

IN THE SUPREME COURT OF FLORIDA

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

Petitioner,

vs.

Case No.: SC09-1909

THE ASSOCIATED PRESS, et al.,

Respondents.

**RESPONDENTS' OPPOSITION TO
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S
EMERGENCY MOTION FOR STAY PENDING APPEAL**

Respondents oppose Petitioner National Collegiate Athletic Association's Emergency Motion for Stay Pending Appeal (the "Motion for Stay"). This case is about the public's constitutional and statutory right of access to records received and utilized by a public university in the course of its official business. This case is not, as the NCAA might lead the Court to believe, about the right of the public to rifle through the private files of the NCAA, or about jeopardizing "the privacy rights of ... thousands of student-athletes." Motion for Stay at 1. Instead, two documents are at stake, documents the NCAA affirmatively made available to Florida State University ("FSU") for its review and use in the conduct of FSU's official business. Under well-established law, the two documents are undoubtedly public records, as both the trial court and the First District Court of Appeal found.

And redacted versions of both documents have now been publicly disseminated by FSU.

The records at issue involve the conduct of a public university charged with educating students and the conduct of its teaching employees. The NCAA withheld them – and interfered with FSU’s ability to disclose them – for far too long. This Court is adamant that “[n]ews delayed is news denied. To be useful to the public, news events must be reported when they occur.” State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1976). The stay sought by the NCAA would be simply one more impediment to the timely disclosure of full information about a cheating scandal in the athletic department of a major public university. Moreover, a stay would not be effective because, as of today, the contents of both documents have now been released by FSU and are public. (As agreed to by the parties, student names and identifying information were first redacted.) A stay at this juncture would serve no purpose.

Background

Respondents include the Associated Press, the First Amendment Foundation, the Florida Press Association and nearly twenty newspapers, television stations and online publishers in Florida. The NCAA is an unincorporated voluntary association of colleges and universities, including many public institutions.

The underlying case arose from the discovery of academic misconduct at FSU, from FSU's and the NCAA's investigation of that misconduct, and from the imposition of sanctions upon FSU. On October 28, 2008, the NCAA's Committee on Infractions conducted a hearing with respect to the purported misconduct. A transcript of the October 28 hearing (the "Hearing Transcript") is one of the two records at issue in this case. See October 1, 2009 Opinion (Fla. 1st DCA) (the "Opinion") at 4.

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

main purpose of the Custodial Site is to maintain confidentiality of documents on the Custodial Site. Opinion at 4-5.

On behalf of FSU, GrayRobinson accessed documents on the Custodial Site and utilized them in assisting FSU in preparing its appeal of the NCAA sanctions. On April 23, 2009, FSU filed its initial brief in the Infractions appeal. The NCAA Committee on Infractions issued a written response to FSU's Appeal on June 2, 2009. The Committee on Infractions' June 2, 2009, Response (the "June 2 Response") is the second record at issue in this case. Opinion at 5-6.

Plaintiffs made public records requests to FSU, GrayRobinson, and the NCAA for access to documents related to the FSU sanctions appeal, including documents that FSU (via GrayRobinson) reviewed on the Custodial Site. FSU, GrayRobinson, and the NCAA failed to provide the public records. As a result, on June 15, 2009, Plaintiffs filed their initial complaint in this case.

On June 16, 2009, the NCAA indicated that it would not object to FSU's transcribing the June 2 Response from the Custodial Site and disclosing that transcript to Plaintiffs, provided that FSU redacted student identifying information from the transcript. On June 18, 2009, FSU transcribed the June 2 Response from the Custodial Site, redacted personally identifiable information of its students, and provided the redacted June 2 Response to Plaintiffs and the public.

In response to Plaintiffs' lawsuit, the trial court conducted several hearings, including a two-day non-jury trial on August 20-21, 2009. It reviewed the records at issue. In a written Final Judgment issued on August 28, 2009, the trial court ruled that the June 2 Response and Hearing Transcript were received by FSU and GrayRobinson in connection with FSU's official business and were public records under Article I, Section 24 of the Florida Constitution and under the Public Records Act, Chapter 119, Florida Statutes. Opinion at 7.

The trial court further held that these public records were not exempt from disclosure under Florida or federal law or by virtue of any contractual confidentiality provisions. The court ordered the NCAA (and FSU and GrayRobinson) to produce the records to Plaintiffs. That order was temporarily stayed while the case was appealed to the First District Court of Appeal.

On October 1, 2009, after receiving briefing, hearing oral argument, and reviewing the redacted records *in camera*, the Court of Appeal issued its unanimous Opinion affirming the Final Judgment. On October 13, the same Court denied the NCAA's Motion for Rehearing and Alternate Motion for Certification and the NCAA's Motion to Stay Issuance of Mandate Pending Appeal.

The First District Court of Appeal issued its mandate on the afternoon of October 13, 2009. The next morning, and consistent with the Opinion, FSU released to Petitioners a redacted copy of the Hearing Transcript that FSU was able

to screen print. Thus, the substance of the both the June 2 Response and the Hearing Transcript are now available to the public.

Argument

I. The NCAA Has Not Demonstrated The Right To A Stay.

Where a party seeks a stay pending its request for discretionary review in the Florida Supreme Court, the factors to be considered are the likelihood that this Court will accept jurisdiction, the likelihood of success on the merits, the likelihood of harm if no stay is granted, and the remediable quality of any such harm. State ex rel. Price v. McCord, 380 So. 2d 1037, 1038 n.3 (Fla. 1980).

Essentially, the moving party must meet the injunction standard. None of these factors, however, favor the granting of a stay.

A. The NCAA Has Not Shown That This Court Is Likely To Accept Jurisdiction.

The Motion for Stay does not even attempt to demonstrate that this Court is likely to accept jurisdiction of this case. The NCAA asked the First District Court of Appeal to certify to this Court several questions of allegedly great public importance. The Court of Appeal refused to do so. Nor did the Court of Appeal note any conflict between its Opinion and the decision of any other Florida court or the United States Supreme Court. And the NCAA has not identified such a conflict. Not one case has been cited. Quite simply, nothing in the record suggests

that this Court is likely to accept jurisdiction over this case. On that basis alone, the Motion for Stay should be denied.

B. The NCAA Cannot Demonstrate A Likelihood Of Success On The Merits.

The fact that the NCAA is not likely to succeed on the merits is made abundantly clear both by the trial court's well-reasoned final judgment in this case and by the First District Court's unanimous Opinion authored by Judge Padovano. In the Opinion and following precedent from this Court, the Court of Appeal explained in no uncertain terms that:

...the documents at issue in this case were examined by lawyers for a public agency, Florida State University, and used in the course of the agency's business. Because the documents were received in connection with the transaction of official business by an agency, they are public records. The NCAA has failed to show that an exception applies under state or federal law, and thus the records must be disclosed.

Opinion at 3. The Opinion expresses no doubt or hesitancy about its conclusions. The NCAA has given no reason to expect this Court to overrule the Opinion.

Moreover, Florida's strong public policy in favor of open access to government records (see, e.g., Media General Convergence, Inc. v. Chief Judge of Thirteenth Judicial Circuit, 840 So. 2d 1008, 1014 (Fla. 2003)) renders it doubly unlikely that the NCAA would succeed in its efforts to justify hiding the two documents at issue. See Dade County Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 304 (Fla. 3d DCA 2001) ("When there is any doubt [about

application of the Public Records Act], the court should find in favor of disclosure.”). Indeed, as the trial court explained, to adopt the NCAA’s position that the two documents are not public records “would emasculate the policy of open government embodied in the Public Records Act and Florida’s Constitution and would provide clever proponents of secret communication with the government an easy mechanism for avoiding the public’s right to know what its government is doing.” Final Judgment at 7.

The Opinion meticulously addressed each of the NCAA’s arguments against disclosure and found those arguments wanting. The Motion for Stay provides no basis for questioning the correctness of the Opinion, let alone for believing that the NCAA is likely to succeed on the merits of its claims.

C. The NCAA Is Not Likely To Suffer Any Harm If The Records Are Disclosed.

As the Opinion explains, the NCAA’s claim that it will be severely harmed by disclosure of the documents at issue in this case is not credible because application of Florida’s public records laws in this case “is not so distinctive [from the public records laws of other states] that it would force the NCAA to change the way it does business.” Opinion at 24. The NCAA has never once explained how the disclosure of the two documents at issue will have any actual negative effect on it. Given the fact that the substance of both documents is now publicly available, the argument simply makes no sense.

Moreover, the NCAA cannot demonstrate harm merely by asserting that the denial of a stay will lead to the release of the records at issue. Obviously, such an argument is not unique to this case; the defendant in every Public Records Act case can make the same claim. Fortunately, this argument has already been rejected by Rule of Appellate Procedure 9.310(b)(2), which establishes only a 48-hour automatic stay in public records cases. After those 48 hours have passed, the records custodian must essentially satisfy the injunctive relief standard to obtain a stay. Otherwise, “[b]y the mere taking of an appeal, the agency could delay a person’s right to examine public records until through the sheer lapse of time, the need expired. This would defeat the purpose of the Public Records Act.”

Boutwell v. Nichol’s Alley of Jacksonville, Inc., 364 So. 2d 1246, 1248 (Fla. 1st DCA 1978). As a result, “[a] stay order shall not be issued unless the court determines that there is a substantial probability that opening the records for inspection will result in significant damage.” Id. Here, the NCAA has utterly failed to demonstrate that it would suffer any real damage, let alone demonstrate a substantial probability it will suffer significant damage, if the stay is denied.

D. Any Harm That Could Theoretically Be Suffered By The NCAA Can Be Remedied On Appeal.

The final stay factor also weighs against the NCAA. If the NCAA could convince this Court to accept jurisdiction, and if the NCAA could somehow persuade this Court that the NCAA is exempt from Florida’s public records laws,

the denial of a stay still would not cause any harm to the NCAA, because as noted above, it is already too late to stay the release of the documents at issue. The substance of the two documents at question has already been made public.

Nothing this Court does is going to put the “cat back in the bag.”

The only real remedy the NCAA could possibly receive from this Court would be a decision that, in future cases involving similar facts, the NCAA is not required to disclose documents it presents to a Florida public university for review and use. That remedy remains available regardless of whether a stay is granted. A stay is not necessary.

II. Further Delay And Frustration Of The Public Records Laws Should Not Be Countenanced.

More than four months ago, Respondents requested access to public records from the NCAA, FSU, and GrayRobinson. Since that time, Respondents have been forced to file a lawsuit to compel disclosure of these public records. Also since that time, the trial court in this matter has conducted a bench trial, reviewed the documents *in camera*, and issued a detailed written order concluding that the records sought are public records and must be disclosed. Similarly, the First District Court of Appeal has received extensive briefing and heard oral argument in this case, reviewed the documents *in camera*, and has issued a lengthy written opinion concluding that the records sought are public records and should be disclosed. During the last four months, FSU has acknowledged that the records

sought are public records and should be disclosed (and has asked the NCAA to disclose them). And the Attorney General of Florida has weighed in on this matter, opining that the records sought are public records and should be disclosed. To date, however, the NCAA has not disclosed a single requested record in its possession.

Standing alone, this delay would be extraordinarily troubling. But this delay does not stand alone. Rather, the NCAA has taken repeated steps to ensure that the documents at issue not be disclosed. As explained above, the NCAA provided FSU with access to the documents only via a secure, Web-based custodial site, from which FSU was told that it could view the documents in a read-only format, but could not save, download, or print the documents. And, before being permitted to view the documents, FSU's attorneys were required to sign patently unlawful confidentiality agreements under which they agreed that they could not copy, print, or download documents from the custodial site – even though the documents were to be used in connection with FSU's official business.

Now, in the face of trial and appellate court decisions deeming the records public, a decision denying the NCAA's request to stay the appellate court's mandate, and the public disclosure of the substance of the two documents, the NCAA requests further unnecessary delay. This request is unfounded and should be denied.

Conclusion

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

DATED this _____ day of October, 2009.

Respectfully submitted,

THOMAS, LOCICERO & BRALOW PL

Gregg D. Thomas
Florida Bar Number 223913
Carol Jean LoCicero
Florida Bar Number 603030
Rachel E. Fugate
Florida Bar Number 0144029
James J. McGuire
Florida Bar Number 01887798
400 N. Ashley Drive, Suite 1100
Post Office Box 2602 (33601-2602)
Tampa, Florida 33602
Telephone: (813) 984-3060
Facsimile: (813) 984-3070

David S. Bralow
Florida Bar. No. 082727
220 E. 42nd Street, Suite 400
New York, New York 10012
Telephone: (212) 210-2893
Facsimile: (212) 210-2883

ATTORNEYS FOR APPELLEES

Of Counsel:

George Freeman

Florida Bar Number 233684
Vice President and Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, New York 10018
Telephone: (212) 556-1558
Facsimile: (212) 556-4634

George Gabel

Florida Bar Number 27220
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202
Telephone: (904)798-7360
Facsimile: (904)358-1872

Michael J. Glazer

Florida Bar Number 286508
Ausley & McMullen
227 South Calhoun Street
P.O. Box 391 (32302)
Tallahassee, Florida 32301
Telephone: (850) 425-5474
Facsimile: (850) 222-7560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Delivery and U.S. Mail to **William E. Williams, Esq.**, GRAYROBINSON, P.A., Post Office Box 11189, Tallahassee, FL 32302; **Peter Antonacci, Esq.**, GRAYROBINSON, P.A., 301 S. Bronough Street, Suite 600, Tallahassee, FL 32301; **Dayton M. Cramer, Esq.**, and **Linda C. Schmidt, Esq.**, The Florida State University, Office of the General Counsel, 222 S. Copeland Street, Tallahassee, FL 32306; **E. Thom Rumberger, Esq.**, and **Leonard J. Dietzen, Esq.**, RUMBERGER, KIRK & CALDWELL, 215 South Monroe Street, Suite 130 Post Office Box 10507, Tallahassee, FL 32302; **Jonathan F. Duncan, Esq.**, and **Linda Salfrink, Esq.**, Spencer Fane Britt & Browne LLP, 1000 Walnut, Ste. 1400, Kansas City, MO 64106; and **Kent J. Perez, Esq.**, and **Alexis Lambert, Esq.**, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050 on this ____ day of October, 2009.

Attorney