**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.**

MIAMI HERALD MEDIA COMPANY,
Publisher of *The Miami Herald,*
MARY ELLEN KLAS, and ELIZABETH KOH,
Plaintiffs,

CASE NO. 2018 CA 993

v.

FLORIDA DEPARTMENT OF TRANSPORATION
and ERIK FENNIMAN,
Defendants.
_____/

ORDER REGARDING PUBLIC RECORDS REQUEST

This matter came before the Court for hearing on July 31, 2018 regarding the Plaintiffs' petition and Defendant's response and motion, as well as the "Statement of Interest" filed on behalf of the United States. Counsel for the parties and federal government were present. The Court, having reviewed the filings and pleadings to date, having had the benefit of the argument of counsel, and being otherwise fully advised in the premises finds as follows:

BACKGROUND

This litigation arises out of the bridge collapse that occurred at or adjacent to the FIU campus on March 15, 2018. The Plaintiffs (hereinafter referred to as "the Herald" or "Plaintiff") initially brought this action on May 2, 2018, seeking to enforce Florida's Public Record Law against the Defendants (hereinafter referred to as "FDOT" or "Defendant").

Apparently the Herald sent public records requests to FDOT between March 17 and March 23 seeking public records relating to the bridge and its construction. After receiving the request, FDOT was instructed by The National Transportation Safety Board that it could produce records prior to February 20th, but that requests for information after that date would have to be reviewed individually. The Herald wants records produced for the dates of February 20 through March 17th.

The amended complaint in this cause has 2 counts and seeks a mandatory injunction to produce the requested public records, and a writ of mandamus pursuant to section 119.11 (1), Florida Statutes, seeking the issuance of an alternative writ of mandamus, requiring FDOT to show cause immediately why the writ should not be entered, and directing it to comply with the public records request.

Defendant FDOT moved to dismiss for failure to state a cause of action, asserting that federal law preempts and that the Herald is mistaken in relying on state public records law. The Defendant asserts that the Herald misinterprets the Code of Federal Regulations and misconstrues its delay in producing records.

The dispute between the parties is relatively straightforward. The Defendant is in possession of requested records which, under normal circumstances, both parties agree would constitute "public records" as defined in Florida Public Records Law. The records sought were provided to the NTSB in the course of that agency's investigation into the bridge collapse. As a result, FDOT claims that it cannot comply with the request, as much as it may otherwise want to, because of federal law and its agreements with the United States.

The Department takes the position that 49 CFR section 831 .13 prohibits it from producing the requested documents. The Herald disagrees. The ultimate question is this: Does the federal regulation apply to documents made and received prior to the collapse of the bridge on March 15, 2018, but which were later furnished to the NTSB in the course of its investigation?

DISCUSSION

Title 49 CFR §831.13 provides:

> (a) Applicability. This section applies to:
>
> > (1) Information related to the accident or incident;
> >
> > (2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the accident, interview statements, wreckage documentation, flight data and cockpit voice recorder information, and surveillance video; and
> >
> > (3) Any information regarding the status of an investigation, or activities conducted as part of the investigation.
>
> (b) Provision of information. All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be promptly provided to the NTSB, except where the NTSB authorizes the party to retain the information.
>
> (c) Release of information. Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:
>
> > (1) Information released at the scene of an accident -
> >
> > (i) Is limited to factual information concerning the accident and the investigation released in coordination with the IIC; and
> >
> > (ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. Additionally, the IIC or

representatives from the NTSB's Office of Safety Recommendations and Communications may release information to media representatives, family members, and elected officials as deemed appropriate.

(2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of an accident does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.

(3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.

(4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:

(i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;

(ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party;

(iii) Information related to the investigation released to an organization or person that is not a party to the investigation;

(d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c) and (d).

The subject Federal Regulation places restrictions upon the dissemination of information by a "party"[1] to an NTSB investigation and provides that "[p]arties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information . . . ." The Herald contends that the records from February 20 to March 17 do not fall within the scope of the regulation because the Department did not obtain them during an investigation. Instead, those records were made and/or received by the Department before it became a Party to the NTSB's investigation, and before the bridge collapsed.

[1] Chapter 49 C.F.R. §831.11(a)(1) authorizes the NTSB's investigator in charge (IIC) to "designate one or more entities to serve as parties in an investigation." FDOT was designated as a party on March 17, 2018.

The Department and NTSB take the position that the phrase "obtained during an investigation" means information obtained *by the NTSB* during an investigation. Although the parties interpret the federal regulation in opposing ways, the court does not find it to be unclear or ambiguous. The Regulation provides under Paragraph (D) that when the state is "participating in the investigation" it must promptly provide material to NTSB unless authorized to retain it. Further, under Paragraph (c) the state may not release "information obtained during an investigation at any time prior to NTSB's public release."

There appears to be agreement that the withheld records were public records and 1) were obtained prior to the existence of an investigation and 2) before the state began participating in said investigation. The Defendant apparently takes a position that under 831.13 49 CFR 831/13, that as soon as those records were obtained by NTSB, they became "investigative information" and cannot be disclosed. The Court does not agree.

The Department and NTSB do not cite any decisions construing §831.13. Nor do they cite any decision in which any court, in construing an analogous statute or regulation, has held that a government agency's records that are public records in the first instance lose their character as a public records, or become otherwise unavailable for public inspection, because they are subsequently provided to an investigative agency in the course of an investigation. There is, however, substantial authority regarding an analogous Florida Statute.

Florida's Public Records Law creates an exemption for "criminal investigative information," which is defined as "information with respect to an identifiable person or group of persons compiled by a criminal justice agency *in the course of conducting a criminal investigation* of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." *See* §119.011(3)(b), Florida Statutes (emphasis added); and §119.071(2)(c), Florida Statutes (creating exemption for criminal investigative information).

Simply put, under Florida law, it is clear that furnishing a document (which was a public record when it was made or created record) to an investigating agency would not alter its status as a public record and it would remain available for public inspection. See *State Attorney Office of 17th Judicial Circuit v. Cable News Network,* ____ So.3d ____ (4 DCA 2018); 2018 WL 3569, 397, and the cases and authority cited therein.

The Department and NTSB contend that despite the plain language of §831.13(c), and despite the absence of any decisions supporting their position, the Court should defer to the NTSB's interpretation of the regulation, as set out in comments made during the rulemaking process.[2] *See* 89 FR 29670, 29682 (July 31, 2017). This deference is presumably a reference to the types of deference addressed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and/or *Auer v. Robbins*, 519 U.S. 452 (1997).

However, courts are permitted to resort to *Chevron*- and *Auer*-type deference *only* when the statute or regulation at issue is ambiguous. *See, e.g., Pereira v. Sessions*, __ U.S. __, 138 S.Ct. 2105, 2113-14 (2018) (addressing *Chevron* deference); *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142,

[2] The letters that the NTSB's inside counsel sent to the Court are not entitled to any deference. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

155 (2012) (describing *Auer* deference). Here, neither the Department nor the NTSB contends that §831.13 is ambiguous. To the contrary, they contend that the regulation is clear and unambiguous. As such, there is no occasion for the Court to defer to the NTSB's interpretations.

This Court has received, accepted, and considered the "Statement of Interest of The United States" filed in this cause on July 30, 2018. The United States takes the position that the work of the NTSB is impaired when investigative information is released without court approval. The United States asserts

> "the NTSB's experience is that the investigative process has been harmed in those instances... Once the direction and focus of an ongoing investigation is revealed, evidence can disappear, and witnesses change their stories or generally become less cooperative, sometimes even refusing to speak with investigators at all... Additionally, once information is prematurely released, the parties to the investigation face increased public pressure to comment and defend themselves in the media."

There may well be a legitimate concern regarding the disclosure of information obtained from private sources. This Court, however, has difficulty envisioning how that argument applies to materials maintained by the State of Florida which were already public records at the time they were provided to the NTSB.

CONCLUSION

The Court finds that 49 CFR §831.13 does not apply to the requested records. After a review of 49 CFR 831.1 through 831.15, the Court does not find the requested records constitute information obtained during an investigation, and therefore, pre-emption does not apply.

Accordingly, it is **ORDERED AND ADJUDGED** that

1. The Department shall produce to The Herald the requested records, but that production shall be limited to records from February 20th to March 15th (prior to the collapse). As a practical matter, records acquired after the collapse may reasonably be considered to be "obtained during an investigation" whether that investigation was yet formally opened or staffed.

2. The Department's motion to dismiss for failure to state a cause of action is denied.

3. The Department's motion to dismiss for failure to name an indispensable party, and its motion for compulsory judicial notice of NTSB letter, are denied as moot. The Court has accepted and considered the "Statement of Interest of the United States," filed on the eve of the hearing in this case.

4. The Court retains jurisdiction with regard to attorneys' fees and costs.

DONE AND ORDERED in Chambers in Leon County, Florida on this 21st day of August, 2018.

KEVIN J. CARROLL
CIRCUIT JUDGE

Copies to:

All Counsel of Record