

FREDDIE PHILLIPS

DOCKET NUMBER C593366 EC. 24

VERSUS

19TH JUDICIAL DISTRICT COURT
IN AND FOR PARISH OF EAST
BATON ROUGE

LOUISIANA AUCTIONEERS LICENSING
BOARD, ET AL.

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STATE OF LOUISIANA

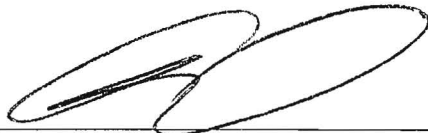
JAN 27 2011

MOTION FOR SUMMARY JUDGMENT

DEPUTY CLERK OF COURT

The motion of defendants LOUISIANA AUCTIONEERS LICENSING BOARD and JAMES KENNETH COMER, JR., respectfully represents that as shown in the attached memorandum, there are no substantial issues of material fact, and this matter can be resolved in favor of defendants and against plaintiff, dismissing the claims of plaintiff and, further, assessing all costs of this proceeding against plaintiff, including attorneys fees, and that this matter is ripe for summary judgment to be entered.

Respectfully submitted,



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19TH JUDICIAL DISTRICT
EAST BATON ROUGE PARISH, LA
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Please serve

FREDDIE L. PHILLIPS
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STATE OF LOUISIANA

ORDER

Premises considered, it is hereby

ORDERED that this matter be set for hearing on the 16 day of

May, 2011, at 9:30 a.m.

Baton Rouge, Louisiana, this 26th day of April, 2011.

R. Michael Caldwell
JUDGE

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FREDDIE PHILLIPS

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LOUISIANA AUCTIONEERS LICENSING
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STATE OF LOUISIANA

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JAN 11 2011

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants LOUISIANA AUCTIONEERS LICENSING BOARD and JAMES KENNETH COMER, JR., the chairman of the LOUISIANA AUCTIONEERS LICENSING BOARD, have asked this court to grant summary judgment in this matter, for the following reasons. It is defendants' belief that there are no factual disputes material to this matter.

FACTS OF THE CASE

The plaintiff in this matter filed a petition, stating as follows:

- a. Petitioner is a member of the defendant Louisiana Auctioneers Licensing Board.
- b. Petitioner requested copies of certain public documents pertaining to the Louisiana Auctioneers Licensing Board from Anna Dow, who is general counsel for the Board.
- c. Counsel responded to petitioner that she was not in possession of the records, and asked that petitioner contact the Chairman of the Louisiana Auctioneers Licensing Board, James Kenneth Comer.
- d. Comer sent a letter to all board members, including petitioner, stating that all requests for documents should go through the chairman.
- e. Petitioner never submitted the request in the original letter to the Louisiana Auctioneers Licensing Board or to Chairman Kenneth Comer.

The petition is attached hereto as Exhibit A.

Plaintiff thereupon filed a memorandum with the court, basically indicating the same information as that provided in the original petition, only adding that he met with the chairman after the original letter was sent. Plaintiff admits that he has been at the office of the Louisiana Auctioneers Licensing Board on more than one occasion since the date of the request in the letter sent to counsel. This memorandum is attached as Exhibit B.

Finally, the parties met with the Court in this matter for a status conference on November



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24, 2010. At that time the Court requested that the parties attempt to resolve the matter. Counsel again offered to make available the records apparently sought by plaintiff in his original request, and counsel was lead to believe that plaintiff agreed to review these records. However, a letter was sent December 1, 2010, indicating that plaintiff refused to review these letters. Specifically, he stated in that letter that his letter to counsel of May 28, 2010, entailed him to receive a “complied” [sic] report listing the requested information. This letter is attached as Exhibit C.

He thereupon stated that he wanted a complied [sic] financial statement and that he requested a complied [sic] report outlining the information he requested. He stated that he asked that counsel run searches in its database and running word searches in its minutes. The original request did ask that the counsel prepare a list of all board members, itemized by title, of all attendees who attended the National Auctioneers Association meeting since January 1, 2000. He also asked that the amount of the respective individual total reimbursements be included with the list. Further, he requested that counsel provide him with any written evidence of the LALB having ever voted against sending a Board member to the annual conference after the Board member expressed interest in attending the conference at any meeting prior to May 17, 2010. The original letter is attached as Exhibit D.

In this case, travel vouchers for Board members are kept in hard copy. Checks paid to board members for all travel are organized only by travel in state or out of state, not by destination, such as the NAA Conference or NALLOA meeting. A report has been generated and provided to plaintiff, showing all checks paid to board members or to credit card bills for out of state travel. That was not satisfactory for plaintiff, who has argued that he is entitled to created lists with the information sought.

Further, motions and votes of the board are kept in minutes books retained by the Board. Most of these are in hard copy, not in electronic form. Plaintiff asks that the Board generate a record of all motions and votes regarding the payment of costs for travel to the NAA Convention or to NALLOA meetings. Further, he only wants that information for those situations when the board member wanted to go the meetings. That information would not be reflected in the motions necessarily. Both of these would be new records. Exhibit D.

ISSUES:

1. Whether sending a public records request to a contract attorney for a state agency constitutes a public records request under the statute.
2. Whether a request to a public agency asking it to create a new set of records is contemplated by the statute.

ARGUMENT

Whether sending a public records request to a contract attorney for a state agency constitutes a public records request under the statute.

There is no question that plaintiff made his request as filed in his petition of the contract attorney for the Louisiana Auctioneers Licensing Board. Exhibit E. The contract attorney is not the custodian of the records pursuant to the Louisiana Public Records Law. LSA-R.S. 44:1 states as follows:

As used in this Chapter, the word "custodian" means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records.

As of this date there is no statement in the petition filed herein that plaintiff has made the request of the chairman of the Louisiana Auctioneers Licensing Board. The request filed by the plaintiff was filed with the attorney, not the Chairman or even the staff member. The contract attorney has her own office, and does not keep any board records at her office. Those records requested by the plaintiff, travel records for board members and board minutes, are not kept by the contract attorney.

Section 31 of Title 44 of the Louisiana Revised Statutes states that providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees. The contract attorney is not an employee of the custodian, especially when the contract attorney does not have the records in question. Section 32 further states that the burden is on the custodian to provide the public records. Again, the contract attorney is not the custodian of the records.

In later documents filed after the original petition, plaintiff states that he met with Mr. Comer, the Chairman, after the original letter was sent and he was instructed to meet with the

chairman. Exhibit B. However, he does not detail whether his records request was denied at that time, or whether a formal request was sent to the Board.

Therefore, the defendants urge that judgment be rendered in favor of defendants, finding that the plaintiff has never made the requisite request of the Board or its chairman, the custodian of the records, as required by the Public Records Law.

Whether a request to a public agency asking it to create a new set of records is contemplated by the statute.

The specific request filed by plaintiff states as follows:

By way of this certified letter, I ask that you provide me with a list of **all** Board Members who have been reimbursed for travel to the NAA / NALLOA conference since January 1, 2000. I ask that the list be itemized by officer title should any attendees who attended hold a title with the Board. I also ask that the amounts of their respective TOTAL reimbursements be included with the list.

I also request that you provide me with any written evidence of the LALB having ever voted against sending a Board member to the annual conference after the Board member expressed interest in attending the conference at any meeting prior to May 17, 2010.

Exhibit D.

This request asks Board counsel to first prepare a list of all board members who have been reimbursed for travel to the national associations' conference since January 1, 2000. This list should be itemized by officer title if applicable. The amounts of the reimbursement should also be listed. Second, the counsel was to provide "written evidence" of the LALB having ever voted against a Board member attending an annual conference once that individual had requested to go. Although "written evidence" would encompass documents, it is not clear what documents are being requested. Counsel is unaware of what documents plaintiff seeks. Exhibit D.

In later submissions to the Board and to the Court, plaintiff attempts to define what he sought in May of 2010 as far as the travel records and reimbursements requested.

Ms Dow, perhaps the best way I can explain to you what I am requesting, since you seem to have difficulty grasping that concept, is to use an analogy of an LALB financial statement. If I were to request such a financial statement, you would not respond to me by relaying, "We will gather the deposit slips, cancelled checks, etc. and you can piece it all together." Rather, you would present a compiled [sic] financial statement. Similarly, I reiterate again (and I enclose a copy of that original certified letter for your benefit) that, what I am requesting is a compiled report outlining the information I requested.

...

Also, as referenced in my September 21, 2010 certified letter to you, the LALB should be able to readily ascertain whether or not any other Board Member has

even been denied by a way of a formal vote of the LALB, that should be able to be accomplished by running word searches for the words "NAA," "NAALOA," "convention," and "conference" for the minutes of March and May or each calendar year (the potential months at which NAA / NALLOA travel will have been discussed).

He reiterates these same responses to discovery, which is also attached, even laying out the form of the report which should be generated as a result of his request. The discovery responses are attached as Exhibit E.

The question then becomes whether these requests fall under the Public Records Act. The court ruled in *Nungesser v. Brown*, 667 So.2d 1036, 95-3005 (La. 2/16/96), that new documents are not required to be prepared to respond to a request for public records.

The custodian need only produce or make available for copying, reproduction, or inspection the existing records containing the requested information, and is not required to create new documents in the format requested.

Williams Law Firm et al. V. Board of Supervisors of Louisiana State University, 878 So.2d 557, 2003-0079 (La.App. 1 Cir. 4/2/04).

In the *Nungesser* case, the petitioner had requested a list of cash investments on estates of closed insurance companies where LIGA had claims, with type, interest rates and maturity dates noted. The First Circuit stated that the Department of Insurance had to provide that list, even though the department had stated that it did not have the data requested in the form sought. In fact, the First Circuit found, that there were certain reports, which, when read together, satisfied the plaintiff's request. However, the agency filed for a writ or certiorari and/or review to the Supreme Court, which reversed the First Circuit.

Nungesser requested a list which did not exist. Brown was not required to produce a list which did not exist and properly refused Nungesser's request. Accordingly, the judgment of the court of appeal affirming the trial court's judgment ordering Brown to comply with Nungesser's request and imposing civil penalties is reversed.

Nungesser, Id.

The *Williams Law Firm* case followed the decision in *Nungesser*. In that case the plaintiff law firm sought certain cancer incidence data in custody of the Louisiana Tumor Registry. Specifically, it sought data by zip code and parish for each year from 1985-1999. The Registry denied the request, stating that there were not documents meeting the descriptions requested and that it was not legally required to generate new computer programs or create lists

or documents to satisfy a request for information under the Public Records Act. The Court found that the Registry was not required to create new computer programs to access and report the information sought by the law firm by zip code, which was not a variable in the data retained by the Registry. The same is true in this case. The variables sought by plaintiff are not part of the records retained by defendants; specifically, the records sought by plaintiff are not kept in the form sought by plaintiff. As ruled by the Supreme Court and by the First Circuit, the defendants are not required to create new records. In this case, travel vouchers are kept in hard copy. Checks paid to board members for all travel are organized only by travel in state or out of state, not by destination, such as the NAA Conference. A report has been generated and provided to plaintiff, showing all checks paid to board members or to credit card bills for out of state travel. That was not satisfactory for plaintiff, who has argued that he is entitled to created lists with the information sought.

Further, motions and votes of the board are kept in minutes books retained by the Board. Most of these are in hard copy, not in electronic form. Plaintiff asks that the Board generate a record of all motions and votes regarding the payment of costs for travel to the NAA Convention or to NALLOA meetings. Further, he only wants that information for those situations when the board member wanted to go the meetings. That information would not be reflected in the motions necessarily. Both of these would be new records, as defined by the cases above, and therefore not subject to preparation by the defendants for the purposes of this request.

CONCLUSION

Defendants urge that this Motion for Summary Judgment be granted. Summary Judgment shall be rendered if “the Pleadings, Depositions, Answers to Interrogatories, and Admissions on file, together with the Affidavits, , , show that there is no genuine issue as to material fact, and that Mover is entitled to Judgment as a matter of law. LSA-C.C.P. art 966 (B). This procedure “is designed to secure the just, speedy, and inexpensive determination of every action . . .[and] is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A). The above demonstrates that there is no showing of a genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

Defendants also urge that this Court find that plaintiff should be ordered to pay all costs

of these proceedings, including but not limited to attorneys fees and court costs. Plaintiff brought this proceeding without complying with the Public Records Act. He is not a member of the public, but a public official who should be aware of the law. He brought the proceeding solely because he felt that he was mistreated because he was denied reimbursement for attending the 2008 convention and attendance as the representative of the Board for the 2010 convention. As such, the defendants should not be penalized.

Respectfully submitted,



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