IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

THE SCHOOL BOARD OF BROWARD COUNTY,

Petitioner,

v.

NIKOLAS CRUZ,

Respondent.

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Case No.: CACE18-014554 (26)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO CRUZ'S MOTION FOR PROTECTIVE ORDER REGARDING SCHOOL BOARD'S REPORT

Intervenors the Miami Herald Media Company and Sun-Sentinel Company, LLC (collectively "News Media") hereby file this supplemental memorandum of law in opposition to Respondent Nikolas Cruz's motion for a protective order to enjoin the release of the report prepared for the School Board of Broward County ("School Board").

In his motion, and during the argument at the initial hearing on this matter on July 11, 2018, Cruz's criminal defense attorneys argued that the release of this report would impair his right to a fair trial. Not only will the disclosure not impede Cruz's fair trial rights, but this Court is also prohibited from reading public policy considerations into the Florida Public Records Act that have not been specifically adopted by the Legislature through an express exemption. Accordingly, this Court should deny Cruz's motion for protective order and, after *in camera* review of the report, order the release of the entire report, or all non-exempt portions thereof.

Memorandum of Law

The Florida Constitution provides a broad right to inspect and copy the records of any state or local agency. Specifically, Article I, Section 24(a) of the Florida Constitution grants

"[e]very person . . . the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state, or persons acting on their behalf." Consistent with the Florida Constitution and public policy, the Public Records Act is liberally construed in favor of access to records, and exemptions from disclosure must be narrowly construed so that they remain limited to their stated purpose. *See Nat'l Collegiate Athletic Ass'n*, 18 So. 3d at 1206; *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 n.1 (Fla. 4th DCA 1985).

Public perception or policy considerations cannot create an exemption to shield public records from disclosure. *See, e.g.*, *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979) (Public Records Act "excludes any judicially created privilege of confidentiality;" only the Legislature may exempt records from public disclosure).[1] The Florida Supreme Court in *Wait* further explained that arguments regarding "public policy considerations" should be addressed to the Legislature: "Courts deal with the construction and constitutionality of legislative determinations, not with their wisdom. In this case, we are confined to a determination of the legislature's intent." *Id.* at 424.

The only basis for denying access to a public record is a constitutional or statutory provision that specifically exempts the record from disclosure. *Hill v. Prudential Ins. Co.*, 701 So. 2d 1218, 1219 (Fla. 1st DCA 1997). If a public record contains certain information that is exempt, the remainder of the record must be produced with the exempt material deleted or

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[1] Similarly, privacy considerations do not trump the public's access rights. *See* Art. I, § 23, Fla. Const. (specifically stating that Florida's constitutional right to privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law").

redacted. § 119.07(1)(d), Fla. Stat. (2016); *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).

When the Legislature intends for public policy to be considered in an exemption, it will write such consideration into the law. *See, e.g.*, Fla. Stat. § 119.071(2)(l)(4)(I)(F) (court "shall" consider whether confidentiality of body camera recording is, among other considerations, "necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice"). Conversely, where no such consideration is expressly written into an exemption, courts interpret the omission as intentional. *See Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee,* 189 So. 3d 120, 127 (2016) (refusing to "engraft" a provision into the Public Records Act which was not expressly provided); *Paragon Health Servs., Inc. v. Cent. Palm Beach Cmty. Health Ctr., Inc.*, 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003) ("Where the legislature has included a specific provision in one part of a statute and omitted it in another part, we must conclude that it knows how to say what it means, and its failure to do so is intentional."); *Kaplan v. Epstein*, 219 So. 3d 932, 933 (Fla. 4th DCA 2017) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal quotation marks and citation omitted).

Bound by this clear maxim, courts routinely refuse to add exemptions and additional procedures into the Public Records Act that are not expressly mandated by the Legislature.[2] *See, e.g.*, *Tribune Co.,* 458 So. 2d at 1078 (declining to "write into the statute something that is not there"); *Rose v. D'Alessandro*, 380 So. 2d 419 (Fla. 1980) (holding that state attorney must

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[2] Article I, Section 24 of the Florida Constitution, approved by voters in 1992, similarly provides that the Legislature may add exemptions, but only by two-thirds vote of each house, and must state with specificity the public necessity justifying the exemption. Art. I, § 24 (c). And even then, the exemption shall be "no broader than necessary to accomplish the stated purpose of the law." *Id.*

disclose non-exempt investigative materials because "courts may not pass upon the wisdom of legislative determinations"); *Morris Publ'g Group, LLC v. Fla. Dep't of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013) (recognizing that a court may not "expand an exclusion to the public records act beyond what was plainly intended by the Legislature"); *Bludworth*, 476 So. 2d at 779 n.1 (recognizing that "expansion of the exemptions from disclosure . . . is an area of which the courts ought to be chary, given the overarching policy of the Public Records Act").[3]

These standards are critically important in this case because Cruz is arguing for an exemption that is not found in the law: an alleged exemption based on fair trial rights. No such statutory exemption exists. The Court therefore should not and cannot consider whether, or to what extent, Cruz's fair trial rights may be impacted by release of the School Board records at issue. The arguments of Cruz's criminal attorneys therefore must be rejected.

CONCLUSION

This Court is bound by the text of Florida Constitution, Chapter 119 and any applicable exemptions. It may not consider Cruz's public policy arguments because no exemption exists permitting non-disclosure of public records based on Sixth Amendment fair trial rights. Accordingly, this Court should deny Cruz's motion for protective order and order release of the report, or any non-exempt portions.

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[3] Courts have considered the balance between fair trial rights and Chapter 119 public disclosures in *criminal* actions in which the judge has power to control criminal discovery. *See Fla. Freedom Newspapers, Inv. v. McCrary*, 520 So. 2d 32 (Fla. 1988) (noting a criminal court's constitutional duty to protect a criminal defendant's fair trial rights and finding lower court was correct to weigh these rights against the request for pretrial discovery information). *McCrary* has no application here because it involves a request for records that have become "judicial public records" by virtue of having been requested by or turned over to the defendant during discovery. In certain limited instances, a trial court in a criminal matter is permitted by Florida Rule of Criminal Procedure 3.220(l) to restrict access to judicial records for cause. Here, the School Board report is not a judicial public record within the criminal case.

THOMAS & LOCICERO PL

By: */s/ Dana J. McElroy*
Dana J. McElroy
Florida Bar No. 0845906
dmcelroy@tlolawfirm.com
Daniela Abratt
Florida Bar No. 118053
dabratt@tlolawfirm.com
915 Middle River Drive, Ste. 309
Fort Lauderdale, FL 33304
Phone: (954) 703-3416
Fax: (954) 400-5415

-and-

Mark Caramanica
Florida Bar No. 110581
mcaramanica@tlolawfirm.com
601 South Boulevard
Tampa, FL 33606
Phone: (813) 984-3060
Fax: (813) 984-3070

Attorneys for the News Media

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **17th** day of **July, 2018**, I electronically filed the foregoing document with the Clerk of the Court via the E-Portal. I also certify that the foregoing document is being served this day on all counsel of record and parties identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by the E-Portal or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

By: */s/ Dana J. McElroy*
Attorney