

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA

THE HENRY AND RILLA WHITE
YOUTH FOUNDATION, INC.,

Plaintiff,

v.

Case No. 2021-CA-364

FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES,

Defendant.

ORDER DENYING WRIT OF MANDAMUS AND DISMISSING COMPLAINT

A hearing was held on March 29, 2021 on Plaintiff's Public Records Complaint for Mandamus and Declaratory Relief. All parties were represented by counsel at the hearing.

Defendant, the Florida Department of Agriculture and Consumer Services', motion to dismiss for lack of standing is granted, without prejudice to amend.

Plaintiff has 20 days from the date of this order to amend and refile.

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida on this 29th day
of Mar, 2021.


Hon. J. Layne Smith
Circuit Judge

Copies furnished to all counsel of record.

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
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FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES,

Defendant.

_____ /

**DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES' RESPONSE TO
ORDER TO SHOW CAUSE AND SUPPORTING MEMORANDUM OF LAW**

Defendant, the Florida Department of Agriculture and Consumer Services ("Department"), by and through undersigned counsel, and pursuant to Rules 1.630 and 1.140, Florida Rules of Civil Procedure, hereby responds to the Court's Order to Show Cause Why Plaintiff's Complaint for Mandamus and Declaratory Relief Should Not be Granted, with incorporated Memorandum of Law.

RESPONSE TO PUBLIC RECORDS COMPLAINT

1. Admitted that this is a public records action pursuant to chapter 119, Florida Statutes. Denied that the Foundation made a public records request on December 17, 2020. Additionally, denied that the Department has refused to provide unredacted versions of documents responsive to the December 17, 2020 public records request.

2. Admitted to the extent the statutes and case law speaks for itself.

3. Admitted.

4. Admitted that the Department is an executive department of the government of the State of Florida, located in Leon County, Florida. Admitted that the Department is an agency pursuant, and subject, to chapter 119, Florida Statutes. Denied that the term “ministerial” appears anywhere in section 119.07(1)(a), Florida Statutes.

5. Admitted.

6. Admitted.

7. Denied that Plaintiff, the Foundation, sent a public records request to the Department on December 17, 2020, or at any other time. Admitted that a public records request was received by the Department on December 17, 2020, from, and in the name of, Mr. Ty Jackson, of Gray Robinson, P.A. In regard to the remaining subparagraphs, the documents in Exhibits B through G speak for themselves.

8. The Department has no knowledge of whether the Foundation reviewed the records produced. Denied that the Foundation responded to the public records request in any way or that the Foundation advised the Department of any citations or legal arguments. This paragraph otherwise consists of legal conclusions and is, therefore, denied.

9. Exhibit H speaks for itself.

10. The case law speaks for itself. This paragraph otherwise consists of legal conclusions and is, therefore, denied.

11. This paragraph consists of legal conclusions and is, therefore, denied.

12. This paragraph consists of legal conclusions and is, therefore, denied.

13. Denied that the Foundation provided written notice to the Department on February 16, 2021, or at any other time.

14. The Department has no knowledge of the Foundation’s legal services agreement

with Gray Robinson, P.A.

15. Denied.

16. The Department restates and incorporates by references the responses provided above to paragraphs 1 through 15.

17. Admitted that the Department has not provided unredacted versions of the public records at issue. The remainder of this paragraph consists of legal conclusions and is, therefore, denied.

18. Admitted that the Department relied on redactions pursuant to case citation as to certain produced documents. The remainder of the paragraph consists of legal conclusions and is, therefore, denied.

19. This paragraph consists of legal conclusions. The case law speaks for itself. Otherwise denied.

20. This paragraph consists of legal conclusions. The case law speaks for itself. Otherwise denied.

21. This paragraph consists of legal conclusions and is, therefore, denied.

22. This paragraph consists of legal conclusions. The case law speaks for itself. Otherwise denied.

23. The Department has no knowledge of the Foundation's legal services agreement with Gray Robinson, P.A. Denied that Gray Robinson, P.A., is entitled to attorneys' fees.

24. The Department restates and incorporates by references the responses provided above to paragraphs 1 through 15.

25. Admitted to the extent that the Foundation is seeking a declaratory judgment. Denied that the Foundation is entitled to inspect the records at issue.

- 26. Denied
- 27. Denied.
- 28. Admitted.
- 29. The Department has no knowledge of the Foundation's legal services agreement with Gray Robinson, P.A.

MEMORANDUM OF LAW

This Court's March 2, 2021 Order to Show Cause Why Plaintiff's Complaint for Mandamus and Declaratory Relief Should Not be Granted, directs the Department to respond to Plaintiff's Public Record Complaint for mandamus and declaratory relief. The Department submits that Plaintiff is not entitled to either prayer for relief on the bases that the Complaint is legally insufficient by failing to demonstrate a clear right to the relief requested and that Plaintiff lacks standing.

Plaintiff's Complaint makes two main assertions. First, that the Department's citation to the *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19 (Fla. 2d DCA) case is an improper basis for the Department's redactions to certain documents, in Exhibits C, E, and G to Plaintiff's Complaint, and is inapplicable because the case regards redacted records that protect the identity of a confidential informant. (Complaint, ¶¶7-8). Second, that the public records exemption in section 119.71(1)(d), Florida Statutes, the so-called attorney work product/litigation privilege exemption, is somehow only applicable to "internal communications," and, therefore, that the redactions to other certain documents, in Exhibits B, D, and F to Plaintiff's Complaint, are improper. (Complaint, ¶¶7 and 18). As a sub-argument of this second assertion, Plaintiff contends that any citation to section 119.71(1)(d), Florida Statutes, requires the Department to identify "the potential parties to any such . . . civil litigation or adversarial administrative proceedings."

(Complaint, ¶19.)

The Department submits, and further articulates below, that Plaintiff's first assertion is plainly inaccurate and evinces a misunderstanding, or a willful mischaracterization, of the *Dillinger* case. Plaintiff's second assertion is simply wrong, and not supported by any legal basis. Section 119.071(1)(d)1., Florida Statutes, broadly exempts from public records disclosure documents prepared by "agency attorneys that *reflect mental impression, conclusion, litigation strategy, or legal theory* of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings." (Emphasis added).

Additionally, the Department's failure to "identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings," as required by section 119.071(1)(d)2., Florida Statutes, is hardly fatal to maintaining the exemption. This is especially true in this case, where the Department is currently involved in two, separate adversarial proceedings with Plaintiff, at the First District Court of Appeal and as part of an internal hearing process, of which Plaintiff is well aware.

Finally, the Plaintiff, the Henry and Rilla White Youth Foundation, Inc., lacks standing to bring this action. Plaintiff did not make, at any time relevant to this action, a public records request to the Department; Mr. Ty Jackson made the request. The request is in Mr. Jackson's name, it was paid for by Gray Robinson P.A., and the records were released to Mr. Jackson. Additionally, Plaintiff did not provide the Department with the required 5 day notice pursuant to section 119.12(1), Florida Statutes, and is therefore not entitled to attorneys' fees.

FACTUAL BACKGROUND

1. The Department is currently engaged in litigation with Plaintiff in two fora; an appellate action arising out of the Department's Notice of Action regarding Plaintiff's improper

receipt of National School Lunch Program funds (Case no. 1D-20-2768), and a more recently filed, Departmental action denying Plaintiff's application to participate in the National School Lunch Program. (See Exhibit 1 hereto, excerpt of the Department's Notice of Action, dated February 24, 2021).

2. The appellate case concerns approximately \$14 million in disputed National School Lunch Program funds that the Department is attempting to recover. The application denial case, if granted, would deprive Plaintiff of hundreds of thousands of dollars each year.

3. The agency attorneys handling these two matters are the undersigned, and Senior Attorney Darby Shaw.

4. On December 17, 2020, the Department received a public records request, not from Plaintiff, but from D. Ty Jackson, an attorney at Gray Robinson, P.A. (Complaint, ¶7, and Ex. A).

5. A cost estimate was sent to Mr. Jackson, not Plaintiff, on January 8, 2021 (Ex. 2), and the Department received a check from Gray Robinson P.A., not Plaintiff, on January 21, 2021. (Ex. 3).

6. The Department responded to the public records request in three installments.

a. On February 3, 2021, the Department sent to Mr. Jackson, via electronic file transfer program (FTP), three Outlook data files consisting of 286 emails and 293 attachments for a total of, when converted to PDF, approximately 27,350 unredacted pages. (Ex. 4).

b. On February 16, 2021, the Department sent to Mr. Jackson, via FTP, documents converted to PDF and redacted. The first set was identified as redacted pursuant to *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19 (Fla. 2d DCA). A total of 825 pages were transmitted, with 123 of those pages bearing

redactions. (Ex. 5).

- c. The second set was identified as redacted pursuant to section 119.71(1)(d), Florida Statutes, the attorney work product exemption. A total of 2,093 pages were transmitted, with 794 of those pages bearing redactions. (Ex. 6 & 7).

7. Following receipt of the documents, Mr. Jackson wrote to Ms. Shaw arguing that the redactions were improper, without citing to any legal basis for such an assertion. (Complaint, Ex. H). Over the course of three days, Ms. Shaw responded to Mr. Jackson's emails with citations to statute and case law. The exchange ended on February 18, 2021.

ARGUMENT

I. The Department properly redacted confidential and exempt documents pursuant to the *Dillinger* case.

Plaintiff's contention that the Department may not rely on *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19 (Fla. 2d DCA) as a basis for its redactions of confidential information is not accurate. *Dillinger* stands for the proposition that when a citation to a public records exemption will itself reveal confidential information, the citation is properly not included as a basis for said redaction. Indeed, the *Dillinger* court found that the public records law may not be used in such a way to obtain information that the legislature has declared must be exempt from disclosure. *Id.* at 21.

The Florida Statutes are rife with examples of confidentiality exemptions to public records disclosure, and when records are confidential, and not merely exempt, the onus is on the disclosing agency to protect that confidentiality to every extent possible. For instance, section 501.2065 Florida Statutes, the Florida Deceptive and Unfair Trade Practices Act, keeps confidential any criminal or civil intelligence, investigative information, or any other information held by any state or federal agency made available to, or held by, the Office of the Attorney General, and

cooperating agencies, during the pendency of the investigation. If a cooperating agency is required to cite to the Act's statutory exemption when disclosing public records, the very existence of the confidential complaint and investigation would be immediately revealed, vitiating the very point of the confidentiality provision.

Moreover, the Department is legally required to keep confidential information from public disclosure. Plaintiff wholly disregards the fact that confidential actions *must* be cited by the Department in such a way as to not jeopardize and improperly reveal the subject matter of such actions or prematurely identify another enforcing authority. The Department has no discretion in this regard; when information contained in a public record is confidential and exempt, the Department is expressly prohibited from disclosing the public records that could, potentially, identify the confidential information. If the statutory citation itself will reveal the nature of a confidential investigation, the requirement on the Department is the same. In this matter, the information Plaintiff seeks is confidential information and no additional information (or records) can be disclosed. (Ex. 8) (*ex parte*).

Accordingly, the 123 documents, out of over 27,000 pages of documents, clearly redacted pursuant to *Dillinger*, are properly redacted.

II. The work product/litigation exemption in section 119.071(1)(d) is not limited to “internal communications.”

Plaintiff's assertion that the documents redacted pursuant to section 119.071(1)(d)1., Florida Statutes, are redacted contrary to statute because they are not limited to “internal communications,” lacks any basis in law or fact. (Complaint, ¶18). First, the section itself contains no limitation that the exempted records of “agency attorneys that reflect mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative

proceedings” are limited to “internal communications.” Indeed, the very next subsection provides that the exemption is *not* waived by the release of such a public record to another public employee or any person consulted by the agency attorney. § 119.071(1)(d)2., Fla. Stat.

Second, the statute has been expressly interpreted to apply to agency attorneys’ impressions of pending litigation, regardless to whom or in what form those mental impressions are transmitted. *Evans v. State*, 995 So. 2d 933, 941–42 (Fla. 2008). In *Evans*, the Supreme Court found that a letter written by assistant state attorney to defendant’s trial counsel, containing mental impressions about the claims raised in defendant’s postconviction motion, was exempt from disclosure as attorney work product in postconviction proceedings. *Id.* So long as the records contain *any* mental impressions, conclusion, litigation strategies, or legal theories of agency attorneys, those records are protected by the exemption and properly redacted.

In this case, all emails redacted pursuant to section 119.071(1)(d), Florida Statutes, with which Plaintiff finds fault are from agency attorney Darby Shaw to either the undersigned, to her agency client, to the staff at the United States Department of Agriculture (USDA) as the federal administering agency of the National School Lunch Program, or to combinations of all of the above. The redactions are precise and necessary and regard *only* mental impressions or litigation strategy. Emails that do not include attorney work product have been properly left unredacted. (*See e.g.* Complaint, Ex. B, pp. 8, 17, 24, 36). In context, it is quite clear that the redactions made concern Ms. Shaw’s thoughts, her mental impressions, and her litigation strategy.

Furthermore, the exemption applies because the Department is currently engaged in litigation with Plaintiff. The allegations litigated in the other fora involve serious allegations of multiple millions of dollars of improper payments to Plaintiff and, as made clear by the attorneys identified in those emails, involve authorities in multiple jurisdictions.

The work product exemption is the only protection that agency attorneys have from having their litigation preparation open to the public, and, to be clear, it is an admittedly narrow exemption. Nevertheless, it does protect emails from agency attorneys preparing for said litigation, especially from the prying eyes of the very parties with whom they are engaged in that litigation. Clearly, emails between Mr. Jackson and anyone he consulted regarding this case would not be discoverable pursuant to work product privilege; the same consideration must be given to Ms. Shaw's emails. Otherwise, the work product privilege in section 119.071(1)(d)1., Florida Statutes, would be rendered utterly meaningless.

Plaintiff additionally seems to imply that because the Department, in citing to the work product exemption, failed to identify the parties to the litigation, the exemption is somehow waived. This assertion is, frankly, ridiculous. Identifying the parties to the litigation which gives rise to the exemption is a notice provision; there is absolutely no indication that failing to do so defeats the exemption in any way. Moreover, in this case, the omission is completely harmless considering that Plaintiff is aware of the parties to the multiple litigations to which the exemption applies considering Plaintiff is one such party and the Department is the other.

Accordingly, the 671 pages of documents, out of over 27,000, clearly redacted pursuant to section 119.071(1)(d)1., are properly redacted.

III. Plaintiff lacks standing to bring this matter forward.

To establish a clear legal right to the performance of an act, a plaintiff must first establish standing. "Standing is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006).

In this matter, Plaintiff did not make a public records request to the Department; Mr. Ty

Jackson did. (Complaint, ¶7, Ex. A.) Plaintiff falsely claims that it “sent a comprehensive and detailed public records request” to the Department. This claim is belied by the very documentation to which Plaintiff cites. The public records request was submitted by Mr. Jackson; it does not even go so far as to state that the request is made on behalf of Plaintiff. The real party in interest to this matter is Mr. Ty Jackson and not the Henry and Rilla White Youth Foundation. Because Plaintiff did not make the public records requests, it lacks standing and cannot sue on a request that it did not make.

The Public Records Act mandates that “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.” § 119.07(1)(a), Fla. Stat. The Department, for its part, has duties under the Public Records Act, and must ensure that the requestor has access to requested records: “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.” § 119.07(1)(a), Fla. Stat. A custodian of public records must acknowledge requests to inspect or copy records promptly and respond to the requests in good faith. *See* § 119.07(1)(c), Fla. Stat.

Furthermore, unpaid fees by a requestor provide a basis for an agency to refuse to produce additional records if the fees for a previous request for records have not been paid by the requestor. *See Lozman v. City of Riviera Beach*, 995 So. 2d 1027 (Fla. 4th DCA 2008) (s. 119.07[4], F.S., “does not require the City to do any more than what it did in this case,” i.e., require Lozman to pay the bill for the first group of records he requested before the city would make any further documents available); AGO 05-28 (custodian authorized to bill the requestor for any shortfall

between the deposit and the actual cost of copying the public records when the copies have been made and the requesting party subsequently advises the city that the records are not needed). Plaintiff not only failed to request the records, it also has not paid what would be the requisite fee for the Department to produce the records.

Of course, the Plaintiff (or any other person) is free to request records but Plaintiff clearly did not do so as of the time of filing the Complaint, much less provided any record evidence of such a request, also in violation of its pleading obligations under Fla. R. Civ. P. 1.630(b).

Finally, Plaintiff also did not provide the Department with the required 5 day notice pursuant to section 119.12, Florida Statutes, in order to be eligible to receive attorneys' fees in the event it prevails in this matter. Exhibit H to the Complaint shows that it was Mr. Jackson corresponding with Ms. Shaw, not Plaintiff. Additionally, at no point in the correspondence did Mr. Jackson indicate he was availing himself, or Plaintiff, for that matter, of the section 119.12 attorneys' fees provision, nor did he give written notice to the agency's custodian of public records as required by the section. Therefore, Plaintiff is not entitled to attorneys' fees.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court deny a writ of mandamus.

Respectfully submitted,

s/ Magdalena Ozarowski
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AGRICULTURE AND
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished via Florida Courts e-filing portal electronic service to all parties on record on this 10th day of March, 2021.

s/ Magdalena Ozarowski
Magdalena Ozarowski