

Public Records, judicial nominating commissions

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Subject:
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Ms. Vicki Russell
Judicial Nominating
Commission Coordinator
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Dear Ms. Russell:

Thank you for your letter requesting my comments on the retention policies for records of the judicial nominating commissions (JNCs).

The State Constitution, not the Legislature, governs the public's right of access to both the records and proceedings of the JNCs.[1] Thus, the JNCs are not subject to s. 286.011, F.S. the Government in the Sunshine Law,[2] or Ch. 119, F.S., the Public Records Law.

Section 11(d), Art. V, State Const., mandates that "[e]xcept for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records shall be open." This language, added by House Joint Resolution 1160 and approved at the November 1984 general election, sought to open judicial nominating commissions "all the way" with the exception of the deliberations of the commission.[3] While uniform rules of procedures are to be established by the JNCs at each level of the court system, such rules may not alter or diminish the constitutional mandate that records and proceedings of the JNCs, except for their deliberations, be open to the public.

Section 11(d), Art. V, State Const., does not define the term "records." While access to the proceedings and records of the JNCs is controlled by the Constitution, s. 286.011 and Ch. 119, F.S., would appear to be helpful in construing the constitutional provision since they serve a similar function—ensuring public access to meetings and records of governmental agencies. Moreover, it should be recognized that the Legislature, in proposing the amendment to s. 11, Art. V, State Const., was aware of the definition of "public records" contained in Ch. 119, F.S.

With respect to the Government in the Sunshine Law and the Public Records Law, this office has consistently advised that when in doubt, open the proceeding or record. Such advice would appear to equally appropriate here. Therefore, I would consider any record or document made or received by the JNC in carrying out its official duties to constitute a public record of the commission.

While the Legislature has created certain exemptions from the disclosure requirements of Ch.

119, F.S., the public's right to view the records and proceedings of the JNCs is controlled by the Constitution, not by the state Legislature. Therefore, the statutory exemptions to disclosure under Ch. 119, F.S., would not appear to be applicable to the JNCs records. Any requirement under federal law, however, that a particular record be closed would prevail over the State Constitution in light of the Supremacy Clause of the United States Constitution.[4]

While the State Constitution limits access for the deliberations of the JNCs, such a limitation would appear to be restricted to those instances in which the commissioners are weighing and examining the reasons for and against a choice.[5] Therefore, while documents made or received by a JNC in carrying out its duties would be open, the commission would not appear to be required to identify which documents it considered during its deliberations. Similarly, the written ballots of a commission would appear to constitute a part of the deliberations of the commission and, pursuant to the Constitution, may be closed.

Although the JNCs are not subject to the provisions of Ch. 119, F.S., requiring agencies to adopt retention schedules, it may be advisable to establish by rule a retention schedule for JNCs records as well as procedural safeguards to ensure that such records are open. The provisions of Ch. 119, F.S., would appear to be helpful by analogy in establishing such a schedule and procedures.

You ask what happens in the event a JNC is unable to fulfill a public records request. Should a JNC fail to comply with the constitutional mandate that its proceedings and records be open, an action might be initiated in the courts to compel such compliance. What further action might be taken would appear to be dependent upon the particular circumstances for the commissioner's failure to open its records.[6] As noted above, however, Ch. 119, F.S., does not apply to the JNCs, and, accordingly, the penalties prescribed in that chapter for violating its terms would be inapplicable to the JNCs.

I hope that the above comments may be of assistance to you in this matter. If this office can be of any further assistance, please let me know.

Sincerely,

Peter Antonacci
Deputy Attorney General

PA/tjw

[1] See In re Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973); Kanner v. Frumkes, 353 So.2d 196 (3 D.C.A. Fla. 1977), stating that the function of a JNC is executive in nature with its mandate coming from the Florida Constitution, not from the Legislature, the Governor or the judiciary.

[2] Kanner v. Frumkes, *supra*.

[3] See Tape 2, Side B, Judiciary Civil Committee, Florida Senate, April 25, 1984; see *also* Tape 1, Rule Committee, Florida Senate, May 25, 1984; and Tape 2 Committee on Judiciary, Florida House of Representatives, April 5, 1984.

[4] Section 2, Art. VI, U.S. Const.

[5] See *generally* Webster's Third New International Dictionary Deliberation p. 596 (unabridged ed. 1981).

[6] *Cf.* s. 7 Art. IV, State Const., providing for the suspension and removal of officers for, among other things, malfeasance and misfeasance.