



HUNTON & WILLIAMS LLP
1111 BRICKELL AVENUE
SUITE 2500
MIAMI, FLORIDA 33131

TEL 305 • 810 • 2500
FAX 305 • 810 • 2460

THOMAS R. JULIN
DIRECT DIAL: 305 • 810 • 2516
EMAIL: tjulin@hunton.com

April 14, 2010

FILE NO:

Joseph Matthews
c/o Kelly Hancock, Esq.
Krupnick Campbell et al
12 SE 7th St Ste 801
Fort Lauderdale, FL 33301
khancock@krupnicklaw.com
954.7638181

The Hon. Michael J. Satz
State Attorney for the 17th
Judicial Circuit
201 Southeast 6th Street
Fort Lauderdale, FL 33301
sao17@sao17.state.fl.us
954.8316955

Chadwick E. Wagner
Chief of Police
c/o Joel Cantor, Esq.
3250 Hollywood Boulevard
Hollywood, FL 33021
JCantor@hollywoodfl.org
954.9674490

Public Records Request for Joe Matthews' Adam Walsh Report

Gentlemen:

This is a request on behalf of Mr. Willis Morgan pursuant to chapter 119, Florida Statutes (2010), and article I, section 24(c) of the Florida Constitution, for inspection and copying of the manuscript or report prepared by former Miami Beach Police Department Detective Joe Matthews referenced by Hollywood Police Chief Chadwick Wagner in a 2008 press conference announcing the closing of the Hollywood Police Department's investigation of the murder of Adam Walsh, referenced by Chief Assistant State Attorney Charles Morton Jr. in his 2008 memorandum regarding the case, and referenced by The Miami Herald in the enclosed March 28, 2010, article.

In a December 2, 2008, letter from Chief Wagner to Mr. Morton, Chief Wagner stated that Assistant Police Chief Mark Smith "was tasked to review" Matthews' report "regarding the abduction and homicide of Adam Walsh." I also discussed the Matthews' report with Mr. Morton last week and he indicated that he also had used the Matthews report in connection with his preparation of a memorandum regarding the Walsh investigation.

Section 119.011(12) defines public records as "all documents, papers . . . books . . . or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." The term "agency" means "any state, county, district, authority, or municipal officer, department . . . or other separate unit of government created or established by law . . . and any public or private agency, person, partnership, corporation, or business agency, acting on behalf of any public agency." Fla. Stat. § 119.011(2).

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The First District Court of Appeal recently examined in *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009), *pet. for rev. docketed*, No. SC09-1909 (Fla. Oct. 14, 2009), whether a record that has been received by a public official for use in his or her official duties is a public record. The Court held:

The term “received” in section 119.011(12) refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer. If that were not the case, a party could easily circumvent the public records laws.

Id. at 1207.

The Court based this decision in part on *Times Publishing Co. v. City of St. Petersburg*, 558 So. 487 (Fla. 2d DCA 1990), a case that involved negotiations between the Chicago White Sox and the City of St. Petersburg. White Sox officials showed city officials documents pursuant to a confidentiality agreement. The Second District held that those records became public records once they had been viewed and used by the city officials. The First District similarly concluded that a “document that is used in the course of public business is a public record under the definition in section 119.011(12) if it was . . . received by the public official.” *NCAA*, 18 So. 3d at 1208.

The First District noted that the documents at issue in the NCAA litigation were viewed by agency lawyers and the documents “directly related to the work” that the lawyers were doing, *id.*, that the NCAA’s “expectation that the documents would remain private” was irrelevant, and that there could be no agreement by state officials to keep the records private. *Id.* at 1208-09. The First District also held that it mattered not that the NCAA was a wholly private organization because the documents at issue “became public records” when they were “received by agents of the University and used in connection with the University’s business. The legal status of these records is no different than it would be if they had been prepared by the University’s lawyers and if the only existing copies were in the NCAA’s possession.” *Id.* at 1209.

The First District pointed out that section 119.07(1)(a) provides that “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 . . . ,” *id.* (emphasis added), and concluded that the law therefore



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could be enforced directly against the NCAA because it had custody of the record. “It makes no difference,” the Court wrote, “that the records in question are in the hands of a private party. If they are public records, they are subject to compelled disclosure under the law.” *Id.* at 1210.

This decision is directly on point and requires disclosure of the Matthews report whether Mr. Matthews was acting on behalf of the Hollywood Police Department or the State Attorney’s office when he prepared the report or whether he was acting solely as a private citizen when he prepared it. The dispositive factor is that the report was received by both agencies and used by those agencies in connection with their official duties.

I know of no exemption to the disclosure requirements of the law that would be applicable to the requested report. If, nevertheless, you contend that the report or any portion of it is exempt, please state, as required by section 119.07(1)(d), the basis of the exemption which you contend is applicable to the record, including the statutory citation to an exemption created or afforded by statute and state in writing and with particularity the reason for the conclusion that the record is exempt. Please also produce immediately all portions of the report which you do not claim to be exempt.

Maintain custody of the report irrespective of whether you contend that the report is not a public record or that it is exempt from statutory and constitutional disclosure requirements.

Mr. Morgan agrees to pay for the actual cost of duplicating the requested report.

The requested report is of great public importance. A failure to provide an immediate response to this request and production of the report will be treated as a denial of the request that will necessitate the commencement of litigation to enforce chapter 119 and article I, section 24(c).

Section 119.11(1), Florida Statutes, provides: “Whenever an action is filed to enforce the provision of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.” In the event that litigation is commenced, I will request strict application of this statutory provision to ensure that the records requested are made immediately available.

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Please note that section 119.021 provides that public records should be kept in the buildings in which they are ordinarily used and requires each agency to comply with retention and document destruction schedules adopted by the Division of Library and Information Services.

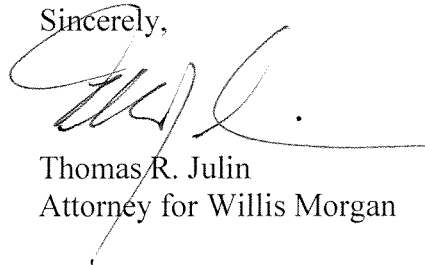
Any public officer who commits a knowing violation of the Public Records Law is subject to suspension and removal or impeachment and commits a misdemeanor of the first degree. Fla. Stat. § 119.10(1)(b) (2010). Moreover, any *person*, including a person who is not a public officer, who willfully and knowingly violate the Public Records Law commits a misdemeanor of the first degree.

Section 119.12, Florida Statutes, provides that if a civil action is filed against an agency to enforce the Public Records Law 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 against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees. If Mr. Matthews is the custodian of the report at this point, he would be regarded as an agency against which fees and costs could be awarded.

Furthermore, it is the obligation of the Hollywood Police Department and the State Attorney's office to obtain the report from Mr. Matthews and to produce it pursuant to this request. Mr. Matthews also has a direct obligation to produce the himself.

I request that the requested report be made available by no later than **5 p.m. on Wednesday, April 21, 2010**. Failure to produce the report by that time will be treated as a denial of this request. If you have any questions, or need more information in order to expedite this request, please call me at 305.810.2516.

Sincerely,



Thomas R. Julin
Attorney for Willis Morgan