

IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

Chauncey M. DePree, Jr.,)
)
Plaintiff)
)
v.)
)
University of Southern Mississippi,)
University of Southern Mississippi)
Foundation)
)
Defendant.)

Case #: 06-0198-GN-TH

MOTION FOR SUMMARY JUDGMENT

COMES NOW Chauncey M. DePree, Jr., Plaintiff in the above named and numbered action, and respectfully moves this Honorable Court, pursuant to M.R.Civ.P. 56 to enter an order granting Summary Judgment on his Complaint. As grounds therefore, Plaintiff respectfully shows the following:

1. Plaintiff is a citizen and taxpayer of the State of Mississippi, a tenured professor at The University of Southern Mississippi, as well as a donor to the University of Southern Mississippi Foundation, who has asked to open the Foundation’s records for public review.

2. On March 1, 2006, Plaintiff wrote the University of Southern Mississippi (“USM”), the Director of the Mississippi Institutions of Higher Learning (“IHL”), and the University of Southern Mississippi Foundation (“Foundation”) seeking certain documents which are itemized as follows:

- 1) Audit reports for the Foundation for fiscal years 2002, 2003, 2004 and 2005.
- 2) All records, agreements, contracts between the Foundation or any of its subdivisions and Dr. James Crockett with regard to the publication of his book, *Operation Pretense: The FBI’s Sting on County Corruption in Mississippi*. This request includes, but is not be limited to, (1) records of funds advanced or paid by

Foundation or any of its subdivisions to support or fund publication of *Operation Pretense*, (2) agreements to reimburse the Foundation or any of its subdivisions for payments made by the Foundation or any of its operating divisions, toward the cost of publication, including records of reimbursements made from the proceeds of sales.

3) All documents reflecting changes in signatory authority for gifts to the University through the Foundation, including endowments or pledges for the periods of 2002, 2003, 2004, 2005 and 2006 (year to date).

4) Endowment Fund Activity Reports for the Morgan Distinguished Professorship in Accounting, McCarty Distinguished Professorship, and the Kaetsu Distinguished Professorship of International Business for fiscal 1998, 1999, 2000, 2001, 2002, 2003, 2004, and 2005.

5) All documents relating to requests and/or authorizations for disbursements and disbursements made from the Morgan Distinguished Professorship in Accounting, McCarty Distinguished Professorship, and the Kaetsu Distinguished Professorship of International Business for fiscal 2002, 2003, 2004, and 2005.

6) Fiscal 2002, 2003, 2004, and 2005 IPEDS Finance data collection reports.

7) All documents related to contributions made to the Foundation by me, including the Jude-DePree Endowed Scholarship and Business Advisory Counsel.

(Exhibit 1)

3. Defendants provided only the audit reports requested in item 1 and a partial response to the documents requested in item 7. (Exhibit 2)

4. USM and the Foundation deny the existence that item 6, which is the fiscal 2002, 2003, 2004 and 2005 IPEDS Finance data collection reports exist. (Exhibit 2) However, in USM's public compliance with Southern Association of Colleges and Schools ("SACS"), its major accrediting agency, USM reports that the University Planning Committee and the University Budget Advisory Committee are charged with the responsibility of collecting "... official data for all external reports, including but not limited to routine reports to ... **the Federal Government (Integrated Postsecondary Education Data System – IPEDS), ...**" (Exhibit 3, p. 4)

5. All remaining documents were withheld under a claim by USM and the Foundation, which until the filing of the Answers in this matter, were represented by the same counsel, claimed that all such documents were confidential and not subject to the Mississippi Public Records Act of 1983 [“the Act”], Miss. Code Ann. § 25-61-1, *et seq.* and that the Foundation was not a “public body”. (Exhibit 2)

6. On March 24, 2006, Plaintiff filed a Complaint in the Chancery Court pursuant to the Act against USM and the Foundation alleging, that the Foundation is a public body in possession of public records subject to disclosure. Alternatively, the Plaintiff seeks a judicial determination that the Foundation is a fiduciary with records relating to the use, investment or disposition of public funds in its custody. Plaintiff also seeks a judicial determination that the Foundation is a “public body” pursuant to Miss. Code Ann. § 25-61-3 and thus subject to the public records requirement of Miss. Code Ann. § 25-61-1.

8. Miss. Code Ann. § 25-61-1 provides in part that “[i]t is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act.” See also, Miss. Code Ann. § 25-61-2 which provides “[i]t is the policy of this state that public records shall be available for inspection by any person unless otherwise provided by this chapter.”

9. A public body is defined as “any department, ... division, ... agency and any other entity of the state or a political subdivision thereof...” Miss. Code Ann. §25-61-3. It is undisputed that USM is a public body. Therefore, if the Foundation is a “... department, ... division, ... agency and any other entity of ...” USM, the records maintained by it are public records and subject to disclosure.

10. The Foundation is administered and operated exclusively for the benefit of USM. The purpose of the Foundation is to solicit, invest, manage, administer and recognize private gifts which support the building of endowments and the addressing of the educational, research and service missions of USM. All private gifts are for the use and benefit of USM and other organizations organized and operated for the support and benefit of USM. (See Exhibit 4, Timothy Ryan Deposition, p. 22).

11. Those wishing to donate to USM have been instructed to direct those funds to the Foundation. (See Exhibit 4, Timothy Ryan deposition, p. 27). The Foundation holds itself out to the public that it “is a nonprofit 501(c)(3) organization that serves as a *fiduciary of private funds donated to Southern Miss.*” (Emphasis added.) (See Exhibit 5)

12. Under the terms of an operating agreement between USM and the Foundation, the University is obligated to “[p]rovide to the Foundation all personnel necessary for the performance of its duties under this Agreement; the compensation of such personnel, together with all fringe benefits, employment taxes, and other costs thereof, shall be set and paid by the University. ... *All such personnel shall be under the full supervision and control of the University and shall for all purposes be considered employees of the University.* (Emphasis added.) (Exhibit 6 Operating Agreement, para. 3(a) and Exhibit 7, Approval of IHL) The salaries and benefits of the employees of the University of Southern Mississippi Foundation are paid like any other staff or faculty member at this university and are all members of the PERS retirement system which exists for the benefit of the State’s *public employees.* (Emphasis added.) (See Exhibit 4, Timothy Ryan deposition, p. 32.) (See also, Exhibit 8) The Director of the Foundation stated that “[a]s an employee of the University of Southern Mississippi, I report direct to President Shelby Thames.” (Exhibit 4, Timothy Ryan deposition, p. 31). The

performance of Director of the Foundation is evaluated by the President of USM. (See, Exhibit 9, USM SACS' Compliance, 3.2.10)

13. The Foundation is located at a building owned by the University and named the Honor House on the southeastern corner of campus. The Foundation does not pay rent on the facility or even electricity. (Exhibit 4, Timothy Ryan deposition, p. 32). See also, Exhibit 6, Operating Agreement, para. 3(C).

14. USM is required to provide technology support services as well as online access to such University files as are relevant to the business and purpose of the Foundation. (Exhibit 6, Operating Agreement) Such services afford the Foundation access to all private data files on graduates, students, employees, and retirees of USM.

15. Between 2003 and 2005, USM paid more than \$3,169,846.00 to support its Foundation. The total general and administrative and fund raising expenses of the Foundation for the same period totaled \$4,466,875.00 Stated somewhat differently, public funds provided nearly 71% of the costs of operating the Foundation. (Exhibit 10)

16. In its reports to SACS, an accrediting association, USM reports that “The University of Southern Mississippi Foundation is a private, not-for-profit fundraising *arm of the University*. Its director is the Executive Director of The University of Southern Mississippi Foundation, who **answers directly to the President.**” (Emphasis added.) (See Exhibit 9, Comprehensive Standards, 3.2.2.4) Furthermore, USM has publicly characterized the Foundation as one of its “fundraising entities.” (See Exhibit 9, Comprehensive Standards 3.2.2.4)

17. As also explained by USM to its accrediting agency, “IHL oversight procedures for budget, audit and compliance of such foundations have been established.” (See Exhibit 9,

Comprehensive Standards 3.2.2.4) Among these oversight procedures established by the IHL are compliance with Governmental Accounting Standards Board (“GASB”) Statement No. 39. (Exhibit 11, IHL Policies and Bylaws, § 301.0806) which requires the financial statements of the Foundation be included in the financial statements of USM and the IHL. GASB No. 39 is to ensure that the financial information of the Foundation does not render the financial statements of USM, and therefore the IHL, misleading or incomplete. Furthermore, the Foundation represents to the public that it “... serves as a fiduciary of private Funds donated to Southern Miss.” (Exhibit 10) in accordance with its Articles of Incorporation, USM Foundation is to be administered and operated exclusively for the benefit of USM. The purpose of USM Foundation is to solicit, invest, manage, administer and recognize private gifts which support the building of endowments and the addressing of the educational, research and service missions of USM. All such private gifts are for the exclusive use and benefit of USM and other organizations organized and operated for the support and benefit of USM. (See, Foundation Bylaws) Furthermore, according to the most recent attachment to the Articles of Amendment of the Articles of Incorporation of University of Southern Mississippi filed with the Secretary of State, the Foundation has an even more explicit role: “The Corporation is to *aid in the operation* and development of The University of Southern Mississippi. (Emphasis added.) (See Exhibit 12).

18. Mississippi Courts have long honored the principle that “[o]penness in government is the statutorily declared public policy of this state.” *Bd. of Trustees v. Miss. Publishers Corp.*, 478 So.2d 269, 271 (Miss. 1985).

19. USM should not be allowed to conceal public business and public records behind an entity with nothing more than a nominal status of a separate corporation. Certainly, the Foundation possesses public records because it retains records relating to the discretionary use of

public funds. Furthermore, the Foundation is plainly performing a government function by virtue of its contract with USM. Therefore disclosure is mandated.

20. Over the past few years, other Courts when confronted with similar statutory schemes and facts have faced no difficulty in concluding that university foundations are, in fact, public entities whose records are subject to disclosure. See, e.g., *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005); *The State ex re. Toledo Blade Company v. University of Toledo Foundation*, 602 N.E.2d 1159 (1992).

Respectfully submitted this 9th day of June, 2006.

By: _____
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CERTIFICATE OF SERVICE

I, Stanton J. Fountain, Jr., counsel for Plaintiff, do hereby certify that I have this day delivered by facsimile and United States Mail, postage prepaid, a true and correct copy of the above and foregoing Motion for Summary Judgment to;

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This, the 9th day of June, 2006.

Stanton J. Fountain, Jr.