

TO: Whom it May Concern
FROM: Peter Penrod, General Counsel for Florida Department of Financial Services
DATE: July 11, 2019
SUBJECT: Decision to Release Allegations Against Commissioner Rubin

Introduction

I am writing to address the analysis for releasing the three redacted documents reporting inappropriate behavior received by the Department of Financial Services ("Department") raising concerns about Commissioner Ronald Rubin ("Commissioner Rubin"). As you are aware, the Department received three separate allegations of inappropriate behavior that could be considered sexual harassment against Commissioner Rubin. The Department, under advice of counsel, decided to remove the identifying information of the alleged victims and release the documents to call for a transparent investigation of the head of an agency under control of the Cabinet. This decision accounted for all exemptions from disclosure required by Chapter 119, Florida Statutes, and the Sunshine Law requirements of Section 286.011, Florida Statutes. Specifically, legal counsel reviewed the exemption for "a complaint of misconduct" found in section 119.071(2)(k), Florida Statutes, and concluded it did not apply. Each issue is addressed in greater detail below.

Public Records Generally

Florida law requires agencies to operate in a transparent manner and creates the strong presumption that agency records are open for inspection. "The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly so they are limited to their stated purpose." *Tribune Company v. In Re Public Records*, 493 So.2d 480 (Fla. 2d DCA 1986), *rev. denied Gillum v. Tribune Company*, 503 So.2d 327 (Fla.1987); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So.2d 775 (Fla. 4th DCA 1985), *rev. denied* 488 So.2d 67 (Fla.1986); *Miami Herald Publishing Company v. City of North Miami*, 452 So.2d 572 (Fla. 3d DCA 1984), *approved* 468 So.2d 218 (Fla.1985). Public records must be available to the public and a state agency may only redact or withhold information if there is a specific exemption that applies. Exemptions must be narrowly construed to grant the public the greatest access possible.

Sexual Harassment Allegations

The three documents received by the Department raised concerns about Commissioner Rubin's behavior. The first complaint could be considered sexual harassment and the second two complaints raised similar concerns. Legal counsel reviewed each document prior to release to ensure any potential confidential information was redacted. Section 119.071(2), Florida Statutes, is titled "Agency Investigations" and contains several categories of information that are confidential. Legal counsel reviewed each category and determined that the only exemption that could potentially apply is section 119.071(2)(n), Florida Statutes. This provision exempts "[p]ersonal identifying information of the alleged victim in an allegation of sexual harassment." Although information regarding the identity of the individual making the allegation is confidential, the document itself and the name of the alleged harasser are not confidential. See § 119.071(2)(n), Fla. Stat. Legal counsel determined that none of the three complaints met the legal definition of misconduct. Legal counsel was responsible for the redactions to ensure each potential victim's identifying information was redacted.

Inapplicability of the Misconduct Exemption

During this analysis, legal counsel also reviewed section 119.071(2)(k), Florida Statutes, and determined it did not apply. This section makes confidential “[a] complaint of misconduct filed with an agency against an agency employee...until the investigation ceases to be active...” See § 119.071(2)(k), Fla. Stat. Legal counsel concluded that Florida law treats and defines misconduct complaints and investigations differently than allegations of sexual harassment. Additionally, Florida law requires that each exemption be narrowly applied. Therefore, the exemption for a complaint of misconduct does not apply to an allegation sexual harassment.

As mentioned above, section 119.071(2), Florida Statutes, exempts several categories of information resulting from different types of agency investigations. Section 119.071(2)(k), Florida Statutes, makes confidential “[a] complaint of misconduct filed with an agency against an agency employee...until the investigation ceases to be active...” The term “misconduct” in this section is undefined in chapter 119, Florida Statutes. Florida law, however, defines misconduct—as it generally applies to agency employees—in two other areas; section 838.022, Florida Statutes, and Rule 60L-36.005, Florida Administrative Code.ⁱ Chapter 838, Florida Statutes, addresses bribery and misuse of public office by public officials. Section 838.022, Florida Statutes, defines the term “official misconduct” to include certain types of actions by a public official, such as falsifying documents or destroying official documents, to either obtain an unlawful benefit or to cause someone unlawful harm.ⁱⁱ Rule 60L-36.005, Florida Administrative Code, addresses disciplinary standards of career service employees and defines the term “misconduct.”ⁱⁱⁱ This definition of “misconduct” describes behavior that is generally unacceptable for a career service employee given their specific employment position. Commissioner Rubin, as the commissioner of OFR, serves in a senior management service position (a form of at-will employment) rather than career service and is not subject to the same restrictions or benefits of career service employment classification. See R. 60L-36.005(3)(g), F.A.C. Importantly, both definitions of “misconduct” do not address or even contemplate sexual harassment.

The Fifth District Court of appeal recently ruled on the applicability of the exemptions in section 119.071(2), Florida Statutes. In this case, the Citrus County Board of County Commissioners withheld a complaint of misconduct against one of its Commissioners using the exemption for complaints of discrimination provided for in section 119.071(2)(g), Florida Statutes.^{iv} See *Schweickert v. Citrus County Florida Bd.*, 193 So. 3d 1075 (Fla. 5th DCA 2016). The Board argued that the investigation might uncover instances of discrimination and therefore the complaint had to be withheld until the investigation concluded. *Id.* The Court outright rejected this argument. In doing so the Court noted, “[a]lthough Thorpe's complaint letter listed many examples of alleged abusive behavior that would be inappropriate for one in Adams' position, the complaint did not assert any form of discrimination based upon race, color, religion, sex, national origin, handicap or marital status.” *Schweickert*, 193 So. 3d at 1080. The *Schweickert* Court makes two points clear about the exemptions in section 119.071(2), Florida Statutes. First, these exemptions contemplate different types of agency investigations and cover different categories of information. Second, these exemptions must be narrowly applied.

The allegations against Commissioner Rubin were not allegations of criminal misconduct or misconduct against a career service employee; they were allegations of sexual harassment against the Commissioner of separate agency. A fundamental cornerstone of administrative law is that agencies are creatures of statute and have only such powers as statutes confer. *State ex rel. Greenburg v. Florida State Board of Dentistry*, 297 So.2d 628, 634 (Fla. 1st DCA 1974), cert. dismissed, 300 So.2d 900 (Fla.1974). Therefore, an

agency may only act in accordance with a statute or properly promulgated rule. Since Florida law defines misconduct, the Department—as an administrative agency—may only investigate one of its employee in response to a complaint specifically alleging misconduct pursuant to section 838.022, Florida Statutes, or Rule 60L-36.005(3)(g), Florida Administrative Code. These provisions of law do not address or even contemplate sexual harassment. Further, Commissioner Rubin is not an employee of the Department. This means the Department could not launch a misconduct investigation of any type resulting from the allegations against Commissioner Rubin. Therefore, the Department could not apply the misconduct exemption in section 119.071(2)(k), Florida Statutes, to the three allegations received by the Department against Commissioner Rubin.

Sunshine Law

Finally, no analysis of this issue could be complete without addressing Florida’s Sunshine Law. The Florida Cabinet is subject to the Sunshine Law when sitting in their capacity as a board created by the Legislature. The Financial Services Commission (“Commission”) was created by section 20.121(3), Florida Statutes, which consists of the Governor and Cabinet. The Commission serves as the agency head for the Office of Financial Regulation and the Office of Insurance Regulation. Thus, the Cabinet, when meeting as the Commission, is subject to Sunshine Law. Section 286.011, Florida Statutes, makes it a crime for a member of a collegial body to discuss matters that could come before such body. In this case, the Department received the allegations at issue but could not independently act without alerting the other members of the Commission. The requirement to act transparently regarding the Cabinet appointees was reinforced by the settlement of the *Weidner et al. v. Scott et al.*, Case No. 2015-CA-283. The Department, therefore, was incapable of discretely transmitting its desire for an immediate investigation to the other members of the Commission without risking a violation of section 286.011, Florida Statutes and the *Weidner* settlement. In order to prevent these possible violations of the Sunshine Law and the *Weidner* settlement by transmitting information to each office and hoping dialogue did not take place due to the seriousness of the issue, the decision was made to operate as transparently as possible.

For the foregoing reasons, the above-named counsel respectfully believes the handling of this matter was proper under Florida law and in the best interest of the State of Florida.

ⁱ The term “misconduct” is used, but undefined, as a standard of discipline for career service employees in section 110.227(1), Florida Statutes.

ⁱⁱ **838.022 Official misconduct.—**

- (1) It is unlawful for a public servant or public contractor, to knowingly and intentionally obtain a benefit for any person or to cause unlawful harm to another, by:
 - (a) Falsifying, or causing another person to falsify, any official record or official document;
 - (b) Concealing, covering up, destroying, mutilating, or altering any official record or official document, except as authorized by law or contract, or causing another person to perform such an act; or
 - (c) Obstructing, delaying, or preventing the communication of information relating to the commission of a felony that directly involves or affects the government entity served by the public servant or public contractor.
- (2) For the purposes of this section:
 - (a) The term “public servant” does not include a candidate who does not otherwise qualify as a public servant.
 - (b) An official record or official document includes only public records.
- (3) Any person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

iii **60L-36.005 Disciplinary Standards.**

(1) This rule sets forth the minimal standards of conduct that apply to all employees in the State Personnel System, violation of which may result in dismissal.

...

(3) Employees outside the permanent career service may be dismissed at will. Permanent career service employees may be suspended or dismissed only for cause, which shall include, but not be limited to, the following. Examples under the categories listed below are not exhaustive.

...

(g) Misconduct. Employees shall refrain from conduct which, though not illegal or inappropriate for a state employee generally, is inappropriate for a person in the employee's particular position. For example, cowardice may be dishonorable in people generally, but it may be entirely unacceptable in law enforcement officers. By way of further example, people are generally free to relate with others, but it may be entirely unacceptable for certain employees to enter into certain relations with others, such as correctional officers with inmates.

...

iv The exemption for misconduct investigations was added into law after this case.