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Finally, Public Agency Does Not Have to Pay Media's Attorneys' Fees under Florida Public Records Act

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In *State Attorney's Office of the Seventeenth Judicial Circuit, et al., v. Cable News Network, Inc., et al.*,ⁱ the Fourth District Court of Appeal held that the School Board of Broward County is not required to pay the Media Parties' attorneys' fees and costs for withholding video footage of the Marjory Stoneman Douglas High School shooting.ⁱⁱ Although the Court upheld the trial court's decision requiring the Board to release the footage, it explained that the Board's refusal was required by statute and therefore its actions were not unlawful such that it should be required to pay the Media Parties' fees.

In order to evaluate law enforcement's response to the Marjory Stoneman Douglas High School shooting, the Media Parties requested copies of certain portions of the High School's exterior video surveillance recordings under Chapter 119, Florida Public Records Act. The Broward Sheriff's Office, the School Board of Broward County, and the State Attorney's Office refused, arguing that the footage was exempt from disclosure.

As a result, the Media Parties sued the Board alleging that "good cause" existed in the form of "extreme public interest" in the "response of law enforcement officers during the shooting and immediately thereafter" justifying disclosure. The Board argued that the footage was exempt from disclosure under the "security plan exemption," Section 119.071(3)(a), *Florida Statutes*, because it could reveal information related to the capabilities and vulnerabilities of the school's security systems, imperiling the safety of its students and employees. After several evidentiary hearings, the trial court ruled that the video recordings were public records, and that the "public's right to be informed" constituted "good cause" for disclosure, outweighing the harm caused by the release of minimal information about the school's security system. The Board complied with the

trial court's initial order to release certain footage, but appealed the court's second order requiring the release of additional footage.

On appeal, the Board argued that the video surveillance of the High School directly related to the school's security systems and plan, exempting it from disclosure under Section 119.071. Further, the Board maintained that while the Florida Public Records Act does not define "good cause," analogous case law provides guidance on the "good cause exception" to the security plan exemption, and, under that framework, more is required to meet the good cause standard than a mere showing of the public's need for the information.

In response, the Media Parties contended that because the trial court found that the footage revealed only minimal information about the school's security system, the "security plan exemption" did not apply. Moreover, even if it did apply, the Media Parties pointed to the trial court's review of witness testimony, documentary evidence, and the video footage itself as sufficiently supporting a finding that the good cause exception to the exemption applied. The Media Parties further argued that because the Board's refusal to disclose the videos was therefore unlawful, they were entitled to attorneys' fees under Section 119.12(1)(a), *Florida Statutes*.

The Fourth DCA affirmed the trial court's second order to produce the requested footage, but it agreed that the Board had properly withheld production under the security plan exemption.ⁱⁱⁱ The Court concluded that the Legislature intended "a court of competent jurisdiction" to apply a common-law approach in determining whether good cause existed, and that the trial court was in the best position to weigh, on a case-by-case basis, the competing needs of disclosure and secrecy of government records. Lastly, the Court, in a separate unanimous opinion, reasoned that the Board's good faith conduct did not become "unlawful" simply because the Board pursued this unsettled area of law on appeal – the Board was initially required by statute to withhold the footage, and therefore its refusal to turn it over before a judicial finding of "good cause" did not entitle the Media Parties to attorneys' fees.

Public employers who have been faced with the most challenging of events in this past year finally received a break for following the statutes that they believe governed this terrible incident. One would hope that future courts understand the difficulties public agencies face in balancing the rights of students versus the rights of the press when it comes to the expensive Florida Public Records Act.

ⁱ The full case name is: *State Attorney's Office of the Seventeenth Judicial Circuit and School Board of Broward County v. Cable News Network, Inc., Miami Herald Media Company, Sun-Sentinel Company, LLC, ABC, Inc., The Associated Press, The Bradenton Herald, The First Amendment Foundation, Florida Press Association, Gannett Co., Inc., Los Angeles Times Communications, LLC, The New York Times Company, Orlando Sentinel Communications Company, LLC, Broward County Sheriff's Office, and Scott Israel, in his capacity as Broward County Sheriff*. This article shall refer to all appellees as "the Media Parties."

ⁱⁱ The Opinions, not yet released for publication, can be found at: 2018 WL 3569397 (Fla. 4th DCA July 25, 2018) and 2018 WL 3769198 (Fla. 4th DCA August 8, 2018).

ⁱⁱⁱ The Court also held that the Media Parties were not entitled to attorneys' fees from the State Attorney, who had argued that the videos were exempt under the criminal investigation information exemption, because the footage was created before the criminal investigation began, the footage was compiled by the School Board instead of a law enforcement agency, and the State Attorney was never the custodian of the public records at issue, i.e. the video footage.