

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

FILED
FT. SMITH DIST
2011 JAN -3 P 2:27
L. O'Leary
CIR. CLERK SEB. CO.
PLAINTIFF

JUNE BRADSHAW

VS.

NO. CV-16-1053

FORT SMITH SCHOOL DISTRICT and
FORT SMITH PUBLIC SCHOOLS BOARD OF EDUCATION

DEFENDANTS

RESPONSE TO MOTION TO DISMISS

Comes now the Plaintiff, June Bradshaw, and for her Response to Defendant's Motion to Dismiss, states:

1. For the reasons stated in Plaintiff's Brief in Support of Response to Motion to Dismiss, which is incorporated herein and made a part hereof by reference, the Defendants' Motion to Dismiss must be denied.

2. Defendants held a formal or informal meeting through a series of email communications in a manner inconsistent with, and in violation of, the Arkansas Freedom of Information Act ("FOIA"). The business that was conducted was not only likely to come before the School Board but was statutorily required to come before the School Board. In the serial communications, Defendants not only nominated a slate of officers but discussed their rationale for doing so and the School Board President referred to herself as "the chair" thus evidencing she was acting as the School Board President or chairman. There is no doubt that a meeting occurred, as well as a violation of FOIA.

WHEREFORE, the Plaintiff, June Bradshaw, prays that the Defendants' Motion to Dismiss be denied and for such other relief as is proper.

Respectfully submitted,

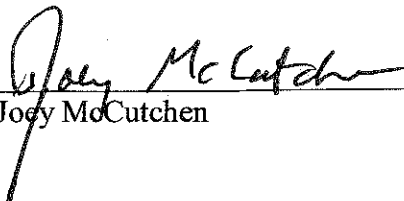


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CERTIFICATE OF SERVICE

I, Joey McCutchen, hereby certify that a copy of the above and foregoing document was mailed to the following attorney of record for the Defendants by first class mail, postage prepaid, on the 3rd day of January, 2017:

Mr. James Mitch Llewellyn
Thompson & Llewellyn
412 South 18th Street
Fort Smith, AR 72902-0818



Joey McCutchen

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FORT SMITH DISTRICT
CIVIL DIVISION

JUNE BRADSHAW

PLAINTIFF

VS.

NO. CV-16-1053

FORT SMITH SCHOOL DISTRICT and
FORT SMITH PUBLIC SCHOOLS BOARD OF EDUCATION

DEFENDANTS

BRIEF IN SUPPORT OF RESPONSE
TO MOTION TO DISMISS

Defendants, Fort Smith School District and Fort Smith Public Schools Board of Education (both of which are collectively referred to in this Brief as “Board” or “School Board”), move to dismiss the Plaintiff’s complaint arguing that a lengthy exchange of emails occurring over a period of days do not violate the Arkansas Freedom of Information Act (referred to in this Brief as “FOIA”), Ark. Code Ann. § 25-19-101, et seq. The Board’s argument is essentially that there was no formal or informal meeting in their exchange of emails that are attached as Exhibit A to Plaintiff’s Complaint. The Board argues that because there was no meeting, no violation of FOIA can be present and the Plaintiff’s Complaint should be dismissed. As is detailed below, the Board’s position is in direct opposition to FOIA and established precedent from the Arkansas Supreme Court.

STANDARD IN RULING ON A MOTION TO DISMISS

In ruling on a Motion to Dismiss based upon failure to state facts upon which relief can be granted, the Court must treat all factual allegations in the Plaintiff’s Complaint as true and view them in the light most favorable to the Plaintiff. *Key v. Curry*, 2015 Ark. 392, 473 S.W.3d 1, 3, citing *Hanks v. Sneed*, 366 Ark. 371, 235 S.W.3d 883 (2006); see also *Billy/Dot, Inc. v.*

Fields, 322 Ark. 272, 275, 908 S.W.2d 335 (1995). The Board's motion is disingenuous in light of the School Board's President publicly conceding that the emails violated FOIA (see <http://www.swtimes.com/news/20161211/fort-smith-school-board-addresses-foia-lawsuit>).

LEGISLATIVE INTENT OF FOIA

Because the Plaintiff's Complaint is based on a violation of FOIA, a determination of the legislative intent in enacting the FOIA is required. Ark. Code Ann. § 25-19-102 sets forth the legislative intent of the Freedom of Information Act:

"Legislative intent.

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials."

The Arkansas Supreme Court has, on numerous occasions, expanded on the legislative intent of FOIA and has indicated that FOIA covers not only decisions actually made but also the rationale for such decisions. For example, in *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 75, 522 S.W.2d 350, 353 (1975), our Supreme Court stated that the public is entitled to know the reasons (or the "why") actions were taken:

"When the General Assembly used the expression 'to learn and report *fully* [emphasis in original] the activities of their public officials', it meant not only the action taken on particular matters, but likewise the reasons for taking that action. Actually, public knowledge of the reasons can well result in a board decision being more acceptable or palatable; to the contrary, decisions rendered in secret, the reasons not being known, can well result in perhaps unjustified criticism of a board. Is not the public entitled to know why a board adopts certain rules or regulations? The 'why' is the essence of the action taken." *Id.*

In addition to condemning decisions that are rendered without a public meeting, as the Court did in *Pickens*, our Supreme Court has also consistently held that FOIA statutes should be

liberally construed to accomplish the intended purpose of open government. *Ark. Dept. of Finance & Administration v. Pharmacy Associates, Inc.*, 333 Ark. 451, 456, 760 S.W.2d 217 (1998), citing *Arkansas Dept. of Health v. Westark Christian Action Council*, 322 Ark. 440, 443, 910 S.W.2d 199 (1995); *Swaney v. Tilford*, 320 Ark. 652, 653, 898 S.W.2d 462 (1995); *Orsini v. State*, 340 Ark. 665, 670, 13 S.W.3d 167 (2000). Doubts regarding the legislative intent are interpreted most favorably to public access and in favor of open government. For example, in *Bryant v. Weiss*, 335 Ark. 534, 538, 983 S.W.2d 902 (1998), the Arkansas Supreme Court said:

“Our decisions have clearly stated that the intent of the Freedom of Information Act was to establish the right of the public to be fully apprised of the conduct of public business. * * * As a rule, statutes enacted for the public benefit are to be interpreted most favorably to the public.”

STATUTORY REQUIREMENTS FOR ELECTION OF BOARD OFFICERS

While the Board does not even address the legal requirements regarding election of School Board officers (*i.e.*, President, Vice-President, and Secretary), it is important to note that that the election of School Board officers **must** occur in a public meeting. Ark. Code Ann. § 6-13-618 provides, in part:

“(a) At the first regular meeting following the later of the certification of the results of the annual school election or the certification of the results of a runoff election, the board of directors of each school district shall organize by electing:

- (1) One (1) of their number president;
- (2) One (1) of their number vice president; and
- (3) A secretary who may be, but need not be, a member of the board of directors.”

Neither FOIA nor Ark. Code Ann. § 6-13-618 permits discussion of a slate of officers or who will be nominated for such positions outside of a public meeting. Yet, that is exactly what occurred here and what is alleged in Plaintiff's Complaint.¹

**A MEETING OCCURRING OVER A PERIOD OF DAYS
IS NOT EXEMPTED FROM FOIA'S OPEN MEETING REQUIREMENTS**

The Board contends that because the lengthy chain of emails among all the Board members occurred over a series of days that there could not possibly be a "meeting" or "gathering" as is required for FOIA's open meeting requirements to apply. This argument is absurd because it would allow any Board to circumvent FOIA on any matter simply through a series of emails that occur over a period of more than one day.

It must also be noted that FOIA does not exempt a meeting lasting more than one day from its open meeting requirements. Likewise, a meeting or gathering that lasts more than one day is still subject to FOIA's open meeting requirements. It would be absurd to hold otherwise because simply holding a two-day meeting would exempt a meeting (which is required to be open) from the open meeting requirements of FOIA.

Additionally, in *Harris v. City of Fort Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004), our Supreme Court gave the clear direction that an actual gathering of two or more Board members was not required in order for FOIA's open meeting requirements to apply. In *Harris, supra*, our

¹Plaintiff notes that if the Court believes that she did not adequately plead facts as required by the Arkansas Rules of Civil Procedure that she should be given the opportunity to correct any deficiencies before a dismissal occurs and she requests such opportunity. However, Plaintiff believes that she has well pled all facts necessary to state a cause of action for violating FOIA. Plaintiff does note that the matter of the election of Board officers was discussed in a September 29, 2016 committee meeting of the School Board and it was noted in the meeting that the matter would be addressed at the next Board meeting. If the Court does not believe that Plaintiff's complaint states facts upon which relief can be granted, Plaintiff should be given the opportunity to plead this additional fact to show that the Board members knew that the matter was coming before the Board as official Board business.

Supreme Court held that a series of communications between the City Administrator and individual members of the Fort Smith Board of Directors, which were not simultaneous, constituted a “meeting” under FOIA even though there was never a gathering or assemblage of any two individual directors. The *Harris* Court said:

“We hold that under the facts of this case, contact of individual Board members by the City Administrator to obtain approval of action to be taken by the Board as a whole constituted an informal Board meeting subject to the FOIA.” *Id.*, 197 S.W.3d at 463.

If individual/non-simultaneous communications occurring over a period of time constitutes an informal meeting under FOIA, how can it be doubted that emails involving each and every member of a Board (subject to FOIA) which do not occur simultaneously and which discuss a matter that was required by statute to come before the Board was either a formal or informal meeting under FOIA?

THE EMAILS WERE NOT MERELY INFORMATIONAL AS THE BOARD SUGGESTS

The Board suggests that the numerous emails were merely informational and not the discussion of official business of the School Board. However, merely looking at the emails shows that the Board members repeatedly discussed nomination of a specific slate of officers and the rationale of Board members for nominating the slate of officers—all being matters which are statutorily required to come before the School Board in a public meeting. An examination of the emails shows the following matters were discussed, with every email including all members of the Fort Smith Public Schools Board of Directors:

Email #1: The first email from Board member Jeannie Cole. It is without question that the email was directed to every other Board member because it is addressed to “Fellow FSPS Board Members.” The email discusses the obligations of School Board officers, is very detailed,

and states Ms. Cole's surprise that the Board is not following tradition (*i.e.*, Ms. Cole was Vice-President and, following tradition, should have been elected Board President). Ms. Cole stated that she did not desire to serve as Vice-President again. Ms. Cole's email, addressed to all Board members, ends with the following statements: "I trust we will think through this and come to a good decision for our students. Please 'reply to all' if you have additional thoughts to share." Thus, the first email was clearly sent to all Board members, discussed business that was statutorily required to come before the Board, and then solicited others to share their thoughts (*i.e.*, "[p]lease 'reply to all' . . .").

Email #2: The second email comes from School Board President Mehl again discussing School Board business with all Board members. That email ends with the following statements:

"At this time, I am requesting that board members suggest a new slate of officers. Again be sure when you respond to this email that you use the 'reply all' indication."

As repeatedly noted, above, there is no doubt that election of School Board officers must occur in a public meeting. Yet, Board President Mehl requests that School Board members essentially indicate their support for "a new slate of officers" and this all occurred outside of the public's presence and with no notice to the media or to anyone. Board President Mehl invites other Board members to continue the email chain, to come up with a slate of officers, and directs Board members to include all other Board members on the communication [*i.e.*, "use the 'reply all' indication"]. It couldn't be clearer that an election of officers, outside of a public meeting, is what Board President Mehl was soliciting.

Email #3: The email chain continues with an email from Board member Gilkey which actually proposes a new slate of officers, just as Board President Mehl had requested. Board

member Gilkey proposes Mehl as President, Susan McFerran as Vice-President, and Bill Hanesworth as Secretary.

Email #4: Next, Board Member Keaton-Martin (then serving as Secretary of the Board) obviously object's to Gilkey's proposed slate of officers, stating: "If the ASBA information that Susan [McFerran] sent is correct then my term as secretary is still place {sic} for another year. Just saying."

Email #5: Board Member Hanesworth (who had been nominated by Board Member Gilkey as Secretary, in place of Board Member Keaton-Martin) responds that he is agreeable to Ms. Keaton-Martin continuing as secretary, and further states "[a]s mentioned in my email we need to be focused on the legacy of our district and this board as we choose a new leader. This is my single focus!!"

Email #6: Next, Board President Mehl clearly sets forth a new slate of officers: Mehl as President, McFerran as Vice-President, and Keaton-Martin as Secretary. This slate is uncontested. Mehl further continues in such a way that can only be construed as indicating that she was serving as the Board Chairman and that a meeting was occurring, stating:

The chair welcomes any additional comments on this subject." [emphasis added]

Unless a meeting was occurring, School Board President Mehl was not the "chair" as she indicated in her email. After all, outside of the context of an official meeting, President Mehl is not "the chair."

Email #7: Board Member Talicia Richardson is the next to join in the email chain, announcing her support for the slate of officers proposed by Board President Mehl:

"As the newest member, I am in support of continuity, as well as experience, with our officers during this very important time. Personally speaking, the knowledge they possess in their role and parliamentary procedures will allow others with

less than 2 years of experience in a school board role to become properly trained and accumulated.”

Email #8: Board Member Gilkey concludes the email chain (or meeting) announcing his support for the new slate of officers: “I agree with the proposed slate of officers.”

Thus, the School Board discussed, gave their rationale, and even announced a slate of officers—a matter which is statutorily required to occur in a public meeting pursuant to Ark. Code Ann. § 6-13-618. And while Defendants contend that these serial communications were not a formal or informal meeting, this claim is meritless because the Supreme Court has defined a FOIA “meeting” as “any gathering of a governing body at which the body discusses official business on which foreseeable action might be taken.” *El Dorado Mayor v. El Dorado Broadcasting Co.*, 260 Ark. 821, 824, 544 S.W.2d 206 (1976); see also Arkansas Attorney General Opinion No. 2005-166. Even though the gathering was by email, it was much more of a “gathering” than occurred in *Harris, supra*, in that it involved serial communications among all board members discussing business that was statutorily required to come before the Board. *El Dorado Mayor* establishes a bright-line rule that was violated by the Board in this matter.

Further, in *El Dorado Mayor, supra*, the Supreme Court quoted with approval from *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968) stating:

“. . . An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. . . .” *El Dorado Mayor, supra*, 260 Ark. at 823.

Again, this is exactly what transpired here—conducting Board business behind closed doors. In fact, business that was statutorily required to come before the School Board in a public meeting was discussed and essentially a decision was made with no notice to the public, the media, or

anyone and all in private. Even the Sebastian County Prosecutor agreed that there was a violation of FOIA. (See Exhibit C to Plaintiff's Complaint.)

**THE CITATION TO VIRGINIA'S FOIA LAW IS CLEARLY NOT IN POINT
BECAUSE VIRGINIA LAW REQUIRES A SIMULTANEOUS ASSEMBLAGE
OF BOARD MEMBERS**

The Board cites *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195 (2004) (and another Virginia case applying *Beck*) for the proposition that no "meeting" occurred for purposes of FOIA when an exchange of emails occurs over a period of time. This argument has no merit. As noted in *Beck, supra*, 593 S.E.2d at 199, a vastly different statute was in issue than here. That statute, Va. Code § 2.2-3701, actually defined the term "meeting" as requiring an **assemblage**, and assemblage was construed as requiring simultaneous communication, with the *Beck* Court stating:

"Clearly, the conduct in question did not involve 'sitting physically' in a 'work session.' **Consequently, the key to resolving the question before us is whether there was an 'assemblage.'** The term 'assemble' means 'to bring together' and comes from the Latin *simul*, meaning 'together, at the same time.' *Webster's Third New International Dictionary* 131 (1993). **The term inherently entails the quality of simultaneity.** While such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission." [emphasis added] *Id.*, 593 S.E.2d at 199.

There are very substantial differences between the Virginia statute and the Arkansas FOIA statute. The Arkansas FOIA statute applies to both formal and informal meetings, with the term "informal meeting" being undefined and very broadly construed. And while the Virginia statute applies to an "informal assemblage," it is very different from our FOIA statute because it very clearly requires an assemblage, very specifically defines what constitutes an informal assemblage. Secondly, the Arkansas FOIA statute applies to serial communications between a city administrator and individual members of a board subject to FOIA, *Harris v. City of Fort*

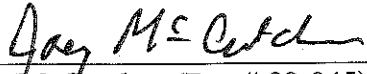
Smith, 359 Ark. 355, 197 S.W.3d 461 (2004), unlike Virginia's statute which requires an "assemblage" and simultaneous communication. And, lastly, based upon *Harris*, it is abundantly clear that the Arkansas statute clearly does not require an "assemblage" or simultaneous communication as is required by the Virginia statute. The Virginia citation is simply not in point because the Arkansas and Virginia open meeting laws are extremely dissimilar.

SUMMARY AND CONCLUSION

The email communications of Defendant Fort Smith Public Schools Board of Education between October 8 and 14 violated FOIA in that: (i) business was transacted in a series of emails constituting a meeting under FOIA out of public view in contravention of Ark. Code Ann. § 25-19-106(a); and (ii) the public was deprived of its right to observe the reason for the slate of officers proposed and discussed, in contravention of the legislative intent of FOIA as set forth in *Pickens*, *supra* and other cases.

For all of these reasons, the Court should deny the Board's Motion to Dismiss. While the present matter is certainly one that warrants summary judgment in favor of the Plaintiff, Plaintiff is requesting a trial on the merits so that the Board has no argument on appeal regarding their actions.

Respectfully submitted,

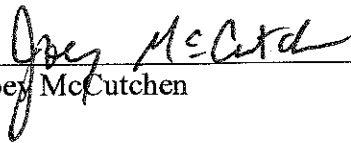


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