

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA  
CIVIL DIVISION

MARY LOU SMITH, an individual,  
and SHARON DENSON, an individual,

Plaintiffs,

vs.

CASE NO. 2008 CA 11315

TRAILER ESTATES PARK AND  
RECREATION DISTRICT,  
an independent special taxing district,  
JANET JONES, an individual,  
JOHN VANDER MOLEN, an individual,  
JOSEPH SALERNO, an individual, and  
MARY LOU McNULTY, an individual,

Defendants.

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**TRAILER ESTATES'S TRIAL BRIEF**

Defendant, Trailer Estates Park And Recreation District ("Trailer Estates"), provides the following Trial Brief to the Court:

**I. GOVERNMENT-IN-THE-SUNSHINE**

**1. Requirements To Prove A Government-In-The-Sunshine Violation**

Fl. Stat. § 286.011(1)

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule or formal action shall be considered binding except as taken or made at such meeting.

*B.M.Z. Corp. v. City of Oakland Park*, 415 So. 2d 735 (Fla. 4th DCA1982)

"In the present case there was no evidence before the trial court of any decision having been reached in private so that the subsequent formal action was merely a perfunctory ratification of secret decisions, or a ceremonial acceptance of secret actions." *Id.* at 738 (emphasis added,

internal citation omitted).

“We are at a loss to see how the trial court could have determined with whom specifically the conversations took place, or when and where they were held, or what was said by whom-to-whom and in whose presence, or what was done at or as a result of those conversations.” *Id.* at 737.

## 2. **Cure of Sunshine Violation**

*Tolar v. School Board of Liberty County*, 398 So. 2d 427 (Fla. 1981)

Public final action of a board will not always be void and incurable merely because the topic of final public action was previously discussed at a private meeting. *Id.* at 428.

The Board’s public final action will stand where it was “not merely a ceremonial acceptance of secret actions and was not merely a perfunctory ratification of secret decisions at a later meeting open to the public.” *Id.* at 429.

## 3. **Administrative decisions**

AGO 81-88

Meetings between officers solely in their capacity as departmental heads, and merely for the purpose of coordinating administrative and operational matters between departments for which a vote or other formal action by the governing body is neither required nor contemplated in the future are not subject to the Government in the Sunshine law.

AGO 93-41

Public officials may discuss matters which may foreseeably come before or are currently being considered by the board or commission amongst themselves without violating the Sunshine Law when such matters do not require action by the board or commission.

## 4. **Fact Finding Reports**

*Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d DCA 1976)

Frequent and unpublicized meetings between an executive officer and advisors, consultants, staff or personnel under his direction, for the purpose of fact finding to assist him in the execution of his duties, are not “meetings” within the Sunshine Law. *Id.* at 99.

It would be unrealistic to require that every meeting, ever contact, and every discussion with anyone from whom executive officers of any county, city or political subdivision would seek counsel or consultation to assist in acquiring necessary information, data or intelligence

needed to advise or guide authority by whom they are employed be a public meeting within the disciplines of the Sunshine Law. *Id.* at 100.

*Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), rev. den. 790 So.2d 1105 (Fla. 2001)

“When a committee has been established for and conducts only information gathering and reporting, the activities of that committee are not subject to section 286.011, Florida Statutes.” *Id.* at 789.

Citizen claiming violations has “burden of proof to establish by the greater weight of the evidence that a meeting should have been held in the sunshine.” *Id.* at 789.

*Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974)

Committee can privately interview persons concerning the subject matter of the committee’s business or discuss among itself in private those matters necessary to carry out the investigative aspects of the committee’s responsibility. *Id.* at 647.

#### **5. Memorandum by Board Member**

AGO 89-23

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting does not violate Florida’s Government in the Sunshine Law if prior to the public meeting, there is no interaction related to the report among the commissioners.

AGO 96-35

It is permissible for a board member to prepare and circulate an informational memorandum or position paper to other board members without violating the Sunshine Law.

#### **6. Resignation from the Board**

*Smith v. Brantley*, 400 So. 2d 443 (Fla. 1981).

The Florida Supreme Court has held that Article X, Section 3 of the Florida Constitution, stating “[v]acancy in office shall occur upon . . . resignation” of the incumbent, means that resignation is complete upon the tender of the resignation and no acceptance by an authority is required.

**7. Exemption for Shade Meeting**

AGO 93-53

Section 286.011(8) applies to a special district created by special act.

AGO 98-06

Section 286.011(8), Florida Statutes, allows a governmental entity seeking direction and information regarding litigation, to meet with both the board attorney and litigation attorney.

*Bruckner v. City of Dania Beach*, 823 So. 2d 167 (Fla. 4th DCA 2002)

F.S. 286.011(8)(b) enables a governmental entity to meet privately with its attorneys to discuss pending litigation in which the entity is presently a party before a court or administrative agency provided that (1) the entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation and (2) that the subject matter of the meeting is confined to settlement negotiations or strategy sessions related to litigation expenditures. *Id.* at 170.

**II. PUBLIC RECORDS**

Fl. Stat., § 119.07(1)(a) and (1)(c)

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.

**1. Award of Attorney's Fees**

Fl. Stat., § 119.12

If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award the agency responsible, the reasonable costs of enforcement including reasonable attorney's fees.

*Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1<sup>st</sup> DCA 2003)

Section 119.12, Florida Statutes, should be construed so as to best enforce the promotion

of access to public records. *Id.* at 1249.

Such costs of enforcement are required to be reasonably incurred in the course of the litigation, depending upon the peculiar facts of each case. *Id.* at 1250.

*Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990)

Section 119.12, Florida Statutes, permits the award of fees only in civil actions seeking to require an agency to permit the inspection, examination or copying of a public record. No fee is authorized for efforts expended to obtain the statutory fee. *Id.* at 248.

*City of Winter Garden v. Norflor Construction Corp.*, 396 So. 2d 865 (Fla. 5th DCA 1981)

The award of attorneys' fees under F.S. 119.12 should not include payment for services incurred to obtain records already in the requesting party's possession, but should be limited to reasonable attorney's fees for necessary legal services performed leading to the full production of all relevant public records and should not include payment for legal services rendered thereafter in the trial court or on appeal. *Id.* at 867.

## **2. Unlawful Refusal**

*Office of the State Attorney for the Thirteenth Judicial Circuit v. Gonzalez*, 953 So. 2d 759 (Fla. 2d DCA 2007)

Attorney's fees are awardable for unlawful refusal to provide public records under two circumstances: (1) when a court determines that the reason proffered as a basis to deny a public records request is unreasonable, and (2) when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced. *Id.* at 764.

*Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F. Supp. 2d 691 (M.D. Fla. 2007)

The court notes that the numerous public record request were handled by a single administrative assistant and that most of the documents requested were produced, but for a few e-mails. Since 555 pages of documents were produced and other documents were produced as a result of subsequent requests and the agency never denied any requests for documents, the court found that the inadvertent failure to include all the documents was not an "unlawful refusal." Thus the policy to be served by section 119.12, Florida Statutes, requiring attorney's fees as a sanction for unlawful refusal to provide records, is not applicable. *Id.* at 738.

## **3. Allegedly Missing Public Records**

*Hillier v. City of Plantation*, 935 So. 2d 105 (Fla. 4<sup>th</sup> DCA 2006)

The appellate court affirmed the trial court's ruling that the city had not violated the public records law. The plaintiff was unable to confirm or deny the existence of many of the documents he requested or that they were in the City's possession. The City showed that Plaintiff was never denied an opportunity to inspect, examine or copy any of the City's records and that some of the documents did not exist. *Id.* at 106.

#### **4. Good Faith Exception**

*Knight Ridder v. Dade Aviation Consultants*, 808 So. 2d 1268 (Fla. 3d DCA 2002).

Entitlement to fees under F.S. 119.12 is based upon whether the public entity had a reasonable or "good faith" belief in the soundness of its position in refusing production. *Id.* at 1269.

*WFSH of Niceville v. City of Niceville*, 422 So. 2d 980 (Fla. 1<sup>st</sup> DCA 1982)

Whether a party is entitled to fees under 119.12, Florida Statutes, falls under the trial court's discretion. *Id.* at 981.

Even though the advice upon which it relied in withholding public records was incorrect, the government entity did not act unreasonably in relying upon advice and withholding public records until a ruling could be obtained from the trial court. The city's actions were justified. *Id.* at 981.

*News-Press Publishing Co. v. Gadd*, 432 So. 2d 689 (Fla. 2d DCA 1983)

Section 119.12 provides for attorney's fees against an agency refusing to permit public records to be inspected only if the court determines the agency refusal to have been unreasonable. *Id.* at 689.

Where there are legitimate differences of opinion as to the lawfulness of the refusal to allow inspection of public records, the trial court had support to refuse to find the government entity acted unreasonably. *Id.* at 690.

#### **5. Delay**

*Office of the State Attorney for the Thirteenth Judicial Circuit v. Gonzalez*, 953 So. 2d 759 (Fla. 2d DCA 2007)

Delay cannot in itself create liability under section 119.12, Florida Statutes. The delay must be unjustifiable and thus amount to an unlawful refusal." *Id.* at 765 n. 4

### III. OTHER LEGAL ISSUES

#### 1. Laches

*Blumin v. Ellis*, 186 So. 2d 286 (Fla. 2d DCA 1996)

The elements of laches are: (1) conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is made; (2) delay in asserting the plaintiff's rights, he having had an opportunity to institute suit; (3) lack of knowledge or notice on the part of defendant that plaintiff would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in event relief is accorded to plaintiff. *Id.* at 294.

*Thrasher v. Ocala Mfg. Ice and Parking Co.*, 153 Fla. 488 (1943)

There can be no rigid rule to determine whether laches will bar a claim. The nature and circumstances must govern. Laches will apply where there is an unexplained delay in prosecuting the claim until death has closed the lips of interested parties. *Id.* at 489-90.

*Citizens State Bank v. Jones*, 100 Fla. 1492 (1930)

Equity views with disfavor suits brought long after occurrence of transactions and after death of persons who might be witnesses. *Id.* at 1502-03.

*Cone v. Benjamin*, 157 Fla. 800 (1946)

To render the defenses of laches effective, the delay must be such as practically to preclude the court from arriving at a safe conclusion as to truth of matters in controversy and thus make the doing of equity either doubtful or impossible or such a change in conditions must have occurred which would render it inequitable to enforce the rights asserted. *Id.* at 829.

#### 2. Custody

*Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4<sup>th</sup> DCA 1998)

“Custodian” under statute Public Records Act refers to all agency personnel who have it within their power to release or communicate public records. *Id.* at 1361.

In order to have “custody” under state Public Records Act, one must have supervision and control over the document or have legal responsibility for its care, keeping, or guardianship. *Id.* at 1361.

Mere fact that employee of public agency temporarily possesses a document does not necessarily mean that person has “custody” for purposes of state Public Records Act. *Id.* at 1361.

### **3. De Facto Authority**

*Penn v. Pensacola-Escambia Governmental Center Authority*, 311 So.2d 97 (Fla. 1975)

This case involved a lease which was authorized by the city, county, and school board. The defendants alleged that a number of members of the board had statutory conflicts of interest that would have prohibited them from voting on the lease. The Florida Supreme Court stated as follows: “Even if there were some conflict, Defendant’s remedy is a direct attack upon the right to hold office as a member of Plaintiff’s governing body, by quo warranto, not a collateral attack in this proceeding. Further, the validity of the action previously taken, even if Defendant should institute such a suit and prevail, would not be affected. They would be, even in such an event, de facto officers whose acts are valid.” *Id.* at 101(internal citation omitted).

*Cristol v. City of Miami Beach*, 246 So.2d 595 (Fla. 3d DCA 1971)

In the *Cristol* case, some residents in the City of Miami Beach sought to invalidate a project for an affordable housing project that would be operated by the Miami Beach Housing Authority. One of the attacks on the action was that some of the Housing Authority members did not have the power to act, because they had not been confirmed by City Council, as required by the ordinance creating the Authority. The court stated “While this argument may be effective to question the de jure right of certain members of the housing authority to participate in the actions of the authority, it is not sufficient to defeat the de facto existence of the authority. It is a collateral attack upon the acts of the authority and would not, if proven constitute a basis for holding that the proposed transfer of the City to its housing authority is illegal.” *Id.* at 597.

### **4. Formatting**

*Seigle v. Barry*, 422 So. 2d 63 (Fla. 4<sup>th</sup> DCA 1982)

It is not the intent of the law to put public officials in the business of compiling charts and preparing documentary evidence. The intent is rather to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers. *Id.* at 66.

### **5. Evidence of Board Action**

*North Beach Yellow Cab Co. v. Village of Bal Harbour*, 135 So. 2d 4 (Fla. 3d DCA 1961)

As to the proffered testimony relative to conversations at the Village Council meetings, the minutes themselves are the best evidence of the action of the Village. *Id.* at 5.

*Beck v. Littlefield*, 68 So. 2d 889 (Fla. 1953)

A municipal corporation speaks only through its records, not through opinions of individual officers. *Id.* at 892.

It is our view that the intention of a municipal corporation may not be shown by the attitude or statements of a minority of the councilmen. *Id.* at 893.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via hand-delivery to Kevin S. Hennessy, Esquire, Lewis, Longman & Walker, P.A., 1001 Third Avenue West, Suite 670, Bradenton, Florida 34205, Attorney for Plaintiffs, this 30th day of September, 2010.

  
Kurt E. Lee