argument that "Viewing" is "Receiving" under Section 119.011(12).

In order to find that confidential information created and maintained by the NCAA, in the course of its private enforcement affairs, should be disclosed to the media, the trial court had to interpret §119.011(12) Fla. Stat. so that any

[1] Lacking Appellees' apparent certainty, the trial court itself confessed that: "[t]his is an unusual set of circumstances which I have not yet seen addressed in cases specifically in this way * * * Perhaps the lack of case law authority on this in part contributed to the situation . . . . " Tr. 279, 281.

information "viewed" by FSU or its representatives instantly becomes a "public record." F.J. at 6-7. This ruling applies the Public Records Act to the NCAA, even though it has been delegated no public function by FSU.

1. The "Plain Language" of the Public Records Act Does Not Support the Ruling Below.

Appellees suggest the trial court broke no new ground in this ruling, boldly declaring "[w]hen an agency reviews a document in the course of agency business, it receives it." Br. at12. Yet, no cases support this sweeping proclamation. Lacking precedent, Appellees instead maintain the "plain language" of the Act should be construed to mean a public official's mere perusal of private documents constitutes "receipt" of public records. Br. at 16-17. [2]

The statutory text does not say this. Section 119.011(12) describes public records to include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, *regardless of the physical form, characteristics, or means of transmission* [of such documents]. . . ." *Id.* (emphasis added). That italicized phrase does not refer to the next clause requiring records be "*made or received*," rather it simply modifies the antecedent clause to provide that electronic forms of the defined documents are covered. *See*

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[2] Application of the Act under stipulated and uncontroverted facts does not present a "mixed question of law and fact," *see* Br. at 14, but is reviewed *de novo* as a matter of statutory construction in light of those facts. *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla.2003).

Ch. 95-296, § 6 at 2727, Laws of Fla. Moreover, however read, the phrase "regardless of the physical form, characteristics or means of transmission" does not mean that mere "viewing" of information, in whatever form, must be construed as "receipt." Had the Legislature intended this meaning, "it could easily have said so by writing that definition" into the act. *Lukacs v. Luto*n, 982 So.2d 1217, 1219 (Fla.1st DCA 2008).

To explain the "clear" statutory language, Appellees resort to a dictionary definition of "received" as meaning "to hear or see (information for example)." Br. at 16, (citing *The American Heritage College Dictionary*). Opening another, well-accepted dictionary yields a substantially different definition of "received" to mean "to come into possession of," *Webster's New Collegiate Dictionary* (11th Ed 2003). This ordinary meaning *has* been routinely applied by the courts. In every case cited or discussed by either party, physical possession is what constituted "receipt." No case has found that information "acquired" through visual osmosis but never formalized has been "received."

2. *Times Publishing* does not hold that Information Becomes a Public Record Solely By Virtue of Being "Viewed" by a Public Official.

Having no controlling, relevant authority, Appellees must rely on *Times Publishing Co. v. City of St. Petersburg*, 558 So.2d 487 (Fla. 2d DCA 1990) throughout their Brief in support of almost every Records Act argument. *Times*

Publishing does not support the proposition that "viewing is receiving." Nor does it even have any other relevant application to this case a host of reasons.

In *Times Publishing*, the media plaintiffs brought suit under Chapter 119 seeking documents generated during negotiations between the City of St. Petersburg and the Chicago White Sox relating to the team's proposed lease of the City's sports facility. *Id.* at 489. When the White Sox requested the negotiations be confidential, the *City's* attorney, not the White Sox, expressed concern about the Public Records Act, drafting and circulating a memorandum to City officials suggesting ways the City could avoid the law. *Id.* In stark contrast to stipulated facts in this case, the *Times Publishing* court held it was *the City* that devised a plan to evade the Act by deliberately not taking possession of any documents. *Id.*

Beyond it plainly distinguishable facts, nothing in *Times Publishing* supports the trial court's "viewing is receiving" reading of Chapter 119. Appellees' argument rests on a select snippet from that case, ignoring its context and the court's holding. Appellees note that the lease documents that were "shown to City employees," and that "the employees were prohibited from making or retaining copies." Br. at 18. They then falsely argue these documents became public records by virtue of being "exhibited" to the City, claiming that there "is no material difference here." *Id.* (citing what is really West's "Headnote" 5 to the case).

This argument misstates the holding of *Times Publishing* and disregards critical facts, including that: (1) the City itself helped create and revise the documents; (2) the documents were discussed and drafted during a mutual negotiations over a City contract; and (3) the City attorney outlined the plan to evade the act and purposefully avoid the City taking possession of the documents. *Times Publishing*, at 494. This was the basis for the court's finding that the City had "improperly delegated its recordkeeping function to the White Sox." *Id.* Nowhere does the court say the documents were public records merely because they had been "viewed" by the City that negotiated, revised and hid them.

The only other cases referenced by Appellees on this point do not advance their argument. *State v. City of Clearwater*, 863 So.2d 149, 154 (Fla. 2003) simply holds that not all electronic mail received by a public official is a public record because it resides on the agency's computer system. Likewise, in *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633 (Fla.1980), the Court flatly rejected the idea that §119.011(1) "applies to almost everything generated or received by a public agency," which is, in effect, the import of the ruling below. *Id.* at 640. *Shevin* held that letters, resumes and other documents gathered by an agency's executive search firm were public records, but that notes or drafts not

intended to "perpetuate, communicate or formalize" knowledge were not.[3] *Id.* at 640. The trial court's logic would lead to the odd conclusion that documents "reviewed" by FSU become "public records," while under *Shevin*, notes made during that review would not.

Appellees also fail to demonstrate how the "viewing is receiving" rule is even tenable. Among its many unworkable aspects is the fact that a private actor's information may be made into a public record without consent or even knowledge. For example, there is no dispute that the NCAA had no means to discern what information GrayRobinson reviewed or used in connection with its representation of FSU. Yet, under the court's reasoning, the NCAA would still have been a custodian of "public records" without its knowledge and without notice of which private documents became public records by being "viewed." Once on the secured website, each time a GrayRobinson attorney clicked "next" on their web-browser, a new public record was generated, unbeknownst to the NCAA.

Ironically, as much as Appellees decry any rule that promotes "evasion" of the Act, they advocate one which must rely on the veracity of the public official's agent to describe (and describe accurately) what private information was "viewed." For these reasons, this Court need not look far to see how the ruling below would

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[3] Importantly, in *Shevin*, the search firm was "acting on behalf of" the public agency by contract to screen potential job candidates for the agency and it was the agency that advised the firm of the desire for confidentiality. *Id.* at 635.

inevitably lead to absurd results. In keeping with the subject of FSU's intercollegiate athletic program, for example, if Coach Bowden were to review game film of a prospective student-athlete taken by the student's father and posted on a private website or viewed in the family's living room, and that review is in the course of the coach's "official business" of selecting football recruits for FSU, the ruling below means the film becomes a "public record" and the father a "custodian" of that record. While liberally applied, the Act should not support this tortured result.

Appellees downplay the NCAA's concerns regarding the effect of the trial court's decision as "overly dramatic," but fail to show how this is not a virtually limitless standard, one which even they articulate as an expansive, categorical rule. ("When an agency reviews a document in the course of agency business, it receives it." Br. at 40, 12.) Nor can Appellees successfully limit the ruling below by virtue of their *post hoc* decision to narrow their request to the two documents GrayRobinson now says it reviewed, rather than the entire contents of the secured site they originally demanded. Br. at 40.

B. Appellees Have Failed to Establish that FSU Delegated any Public Function to the NCAA.

Like the trial court below, Appellees seem to pretend this Court's ruling in *B & S Utils., Inc. v. Bakersville-Donovan, Inc.*, 988 So.2d 17 (Fla. 1st DCA 2008) does not exist. They cite it only to say that "public records may be found in private

hands," Br. at 30, with *no* further discussion, and ignore its holding proscribing the two limited circumstances under which those "private hands" may be subject to the Public Records Act; that is, either (1) through the delegation of a "statutorily authorized function to a private entity," or (2) under the "totality of the factors" test under *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla.1992). *Schwab* is not at issue and Appellees fail to show FSU delegated any "statutorily authorized function" to the NCAA.

Rather than address the NCAA's argument that *B & S Utilities* is dispositive, Appellees again rely on *Times Publishing*, this time claiming that "[t]here is no material difference between the actions of the NCAA and those of the White Sox." Br. at 32. *Times Publishing* is distinguishable for all of the reasons discussed above and does not excuse Appellees from showing why *B & S Utilities* does not control. This aside, the comparison of the NCAA to the White Sox is indefensible. The "improper delegation of the City's recordkeeping function" in *Times Publishing* was based solely on misconduct by the *City* in advising the White Sox how the two could avoid the Act and the *City* purposefully avoiding taking possession of the *City's* documents. *Id.* at 492. There is no evidence of any similar conduct by FSU. Just as Appellees ignore the inconvenient holding of *B & S Utilities*, they ignore the critical facts distinguishing the one authority on which they do rely. Nothing in *Times Publishing* supports the trial court's dubious

finding that FSU "involuntarily" assumed a position identical to the City. F.J. at 17. [4]

The question raised by *B & S Utilities* is whether a private entity performs a governmental function through delegation which would otherwise be a function of the public agency. In that case, the function delegated was providing municipal water and sewer services. Only documents generated that are related to that delegated function were subject to the Act. There is no evidence here FSU delegated any public function to the NCAA. To the contrary, Appellees now admit they "never argued that the NCAA was acting on behalf of FSU during the infractions proceedings." Br. at 36. This alone destroys any argument for applying the Act under *B & S Utilities*.

Because none of the circumstances previously recognized for applying the Act to a private party exist here, Appellees simply make up their own circular standard, claiming that "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." Br. at 36. If the NCAA never acted on behalf of FSU in connection with the enforcement proceedings, it makes no sense to say that FSU somehow delegated its "recordkeeping function" to the NCAA for all

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[4] Try as they might, Appellees cannot word their way around the absence of the kind of "scheme" found in *Times Publishing*, and they eventually admit as much. Br. at 40, n. 14.

documents concerning those proceedings. Br. 31, 36. No cases, not even *Times Publishing*, support this argument.

C. Appellees Misconstrue FERPA and the Nature of the Student Information at Issue.

Appellees read Chapter 119 too broadly and federal and state law regarding student records too narrowly. After arguing that Chapter 119 reaches every document viewed by a public official, they spend more than seven pages trying to persuade this Court that documents arising from an academic cheating scandal have nothing to do with education or the 61 students implicated. Br. at 20-27. In support, Appellees cite a body of inapposite cases involving physical or sexual misconduct by teachers and a case about student parking violations. The single case they do cite not concerning teacher misconduct, *Owasso Independent School District v. Falvo*, 534 U.S. 246 (2002), Br. at 25, is distinguishable for the simple reason that it involved students who "were not acting for an educational institution" under FERPA when they kept possession of each other's "peer graded" papers. *Id.* at 433, 436.

The NCAA never suggested that teacher records and parking violations fall under FERPA or that its privacy protections should be manipulated by dropping student names into otherwise public documents. Rather, the NCAA simply submits that records directly relating to academic misconduct by 61 specific

students at an institution of higher education easily fall within FERPA's definition of "education record." *See* 20 U.S.C. § 1232g(a)(4)(A).

Appellees confuse the content of the documents at issue with the context in which they arose. It is the former which matters; not the latter. Ignoring the obvious educational content, they argue that the documents at issue cannot be education records because FSU's appeal from NCAA sanctions is about "the institution's and its employees' behavior." Br. at 24, 26-27. This misses the broader scope of the NCAA's responsibility in connection with the cheating scandal at FSU. Although Appellees choose to focus on one narrow slice of the scandal (i.e., institutional responsibility), the reality is that scandal directly impacted the eligibility of student-athletes and their academic misconduct. Even Appellees acknowledged FERPA's obvious protection and withdrew their request for at least some records. Br. at 7, n. 6. However, documents related to different penalties arising from the same investigation do not cease being education records simply because they are used in another context.

Thus, it is irrelevant under FERPA that one focus of the COI hearing was the conduct of FSU or one employee. Here, the NCAA investigation would not exist but for student athlete academic misconduct. While a teacher and student-staff were questioned, this inquiry was to discover the extent of the academic misconduct of students – not at teacher or staff misconduct. If the NCAA

transcript is released in an un-redacted format, detailed information about specific student-athletes engaged in academic fraud such as grades, courses taken, and even a reference to a student's IQ would be disclosed. This is precisely what FERPA is designed to prevent.

Appellees also read Florida's student privacy laws far too narrowly. *See* § 1006.52 (2009), Fla. Stat. (effective July 1, 2009). The state statute not only ensures compliance with FERPA, but also expands those protections by providing that the such records are entirely exempt from the Public Records Act, not just personally identifiable information, and not "redactable." *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004) Accordingly, the judgment below improperly allows public access to student-education information in violation of FERPA and any proposed solution to redact this information violates Florida's broader law.

D. Evidence of Harm to the NCAA Was Undisputed and Appellees Misstate that Harm and its Constitutional Implications.

At several points, Appellees make the reckless and unsupported assertion that the burdens imposed on the NCAA by the trial court's order "are non-existent." *See, e.g.*, Br. at 44, 46-47. However, because evidence of the real and significant harms to the NCAA was admitted and wholly uncontroverted at trial, this argument is predictably light on citations to the record. It represents no more than speculation by "Media Entities" about the complex functions of the NCAA.

Opinions of newspaper publishers regarding the governance of intercollegiate athletics are entitled to no deference and are improper "argument" before this Court. Further, their basic misunderstanding of the NCAA, and the uncontroverted harm flowing from the order below, are reflected in the sole record citation in this portion of their Brief. Specifically, Appellees cite NCAA Bylaw 32.8.7.4.1 and opine that the NCAA's concerns about confidentiality are overstated. Br. at 46. However, they misapprehend that Bylaw and confuse two very different types of witnesses in NCAA investigations. In doing so, they inadvertently support the NCAA's position in this appeal.

One type of witness, called a "confidential source" in Bylaw 32.8.7.4.1, does not want his or her identify revealed to members of the COI. Obviously testimony from such a witness cannot be used to support an alleged infraction and the cited Bylaw provides accordingly. These witnesses are not at issue in this case. In contrast, as explained in the NCAA's Initial Brief (pp. 42-43), the vast majority of witnesses allow their names to be shared with the COI but do not want their names disclosed *publicly*. These witnesses, who are critical to enforcement operations, provide information and cooperate in investigations because they understand their involvement will be known only by those at the COI hearing and not by newspaper reporters or members of the public. Tr. 106-08. It is *this* expectation of

confidentiality beyond the COI hearing that is in jeopardy and which will discourage otherwise willing witnesses from providing information.

Although the Bylaw cited by Appellees has nothing to do with these witnesses, the trial court's decision has everything to do with them. Appellees did not rebut the NCAA's evidence regarding the resulting harm to its membership and the trial court erred as a matter of law by ignoring uncontroverted testimony by NCAA witnesses. Further, Appellees' suggestion that the judgment below has not yet unleashed any parade of horrible misses the larger point that the court's ruling effectively opens access the entire secured site and, by extension, its logic (if accepted) would apply in all future enforcement cases.

Appellees' failure to appreciate the basic nature of the NCAA is also demonstrated by their confusing two distinct lines of cases under the Commerce Clause. As the trial court did, Appellees rely on cases which focus on whether a state law "discriminates" against commerce by measures to benefit in-state interests. Br. at 42. However, the NCAA does not argue that the Act was intended to "target" the NCAA. Rather, as applied, the evidence clearly showed that the Act would severely disrupt and impair the NCAA's ability to conduct its interstate affairs *uniformly*.[5]

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[5] Under this line of cases, the Supreme Court has " invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on

Finally, the media Appellees' repeated trivializing of the NCAA's vital need for confidentiality is ironic, if not disingenuous, since they routinely rely on the same principles for the same reasons and have vigorously fought for the right to shield their "sources" from disclosure. *See, e.g.,* § 90.5015, Fla. Stat..

III. CONCLUSION

Florida law is clear that the Public Records Act is intended to ensure open government, not to provide public access to a private association's documents or its rules proceedings. This case does not present a "routine" application of Chapter 119. The trial court conceded this. Appellees have simply created a new definition of "public record" that suits them, one has never before been recognized by a Florida court. At the same time, they ignore—because they cannot satisfy—the well-established law limiting when private entities may be subject to the Act. The judgment below is unprecedented, unworkable and misapplies the Act, and this Court should reverse it as matter of law.

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similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n. 12 (1997). *See e.g. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (train lengths); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88, 107 S.Ct. 1637, 1649, 95 L.Ed.2d 67 (1987) ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

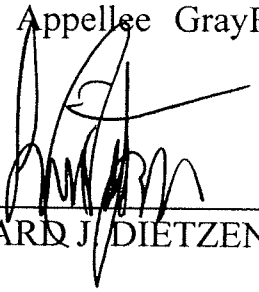
I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

LEONARD J. DIETZEN, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Electronic Mail to Gregg D. Thomas, Esquire, Carol Jean LoCicero, Esquire, Rachel E. Fugate, Esquire, Thomas, LoCicero & Bralow PL, P.O. Box 2602, Tampa, FL 33602, George Freeman, Esquire, The New York Times Company, 620 Eighth Avenue, New York, NY 10018, Michael J. Glazer, Esquire, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302, George Gabel, Esquire, Holland & Knight LLP, 50 North Laura Street, Suite 3900, Jacksonville, FL 32202, David S. Bralow, Esquire, 220 E. 42nd Street, Suite 400, New York, NY 10012, representing Appellees The Associated Press; Cape Publications, Inc., Collier County Publishing LLC, First Amendment Foundation; Florida Press Association; Lakeland Ledger Publishing Corporation, Media General Operations, Inc., Miami Herald Media Company, Morris Publishing Group LLC, News-Journal Corporation, NYT Management Services Inc., Orlando Sentinel Communications Company, Multimedia Holdings Corporation; Scripps Howard Broadcasting Company, Scripps Treasure Coast Publishing LLC, Sun-Sentinel, Inc., Tampa Bay Television, Inc., Federated Publications, Inc. WJXX, Gannett River States Publishing Corporation; and WTSP, William E. Williams, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Betty Steffens, Florida State University, 211 Westcott Building, Tallahassee, FL 32306-

1470, Representing Appellee Florida State University Board of Trustees and T.K. Wetherell and Peter Antonacci, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Representing Appellee GrayRobinson, P.A. this _____ day of September, 2009.



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