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Civil Rights for Seniors v. Admin. Office of the Courts, 129 Nev. Adv. Op. 80 (Oct. 31, 2013)¹

STATUTORY INTERPRETATION: PUBLIC ACCESS TO FMP RECORDS

Summary

The Court determined two issues: (1) the scope of public access to records maintained by the Administration of the Courts (AOC); and (2) whether documents related to the Foreclosure Mediation Program (FMP) are confidential as a matter of law.

Disposition

The district court properly rejected access to the requested information based on the confidentiality provisions set forth in the Foreclosure Mediation Rules (FMRs).

Factual and Procedural History

Civil Rights for Seniors (CRS) sought access to information contained in FMP records, pursuant to Nevada's Public Records Act (the Act)². These records are maintained by the AOC in its capacity as Mediation Administrator. The AOC offered CRS some of the requested documents in redacted or statistical form, but would not provide other information which it considered either confidential or privileged.

CRS filed a petition for a writ of mandamus in district court to compel the AOC to provide the documents in full, arguing that the redacted information was insufficient for its desired use. The AOC responded that it was not a government entity as defined in the Act, so it was not compelled to disclose. Further, the requested documents would reveal sensitive information about homeowners, who had been assured that certain aspects of the process would be confidential. Lastly, the AOC argued that disclosure of the mediator statements and trustee affidavits may discourage future FMP participation.

The district court denied CRS's petition, stating that the AOC is a judicial entity, and as such is not included in the Act's definition of "[g]overnmental entity." The court also found that the requested documents are otherwise confidential as a matter of law. CRS appealed.

Discussion

The requested records are confidential under the Act

The Act dictates that "unless otherwise declared confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person."³ Although CRS argued that this applies to the judiciary, the Court declined to make a decision on this point because it concluded that the records in question are confidential as a matter of law.

¹ By Collin Jayne.

² NEV. REV. STAT. §239 (2013).

³ NEV. REV. STAT. §239.010(1) (2013).

The Nevada Supreme Court is to carry out FMP statutory provisions by “[e]stablishing procedures to protect the mediation process from abuse.”⁴ To this end, the Court enacted the FMRs, which dictate confidentiality of many FMP documents, including “[a]ll documents and discussions presented during the mediation ... *except* in an action for judicial review.”⁵ In addition, “[a]ny program-issued certificate is considered confidential until recorded.”⁶ The Court further rejected CRS’s argument that the First Amendment guarantees the public’s right to access the information because it does not relate to a public judicial proceeding.⁷

Thus, the plain language of the FMRs state that “any documents or discussions presented at mediation, as well as any unrecorded certificates, are unequivocally confidential unless and until a participant files a petition for judicial review or the certificate is recorded.” All of the information requested by CRS were documents presented at mediation, documents that embody the discussions and negotiations that took place, and certificates without regard to their recording status, which are therefore confidential as a matter of law according to the FMRs.

The requested documents are not court records

The Court also rejected CRS’s argument that the information should be available as court records. The definition of “court records” in the Supreme Court Rules Governing Sealing and Redacting Court Records (SRCR) includes information that is maintained by a court in connection with a judicial proceeding, but explicitly doesn’t include information gathered or stored by another entity to which the court has access but which is not entered in connection with a judicial proceeding.⁸ Because the FMP process is completed before, and often in lieu of, the initiation of a proceeding in any court, the requested records are not court records subject to disclosure under SRCR 1(3).

The common law does not mandate disclosure

Citing *Nixon v. Warner Commc’ns, Inc.*⁹, the Court upheld the AOC’s justification of withholding the information from the public, because the requested documents were not court records and were not otherwise open to the public. Furthermore, the AOC’s interest in maintaining the confidentiality of participant information was justified, given the personal and sensitive nature of the information involved.

Conclusion

Because the FMRs plainly classify the requested information as confidential, and considering the judiciary’s authority to manage its own affairs, the Court held that “the

⁴ NEV. REV. STAT. §107.086(8)(d) (2013).

⁵ NEV. F.M.R. 19.

⁶ NEV. F.M.R. 7(3).

⁷ *See Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245,248 (1996).

⁸ NEV. R. S.R.C.R. 2(2)(a)–(b).

⁹ 435 U.S. 588, 597–98 (1978) (holding that the public’s “general right to inspect and copy public records” is not absolute and courts have inherent authority to deny public access to its records when justified).

information is explicitly declared confidential by law and the AOC acted within its power by maintaining the requested documents as confidential in order to protect the privacy of FMP participants.” The AOC asserted an uncontested privilege over the requested documents that were not deemed confidential. Accordingly, the judgment of the district court was affirmed.