

First District Court of Appeal Case Docket**Case Number: 1D14-4579****Final Civil Other Notice from Columbia County****Lake Shore Hospital Authority et al. vs. Stewart Lilker****Lower Tribunal Case(s): 2013-CA-000401**

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August 26

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

STEWART LILKER,

Plaintiff,

vs.

CASE NO.:13-401-CA

LAKE SHORE HOSPITAL AUTHORITY and
JACKSON P. BERRY, individually and in his
official capacity as the LAKE SHORE HOSPITAL
AUTHORITY'S custodian of records.

cc: [unclear]

Defendants.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

The Parties hereto filed cross motions for summary judgment. The Court heard the cross motions for summary judgment on July 25, 2014. The Court has reviewed the pleadings, summary judgment evidence, and authority provided by the Parties.

All Parties hereto have advised this Court there are no genuine issues of material fact and this case should be decided as a matter of law. The Parties merely disagree on the application of the law to the undisputed material facts. All Parties requested this Court review and consider the copies of emails attached to the Complaint, and attached to DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW, in

deciding the cross motions for summary judgment.¹ At the hearing, neither party asserted there was a genuine issue of material fact that precluded summary judgment. This case is ripe for disposition by summary judgment.

UNDISPUTED MATERIAL FACTS

Lilker is a “person” as that term is used in Section 119.07(1)(a), Florida Statutes. Defendants admitted this fact in their answer.

Defendant, LAKE SHORE HOSPITAL AUTHORITY (“LSHA”) is an “agency” as that term is used in Section 119.011(2), Florida Statutes. Defendants admitted this fact in their answer.

Defendant, JACKSON BERRY (“BERRY”), is the “records custodian” of Defendant LSHA as the term “records custodian” is used in Section 119.011(5), Florida Statutes. Defendants admitted this fact in their answer.

Defendants received Lilker’s 5/28/13 public records request for the LSHA’s “Line item budgets for the past three years” (“the budgets”). “The budgets” were public records that existed on 5/28/13. Defendants admitted these facts in their answer.

Defendants received Lilker’s 5/28/13 public records request for the LSHA’s “....plans mentioned to be in the Manager’s office for the old generator shop” (“the

¹ At the hearing, Counsel for Defendants repeatedly asked the Court to review and consider the copies of these emails in deciding the cross motions for summary judgment. July 25, 2014 Tr. at p. 7:23; p. 96:15; p. 101:11; p. 108:14.

plans"). "The plans" were public records that existed on 5/28/13. Defendants admitted these facts in their answer.

In both public records requests referenced above, Lilker requested a written statement explaining with particularity the reasons for any conclusion by Defendants that any portion of the requested public records are exempt from production under the Public Records Act.

Prior to May 9, 2014, Defendants did not provide Lilker with any written statement explaining with particularity the reasons for any conclusion by Defendants that any portion of the requested public records are exempt from production under the Public Records Act.

Defendants cited no exemption to the production of the plans until May 9, 2014.

Defendants advised Lilker that Defendants maintained a policy of only permitting the inspection of public records during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday. Defendants also advised Lilker this policy also required a person wishing to inspect public records in Defendants' possession to provide 24 hour notice to Defendants of the time (during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday) that the person wished to inspect the public records.

Defendants advised Lilker he could inspect "the plans" if (and only if) he inspected them between the hours of 8:30 a.m. and 9:30 a.m., Monday through Friday, with 24 hour notice. See DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW at p. 2, para. I. 7.

Defendants have actually refused to permit Lilker to inspect "the plans" at any time other than during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday.

Defendants advised Lilker that "Monday thru Friday at 08:30-09:30 AM" is the "time" Defendants "set aside to comply with [Lilker's] request." See Verified Complaint, at Ex. 12.

Lilker asked Defendants (in writing) to allow him to inspect "the plans" on Monday, June 17, 2013, at 4:15 p.m. and that Defendants refused to allow Lilker to inspect "the plans" on Monday, June 17, 2013, at 4:15 p.m. See Verified Complaint, at Ex. 12.

Lilker advised Defendants he couldn't inspect the records during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday. See Verified Complaint, at Ex. 12.

The sole reason that Defendants denied Lilker's request to inspect "the plans" on Monday, June 17, 2013, at 4:15 p.m., was because of Defendant's policy

of only allowing public records in Defendants' possession to be inspected during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday (with 24 hour notice). See Verified Complaint, at Ex. 12. In that exchange, Berry refused to allow Lilker to inspect "the plans" at 4:15 p.m. on Monday [June 17, 2014] because he refused to make Lilker "any different from any other citizen."

On June 10, 2013, Lilker emailed Defendants and advised them he could not access "the budgets" via the internet website that Defendants had pointed him to and requested paper copies of "the budgets". Defendants admit this in paragraph I.4. of DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW which has this email attached to it at page 32.²

² Defendants also admit that "*Plaintiff requested the budgets in paper format, asserting that he could not locate them on the website*" on page 5 (first full paragraph) of DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW. At the hearing, Counsel for Defendants stated that perhaps she shouldn't have admitted (repeatedly, and in writing) that Lilker requested paper copies of "the budgets." However, Rule 2.505(h) of the Florida Rules of Judicial Administration reads as follows: "*(h) Attorney as Agent of Client. In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client, and any notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client.*" Attorneys of record routinely admit facts on behalf of their clients in civil litigation (as in an Answer to a Complaint, or in responses to requests for admission, for example). In any event, the record is undisputed that Lilker asked Defendants to "send the file" containing "the budgets" or "have the hard copy ready for inspection." Even if Counsel for Defendants was somehow allowed to disavow the admission that Lilker requested paper copies of "the budgets," the record is undisputed that he did. Counsel for Defendants cited no summary judgment evidence in support of the notion that there is a genuine issue of fact on whether or not Lilker requested paper copies of "the budgets." Counsel for Defendants didn't cite any facts supporting the notion that she was *mistaken* in her admission that Lilker requested paper copies of "the budgets" such that she should be allowed to disavow that express admission.

June 10, 2013, Lilker emailed Defendants, advising he could not access “the budgets” via the internet website that Defendants had pointed him to and requested that Defendants “send the file” containing “the budgets” or “have the hard copy ready for inspection.” See Verified Complaint at Ex. 7, and DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW at 32.

June 13, 2013, Lilker emailed Defendants, advising Defendants that the “line item budgets” that he had requested had “not been forthcoming” but that he had been told to go to the LSHA website and find them himself. Lilker further advised in that email he could not locate “the budgets” on the website. The email then references that “the budgets” should be available in their digital format and concludes with yet another request from Lilker that Defendants FORWARD “the budgets” to him. See Verified Complaint at Ex. 10, and DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW at 36.

June 14, 2013, Lilker emailed Defendants, requesting for Defendants to FORWARD the “line item budgets”. See Verified Complaint at Ex. 12, and DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF LAW at 25.

There is no dispute that Lilker repeatedly requested COPIES of "the budgets." There is no dispute that Lilker repeatedly advised Defendants he could not access "the budgets" via the website that Defendants had pointed him to. There is no dispute that after Lilker advised Defendants he could not access "the budgets" via the website Defendants had pointed him to Lilker:

1. Requested paper copies of "the budgets;"
2. Asked Defendants to send him "the file" containing "the budgets;"
3. Asked to inspect a "hard copy" of "the budgets;" AND
4. Repeatedly asked Defendants to FORWARD copies of "the budgets" (whether in electronic or paper form).

There is no dispute that all Defendants ever did in response to each of Lilker's requests for copies of "the budgets" was to continue pointing Lilker to the LSHA website.

APPLICATION OF LAW TO THE UNDISUTED FACTS
"The Plans"

On its face, Defendants' policy of only "permitting the inspection of public records during the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday with 24 hour advance notice" ("Defendants' policy") violates the Public Records Act as a matter of law. Defendants' actual application of Defendants' policy to Lilker's request to inspect "the plans" violated the Public Records Act ~~as a matter of law.~~

Section 119.07 of the Florida Statutes plainly says that "Every 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...." (emphasis added).

Defendants interpret this statutory provision as allowing Defendants to restrict the inspection of "the plans" to the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday with 24-hour advance notice. Defendants have argued that their giving Lilker the opportunity to inspect "the plans" during these set hours, with a 24 hour notice requirement, satisfied Defendants' statutory duty to allow Lilker to inspect "the plans" at ANY reasonable time. Defendants' argument is based on an erroneous interpretation of the statute and fails as a matter of law.

The statute required Defendants to permit "the plans" to be inspected at "ANY" reasonable time, not "A" reasonable time of the Defendants' choosing as Defendants' argument requires. Defendants erroneously interpret their duty to permit inspection of "the plans" at ANY reasonable time as permission to limit the access to "the plans" to a predetermined sliver of Defendants' normal business hours.

Defendants' policy sets an unlawful "arbitrary time for inspection" of public records. Page 142 of the 2014 Edition on the GOVERNMENT-IN-THE-SUNSHINE-MANUAL reads as follows regarding the impermissibility of an "arbitrary time for inspection":

c. Arbitrary time for inspection

While an agency may restrict the hours during which public records may be inspected to those hours when the agency is open to the public, a custodian is not authorized to establish an arbitrary time period during which records may or may not be inspected. AGO 81-12. Thus, an agency policy which permits inspection of its public records only from 1:00 p.m. to 4:30 p.m., Monday through Friday, violates the Public Records Act. Inf. Op. to Riotte, May 21, 1990. There may be instances where, due to the nature or volume of the records requested, a delay based upon the physical problems in retrieving the records and protecting them is necessary; however, the adoption of a schedule in which public records may be viewed only during certain hours is impermissible. *Id.*"

While the Attorney General Opinions discussed in the passage from the GOVERNMENT-IN-THE-SUNSHINE-MANUAL are not mandatory authority upon this Court, the reasoning in them is certainly *persuasive* authority this Court may consider and adopt.³ This reasoning is that a policy that AUTOMATICALLY restricts the hours of an agency's normal hours of operation available for the inspection of public records, violates the express statutory requirement that public records be available for inspection and copying at ANY reasonable time.

This reasoning is derived from the Florida Supreme Court's holding in *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984), which held that "the only delay permitted by the [Public Records] Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the

³ The First District Court of Appeal recently quoted and agreed with two early 1990s Attorney General Opinions that say that a person requesting public records does not have to give background information. *Chandler v. City of Greenacres*, Case No.: 4D13-377 (June 11, 2014). This case demonstrates the high degree of persuasiveness with which the First District regards the Attorney General's Opinions relating to the Public Records Act.

custodian asserts are exempt.” *Cannella* further held that disclosure of nonexempt public records may not be AUTOMATICALLY delayed for a specific period of time, no matter how short the automatic delay is.

Under *Cannella*, ACTUAL delay in allowing access to public records is not unlawful in and of itself. Likewise, an agency doesn’t have to allow inspection of public records during times that are ACTUALLY unreasonable considering the actual circumstances surrounding each unique public records request. The actual *nature of the public records request* determines what delay is allowed and what times are reasonable for the inspection of those records. However, AUTOMATIC delay in allowing access to public records *is* unlawful as a matter of law according to *Cannella*. Likewise, an AUTOMATIC determination that certain times during an agency’s business hours are not reasonable times for the inspection of public records is unlawful as a matter of law given the reasoning in *Cannella*. Such AUTOMATIC restrictions on access to public records are agency “conditions which must be fulfilled before review is permitted” that are unlawful according to the Florida Supreme Court. *Wait v. Florida Power & Light Company*, 372 So.2d 420, 425 (Fla. 1979).

Defendants’ application of Defendants’ policy to Lilker’s request for “the plans” was an AUTOMATIC delay and an AUTOMATIC, unilateral determination by Defendants that all the business hours during the work week

outside of Defendants' policy were not reasonable times for Lilker to inspect "the plans." This actual application of Defendant's policy to Lilker's request for "the plans" violated Defendants' duty under the Public Records Act to permit Lilker to inspect "the plans" at "ANY" reasonable time.

Defendants violated the Public Records Act, as a matter of law, when, solely because of Defendants' policy, Defendants refused to allow Lilker to inspect "the plans" at 4:15 p.m. on Monday, June 17, 2013, as he requested.⁴ Defendants violated the Public Records Act, as a matter of law, when, solely because of Defendants' policy, Defendants refused to allow Lilker to inspect "the plans" at any time other than 8:30 a.m. to 9:30 a.m., Monday through Friday. Defendants violated the Public Records Act, as a matter of law, when they required Lilker to give 24 hours advance notice before he would be allowed to inspect "the plans." Each of these violations of the Public Records Act is an unlawful refusal to permit a public record to be inspected as meant in Section 119.12 of the Florida Statutes.

"The Budgets"

Defendants violated the Public Records Act when they unlawfully refused to forward copies of "the budgets" to Lilker as he requested. Merely pointing Lilker to a website to access "the budgets" did not satisfy Defendants' duty to forward copies of the budgets to Lilker as he requested. This is particularly so because

⁴See Verified Complaint at Ex. 12.

Lilker advised Defendants he could not access “the budgets” via the website. Whether or not Lilker actually was able to access “the budgets” via the website is irrelevant. The record is undisputed that after Lilker advised Defendants he could not access “the budgets” via the website, he requested paper copies of “the budgets,” asked Defendants to send him “the file” containing “the budgets,” asked to inspect a “hard copy” of “the budgets,” and repeatedly asked Defendants to FORWARD copies of “the budgets” to him (whether in electronic or paper form).⁵ The record is undisputed that all Defendants did in response to these requests from Lilker was continue to point Lilker to the website. Faced with these requests from Lilker to gain access to “the budgets,” the law did not allow Defendants to refuse these requests just because Defendants had previously pointed Lilker to the website to view “the budgets.”

Section 119.01(2)(f) of the Public Records Act expressly allows a person to request and receive a public record in any medium that the agency maintains the record in. As such, Lilker was perfectly entitled to request (and receive) paper copies of “the budgets” independent of Defendants’ attempt to point Lilker to “the budgets” on the website.

⁵ While Section 119.07(2)(a) of the Public Records Act does allow agencies, “as an *additional* means of inspecting or copying public records,” to provide “access to public records by remote electronic means,” this allowance does not abrogate a person’s right to request and receive actual copies of the public records directly from the agency, or paper copies, rather than only getting the records via remote electronic means. This is particularly so where that person claims they cannot actually access the records via the remote electronic means.

The Public Records Act places a duty upon any agency to MAIL COPIES of public records to any person that identifies the records he wants and forwards the appropriate fee. *Wooten v. Cook*, 590 So.2d 1039 (Fla. 1st DCA 1991); *Schwartzman v. Merit Island Volunteer Fire Department*, 352 So.2d 1230 (Fla. 4th DCA 1977). Sections 119.01(1)(f), 119.07(1)(a), and 119.07(4) of the Florida Statutes say that an agency must furnish a COPY of any requested public record. As a matter of law, the fact that Defendants had previously pointed Lilker to a website to view "the budgets" online did not discharge Defendants' duty under the law to forward copies of "the budgets" to Lilker as he subsequently requested when he advised Defendants he could not access "the budgets" via the website.

That "the budgets" may have been on the website is not a legal basis for Defendants' denial of Lilker's subsequent requests for "the budgets" after he advised Defendants he could not find the budgets on the website. *Miami Dade County v. Professional Law Enforcement Association*, 997 So.2d 1289 (Fla. 3rd DCA 2009) (the fact that pertinent public information may exist in more than one format is not a basis for denial of the request).

Lilker was not required to first prove that he could not access "the budgets" via the website before he was entitled to make the subsequent requests he made for "the budgets" and receive the copies of "the budgets" from Defendants. *Warden v. Bennett*, 340 So.2d 977 (Fla. 2d DCA 1976) (person requesting public records does

not have to first show he unsuccessfully sought public records from "other sources" before he may request and receive those public records from an agency).

Defendant's Affirmative Defenses Fail as a Matter of Law

Plaintiff addressed all of Defendants' affirmative defenses in PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. Defendants did not respond at all to Plaintiff's arguments regarding Defendants' affirmative defenses. Defendants presented no summary judgment evidence in support of any of Defendants' affirmative defenses.

The Court finds as a matter of law that the legal concepts of estoppel, waiver, and unclean hands do not apply to Plaintiff's claims. (Affirmative Defenses 1, 2, and 3).

The Court finds as a matter of law that the doctrine of sovereign immunity does not apply to Plaintiff's claims. (Affirmative Defense 4)

The Court finds as a matter of law that Defendant Jackson P. Berry is a proper Defendant. (Affirmative Defense 5).

The Court finds as a matter of law that even if a statutory exemption applied to "the plans," Defendants waived their right to assert that exemption because Defendants did not cite the exemption when Lilker made the request to inspect "the plans" and agreed to allow Lilker to inspect the plans between the hours of 8:30 a.m. and 9:30 a.m. Defendants had a statutory obligation to cite any claimed

exemption in response to Lilker's public records request (Section 119.07(1)(e) of the Florida Statutes) and failed to do so. Defendants asserted no exemption regarding the plans until after this lawsuit was filed and nearly a year after Lilker made the request to inspect "the plans." An agency may waive the right to assert an exemption under the public records law. *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991). The undisputed facts show that Defendants waived any right they had to assert any exemption regarding the plans. *Destin Savings Bank v. Summerhouse*, 579 So.2d 232 (Fla. 1st DCA 1991). The Court finds further that Defendants presented no argument or summary judgment evidence to support any claimed exemption regarding "the plans." Even though Defendants have the burden of proof with regard to any claimed exemption, Defendants did not point to any evidence, or make any argument, to support any claimed exemption. *National Collegiate Athletic Association v. Associated Press*, 18 So.3d 1201 (Fla. 1st DCA 2009). The Court finds further that even if an exemption applied to "the plans," Defendants were still under an obligation to redact any exempt portions of "the plans" and then allow Lilker to inspect the balance of "the plans." (Section 119.07(1)(f) of the Florida Statutes). The record is undisputed that Defendants did not try to redact exempt portions of "the plans" and then allow Lilker to inspect the balance of "the plans." This failure to redact exempt information and permit Lilker

to access the balance of “the plans” violates the Public Records Act just the same as if the exemption did not apply. (Affirmative Defense 6).

CONCLUSION

Defendants argue, overall, they have acted “reasonably” in responding to Lilker’s public records requests. This is not the standard by which the law ultimately judges Defendants’ responses to Lilker’s public records requests. The law requires this Court to determine whether Defendants’ responses to Lilker’s public records requests were “lawful,” not whether they were “reasonable.” *Johnson v. Jarvis*, 74 So.3d 168 (Fla. 1st DCA 2011); *Lee v. Board of Trustees*, 113 So.3d 1010 (Fla. 1st DCA 2013).

The Court hereby **GRANTS** Plaintiff’s Motion for Summary Judgment and **DENIES** Defendant’s Motion for Summary Judgment. The Court finds, as a matter of law, that Defendants’ responses to Lilker’s public records requests for “the plans” and “the budgets” were not lawful and were an unlawful refusal to permit public records to be inspected or copied as meant in Section 119.12 of the Florida Statutes. Plaintiff may recover the reasonable costs incurred in bringing and prosecuting this enforcement action, including attorney’s fees. Plaintiff is also entitled to the public records he requested. This Court hereby orders Defendants to allow Lilker to inspect “the plans” at any reasonable time during the business hours of the Lake Shore Hospital Authority and to mail Lilker copies of “the budgets” as

he requested. The Court reserves jurisdiction to determine Plaintiff's attorney's fees and other costs. The Court reserves jurisdiction to enter any further order that may be necessary to achieve Lilker's access to the public records he requested.

DONE AND ORDERED in Chambers, Live Oak, Suwannee County, Florida, this 26 day of AUGUST, 2014.



Honorable William F. Williams, III
Acting Circuit Court Judge

Copies furnished to:

Kris B. Robinson, Attorney for the Plaintiff at kbr@rkkattorneys.com and mbs@rkkattorneys.com

Robert Case, Attorney for the Plaintiff, at recaselaw@yahoo.com

Janice L. Merrill, Attorney for the Defendant, at jlmerrill@mdweg.com and jrnprosser@mdweg.com