

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

CHARLES GRAPSKI,

Plaintiff,

vs.

CASE NO.: 01-2005-CA-4005
DIVISION: J

J. BERNARD MACHEN, in his official capacity
As President of the University of Florida,

Defendant.

ORDER ON EVIDENTIARY HEARING

This cause came before the court for an evidentiary hearing on Plaintiff's Amended Complaint seeking an order compelling Defendant to produce certain public records and awarding him his attorney's fees and costs. Based upon the testimony of the witnesses, the documents received in evidence and a review of the entire case file, the court makes the following findings of fact and conclusions of law:

1. Plaintiff is a University of Florida doctoral candidate who teaches at the University of Florida on occasions. He is self described as politically active with a keen interest in the relationship between the University of Florida and Florida Blue Key, Inc., a private corporation. He desires to monitor that relationship including the flow and control of money between the two.
2. Defendant is the President of the University of Florida and is being sued in his official capacity.

3. Plaintiff routinely sends numerous e-mails to Defendant and other officers and employees of the University of Florida expressing his concerns about various issues including his concerns about the relationship between the University of Florida and Florida Blue Key, Inc.

4. In an effort to monitor this relationship, Plaintiff sent numerous public records requests to Defendant and other University of Florida officials requesting documents about the relationship. The specific subjects of the hearing on Plaintiff's complaint and this order are two public records requests made by Plaintiff on June 7, 2005. These were an e-mail to Defendant (Exhibit "4") and an e-mail to Dr. Patricia Telles-Irvin, Vice President for Student Affairs (Exhibit "5"). The emails were identical in their request. Plaintiff sought from Defendant and Dr. Telles-Irvin the following documents in their possession or control:

[A]ny and all records held by or generated by your office with regard to the issue of the funding of Homecoming 2005, the related proposal to use the A&S fee, and the agency relationship of UF with Florida Blue Key, Inc.

5. On June 13, 2005, Steve Orlando, an employee in the University of Florida's News Bureau responded to the Plaintiff's public records requests by e-mail. He advised Plaintiff that Defendant had no records responsive to Plaintiff's request and that the documents in Dr. Telles-Irvin's possession or control responsive to his request were available for pickup. These documents were admitted into evidence as exhibit "1" which contained 43 pages. After receiving Steve Orlando's e-mail, Plaintiff testified that he dealt primarily with Steve Orlando regarding his public records requests.

6. Plaintiff picked up the documents and reviewed them. He e-mailed Dr. Telles Irvin on June 13, 2005 advising her that the production was incomplete. He identified documents he believed were public records which were not produced (Exhibit "6"). Plaintiff also testified that he again requested that Defendant produce documents responsive to the request.

7. On June 22, 2005, Steve Orlando e-mailed Plaintiff that Defendant did not have any documents responsive to the Plaintiff's requests.

8. On July 11, 2005, Plaintiff was advised that additional documents responsive to his request to Dr. Telles-Irvin were available for pickup. These documents were admitted into evidence as exhibit "2" which contained 38 pages.

9. Plaintiff continued to send e-mails to Defendant and Dr. Telles-Irvin stating that the production was not complete and that additional documents should be produced. Defendant advised Plaintiff by e-mail again on August 10, 2005 that his office had no documents responsive to Plaintiff's requests. On August 17, 2005, Steve Orlando e-mailed Plaintiff stating that Dr. Telles-Irvin and Defendant had produced all documents in their possession or control responsive to Plaintiff's requests and that no further documents would be forthcoming.

10. On October 20, 2005, Plaintiff sent an additional Public Records request "B" to Dr. Telles-Irvin requesting additional documents regarding the University of Florida and Florida Blue Key, Inc. This request was much broader in scope. He

requested, "ALL relevant University documents pertaining to FBK, Growl, and Homecoming."

11. On November 14, 2005, Plaintiff filed his amended complaint seeking an order from this court compelling Defendant to produce the documents responsive to his June 7, 2005 public records requests which he believed were not produced. He also sought an award of attorney's fees and costs. The Amended complaint was served by mail upon Defendant's counsel, John Devault, whose office is in Jacksonville, Florida.

12. On November 15, 2005, Steve Orlando advised Plaintiff by e-mail that documents responsive to his October 20, 2005 public records request "B" were available for pickup and that a fee of \$144.19 was being charged for copying and staff time for assembling the documents. Plaintiff did not pick these records up until the week of the evidentiary hearing of April 21, 2006, some five months later. These documents were admitted into evidence as exhibit "3" which contained 42 pages.

13. Defendant does not routinely maintain copies of documents, including e-mail communications he receives, that he forwards to his executive staff for handling. Defendant's executive staff members are his designee responsible for maintaining any public records pursuant to Chapter 119, Florida Statutes, Florida's Public Records Law. Dr. Telles-Irvin was Defendants' designee for the public records requested by Plaintiff on June 7, 2005.

14. The sole issue for determination by this court is if the Defendant, through his designee, "unlawfully refused to permit a public record to be inspected, examined, or

copied" and if Plaintiff had to file a civil action to require production of these public records. If the court determines that defendant did unlawfully refuse, then Plaintiff is entitled to production of the refused documents and he is entitled to reasonable costs of enforcement including reasonable attorney's fees.

15. Plaintiff contends that the records produced by Defendant on November 15, 2005 responding to his October 20, 2005 contained documents which should have been produced in response to his June 7, 2005 requests. He also contends that the numerous e-mails from himself and others to Defendant and other University officials concerning 2005 homecoming are public records and should have been produced.

16. E-mails from Plaintiff and others to Defendant, Dr. Telles-Irvin, and other University of Florida officials raising concerns about issues, complaining about things, praising them or condemning them may or may not be "public records" within the meaning of the Public Records Act. The Florida Supreme Court has limited the definition of public records to: "those materials which constitute *records*- that is, materials that have been prepared *with the intent* of perpetuating or formalizing knowledge", State v. City of Clearwater, 863 So.2d 149 (Fla. 2003). In City of Clearwater, *supra*, the Court was specifically speaking of e-mails on government computers. "Thus, it cannot merely the placement of the e-mails on the City's computer system that makes the e-mail public records. Rather, the e-mails must have been prepared 'in connection with official agency business' and be 'intended to perpetuate, communicate, or formalize knowledge of some type.'" City of Clearwater, *supra*.

17. Plaintiff contends that all e-mails, regardless of source, received by a public official concerning the agency are public records. He also seems to believe that it is his *intent* that his e-mails be formalized or perpetuated as knowledge within the agency which makes them public records. Accepting Plaintiff's interpretation, would lead to an unreasonable and unworkable result for public agencies. In this modern computer age with the ability of people to continually send e-mails to public officials and the problems all persons who own a computer face with "spam" and bulk mail, to hold that every e-mail a public official receives on his or her public computer mentioning the agency, is a public record is an absurd result. The mere fact that an e-mail is received by a public agency or official does not make it a public record.

18. If the public agency or official receives an e-mail and it is intended by that agency or official that the e-mail be acted upon by the agency or that its contents be perpetuated, communicated or formalized as knowledge within the agency, then it properly is to be considered a public record. Otherwise the e-mail is not a public record.

19. Plaintiff's public records requests of June 7, 2005 were very specific. He wanted documents regarding funding of homecoming 2005, the related proposal to use A&S fees and the agency relationship of the University of Florida and Florida Blue Key, Inc. The Defendant responded to this request twice, providing 81 pages of documents.

20. Plaintiff's public records request of October 20, 2005, was much broader in scope. He requested, "ALL relevant University documents pertaining to FBK, Growl,

and Homecoming." The Defendant provided 42 pages of documents in response to this request.

21. The court has carefully reviewed exhibits "1, 2 & 3" and the e-mails from Plaintiff and others to Defendant and Dr. Telles-Irvin to determine if any of these documents support Plaintiff's contention that Defendant "unlawfully" withheld production of public records which were responsive to his June 7, 2005 requests.

22. The only documents introduced into evidence which could conceivably support Plaintiff's claim that Defendant unlawfully withheld public records would be any documents in exhibit "3" which were responsive to Plaintiff's June 7, 2005 requests which had not previously been produced since the documents in exhibits "1" and "2" were produced by Defendant or his designee before the initial or amended complaint were filed. The documents in exhibit "3" were compiled in response to Plaintiff's October 20, 2005 request and produced one day after Plaintiff's amended complaint was served by mail. Plaintiff's beliefs and supposition that other "public records" exist which are responsive to his June 7, 2005 requests are not evidence. Plaintiff failed to produce any evidence that any other "public records" exist which are responsive to his initial requests.

23. The only documents contained in exhibit "3" which could be considered as responsive to Plaintiff's initial public records requests are: (a) a copy of a June 14, 2005 Independent Florida Alligator article titled: "VP vetoed bill, cuts Gator Growl Funding by \$200K"; (b) copy of University of Florida Student Senate, Student Body Law 2005-124, an amendment to the A&S Fee Budget dealing with a transfer from reserves to SGP to

fund 24,000 tickets to Gator Growl; (c) copy of a June 1, 2005 Gainesville Sun article titled, "SG clears up confusion over source of funds"; (d) copy of Letter from Dr. Telles-Irvin to Randy Talbot appointing him to the Homecoming Advisory Committee along with a copy of a list of the committee members. At the hearing, Dr. Telles Irvin said copies of other appointment letters to the remaining committee member were missing, but they were identical to the Talbot letter. She did not know where there other copies were. Since there was no testimony that these copies existed at the time of the hearing, the missing copies are not public records. Skeen v. D'Alessandro, 681 So.2d 712 (Fla. 2d DCA 1995); (e) copy of a June 21, 2005 e-mail from Dr. Telles-Irvin to Linda Nielsen asking her to file an e-mail from an unknown person (the name was redacted), subject FBK Homecoming and Gator Growl documents.; (f) copy of Gator Growl/Homecoming Budget Analysis. This appears to be another iteration of two other budget analysis previously provided in exhibits "1 & 2"; and (g) copy of an e-mail dated June 2, 2005 from Defendant to Dr. Telles-Irvin forwarding a copy of Plaintiff's email to Defendant dated June 2, 2005, subject FBK getting A&S Fee money. Defendant's email to Dr. Telles-Irvin stated "This guy's not the one to pursue this but the issues are contained in his memo." The court finds that a, b, d, f, and g are records are public records which could be deemed responsive to Plaintiff's June 7, 2005 public records request since the agency intended that this information be perpetuated or formalized as knowledge. Item c is not responsive to the initial public records request since it dealt with Student government transfer of reserve funds and not A&S fees as plaintiff specifically requested.

Item e is not responsive to the initial request since it was an email from a student government officer wanting to develop a working relationship with Dr. Telles-Irvin, not with anything specifically requested by Plaintiff.

24. The question is whether the Defendant through his designed "unlawfully refused" inspection, examination or copying of these public records. The public records law is designed to allow citizens access to public records in a timely manner without the need for court intervention. It should be liberally construed in favor of production of the documents. No citation of authority is needed for these propositions. Every court knows this. However, common sense and reason must play a part in applying this statute to a set of facts. The legislature never intended this statute to be used as a hammer to club an agency or public official in a game of minutiae when a few documents are inadvertently omitted. Were there some public records that were not produced in the first two requests? Absolutely. Was this failure of production an unlawful refusal? Absolutely not. The record in this case clearly establishes that the Defendant and his designees made a good faith attempt to comply with the public records requests of Plaintiff. They acted in a timely manner and produced these documents. There was no evidence of a refusal to produce the records. Six documents produced in the third production by Defendant out of 123 pages produced do not prove an unlawful refusal or unlawful delay on Defendant's part in producing the records. In fact, it shows that Defendant was still trying to produce documents responsive to Plaintiff's requests. Plaintiff failed to produce any evidence that Defendant "unlawfully refused" or "unlawfully delayed" production or that his court

action was the catalyst which caused the documents to be produced. The evidence was that the records were timely produced in response to his public records requests.

25. Plaintiff's theory of this case is that if a record is missing, regardless of the reason, he is entitled to attorney's fees. He argues if the agency overlooks a document, even though it produces many documents responding to his request, or that the agency in good faith believes it has complied, but that a document later turns up responsive to his request, he is entitled to attorney's fees. This is not in keeping with the interpretation of the public records law. A finding of "unlawful" refusal or delay in producing public records requires some proof that the agency or public official took some action in hindering the production or took no action which resulted in an unlawful delay in production of the public records. In this case that proof is lacking. "Good faith" is recognized as a defense to a request for attorney's fees in cases where the agency refused production on a good faith belief that the requested documents were not public records. Alston v. City of Riviera Beach, 882 So.2d 436 (Fla. 4th DCA 2004); Skeen v. D'Alessandro, 681 So.2d 712 (Fla. 2d DCA 1995). Dr. Telles-Irvin testified she made a good faith effort to comply with the public records requests of Plaintiff. The record indicates she did just that. If "good faith" is a defense to a refusal, surely it is a defense in a case where the Defendant is making a "good faith" attempt to produce. Inadvertence or misplacing a document is not a refusal or an unreasonable delay.

26. The six documents described in paragraph 23 were not produced by Defendant in response to Plaintiff's law suit. They were compiled and made available to

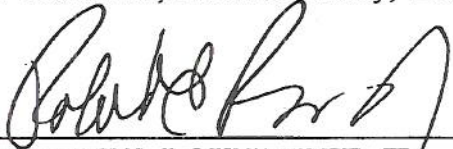
Plaintiff by Defendant on November 15, 2005 in response to Plaintiff's additional public records request of October 20, 2005. It is mere happenstance that the production and delivery occurred one day after Plaintiff filed his amended complaint. Plaintiff served his amended complaint by mail, therefore, this production was made before Defendant received Plaintiff's amended complaint.

27. Plaintiff failed to prove that Defendant or his designees unlawfully refused or delayed production of the public records he requested and he failed to prove that any other public records exist which were not produced. He is not entitled to costs or attorney's fees. Defendant is not entitled to attorney's fees in defending Plaintiff's suit. He is, however, entitled to recover costs as the prevailing party.

Accordingly, it is adjudged:

Plaintiff shall take nothing by this action. The court reserves jurisdiction for an award of costs to Defendant.

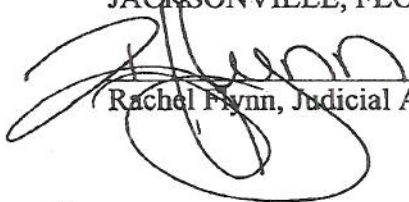
DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida,
this 9th day of May, 2006.


ROBERT E. ROUNDTREE, JR.,
Circuit Judge

Copy furnished by regular U.S. mail May 9, 2006 to:

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IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

CHARLES GRAPSKI,

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J. BERNARD MACHEN, in his official capacity
as President of the University of Florida,

Defendant.

CASE NO.: 01-2005-CA-4005

DIVISION : "J"

NOTICE OF APPEAL

NOTICE IS GIVEN that CHARLES GRAPSKI, Plaintiff, Appellant, appeals to the First District Court of Appeal, the Order on Evidentiary Hearing rendered on May 9, 2006, and the Order of October 27, 2005 [dismissing Count II with Prejudice]. The nature of the May 9, 2006 Order is a final decree, after an evidentiary hearing, denying Plaintiff's demand for certain public records under Chapter 191, Fla. Stat. The nature of the October 27, 2005 Order is the dismissal with prejudice of one Count in the Plaintiff's initial Complaint seeking some of those same public records in the form of e-mails.

I HEREBY CERTIFY that a copy hereof has been furnished to JOHN A. DEVAULT, III, Esquire, 101 East Adams Street, Jacksonville, Florida 32202, by U.S. Mail this 15th day of May, 2006.

GARY S. EDINGER & ASSOCIATES, P.A.



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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CHARLES GRAPSKI,

Appellant,

v.

J. BERNARD MACHEN, in his
official capacity as President of
the University of Florida,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D06-2557

Opinion filed February 20, 2007.

An appeal from the Circuit Court for Alachua County.
Robert E. Roundtree, Jr., Judge.

Gary S. Edinger of Gary S. Edinger & Associates, P.A., Gainesville, for Appellant.

John A. DeVault, III, and Courtney K. Grimm of Bedell, Dittmar, DeVault, Pillans &
Coxe, P.A., Jacksonville, for Appellee.

PER CURIAM.

AFFIRMED.

BARFIELD, VAN NORTWICK and THOMAS, JJ., CONCUR.