

# EXHIBIT B

**IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT IN AND  
FOR BROWARD COUNTY, FLORIDA**

HUMAN RIGHTS DEFENSE CENTER,  
a not-for-profit corporation,

Petitioner,

CASE NO.: CACE19025141

v.

CENTURION OF FLORIDA, LLC and  
MHM HEALTH PROFESSIONALS, LLC,

Respondents.

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**CENTURION OF FLORIDA, LLC AND MHM HEALTH PROFESSIONALS, LLC'S  
MOTION TO DISMISS COMPLAINT AND PETITION FOR WRIT OF MANDAMUS**

This case presents a significant issue of public importance and of first impression: the extent to which a *private* entity's *internal* and *confidential* records are subject to Florida's Public Records Act<sup>1</sup> ("PRA") when that entity subcontracts to provide staffing services to a private contractor who has in turn contracted to provide services to an agency subject to the PRA. Because the internal, confidential records of a private entity are not subject to the PRA, the Human Rights Defense Center ("HRDC") has failed to state a claim for relief under the PRA against Centurion of Florida, LLC ("Centurion") and MHM Health Professionals, LLC ("MHMHP"), and, therefore, Centurion and MHMHP respectfully request that this Court dismiss the HRDC's Complaint.

While recognizing that Florida's PRA is expansive and meant to be construed liberally so that the public can have access to government records for the purposes of government transparency, the PRA does not reach so far as to erode the rights of private entities who are not acting on behalf of an agency subject to the PRA. The scope of the PRA is not without limits. To

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<sup>1</sup> See Fla. Stat. §§ 119.01–119.19.

conclude that a private entity who merely has a subcontract subservient to a contract between another private entity and an agency subject to the PRA is required to subject its confidential, internal records to the PRA would have several detrimental effects, including, but not limited to, chilling the government's ability to contract for necessary and vital services from private entities because to do so would mean to expose the internal, confidential records of such entities to public scrutiny.

In the present matter, and assuming for the purposes of this motion to dismiss that the allegations in the Complaint are true, the fact of the matter is that MHMHP, the entity who created and maintains the records at issue, is not an "agency" subject to the PRA. Thus, its internal records are not subject to the PRA. Moreover, the records sought by the HRDC are not "public records" under the PRA. For these reasons, as a matter of law, the HRDC's Complaint is due to be dismissed.

### **RELEVANT FACTUAL BACKGROUND**<sup>2</sup>

From 2016 to the present, the Florida Department of Corrections ("FDOC") has contracted with Centurion to provide contractually-specific healthcare services to inmates in the custody of the FDOC. (Compl. at ¶¶ 5, 11). The contract between the FDOC and Centurion requires that Centurion "keep and maintain *public records required by the Department in order to perform the service.*" (*Id.* at ¶ 13) (emphasis added). MHMHP is not a party to any contract between the

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<sup>2</sup> At the motion to dismiss stage, the Court is confined to the facts alleged in the four corners of the complaint and any documents attached thereto or incorporated by reference. *City of Gainesville v. State, Dep't of Transp.*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001); *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860–61 (Fla. 5th DCA 1996). Thus, for the purposes of this motion, Centurion and MHMHP accept the factual allegations of the Complaint as true to the extent they do not contradict any documents attached thereto or incorporated by reference. However, Centurion and MHMHP expressly reserve their right to challenge any of the factual allegations in the Complaint at the appropriate stage of these proceedings.

FDOC and Centurion. (*Id.* at Ex. 4). Rather, MHMHP provides staffing services to Centurion via a subcontract. (*Id.* at ¶¶ 6, 14).

The HRDC is an agency that exists for the purpose of “assisting . . . prisoners who seek legal redress for infringements of their constitutionally guaranteed and other basic human rights.” (*Id.* at ¶ 7). In August 2019, the HRDC made a public records request to Centurion for the personnel file and any disciplinary records of Dr. Jose Rodriguez, the Chief Health Officer who provides medical services at Lowell Correctional Institution and the Florida Women’s Reception Center. (*Id.* at ¶ 16). Centurion responded to the request by informing the HRDC that (1) it does not employ Dr. Rodriguez and does not have custody of the requested records; (2) Centurion has a subcontract with MHMHP, an affiliate, for the provision of staffing services related to its contract with the FDOC; (3) MHMHP is Dr. Rodriguez’s employer and the custodian of the requested records; (4) MHMHP is not an agency subject to the PRA; and (5) the requested records are not public records under the PRA. (*Id.* at ¶ 18, Ex. 4). In September 2019, the HRDC made an identical request to MHMHP. (*Id.* at ¶ 19, Ex. 5). MHMHP also informed the HRDC that it is not an agency subject to the PRA and the requested records are not public records under the meaning of the PRA. (*Id.* at Ex. 5). For these reasons, Centurion and MHMHP did not provide the requested records to the HRDC. (*Id.* at ¶ 21). On December 6, 2019, the HRDC filed this action alleging that Centurion and MHMHP violated the PRA and seeking, among other relief, that Centurion and MHMHP be required to disclose the requested records. (*Id.*).

### **MOTION TO DISMISS STANDARD**

The primary purpose of a motion to dismiss is to request that the trial court determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *See Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996). In making this determination, the trial court must confine its

review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. *City of Gainesville*, 778 So. 2d at 522; *Cintron*, 681 So. 2d at 860–61.

“To survive a motion to dismiss, a complaint must allege sufficient ultimate facts showing entitlement to relief.” *Stein v. BBX Capital Corp.*, 241 So. 3d 874, 876 (Fla. 4th DCA 2018) (quotations omitted). But this Court need not “accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.” *Shands Teaching Hosp. & Clinics, Inc. v. Estate of Lawson ex rel. Lawson*, 175 So. 3d 327, 331 (Fla. 1st DCA 2015) (en banc), *disapproved on other grounds by Nat’l Deaf Acad., LLC v. Townes*, 242 So. 3d 303 (Fla. 2018); *see also Stein*, 241 So. 3d at 876 (“While we must accept the facts alleged as true and make all reasonable inferences in favor of the pleader, [] conclusory allegations are insufficient.”). Dismissal is proper if a complaint includes merely conclusory, speculative, and internally inconsistent allegations. *See McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st DCA 2016); *Stein*, 241 So. 3d at 876.

### **ARGUMENT**

Under the PRA, “all state, county, and municipal records are open for personal inspection and copying by any person.” Fla. Stat. § 119.01(1). An “agency” subject to the PRA includes “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” Fla. Stat. § 119.011(2). “Public records” subject to the PRA are defined as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or

received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Fla. Stat. § 119.011(12); *accord Braddy v. State*, 219 So. 3d 803, 820 (Fla. 2017).

To state a claim under the PRA, the HRDC must establish that it made a specific request for public records, an agency subject to the PRA received it, the requested public records exist, and the agency improperly refused to produce them in a timely manner. *See Grapski v. City of Alachua*, 31 So. 3d 193, 196 (Fla. 1st DCA 2010); *O’Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040 (Fla. 4th DCA 2018). Here, the HRDC has failed to state a viable claim under the PRA because, under the facts alleged in the Complaint, the HRDC cannot demonstrate that an agency subject to the PRA received or made records related to a governmental function such that the records would fall within the disclosure requirements of the PRA. Consequently, its claims against Centurion and MHMHP under the PRA should be dismissed.<sup>3</sup>

**1. Centurion is not a proper party to this action because it did not create or receive and does not maintain the requested records.**

As a preliminary matter, the HRDC has asserted a claim for violation of the PRA against both Centurion and MHMHP. However, the Complaint does not allege that the requested records are currently or ever have been in the possession, custody, or control of Centurion. The Complaint recognizes that the records were created and are currently maintained by MHMHP. (Compl at Ex. 4, 5). Centurion cannot be made to produce records that it did not create, receive, or maintain.

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<sup>3</sup> For purposes of this motion to dismiss, Centurion is currently setting aside the issue of whether Centurion is a contractor acting on behalf of a state agency under section 119.0701(2), Florida Statutes, such that its records would be subject to the PRA because such issue is not appropriate for resolution on a motion to dismiss. Centurion expressly reserves the right to challenge at the appropriate time the HRDC’s assertion that it is an “agency” subject to the PRA under the factors outlined in *News & Sun-Sentinel Co. v. Schwab, Twitty, Hanser Architectural Grp, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992), or under the “delegation of function” test.

Under the PRA, public records are materials “*made or received* pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Fla. Stat. § 119.011(12). Thus, an agency subject to the PRA cannot refuse inspection of a record if the agency made or received the record in the course of its official business. *See Times Publ’g Co. v. City of St. Petersburg*, 558 So. 2d 487, 492–93 (Fla. 2d DCA 1990). The decision in *Times Publishing Corporation* is illustrative. In *Times Publishing Corporation*, the Second District concluded that a city and a private entity violated the PRA when the city failed to produce records that the city reviewed and discussed with the private entity on the grounds that the city did not have the documents in its possession because the city purposefully left the documents in the possession of the attorney for the private entity. *Id.*; *see also Nat’l Collegiate Athletic Assoc. v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009) (concluding that records on a private entity’s secure website that were viewed and used by a state university in carrying out its official duties were public records even though the state university did not take physical possession of the records).

However, unlike *Times Publishing*, there are no allegations that Centurion has ever had custody or received the requested records in the course of performing its contractual obligations for the FDOC. *See Fox v. News-Press Publ’g Co., Inc.*, 545 So. 2d 941, 943–44 (Fla. 2d DCA 1989) (concluding that assignor of towing contract with a city was not a proper party to a public records action where the assignor did not have custody of the records). Because the requested

records were not made or received by Centurion in the course its business with the FDOC, HRDC's claim against Centurion for violation of the PRA should be dismissed.

**2. MHMHP is not a public agency or contractor acting on behalf of a public agency and is therefore not subject to the public records act.**

The HRDC does not dispute that MHMHP is a subcontractor of Centurion, and that MHMHP has contracted with Centurion to provide staffing services so that Centurion can fulfill its contract with the FDOC. (Compl. at ¶¶ 6, 18). The mere provision of staffing services to Centurion does not render MHMHP an agency subject to the PRA.

In interpreting what it means to “acting on behalf of” a public agency, the Florida Supreme Court has rejected the notion that a private entity acts on behalf of a public agency merely by entering into a contract to provide professional services to that agency. *See Schwab*, 596 So. 2d at 1031. The Fifth District has further explained as follows:

If one merely undertakes to provide material—such as police cars, fire trucks, or computers—or *agrees to provide services*—such as legal services, accounting services, or *other professional services*—for the public body to use in performing its obligations, then there is little likelihood that such contractor's business operation or business records will come under the open meetings or public records requirements.

*News-Journal Corp. v. Mem'l Hosp.-W. Volusia, Inc.*, 695 So. 2d 418, 420 (Fla. 5th DCA 1997), *approved*, 729 So. 2d 373 (Fla. 1999) (emphasis added). Here, there is no dispute MHMHP contracted with Centurion for the sole purpose of providing staffing services to Centurion. (Compl. at ¶ 6). The service of providing health professionals to Centurion for the purpose of performing its obligations under its contract with the FDOC does not transform MHMHP into an agency subject to the PRA. MHMHP simply provides a professional service to Centurion as contemplated in *News-Journal Corp.*

Because MHMHP is not acting on behalf of Centurion in providing Centurion staffing



services, it is not an agency subject to the PRA.

**3. Even if MHMHP were an agency subject to the PRA, the requested records are not public records under the PRA as a matter of law.<sup>4</sup>**

Even if MHMHP were considered an agency subject to the PRA (which MHMHP disputes for the reasons stated above), that does not automatically mean that all of its records are public records subject to the PRA. *See Sarasota Herald-Tribune Co. v. Cmty. Health Corp., Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (noting that even though a private corporation was found to be acting on behalf of a public agency, that did not necessarily mean that every function of the entity was performed on behalf of the public agency and directing the trial court to consider whether specific activities involve nongovernmental functions that fall outside the PRA); *see also State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) (rejecting the notion that “almost everything generated or received by a public agency” is a public record). While there is a significant number of cases that address access to the personnel files of *public* employees under the PRA,<sup>5</sup> no Florida case law exists regarding the applicability of the PRA to personnel files of *private* sector employees who are employed by a private entity that contracts with another private entity who then contracts with an agency subject to the PRA.<sup>6</sup>

A public record is defined as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.*” Fla. Stat.

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<sup>4</sup> To the extent the Court concludes that Centurion is a proper party, this argument applies equally to Centurion.

<sup>5</sup> *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985); *News-Press Publ’g Co. v. Wisher*, 345 So. 2d 646 (Fla. 1977); *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980).

<sup>6</sup> In fact, the undersigned was unable to find any Florida law regarding the status of personnel files of privately employed employees under the PRA.

§ 119.011(12) (emphasis added). The personnel file (and other related employment records, such as disciplinary records) of an employee of a private employer who subcontracts with another private entity who in turn contracts with an agency subject to the PRA is fundamentally different in its status under the PRA than the personnel file of a public employee. The Florida Supreme Court has specifically recognized that ““personnel records are not kept as a principal function of a public agency. They are merely an internal agency function maintained to facilitate the primary purpose of that particular agency.”” *Michel v. Douglas*, 464 So. 2d at 546 (quoting *Roberts v. News-Press Publ’g Co.*, 409 So. 2d 1089, 1095 (Fla. 2d DCA), *review denied*, 418 So. 2d 1280 (Fla. 1982)). The creation and maintenance of a personnel file is an administrative function. *Id.* An administrative function performed by a private entity is not a governmental function. Thus, the personnel files of private employees should not be deemed public records under the PRA.<sup>7</sup>

Because the creation and maintenance of a private employee’s personnel file is not related to a government function, and, instead, is an internal, administrative function, a private employee’s personnel file does not fall within the ambit of records considered public under the PRA.<sup>8</sup>

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<sup>7</sup> Indeed, not even all records created or maintained by a public agency are subject to disclosure under the PRA. *See, e.g., Bent v. State*, 46 So. 3d 1047, 1048–49 (Fla. 4th DCA 2010) (concluding that recordings of phone calls made by juveniles in jail to their parents and third parties were not public records under the PRA because while the monitoring of phone calls related to agency business the retention of recordings of the calls were not).

<sup>8</sup> *See, e.g., Paff v. Cmty. Educ. Ctrs., Inc.*, No. A-2295-12T1, 2013 WL 6096513 (N.J. Sup. Ct. Nov. 21, 2013) (concluding that the personnel records of a subcontractor who provided services and staff for a contractor with a government agency for the purposes of providing addiction treatment and education to individuals incarcerated by the government agency were not subject to disclosure under New Jersey’s public records act).

**4. The personnel record of a physician who provides medical care to prisoners in the custody of the FDOC is exempt from disclosure.**

Section 945.10, Florida Statutes, enumerates a number of exemptions to the PRA for “records and information” held by the FDOC.<sup>9</sup> Records and information subject to exemption under section 945.10 include “[i]nformation which if released would jeopardize a person’s safety” and “[r]ecords that are otherwise confidential.” Fla. Stat. § 945.10(1)(e), (i). Dr. Rodriguez’s personnel file is exempt from disclosure under both subsections.

The personnel file of Dr. Rodriguez, the employee of a private company, is confidential. Under Florida law, a private employee has a right of privacy to the information contained in his or her personnel file, rendering such personnel file confidential. *See, e.g., Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 940–41 (Fla. 2002). While the PRA typically trumps the privacy rights of public employees in their personnel files, it would not trump Dr. Rodriguez’s privacy right because he is employed by a private company and the confidentiality exemption under section 945.10(i) permits “otherwise confidential” records held by the FDOC to be exempt from disclosure. Thus, Dr. Rodriguez’s personnel file should be deemed exempt from disclosure under section 945.10(i).

Additionally, the disclosure of Dr. Rodriguez’s personnel file, which contains personal information, including, but not limited to, his home address, phone number, and other identifying information, could jeopardize his personal safety and that of his family. The idea that the disclosure of personnel records could jeopardize the safety of a public employee was specifically recognized by Justice Overton in his dissent in *Michel v. Douglas*, where the Court considered the issue of disclosure of a personnel files of public hospital employees. 464 So. 2d at 547. As Justice

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<sup>9</sup> And if Centurion and MHMHP are found to be acting on behalf of the FDOC, these exemptions also apply to any records held by them.

Overton noted: “some of the hospital employees are psychiatric personnel who work with persons who are a danger to themselves and to others. . . .” *Id.* While this issue was not addressed by the parties, Justice Overton noted that “[i]t appears that a significant issue has been raised if evidence can clearly establish that the disclosure of certain portions of the information contained in public records could result in serious physical injury.” *Id.*

In the present case, the personal safety and security of medical personnel, including Dr. Rodriguez, who provide medical care to inmates, is of paramount importance. It is well known that there is a prevalence of mental health and psychiatric issues among incarcerated individuals.<sup>10</sup> Moreover, setting aside the issue of mental health, prisons and jails house the dangerous and disaffected. Thus, any decision finding that the personnel record of a privately employed medical provider is subject to the PRA has far reaching implications beyond this case because it would set a precedent that anyone, including a former inmate, could seek personal information about his or her current or former medical provider, which could be used to harass or harm. Accordingly, the personnel records of medical providers who provide services to the FDOC should be exempt under section 945.10(e) as well.

Section 945.10(3) provides an additional basis to withhold Dr. Rodriguez’s personnel file. Section 945.10(3) states, in pertinent part: “Due to substantial concerns regarding *institutional security* and unreasonable and excessive demands on personnel and resources if an inmate or an offender has unlimited or routine access to records of the Department of Corrections, an inmate or an offender who is under the jurisdiction of the department may not have unrestricted access to the department’s records or to information contained in the department’s records.” (emphasis added);

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<sup>10</sup> “A ‘hellish world’: the mental health crisis overwhelming America’s prisons, <https://www.theguardian.com/society/2018/mar/31/mental-health-care-crisis-overwhelming-prison-jail> (last accessed January 31, 2020).

*see also Smith v. Hernandez*, 20 So. 3d 905, 906 (Fla. 2d DCA 2009) (finding the personnel file of a correctional employee was exempt from disclosure under the PRA when requested by an inmate). The HRDC specifically stated in its Complaint that it is an organization “assisting . . . prisoners who seek legal redress for infringements of their constitutionally guaranteed and other basic human rights.” (*Id.* at ¶ 7). The HRDC should not be permitted to make requests on behalf of inmates that would not otherwise be permitted under the law if made by an inmate directly. It would allow inmates to circumvent the legislatively-imposed restrictions on inmate requests under the PRA.<sup>11</sup> For this additional reason, Dr. Rodriguez’s personnel file is exempt from disclosure under the PRA.

### **CONCLUSION**

The records requested by the HRDC are not public records and were not created or maintained by an agency subject to the PRA. Thus, the HRDC has failed to state a claim against Centurion or MHMHP, and its Complaint should be dismissed.

Dated: February 4, 2020

Respectfully submitted,

*s/ R. Craig Mayfield*

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<sup>11</sup> In the event the Court ultimately concludes that Centurion and/or MHMHP is required to produce the requested records, Centurion and MHMHP reserve the right to redact information exempt from disclosure under the PRA.

**CERTIFICATE OF SERVICE**

I **HEREBY** certify that on February 4, 2020, I electronically filed and served the foregoing with the Clerk of the Court by using the Florida Courts E-Filing Portal, which will provide copies to counsel of record.

*s/ R. Craig Mayfield*  
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