

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

KNIGHT NEWS, INC.,
Plaintiff,

v.

Case No: 2013-CA-2664-O

THE UNIVERSITY OF CENTRAL FLORIDA
BOARD OF TRUSTEES, *et al.*,
Defendants. /

**PLAINTIFF’S MOTION FOR PARTIAL JUDGMENT AND
PEREMPTORY WRIT OF MANDAMUS**
[Counts I, II, III, IV, V, VI and VII]

Plaintiff KNIGHT NEWS, INC. (“**Knight News**”), by and through undersigned counsel and pursuant to Rules 1.420(b) and 1.630(d) *Florida Rules of Civil Procedure*, the Court’s January 30, 2014 verbal order, and other applicable law, hereby moves for a Plaintiff’s judgment on Counts I-VII in light of the failure of Defendants THE UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES and JOHN C. HITT (collectively “**UCF**”) to meet their burden to show cause why the relief sought by Plaintiff in Counts I-VII of Plaintiff’s *Complaint* should not be granted. Plaintiff also seeks entry of a peremptory writ of mandamus commanding UCF to provide to Plaintiff the aforementioned sought relief. In support thereof, Knight News states as follows:

I. Introduction

1. On January 30, 2014, this Court held an evidentiary hearing on the *Alternative Writ of Mandamus* entered on June 24, 2013. The Defendants, bearing the burden of proof, put on their case-in-chief first then rested at approximately 5:45 p.m. that day. There being no time remaining for either legal arguments in support of (and against) a plaintiff’s judgment, not to mention Plaintiff’s case-in-chief, the Court ordered the parties to submit written motions and schedule additional hearing time to conclude the issues that were set for resolution on January 30.

2. This motion, while limited by the Court to five pages, does not abandon and hereby supplements and incorporates the arguments set forth in Plaintiff’s June 10, 2013 response in opposition to Defendants’ motion to dismiss and Plaintiff’s January 29, 2014 memorandum of law in support of entry of a peremptory writ of mandamus.

3. Defendants, despite examining several witnesses and admitting dozens of documents

into evidence during the full-day evidentiary hearing, have failed to meet their burden to show why the relief sought by Plaintiff in Counts I through VII of the *Complaint* should not be granted. Specifically, Defendants failed to show 1) that Plaintiff did not make the public records requests referenced in the aforementioned counts, 2) that UCF produced the requested records in accordance with Chapter 119, *Florida Statutes* (the “Public Records Act”), by justifying redactions from the produced records by citation to statutory authority substantiating the redactions, 3) that UCF explained with specificity upon request why it believed the produced redacted records are exempt from the Public Records Act, and 4) that UCF produced the requested records in the “limited reasonable time” required to gather and redact the records. Additionally, Defendants failed to show that their belated assertions of FERPA-compelled confidentiality are based in either fact or law. Moreover, Defendants’ “affirmative defenses are not cognizable in law, and, even if they were, Defendants’ failed to prove them up. As a result, Plaintiff is entitled to entry of a peremptory writ of mandamus commanding Defendants to forthwith provide the relief sought in Counts I through VII of the *Complaint*.

4. UCF raises several alleged defenses to Plaintiff’s prima facie claims for relief.

II. UCF’s Unclean Hands “Defense”

5. First, UCF alleges Plaintiff has “unclean hands” because its “overly-broad” (sic) records requests were not directed to the university’s public relations office. Of course, there is no such thing as an overbroad public records request. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA, *review denied*, 475 So. 2d 695 (Fla. 1985) (the “breadth of such right [to access public records] is virtually unfettered . . .”). Additionally, Florida law provides, and UCF’s own Policy No. 2-100.2 confirms, that any custodian of a public record can be subject to a request for production of the record. Fla. Stat. § 119.07(1)(a). UCF’s purported *internal* “policies and procedures” directing records custodians to refer media requestors, and only media requestors, to the public relations office are not supported in law and could govern only the conduct of university employees, not the public. *Id.* Finally, Defendants offer no legal justification for their attempts to treat the media differently than the public at-large and offer no testimony to suggest they were not custodians of the requested records. Accordingly, this defense fails.

III. UCF’s Records-Available-for-Inspection “Defense”

6. Second, UCF alleges that it made all the requested records available for Plaintiff’s inspection. However UCF presented no testimony to counter Plaintiff’s testimony that the university failed to produce the Passing the Gavel Expense report (Count IV), refused to produce documents showing which performers were booked to headline Homecoming events (Count V) and refused to

produce a contract between UCF and a campus speaker (Count VII).

7. Passing the Gavel: UCF's claim that providing information about the Passing the Gavel event satisfies its obligation to produce an "expense report" requested under Chapter 119 is not supported in law. And, in any event, Plaintiff requested both information *and* the expense report. To the extent Defendants were unclear about what was being requested, they were required to follow up—not Plaintiff. If a public records request is insufficient to identify the records sought, the agency has an affirmative duty to promptly notify the requestor that more information is needed to produce the records. *Salvadore v. City of Stuart*, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991). Nonetheless, Plaintiff did follow up, and UCF just ignored the inquiries.

8. Homecoming Contracts: Defense counsel's production—after the inception of this lawsuit—of a contract between Snoop Dogg and UCF that predates Plaintiff's request conclusively demonstrates Defendants' unlawful refusal to produce the requested records. Indeed, Defendants in writing refused to produce the records unless and until Plaintiff provided "a reasoning for the request." Of course, the motive underling a request for public records is irrelevant. *See Curry v. State*, 811 So. 2d 736, 742 (Fla. 4th DCA 2002 ("The motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act); *Timoney v. City of Miami Civilian Investigative Panel*, 917 So. 2d 885, 886 n. 3 (Fla. 3d DCA 2005) (same); *Staton v. McMillan*, 597 So. 2d 1266 (Fla. 1992) (same); *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (same); *News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) (same). Notably, UCF's belated production of the Snoop Dogg contract does not provide a defense to Plaintiff's claim, and Defendants still have produced no document that would satisfy Plaintiff's request for a document identifying the comedian headliner.

9. Speaker's Contract: UCF presented no evidence whatsoever to suggest the requested record was produced to the Plaintiff or made available for inspection. Rather, Plaintiff's uncontradicted testimony is clear that UCF simply refused to produce the document because it was "not allowed to give out . . . contracts."

IV. UCF's Waiver "Defense"

10. Third, UCF claims that Plaintiff "has known that Defendants redact certain information from public records pursuant to UCF Policies and Regulation, and applicable state and federal laws . . . accepted redacted records without objection [and, therefore] has waived any claim based on the alleged lack of citations for certain redactions." Plaintiff is not required to object, however, if Defendants fail to

obey the law. Moreover, Plaintiff's alleged knowledge that UCF redacts information pursuant to law does not eliminate UCF's mandatory duty to disclose the statutory basis for any redaction made to a produced public record. Fla. Stat. § 119.07(1)(e). Defendants' belated assertions herein that FERPA authorizes the exemptions are insufficient to remedy Defendant's initial failure to cite exemptions. *See Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000) (response that all records were produced except exempt victim information was inadequate because it "failed to identify with specificity either the reasons why records were deemed to be exempt, or the statutory basis for any exemption"); *Langlois v. City of Deerfield Beach, Fla.*, 370 F. Supp. 1233 (S.D. Fla. 2005) (rejection of records request unlawful for failure to give statutory reason for exemption). Accordingly, this defense fails.

V. UCF's Plaintiff-Didn't-Request-the-Record "Defense"

11. Fourth, UCF claims, in defense to Counts V (Homecoming Contracts) and VII (Speaker's Contract), that Knight News didn't actually request the records, rather its corporate representative Jacob Sadowsky did so in an individual capacity, therefore Plaintiff lacks standing. Of course, a reporter need not identify his or her media affiliation to make a public records request, and in any event, no member of the public can be compelled to identify themselves at all when making a records request. *See Bevan v. Wanicka*, 5050 So. 2d 1116 (Fla. 2d DCA 1987); AGO 93-38; AGO 91-76; Inf. Op. to Cook, May 27, 2011. Accordingly, this defense fails.

VI. UCF's FERPA-Justifies-All-the-Redactions "Defense"

12. Fifth, UCF claims that FERPA justifies all redactions apparent in the records relevant to this lawsuit. As a threshold matter, FERPA doesn't actually prohibit the disclosure of anything. *Red & Black Pub. Co.* 427 S.E.2d at 261. And UCF's Chad Binnete has already testified that the university unlawfully produced a hazing incident report (Count VI) in a redacted matter then corrected itself after the inception of this lawsuit.

SGA Records: Records of an elected student government, like those at issue in Counts I (Impeachment Affidavits), II (Elections Affidavits) and III (A&S Fee Budget Request Packets), simply are not "education records" as envisioned by FERPA. These individuals are either publically campaigning for elected office or fulfilling their duties in public office, conducting the business of the university and its student body. In a similar situation concerning video of student government meetings, the trial court in *Bracco v. Machen*, 01-2009-CA-4444 (Fla. 8th Jud. Cir., Jan 10, 2011), explained that

[i]t is inconsistent for the Defendant to release certain student government records and records of student organizations, including identifying

individual student names, student statements, and images of students related to the University of Florida Student Senate meetings, while holding that video recordings of the same student senate meetings are exempt from disclosure under FERPA because such recordings contain “images of students” or “student names” or “statements made by and or about any student.

The Senate meetings were open meetings which any member of the public could attend in person. While the videos depict students discussing student and University business, the record does not reflect that the proceedings relate directly to an identified student. Rather, the proceedings relate generally to topics of importance to students and may identify specific students, but not as a focus of the record. Moreover, because the meeting itself was open, it is hardly logical that a memorialization of it would be confidential.

13. Moreover, records maintained or created by student governments are not “education records” covered by FERPA. *See Owasso Indep. Sch. Dist. V. Falvo*, 534 U.S. 426 (2002). They do not become part of a student’s institutional record and do not reflect student grades or instances of student discipline. Rather, the redactions are simply of information that identifies the names of individuals elected by the public to allocate an \$18.9 million budget of public funds. UCF’s assertion that these individuals can control public funds in secrecy by preventing the public from knowing who they are is foreign to Florida law and flies in the face of the common sense reality that these people put their names out there while electioneering and on the ballot. Upon winning an election, their identities do not thereafter become secret. Accordingly, this defense fails.

VII. Conclusion

14. As UCF has presented no testimony to contradict Plaintiff’s testimony that it requested records, that the records were produced in a redacted manner without the required justification and that certain records were not produced in the “limited reasonable time” to gather and redact the documents, and UCF’s defenses fail, Knight News is entitled to entry of a peremptory writ of mandamus commanding UCF to provide the Plaintiff the relief sought in Counts I-VII.

WHEREFORE, Plaintiff KNIGHT NEWS, INC., respectfully requests that this Court: a) enter a preematory writ of mandamus requiring UCF to—within 48 hours—provide Plaintiff with the relief sought in Counts I – VII of the *Complaint*; b) award to the Plaintiff reasonable costs and attorneys’ fees; and c) award to Knight News any other relief deemed by the Court to be just and proper under the forgoing circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed with the Orange County, Fla., Clerk of Court via the Florida Courts eFiling Portal and thereby sent to **Rick Mitchell, Esq.**, GRAYROBINSON, P.A., 301 E. Pine Street, Suite 1400, Orlando, FL 32801, E-mail: rick.mitchell@gray-robinson.com and jacque.denton@gray-robinson.com on this the 6th day of February, 2014.

Respectfully submitted,

J.S. HEMLEPP, P.A.

/s/ Justin S. Hemlepp

Justin S. Hemlepp, Esq.

Fla. Bar No.: 0058991

10906 Sheldon Road

Tampa, FL 33626

Telephone: (813) 438-6103

Facsimile: (800) 351-8262

E-mail: jhemlepp@hemlepplaw.com

Attorney for Knight News, Inc.