Broward County Chiefs of Police Association, Inc.
Legal Update

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NOVEMBER 2018 LEGAL UPDATE

Case Law Update

Kramer Forest v. State, 43 Fla. L. Weekly D2360a (Fla. 1st DCA October 18, 2018)

Facts: Kramer appealed his conviction for Possession of Cannabis over 20 grams, asserting that he could not have committed the crime because Florida law classifies cannabis as a substance that "has no current medical use," which is in direct conflict with the Florida Constitutional provision which approves the production, possession, and use of medical marijuana.

Holding: The Court disagreed with Kramer's position finding that although Article X, section 29 of the Florida Constitution, approved the production, possession, and use of medical marijuana, the amendment specifically states that "[n]othing in this section allows for a violation of any law other than for conduct in compliance with the provisions of this section" and "[n]othing in this section shall affect or repeal laws relating to non-medical use, possession, production, or sale of marijuana." Therefore, nothing in the amendment expressly repeals F.S. 893.03(1)(c)7.

Martin E. O'Boyle and Asset Enhancement, Inc. v. Town of Gulf Stream, 43 Fla. L. Weekly D2386a Fla. 4th DCA October 24, 2018)

Facts**:** O'Boyle and Asset Enhancement, Inc., ("Asset") made a public record request for copies of bills and payments sent to the Town for services rendered by the Town's attorney; and for copies of text messages sent or received by the Town's mayor since the time of his appointment. Appellants alleged that the Town improperly redacted copies of the bills and payments and that the Town produced "a cherry picked" selection of texts which painted O'Boyle "in a negative light." After another records request that produced additional, previously unseen texts, O'Boyle alleged that the initial release was incomplete and that the Town and Mayor deliberately concealed records from the public, in violation of Article I, section 24 of the Florida Constitution and Chapter 119, Florida Statutes. The Appellants filed a lawsuit demanding that the trial court order the Town and others to allow the inspection, copying, and photographing of the requested records and an in-camera inspection of the redacted legal bills to determine if they fell within the "work product" exception of the Public Records Act, as the Town claimed. A week later, the Town turned over the bills and payment records at issue without any redactions.

The Town and the other appellees then filed a motion to dismiss, which the trial court granted and O'Boyle and Asset appealed.

Holding: The Court first noted that the records being sought (text messages) were potentially related to the Town's public business, but were in the exclusive control of one of their elected officials. The Court then determined that "an elected official's use of a private cell phone to conduct public business via text

messaging can create an electronic written public record subject to disclosure". However, for the requested information to be deemed a public record, an official or employee must have prepared, owned, used, or retained the information within the scope of their employment or agency. To be considered "within the scope of employment or agency", the communication must have been made "only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests". Therefore, Florida's Public Records Law only apples to those records which are related to the employee's or official's public responsibilities.

The Court further found that a public entity must treat text messages no differently than it would any other public record request, by reviewing each record to determine if any of the information contained therein is exempt from production and then disclosing the unprotected records to the requester. When a request is made for communications to or from government employees or officials, regardless of whether the records are located on private or public device, the government entity must conduct a reasonable search, which includes requesting those individual employees or officials to provide any public records stored in their private accounts that are responsive to the request. If an entity's officials and employees use private cell phones to conduct public business, via text messages, e-mails, or any other medium, there must be a process available to offer the public a way to obtain those records and resolve disputes regarding the compliance with the request. Otherwise, the requirements of the Public Records Act cannot be properly fulfilled.

Therefore, the Court reversed the lower court's dismissal to the extent that an in-camera hearing is required to be conducted to determine if any of the disputed text messages qualify as a public record. Additionally, the Court upheld the dismissal as it related to the production of the attorney bills, but due to the delay in production of the complete records, the Court remanded the issue of the determination of attorney's fees to the trial court.

****Note**: If agencies permit their employees to use their personal cell phones for public business, it is imperative that a process is put in place where those messages are stored in accordance with public records law and state record retention schedules.