

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
CIVIL DIVISION

PAM HICKS and JOHN MARK BYERS

PLAINTIFFS

VS.

CASE NO. CV-2012-290

THE CITY OF WEST MEMPHIS, ARKANSAS
POLICES DEPARTMENT; THE CITY OF WEST
MEMPHIS, ARKANSAS; DONALD OAKES, in his
Individual and Official Capacities as Chief of Police of
the West Memphis, Arkansas Police Department; and,
WILLIAM H. JOHNSON, in his Individual and Official
Capacities as Mayor of WEST MEMPHIS, ARKANSAS;
and SCOTT ELLINGTON, in his Individual and Official
Capacities as Prosecuting Attorney for the Second Judicial
Circuit of Arkansas

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CLERK OF COURT
CRITTENDEN COUNTY, ARKANSAS

DEFENDANTS

ORDER

On the 24th day of October came on for hearing the plaintiffs's complaint under the Arkansas Freedom of Information Act, and various motions to dismiss by certain defendants. There are essentially two issues for resolution by the court at this time. There are others that will be developed and considered at a later proceeding. Preliminarily, the court quashed subpoenas that were issued on Circuit Judge John N. Fogleman, and District Judge Dan Stidham upon their representations that they had no information relating to the freedom of information request, and that the notice to them was so short that they had insufficient time to make alternate arrangements for someone to cover their judicial obligations. Mayor William Johnson and Chief Donald Oakes are dismissed as parties to this action. The defendants's motion challenging John Mark Byers's standing to appear as a plaintiff in this cause is withdrawn.

The first issue is whether Mr. Ellington will be required to surrender to the plaintiffs

several documents that he received relating to the deaths of three children in West Memphis, Arkansas on May 5, 1993. At the hearing, the crime was referred to as the "Robin Hood Hills murders." Ellington, by his deputy, Curt Huckaby, states that his office has opened an investigation into the allegations contained in those documents. Plaintiffs argue that three persons have pled guilty and have been sentenced for those murders, and the presumption is that the case is closed and the documents therefore subject to disclosure under the Act. Plaintiffs argue that apart from receiving the documents in question and scheduling two interviews, no other action has been taken. Plaintiffs go on to point out that Ellington has not enlisted the assistance of any other law enforcement agency in furtherance of the investigation. Ellington states that he has no need or obligation to seek the assistance of any other law enforcement agency, since his office is, itself, a law enforcement agency, with the authority and the capability to conduct its own investigations.

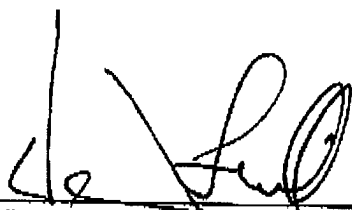
The only issue here, in the court's view, is whether the court finds Ellington's claim of an investigation to be credible. Based upon the testimony of Mr. Huckaby and the court's *in camera* review of the documents in question, the court does accept the claim as credible. While the fact that others have pled guilty to the Robin Hood Hills murders is relevant as to whether it is a closed issue, that is not determinative. The prosecutor has the right and the obligation to ascertain whether a miscarriage of justice might have occurred, or whether there were others who might have acted in concert with those who pled guilty, but who have, as yet, not been brought to justice. That is his prerogative, and he might even be said to derelict in that duty if he failed to conduct such an investigation. In pursuit of that duty, the prosecutor is entitled to a reasonable period of time, and the court cannot say that the prosecutor has exceeded that time. The court

believes that it would be an abuse of judicial authority to intrude prematurely into an investigation that the prosecuting attorney has elected to launch, or to compel a premature disclosure of sensitive documents that might prove essential to that investigation. The court therefore finds that Prosecuting Attorney Ellington has not violated the Freedom of Information Act, and is therefore not subject to sanction under the Act.

The other issue is whether the Police Department of the City of West Memphis is obliged under the Act to permit inspection of articles of physical evidence in the Robin Hood Hills murder case. The resolution of this issue is merely one of statutory interpretation. The plaintiffs offer an ingenious argument for why these articles should be deemed "public records," in that they were presented to members of a jury to transmit relevant information to them. However, given a plain reading of the Act, and the holdings of the Supreme Court, it is clear that the court may not accept plaintiffs's interpretation. These items might be available for viewing under some other provision of the statutory or common law, which plaintiffs are free to argue at a later hearing, but these items are not available to them under the Freedom of Information Act. The court likewise rejects the notion that plaintiffs are entitled to see the evidence under the Act because others might have viewed it. The court therefore finds that the West Memphis Police Department has not violated the Freedom of Information Act, and is therefore not subject to sanction under the Act.

There were other issues raised recently by the plaintiffs that the defendants have not had time to respond to. Those matters will be the subject of a later hearing. The court suggests that the attorneys communicate with the court's case coordinator for a special setting.

IT IS SO ORDERED, this 29th day of October, 2012.



Victor L. Hill, Circuit Judge

copies to:

Mr. Ken Swindle, Attorney for Plaintiffs
Mr. David Peoples, West Memphis City Attorney
Mr. Colin Jorgenson, Assistant Attorney General
Ms. Terry Hawkins, Circuit Clerk