

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

ABC, INC., et al.,

Plaintiffs/Petitioners,

Case Number: 2016-CA-005528-O
Consolidated with 2016-CA-005536-O

v.

Division: 40

CITY OF ORLANDO,

Defendant/Respondent.

**ORDER ON THE NEWS MEDIA'S PETITION FOR ACCESS
TO 911 RECORDINGS**

This cause comes before the Court on Plaintiffs/Petitioners, ABC, Inc., et. al.'s (hereinafter "the News Media") Petition for Access to 911 Recordings pursuant to Florida Statute Section 406.136(4). The Court has considered the City of Orlando's Memorandum in Support of Section 406.136 Exemption (filed October 3, 2016), the News Media's Memorandum Regarding the Inapplicability of Section 406.136 to City of Orlando Audio Recordings and Alternative Good Cause Argument (filed October 10, 2016) and the City of Orlando's Reply Memorandum Regarding Section 406.136 Exemption (filed October 17, 2016). The Court has also considered the Stipulated Facts Regarding the News Media's Good Cause Petition Pursuant to Section 406.136(4), Florida Statutes (2015) (filed October 26, 2016) together with the evidence and legal authority submitted by counsel. The Court has considered the testimony of those appearing at the duly noticed Good Cause Hearing held on October 31, 2016, as well as reviewed letters received from those who chose to provide written notice of their position. Finally, the Court has reviewed *in camera* all 911 Recordings provided by and claimed by the City of Orlando to fall within the

Section 406.136, Florida Statutes (2015) exemption. Based on the foregoing, the Court finds as follows:

I. BACKGROUND

The tragic facts of this case are undisputed. In the early morning hours of June 12, 2016, the worst mass shooting in United States history occurred at the Pulse nightclub in Orlando, Florida. During this incident, Omar Mateen (hereinafter “the shooter”) was responsible for the deaths of forty-nine (49) individuals and for injuries to at least fifty-three (53) others. The shooter remained in the nightclub from approximately 2:00 a.m. until 5:00 a.m., during which time he held some Pulse nightclub patrons hostage. During this period, the shooter engaged in one call to City communications services and subsequently engaged in three (3) separate calls with City crisis negotiation team members. The parties stipulated to the accuracy of transcripts of these calls.¹ The shooter was also ultimately shot and killed after a standoff with the Orlando Police Department (“OPD”).

During the incident, numerous phone calls from witnesses and victims were received by the OPD and the Orlando Fire Department which were also recorded (hereinafter “the 911 recordings”). On or about June 13, 2016, the News Media served a public records request seeking the 911 recordings. The City of Orlando raised certain objections to release of the 911 recordings, only one of which is at issue in this proceeding. The City contends that the remaining 911 recordings are exempt and confidential pursuant to Section 406.136, Florida Statutes (2015) (which generally proscribes the public disclosure of an audio or video recording that depicts the “killing of a person”), and contends that before these 911 recordings can be disclosed a good cause hearing must be conducted as required by statute. The City of Orlando has identified 232 such

¹ The audio of these calls was released pursuant to this Court’s oral ruling at the hearing held on October 31, 2016.

recordings between victims/witnesses and law enforcement personnel as exempt and confidential pursuant to Florida Statute Section 406.136.

The City of Orlando maintains that these 232 recordings depict the “killing of a person” as defined by Section 406.136(1), Florida Statutes (2015) and are therefore required to be withheld pursuant to Section 406.136(2). According to the City, some of these calls also contain the sounds of gunfire and/or suffering. To date, the City has released approximately 200 records of telephone calls relating to the shooting that it contends are not within the scope of the exemption found at Section 406.136(2), and placed other public records related to the shooting on the City’s website.

The News Media maintain that the City has applied the public records exemption found at Section 406.136(2), Florida Statutes (2015), too broadly, thereby violating both the Florida Constitution and Florida’s Public Records Act. According to the News Media, access to public records is a right demanded by the people of this state and is enshrined in Article I, Section 24(a) of the Florida Constitution. The News Media contend that the Public Records Act is to be liberally construed in favor of public access and in a manner that frustrates all evasive devices, with exemptions construed narrowly. The City, according to the News Media, has wholly failed to meet its burden of establishing the applicability of the exemption for each 911 recording by attempting to assert a blanket exemption for all calls into and out of the Pulse nightclub for the time period at issue. The withholding of all 911 recordings because some may contain audio of gunfire or suffering is an arbitrary reading of the statute which cannot be sustained, according to the News Media. Finally, the News Media contend that even if the exemption applies, the News Media have shown good cause for release of the 911 recordings pursuant to Section 406.136(4), Florida Statutes (2015).

The parties have submitted the following issues to this Court to address: (1) whether all of the remaining 911 recordings, defined by the City of Orlando to be those going into or out of Pulse nightclub, are exempt from disclosure under Florida's Public Records Act because they fall within the scope of Section 406.136, Florida Statutes (2016); and (2) whether there is good cause to release the 911 recordings at issue pursuant to Section 406.136(4) notwithstanding the applicability of the exemption. As explained below, the Court finds the City of Orlando, under the specific and unique circumstances of this case, has met its burden to establish the 911 recordings at issue fall within the exemption provided in Section 406.136. The Court also finds that the News Media has demonstrated good cause pursuant to Section 406.136(4) for release of either the audio or a transcript of these calls.

II. DISCUSSION

A. Florida's Public Records Act

Access to public records is a right set forth in Article I, Section 24 (a) of the Florida Constitution which grants every 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Because the right of access to public records is a constitutional right "demanded by the people" and not "merely established by legislation," *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), it is "virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." *Times Publ'g Co. v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 2d DCA 1990).

The Florida Constitution requires the legislature to “enact laws governing the enforcement of this section” and provides that the legislature “may provide by general law by a two third’s vote of each house for the exemption of records from the requirements of subsection (a) . . .” Art. 1, §24(c), Fla. Const. Pursuant to that constitutional mandate, the legislature has enacted various enforcement provisions and exemptions in Chapter 119, Florida Statutes (2015), the Public Records Act (“Act”). Courts must construe the Act’s provisions liberally in favor of “open government to the extent possible in order to preserve our basic freedom, without undermining significant governmental functions such as crime detection and prosecution . . .” *Tribune Co. v. Pub. Records*, P.C.S.O. No. 79-35504 Miller/Jent, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) (quoting *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985)). Conversely, exemptions must be construed narrowly and limited to their stated purposes. *Id.* See also *Chandler v. City of Sanford*, 121 So. 3d 657, 660 (Fla. 5th DCA 2013). When an agency denies access to public records based on a statutory exemption, that agency bears the burden of proof and persuasion with establishing its right to the claimed exemption. *WFTV, Inc. v. School Bd. Of Seminole Cnty.*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004); *Wooling V. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000). “[W]hen in doubt the courts should find in favor of disclosure rather than secrecy.” *Bludworth*, 476 So. 2d at 780, n. 1; *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 304 (Fla. 3d DCA 2001).

Neither party disputes the applicability of Florida’s Public Records Act; it is the applicability of the Section 406.136, Florida Statutes (2015) exemption to Florida’s Public Records Act that is at issue.

B. The Section 406.136, Florida Statutes (2015) Exemption

Section 406.136(2), Florida Statutes (2015) provides in relevant part: “A photograph or video or audio recording that depicts or records the killing of a person is confidential and exempt” under Florida’s Public Records Act, with exceptions allowing certain surviving family members to have access. “Killing of a person” is defined in Section 406.136(1), Florida Statutes (2015) as follows:

“(1) As used in this section, the term “killing of a person” means all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.”

Both parties rely upon and cite a portion of the stated purpose for the Section 406.136, Florida Statutes (2015) exemption, as set forth in the Legislature’s 2011 statement of public necessity, in support of their positions. The Legislature’s statement of public necessity provides, in relevant part:

The Legislature finds that photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.

The News Media contend that the stated purpose set forth in the enabling legislation is to limit the exception to those portions of records that reveal the most graphic and sensitive end of life moments immediately surrounding the time that an individual actually lost his or her life.

The City disagrees, contending the stated purpose is to prohibit disclosure, in this case, of recordings that depict the “killing of a person” because of the obvious harm to the family and memory of the deceased. According to the City, the statement of purpose cannot be read narrowly

as argued by the News Media to limit the broad definition of “killing of a person” in the statute. That broad definition includes any related acts or events immediately preceding or subsequent to the act or events that were the proximate cause of death. The proximate cause of death, according to the City, was the indiscriminate shooting by the shooter which resulted in the 49 deaths, and once the shooting began, all calls into or out of Pulse were related to those deaths or was a related act or event immediately preceding or subsequent to the shootings.²

This Court has conducted an *in camera* review of the 911 recordings at issue. What is evident from this review is that these calls cannot easily be chronicled or categorized: it is unknown which shots recorded in the background of some of these calls reflect the “killing of a person.” It is clear that those calls made between 2:00 a.m. and 2:12 a.m. reflect a barrage of gunfire, together with screaming and crying out, and that many of those undisputed 49 deaths actually occurred at Pulse. It is also unclear whether unknown voices heard on 911 recordings were received from individuals who ultimately succumbed to their injuries. It is extremely likely, however, that the families of those audio voices would recognize the voices of their loved ones in their final moments. To require the City to prove the applicability of the exemption to each and every call coming from Pulse during this incident would be to place an impossible burden on the City given the magnitude of this incident. A close reading of Section 406.136, however, shows that an individual analysis of each call to determine the applicability of the exemption, as is urged by the News Media, is not required.

As noted above, the statutory definition provided for “killing of a person” means “all acts or events that cause **or otherwise relate** to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate

² The City also pointed out that Section 406.136(6)(a), Florida Statutes (2015) makes it a third degree felony for any custodian of an audio recording depicting the killing of a person to willfully and knowingly release the recording.

cause of death.” Section 406.136(1), (*emphasis supplied*). The Court finds the City of Orlando’s argument concerning the grammatical interpretation of this definition persuasive. The comma placed before “including” means the clause following it is nonrestrictive, or not essential to define or identify the previous portion of the sentence. *See Strunk and White, The Elements of Style*, Rule 3 (4th ed. 2000).

The proximate cause of the victims’ deaths was the shootings. It is undisputed that many individuals died in Pulse throughout the time the shooter was in Pulse. In applying Section 406.136 to a mass casualty event, it would contradict the stated public purpose for the exemption to wholly eliminate that exemption for all 911 recordings simply because the City was unable to establish the applicability of that exemption for each *individual* 911 recording. It would also contradict the clear language of the statute. There are 911 recordings reflecting (i) gunfire, (ii) individuals speaking and then going silent, (iii) callers describing individuals bleeding out or otherwise in significant distress, and (iv) silence alone. Under the unique and specific circumstances involved in this case, the Court finds that all 911 recordings reflecting calls coming out of Pulse or going into Pulse “otherwise relate” to the killings of these individuals, and are therefore exempt under Section 406.136.

C. The “Good Cause” Exception to the Exemption

The News Media contend that even if the statutory exemption applies, however, the 911 recordings should be released under the “good cause” exception to the statutory exemption. Section 406.136, Florida Statutes (2015) provides:

- (a) The Court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording that depicts or records the killing of a person or to listen to or copy an audio recording that depicts or records the killing of a person and may prescribe any restrictions or stipulations that the court deems appropriate.
- (b) In determining good cause, the court shall consider:

1. Whether such disclosure is necessary for the public evaluation of governmental performance;
2. The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
3. The availability of similar information in other public records, regardless of form.

There appear to be no Florida decisions available to guide this Court concerning the determination and application of the good cause standard under Section 406.136(4); accordingly, this Court will look to other statutes for guidance. *In re Records of Dept. of Children & Family Servs.*, 873 So. 2d 506 (Fla. 2d DCA 2004) addressed the issue of whether good cause existed to release child abuse records. In balancing the interests necessary to determine whether good cause existed for disclosure, "the trial court is required to weigh the potential harm to the child involved in the abuse case against the potential benefit to the public that would result from the public disclosure of the information contained in the records." *Id.* at 512. The court also noted that the relative weight of the competing interest would in some cases be affected by the fact that the information contained in the records was already known to the public. Failure to conduct an *in camera* review of the records at issue when balancing those competing interests was an abuse of discretion. "[T]here can ordinarily be no 'logic and justification for the result' embodied in the trial court's good cause determination if the trial court has not conducted an *in camera* review of the records at issue. *In re Records of Dept. of Children and Family Services, supra*, at 514, citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). See also *Department of Health and Rehabilitative Services v. Gainesville Sun Publishing Co.*, 582 So. 2d 725 (Fla. 1st DCA 1991).

According to the News Media, disclosure of the 911 recordings "would help shed light on the government's response to the largest mass shooting in our Nation's history, fill in important

details, possibly substantiate or refute OPD's account of the standoff, and help the public examine OPD's crisis situation decision-making." The News Media further argues that any intrusion into the families' right of privacy would be minimal as all personal information would be redacted pursuant to Section 365.171(12)(a), Florida Statutes (2015), and that similar information is insufficient where only the core 911 recordings would likely illuminate what was occurring inside the Pulse.

The City of Orlando contends the News Media have failed to establish good cause, essentially arguing: (1) disclosure is not necessary for evaluation of government performance; (2) disclosure would intrude upon the families' rights of privacy; and (3) other types of similar information, such as crime scene reports, are available and sufficient to allow the News Media to evaluate government performance. The City also suggests that if these 911 recordings were to be released, it would be appropriate to release a written transcript of the recordings rather than the audio version of them.

Finally, this Court has also heard from, and gives great weight to, those family members who chose to speak or provide letters in connection with the good cause hearing held October 31, 2016. Two individuals were against a finding of good cause to release the 911 recordings in any format. The remaining (majority) were in favor of releasing a transcript of the call in order to better understand what happened, but preferred that the audio not be released. The latter group of individuals expressed a need to understand the timeline of what happened, and one wrote the family was "still in the dark concerning this tragedy." All but two expressed a need to know what happened in the early morning of June 12, 2016.

This Court finds that the 911 recordings do fall within the scope of Section 406.136(4), as the News Media has established good cause for release of the 911 recordings in that the (i) release

of the 911 recordings is necessary for the public evaluation of governmental performance, (ii) the seriousness of the intrusion into the victims families' right to privacy is minimal with respect to these calls, and (iii) similar information in other public records is not available or sufficient to evaluate the events that occurred inside Pulse. The 911 recordings occurring between 2:00 a.m. and 2:12 a.m. and the call occurring at 2:14 located at Desk 3, Call 5, are graphic and disturbing, and this Court finds it appropriate to release a written transcript of these calls in lieu of the audio of these calls.

III. CONCLUSION

Accordingly, based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. The 911 recordings reviewed by this Court fall within the exemption found within Section 406.136, Florida Statutes (2015);³
2. Pursuant to Section 406.136(4), Florida Statutes (2015), the News Media has established good cause for release of the 911 recordings in that the (i) release of the 911 recordings is necessary for the public evaluation of governmental performance, (ii) the seriousness of the intrusion into the victims families' right to privacy is minimal with respect to these calls, and (iii) similar information in other public records is not available or sufficient to evaluate the events that occurred inside Pulse.
3. The City of Orlando is directed to immediately release the audio recordings for all 911 recordings that were provided to the Court for an *in camera* review made at or **after 2:12 a.m. on June 12, 2016 (excluding, however, that call made at 2:14 a.m. defined as Desk 3, Call 5)**, subject to the provisions of Section 365.171(12)(a),

³ This Court finds it is not necessary to address whether the Section 406.136, Florida Statutes (2015) exemption applied to the shooter's calls as (i) the City of Orlando released transcripts of those calls prior to the October 31, 2016 hearing on the applicability of the exemption and the existence of good cause notwithstanding the exemption and (ii) the City of Orlando stipulated to a finding of good cause for release at that hearing.

Florida Statutes (2015). Specifically, prior to release, all personal identifying information such as the “name, address, telephone number or personal information” shall be redacted.

4. Pursuant to Section 406.136(4)(a), Florida Statutes (2015), this Court finds it appropriate to restrict the release of the 911 recordings between **2:00 a.m. and 2:12 a.m. together with that call made at 2:14 a.m. defined as Desk 3, Call 5.**

Accordingly, the City of Orlando is directed to immediately release a written transcript only of the audio recordings for all 911 recordings that were provided to the Court for an *in camera* review made **prior to 2:12 a.m., together with that call made at 2:14 a.m. defined as Desk 3, Call 5**, subject to the provisions of Section 365.171(12)(a), Florida Statutes (2015). Specifically, prior to release, all personal identifying information such as the “name, address, telephone number or personal information” shall be redacted.

5. The News Media shall be responsible for the initial costs of the written transcript referenced in paragraph 4, above; however, this Court reserves jurisdiction to determine entitlement to attorneys’ fees and costs.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 10th day of November, 2016.



MARGARET H. SCHREIBER
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 10th day of November, 2016, by using the Florida Courts E-Filing Portal System. Accordingly, a copy of

the foregoing is being served on this day via electronic filing to Darryl Bloodworth, Esquire at DBloodworth@deanmead.com; to Carol Jean Locicero, Esquire at clocicero@tlolawfirm.com; to Rachel Fugate, Esquire at rfugate@tlolawfirm.com; and to Sean Flynn, Esquire at sean.flynn2@usdoj.gov


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