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FT. SMITH DIST.

Reginald Moore
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CLERK SEB. CO

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DIVISION
CIVIL DIVISION

JUNE BRADSHAW
V.

Case No. CV-16 1053

PLAINTIFF

FORT SMITH SCHOOL DISTRICT and

FORT SMITH PUBLIC SCHOOLS BOARD OF EDUCATION DEFENDANT

MOTION TO DISMISS

(With Brief Supporting Statement and Citations)

The Defendants, Fort Smith School District and the Fort Smith Public Schools Board of Education, appearing by and through their attorney, James M. Llewellyn, Jr., for their Motion to Dismiss the Complaint of the Plaintiff, June Bradshaw, state and say:

1. The Defendant moves the Court to dismiss this case pursuant to Arkansas Rule of Civil Procedure Rule 12(b)(6) for failure to state facts upon which relief can be granted.
2. The Complaint alleges denial of rights under the Arkansas Freedom of Information Act ("AFOIA") pursuant to Ark. Code Ann. § 25-19-107(a).
3. The allegations of paragraphs 3, 4, 5, 6 and 7 are admitted.
4. The allegation of paragraph 8 is only a partial excerpt and therefore denied. Exhibit A. speaks for itself.

5. The allegation of paragraph 9 is only a partial excerpt and therefore denied. Exhibit A. speaks for itself.

6. The allegation of paragraph 10 is only an excerpt and therefore denied. Exhibit A. speaks for itself.

7. The allegations of paragraph 11 are denied. Exhibit A. speaks for itself.

8. The allegations of paragraph 12 are admitted.

9. It is admitted that the allegations of paragraph 13 are a partial excerpt of Ark. Code Ann. § 25-19-102.

The remaining paragraphs of the Complaint are argumentative and do not contain facts requiring Defendants admission or denial.

ARGUMENT

The Complaint fails to state facts upon which relief can be granted. Arkansas Rule of Civil Procedure Rule 12(b)(6).

The Defendants agree that the emails at issue are discoverable under the Arkansas Freedom of Information Act and they were produced when requested.

However, the legal authorities the Plaintiff cites: Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 75: 522 S.W. 2d 350, 353 (1975) and El Dorado Mayor v. El Dorado Broadcasting Co. 260 Ark. 821: 260 Ark. 821, 824: 544 S. W. 2d 206 (1976) are informative, but not conclusive. In El Dorado the Court referred to a California case for guidance, Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal. App. 2d 41,69 Cal.Rptr. 480. While these two Arkansas cases

address meetings, the correspondence addressed in the case before the Court was not a meeting. In Pickens the reporter was denied access to the room where the Board of Trustees of the University of Arkansas were meeting. In El Dorado a reporter was denied access to a conference where four of the City's aldermen were in attendance with the mayor discussing the use of federal revenue funds. In El Dorado the Arkansas Supreme Court recognized the trial court's order emphasized that the Freedom of Information Act did not apply to meetings of any number of the city council for purposes of only obtaining information, a conclusion applicable to this case.

Two Fort Smith FOIA cases, Harris v. City of Fort Smith, 359 Ark. 355, 197 D.W.3d 461 (2004) and McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 (2012) offer guidance. In Harris the City Administrator met individually with each member of the City Board of Directors to obtain approval of a bid to be made on property the City should acquire for City purposes. The bid by the City was successful. After the City Board meeting approving the purchase, the City bid being successful, Harris filed an FOIA complaint. Following several Court proceedings the Supreme Court found that the serial meetings of the Administrator to obtain approval of the individual board members constituted a Board meeting subject to the FOIA.

McCutchen v. City of Fort Smith, 2012 Ark 452, 425 S.W. 3d 671 (2012) reached a different result. The City Administrator, Kelly, believed he did not have the authority to hire or fire department heads. Kelly prepared and delivered a memorandum to five of the seven board members proposing an ordinance in advance of a board study session at which the ordinance would be discussed but not

voted on. The proposed agenda was not placed on the regular Board agenda. Suit was filed claiming a violation of the FOIA.

The Supreme Court agreed there was no FOIA violation after appeal from the Circuit Court decision finding there was no violation.

The distinction between the two cases is in Harris contact was to obtain approval of action to be taken by the board before the Board meeting and in McCutchen the contact was only to provide information. The emails in this case were a sharing of information and no action was taken during the email exchange. No vote was taken and no commitment by any board member to a slate of officers was sought.

The Plaintiff refers to an opinion issued by Attorney General Beebe, 2005-166. General Beebe discusses many different fact situations and proposes possible results. His conclusion is the key point of his opinion: "In conclusion, therefore, it is my opinion that a violation of the FOIA's open meeting requirement could occur under circumstances involving e-mail communications, but only a finder of fact presented with all the underlying circumstances will be situated to decide the matter."

General Beebe looked to decisions from other states and cites some of those cases. Arkansas courts frequently look to opinions from other states.

The Courts of the Commonwealth of Virginia have provided an analysis of the use of email communications by members of a public body. In Bill Beck, et al. v. Gordon Shelton, et al. 267 Va. 482, 593 S.E. 2d 195 (Va., 2004) (copy enclosed) the Court concluded the emails did not occur simultaneously. Nether did the emails in this case occur simultaneously, they occurred over a period of 5 days:

Mrs. Cole sent the initial email on October 8 at 3:47 PM

Dr.Mehl sent the next email on October 10 at 11:36 AM

Mr. Gilkey sent the next on October 11 at 4:26 PM

Mrs. McFerran sent the next on October 11 at 7:47 PM

Mrs. Keaton-Martin sent the next on October 12 at 7:47 PM

Mr. Hanesworth sent the next on October 12 at 8:54 PM

Dr. Mehl sent the next on October 13 at 8:55 AM

Mrs. Richardson sent the next on October 13 at 10:09

Mr. Gilkey sent the next on October 13 at 10:36 AM

The only conclusion, without a vote, was Dr. Mehl's email of October 13 noting that there appeared to be a tentative slate. The use of "tentative slate" by Dr. Mehl clearly conveys her opinion that this was not the final slate and was subject to full discussion by the board at the next meeting.

As in Beck the exchange occurred over a period of days, and contained only personal opinions of individual members, such as Mrs. Cole explaining why she would not accept the Vice Presidency, Mrs. McFerran referring to an Arkansas School Board Association recommendation and, finally, Dr.Mehl suggesting what a possible board officer configuration might be. Beck was followed and cited in 2012 by another Virginia case, Jill Demello Hill v. Fairfax County School Board, 727 S.E.2d 75, 281 Ed. Law Rep. 714, 40 Media L. Rep. 1922. The Hill Court endorsed and applied Beck in its decision.

Here, no nominations were presented and no vote was taken until the regular School Board meeting.

The Plaintiff has not set out a factual basis to show a violation of the Arkansas Freedom of Information Act. While there was casual conversation via email over a period of five days, no vote was sought and no agreement was stated by each board member to the tentative slate of officers. The matter was clearly left for the next Board meeting.

Arkansas is a fact pleading state. ARCP Rule 8(a)(1). ARCP Rule 12(b)(6) provides the Complaint may be dismissed where, as here, the facts pled do not evidence any violation. Perrodin v. Rooker 908 S.W. 2d 85, 322 Ark. 117. The Plaintiff has not pled any facts to support a violation of the FOIA.

WHEREFORE, Defendants the Fort Smith School District and the Fort Smith Public Schools Board of Education the pray that this Court dismiss the Complaint for failure to state facts upon which relief may be granted and award the Defendants its attorney fees and costs and such other relief the Court may deem appropriate.

Respectfully submitted

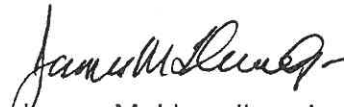


James M. Llewellyn, Jr.,
Bar no. 66040
412 South 18th Street
P.O. Box 818
Fort Smith, AR 72902-0818
Telephone: 479-85-2867
Facsimile: 479-782-8046

CERTIFICATE OF SERVICE

I, James M. Llewellyn, Jr., have on this 16th day of December 2016 caused a true and correct copy of this MOTION TO DISMISS to be mailed First Class, postage prepaid, to:

Joey McCutchen
A. Tyler Hudgens
McCutchen & Sexton – The Law Firm
P.O. Box 1971
Fort Smith, AR 72902-1971


James M. Llewellyn, Jr.