

ORIGINAL

IN THE SUPREME COURT OF OHIO

KOKOSING CONSTRUCTION
COMPANY, INC.
6235 Westerville Road
Westerville, Ohio 43081,

Case No: 11-2100

Relator,

vs.

CITY OF ZANESVILLE, OHIO
c/o Scott Hillis, City Law Director
825 Adair Avenue
Zanesville, Ohio 43701,

and

CH2M Hill
c/o CT Corporation System, Statutory Agent
1300 East Ninth Street
Cleveland, Ohio 44114,

Respondents.

MEMORANDUM IN SUPPORT OF
COMPLAINT FOR WRIT OF MANDAMUS

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I. INTRODUCTION

This controversy arises out of the construction of approximately \$20 million in improvements to a water treatment plant in the City of Zanesville, Ohio (the "Project"). The City of Zanesville, Ohio ("Respondent City") entered into a contract with CH2M Hill ("Respondent CH") for the design of the project and for resident project engineering services during construction. The Petitioner, Kokosing Construction Company, Inc. ("Kokosing"), entered into a contract with Respondent City for the construction of the improvements in question. The construction of the Project is not complete.

The specific issues to be decided in this case arise from Respondent City's failure to produce documents validly requested under the Ohio Records Act, O.R.C. 149.43. As will be

outlined below, Respondent City's response to the public records request at issue is plainly in bad faith. Respondent City has (1) failed to produce numerous categories of records, (2) asserted that categories of documents were not requested when they expressly were, (3) asserted that its documents will be produced by a third party at some indeterminate time in the future, (4) claimed documents were produced when they were not, and (5) refused to produce and/or redacted documents based upon the claim that communications between its outside law firm and the third party engineer responsible for rendering independent and unbiased engineering decisions under the contract, i.e. Respondent CH, are protected by the attorney-client privilege. Respondent CH has violated the Ohio Records Act by its failure thus far to produce any documents responsive to the request or to respond in any other way.

II. FACTUAL BACKGROUND

The Project was first contemplated by the City in 2004 when certain initial design work was undertaken by BBS Corporation ("BBS") pursuant to a contract with Respondent City.¹ BBS and Respondent City signed a contract dated February 4, 2004, to cover preliminary design of the Project and if authorized by Respondent City the option for final design, bid phase, and construction phase. On October 17, 2007, Respondent CH and Respondent City signed Modification 2 to the Agreement and signed subsequent modifications until Modification 5, which was not dated, but was prepared August 30, 2011.

Ohio Revised Code Section 153.01 requires that with respect to a project, such as that at issue here, Respondent City was required to prepare full and accurate plans and definite and complete specifications of the work to be performed. Accordingly, on or about October 17, 2007, Respondent City entered into a modification of the contract with BBS, which modification

¹BBS was subsequently acquired by Respondent CH.

recognized Respondent CH as the Engineer and pursuant to which Respondent CH was to prepare all plans and specifications for the Project.

Respondent City applied for and received funding for the Project through the American Recovery and Reinvestment Act (ARRA), otherwise known as stimulus funding. The deadlines associated with qualifying for this funding accelerated Respondent City's schedule to award the Project and issue a notice to proceed.

As required by law, on July 8, 2009, Respondent City published the plans and specifications and contract forms² and on August 13, 2009, Respondent City accepted competitive bids for the contract for the Project. Upon information and belief, Respondent City and Respondent CH knew, at the time that the plans and specifications were published, that they were incomplete. The decision to publish incomplete plans and specifications was apparently driven by the fact that there was a deadline associated with the ARRA financing. This fact was not disclosed to the bidders. The following combined construction bids were received:

PAE& Associates, Inc.	\$11,988,900
Kokosing Construction Company, Inc.	\$16,101,750

On August 19, 2009, Respondent CH recommended to Respondent City to award the contract to Kokosing, which contract was then executed on October 13, 2009.

After beginning work on the Project, it became apparent that numerous aspects of the plans and specifications were incomplete and that they contained a significant number of errors and omissions. Kokosing and Respondent CH were able to work through numerous of these issues over the course of the first 14 months of construction on the Project. More specifically, Respondent CH's Project Engineer developed a process where he would either make changes and

²The contract forms had been prepared by Respondent City's outside law firm, Bricker & Eckler LLP.

issue a Proposal Request ("PR") to be priced by Kokosing, or Kokosing would identify an issue through a Request for Information ("RFI") and CH would then issue a PR. In circumstances where Kokosing and Respondent CH agreed upon a price, a change order would then be issued covering one or more PRs. Where there was either no agreement that an RFI was a change, or where the parties did not agree upon price, the exchange of information and pricing continued. Both Respondent CH's and Kokosing's position during the first 14 months of the job were that this process was what the contract documents required.

In July, 2011, it became apparent that Respondent CH and Kokosing were not going to be able to reach agreement with respect to some of the then outstanding issues through the process that had been utilized by them up to that time. For that reason, Kokosing scheduled a meeting with representatives of Respondent City to discuss the outstanding items. The purpose of the meeting, at least from Kokosing's perspective, was to try to reach some resolution of the outstanding issues before the issues had to be elevated to a formal "claim". This meeting was held on July 8, 2011, and was attended on behalf of Respondent City by the Mayor, the Public Service Director and the City Attorney. Respondent CH's Project Engineer also attended the meeting. At the conclusion of the meeting, it was Kokosing's understanding that Respondent City would consider the presented issues, advise where there was agreement and where there was not, and provide guidance on how it preferred to address any issues that remained unresolved.

Subsequent to the July 8, 2011, meeting, Respondent City never communicated further with Kokosing. Rather, Respondent City engaged its outside counsel, Bricker & Eckler LLP ("Bricker"). It is well recognized within the Construction Bar that the typical approach of Bricker with respect to construction projects is to avoid the underlying merits of any construction claim by creating as many technical legal defenses as possible.

In a letter dated July 22, 2011, Bricker began that process with respect to this Project. Specifically, Bricker's letter begins to impose upon the Project an interpretation of the contract documents that neither Respondent City, Respondent CH, nor Kokosing had utilized with respect to any issue on the Project during the preceding 14 months of construction. Moreover, it is apparent from this letter, and those that followed, that Bricker not only seeks to impose this new interpretation upon issues arising *after* July 22, 2011, but also upon those matters *already at issue and pending* upon the Project. A true and accurate copy of the July 22, 2011, letter is attached to the Complaint herein as Exhibit 5.

Respondent CH owes an independent duty to Kokosing to evaluate all matters at issue on the Project in good faith and on an unbiased basis. Specifically, the general conditions of the contract between Kokosing and Respondent City states as follows:

9.08 *Decisions on Requirements of Contract Documents and Acceptability of Work*

A. Engineer will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. All matters in question and other matters between Owner and Contractor arising prior to the date final payment is due relating to the acceptability of the Work, and the interpretation of the requirements of the Contract Documents pertaining to the performance of the Work, will be referred initially to Engineer in writing within 30 days of the event giving rise to the question.

* * *

C. Engineer's written decision on the issue referred will be final and binding on Owner and Contractor, subject to the provisions of Paragraph 10.05.

D. *When functioning as interpreter and judge under this Paragraph 9.08, Engineer will not show partiality to Owner or Contractor* and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity.

In this regard, it is important to note that the Project will not be complete until late December, 2011, and Respondent CH continues to be the party responsible for the construction administration of the Project. Accordingly, its obligation to make decisions and interpret the documents in a manner that is unbiased and in good faith is on-going. It is apparent, however, that that role is being usurped by Bricker.

By email dated August 2, 2011, Respondent City directed Respondent CH to "copy Scott Hillis (the City Law Director) on any submittals to Bricker regarding claims and proposals". A true and accurate copy of this email, as produced by Respondent City, is attached to the Complaint herein as Exhibit 6.³ Although Respondent City has refused to produce the communications between Bricker and Respondent CH based upon a claim of "attorney-client privilege", it may reasonably be presumed that Respondent CH was given the directive to submit all "claims and proposals" to Bricker before publishing any independent interpretation.

Subsequent to the August 2, 2011, email from Respondent City to Respondent CH regarding submission of the claims and proposals to Bricker, a letter dated August 24, 2011, on Respondent CH letterhead, was received in which Respondent CH demanded that Kokosing make available certain records relating to one of the pending issues on which Respondent CH had not taken a position as contemplated by Article 9.08 of the contract cited above. This initial letter was then followed by identical letters dated August 24, 2011, September 2, 2011, and September 24, 2011, relating to each of the pending items on which Respondent CH had not taken a position.

³This email reflects redactions made by Bricker based upon the claim that its communications with Respondent CH are protected by the "attorney-client privilege".

In response to these requests, Kokosing has made all such records available. The review of the documents, however, was done by both Respondent CH and Bricker in its role as counsel for Respondent City.

On August 30, 2011, Respondent CH's Project Engineer sent an email to the City Public Service Director in which he stated:

We are generally corresponding with Bricker & Eckler by e-mail, face to face meeting (in which the City is always present) and telephone conversations. Any correspondence sent to Bricker & Eckler is also copied to yourself and the City Attorney Scott Hillis.

* * *

We will also provide a monthly accounting statement showing hours charged to the Bricker & Eckler communication task, who is charging the time and what the total cost (billings) of time charged to date.

A true and accurate copy of this e-mail is attached to the Complaint herein as Exhibit 7.

Over the course of the last month, all pending issues presented to Respondent CH by Kokosing have been denied through what amount to form letters which are on Respondent CH letterhead, but which parrot the arguments advanced in Bricker's letters. One can reasonably conclude that these determinations are based upon the communications, meetings and telephone calls with Bricker referred to in the email quoted above.

On September 9, 2011, Kokosing provided to Respondent CH and Respondent City a letter requesting that certain public records in their files relating to the pending issues be made available. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 8. The only response Kokosing received to this request was a letter on Respondent CH letterhead advising Kokosing that, in order to review the requested documents, Kokosing would need to obtain a subpoena. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 10.

By letter dated September 23, 2011, Kokosing served upon both Respondent City and Respondent CH a revised request for documents which made specific reference to the Ohio Records Act and which provided a reference to *State, ex rel. Cincinnati Enquirer v. Krings*, (2001) 93 Ohio St. 3d 654, so that there would be no dispute as to the public nature of the documents in Respondent CH's possession. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 11.

At Article 10.05(H) of the contract between Respondent City and Kokosing, Bricker had inserted a provision that required that Kokosing respond to any document request by Respondent City within ten (10) days. Accordingly, Kokosing presumed that Respondent City and its counsel believed that this was a reasonable period of time within which such documents could be produced and that time frame was included in the September 23, 2011, public records request.

As is set forth in paragraphs 57 through 68 of the Complaint herein, Bricker claimed for weeks that Respondent City was assembling the responsive documents and ignored the suggestion that they be produced in phases as they were available. Ultimately, it took Respondent City approximately seven weeks from the initial request, and six weeks from the September 23, 2011, request to "assemble" the documents.

By letter dated November 1, 2011, Bricker advised Kokosing:

The City of Zanesville (the "City") is making the records responsive to your public records request available for your inspection and copying.

The letter then went on to assert that "any records which contain communications with CH2M Hill that fall under Section 3.6 of the Agreement are also subject to the attorney-client privilege and are not being produced." A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 23.

Although it might be expected that having taken more than six weeks to "assemble" the documents, the records produced in response to the public records request would be complete. This is not the case. On November 2, 2011, representatives of the Petitioner reviewed the files made available by Respondent City. It became readily apparent that the documents being made available were significantly incomplete. The following are some examples of the documents that were not produced:

- The contract between the City and BBS is dated in 2004 and related to preliminary design work. This contract was followed by one with CH2M Hill in 2007, which had 5 modifications through August, 2011. A copy of the contracts and/or modification are attached to the Complaint herein as Exhibits 1, 2, and 3. The City produced no documentation of internal communications or meeting minutes relating to these contracts. Apparently, it is the City's position that over the course of 7 years there were no memorialized internal discussions, no meetings to approve or discuss the contracts, the design of the Project, the bidding or the award or performance of the contract.
- The 2004 contract outlined numerous deliverables by BBS, including various reports, the drawings and specifications, bid tabulations, documents for approvals, construction cost estimates, and award recommendations. None of these documents were produced.
- The 2004 contract required the engineer to keep the owner informed of progress. No written progress reports were produced.
- The 2004 contract required the City to provide the engineer with all criteria and full information as to the City's requirements for the Project. None of these documents were produced.
- Modification No. 2 at Article 1.1 required the engineer to provide the City with a Technical Memorandum. This has not been produced.
- Modification No. 2 refers to a 2006 Water Treatment Plant Expansion and Upgrade report prepared by BBS/CH2M Hill Company. This document has not been produced.
- Modification No. 2 at Article 3 indicates that "the design approach will be based on interactive workshops and informal deliverables (e.g., such as sketches, a few

preliminary drawings, catalog cuts, and workshop meeting minutes)". No such documents were produced.

- Modification No. 4 required the engineer's resident project representative to prepare minutes of the monthly meetings. Only two sets of minutes were produced despite the fact that construction has been ongoing for 21 months.
- The contract between Respondent City and Respondent CH, together with the modifications thereto, totals approximately \$2 million. The payments are based upon direct labor costs, indirect labor costs and reimbursable expenses. The City produced only one payment application from the engineer, although the engineer has been working on the project since 2004.
- Respondent City has not produced any design information relating to any phase of the design of the Project.

In addition to the failure to produce any of the documents identified above, it also became apparent that the emails that were produced did not contain any of the attachments referenced therein. This issue was raised with the paralegal sent to administer the production of the records; however, she was unfamiliar with the documents and simply pointed to the box of email and said "I am sure if there were attachments they are in there". Further, Respondent City continued to assert that the communications between its counsel and Respondent CH are protected by the attorney-client privilege. By letter dated November 7, 2011, Kokosing raised these issues with Respondent City. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 18.

Respondent City's response to this letter demonstrates the complete lack of good faith by Respondent City in responding to the public records request. Respondent City engaged in semantic game playing, the purpose of which can only be to frustrate the ability of Kokosing to obtain these relevant public records. Respondent City's response to the issues was by Bricker's letter dated November 10, 2011. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 19. The bad faith in Respondent City's response is best

demonstrated by the fact that it states that Kokosing did not request certain categories of documents, when those categories could not have been more specifically identified in the public records request at issue. A comparison of the public records request and Respondent City's November 10, 2011, response yields the following:

Request

1. All design files produced by CH2M Hill related to the design of the project.

City Response

First bullet point: You have not requested any specific documents related to the City's contract with BBS dated 2004 and related to preliminary design work.

Last bullet point: Your letter did not request any specific design information for the project.

Request

4. All minutes of meetings attended by any representative of the City relating in any way to the funding, design or the construction of the project.

City Response

Eighth bullet point: To the extent that there were any meeting minutes prepared by the Resident Project Representative, ... However, it should be noted that Kokosing's public records request was overbroad and did not specifically request these documents.

Request

6. All payment applications from CH2M Hill relating to the project.

City Response

Ninth bullet point: The City has located additional payment application requests from CH2M Hill. ... However, it should be noted that Kokosing's public records request was overbroad and did not specifically request these documents.

Request

9. All reports of any nature relating to the project.

City Response

Third bullet point: All of the progress reports located by the City either have been produced or will be produced. ... However, it should be noted that Kokosing's public records request was overbroad and did not specifically request these documents.

Rhetorically, one must ask how a public body can respond in good faith to a written request for the production of public records by asserting that the requested documents were not, in fact, requested. Further, any argument by Respondent City that the documents were not "specifically requested" would undermine the very purpose of the act. One can not "specifically identify" that which it does not yet know to exist. This is the very reason why such requests must, by definition, request categories of records.

In addition to being obvious from Respondent City's response relative to these specific categories of documents, the disingenuous nature of Respondent City's response can be seen in other positions advanced in the November 10, 2011, response:

(1) The letter indicates that Respondent City will be satisfying its obligation to provide its public records through the production of records by Respondent CH. While there is no argument but that Respondent CH's records are public records subject to production, the request also seeks those same records to the extent that they are in Respondent City's possession. This is important for the reason that Respondent City's version of early design documents, meeting minutes and other such records would likely contain the handwritten notes of Respondent City representatives.

(2) Item 9 of the September 23, 2011, letter requested "[A]ll reports of any nature relating to the Project", and Respondent City produced none. The November 7, 2011, letter from Kokosing pointed out that there were a number of reports identified in the contract between Respondent City and Respondent CH. In its November 10, 2011, letter, Respondent City responded by taking the position that these reports were not "specifically requested". The documents that are referred to in the third, fourth, fifth, sixth and seventh bullet points of the November 10, 2011, letter each refer to documents specifically identified in the contract between Respondent City and Respondent CH and which would surely be in Respondent City's possession. Apparently, Respondent City seeks to respond to public records requests by playing such semantic games.

By letter dated November 11, 2011, Kokosing pointed out to Bricker the issues identified above with respect to the November 10, 2011, letter. In addition, Kokosing provided more specificity to certain of the requests, requested that certain documents be produced a second time in order to verify that the attachments to emails had not been included, and advised Bricker that Respondent City's response to the public records request was not in good faith. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 20.

By letter dated November 22, 2011, Bricker responded. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 21. This response is indicative of yet more gamesmanship with respect to the records of Respondent City. In each instance, Bricker claimed that the original public records request was overly broad. The most illustrative example of Respondent City's lack of good faith relates to the request for "reports" relating to the Project. The original request as set forth in the September 9, 2011, and September 23, 2011, public records request sought all reports of any nature relating to the Project.

Respondent City produced no reports of any kind on November 2, 2011. Respondent City did, however, produce its contracts with BBS and Respondent CH. These reports identified specifically certain reports that Respondent CH was contractually obligated to produce during the Project. Accordingly, by letter dated November 7, 2011, Kokosing specifically requested that each of these reports be produced. In Bricker's letter of November 10, 2011, Respondent City took the position that these reports had not been "specifically requested". In Kokosing's letter of November 11, 2011, Kokosing pointed out that the reports were those specifically identified in the City/CH2 contracts. Bricker, in its November 22, 2011, letter asserts:

"Fifth, you have requested "all reports of any nature relating to the project." Again, your own letter demonstrates the overbroad nature of this request. Specifically, you opine as to at least 3 different categories of "reports" that fall within this request (progress reports, technical memoranda, the 2006 Water Treatment Plant Expansion and Upgrade Report). As you make no effort to specify the categories of "reports" you wish to inspect, this request does not identify the "reports" you want with sufficient clarity."

Remarkably, all three of the categories that Bricker identifies in the quoted passage are exactly the names placed upon the reports in the City/CH2 contract. One must ask the question how much more specific one could be in describing the reports in question. Kokosing responded to the November 22, 2011, letter by letter dated December 8, 2011, and identified, with respect to each category of requested documents, how the request was not "overly broad" as claimed.

In regard to the claim of privilege, Respondent City has refused to produce not only the direct communications between Bricker and Respondent CH, but also any communication on which Bricker was copied. As is pointed out above, Respondent CH had a contractual duty to evaluate issues presented by the parties on an impartial basis. The redacted emails produced by Respondent City reflect that Respondent CH prepared responses to the individual claims submitted by the Petitioner and that Respondent CH transmitted those responses to the City

Service Director. However, because those initial responses to the claims were also copied to Bricker, that initial response was not produced based upon the assertion that it was privileged. Accordingly, it would appear that absent an order requiring their production, we will never know what part of the final decision was the independent judgment of Respondent CH as contemplated by the contract, versus the analysis of Respondent City's outside attorneys.

III. LAW AND ARGUMENT

A. The Ohio Records Act And The City Of Zanesville Public Records Policy

The Ohio Records Act, R.C. Section 149.43, provides the public with broad access to public records. In pertinent part, the Act provides:

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

The Public Record Policy adopted by the City of Zanesville similarly requires that public records be made available. In pertinent part, this policy provides:

Introduction

It is the policy of (this office) that openness leads to a better informed citizenry, which leads to better government and better public policy. It is the policy of (this office) to strictly adhere to the state's Public Records Act. All exemptions to openness are to be construed in their narrowest sense and any denial of public records in response to a valid request must be accompanied by an explanation,

including legal authority, as outlined in the Ohio Revised Code. If the request is in writing, the explanation must also be in writing.

* * *

Section 2.1

Although no specific language is required to make a request, the requester must at least identify the records requested with sufficient clarity to allow the public office to identify, retrieve, and review the records. If it is not clear what records are being sought, the records custodian must contact the requester for clarification, and should assist the requestor in revising the request by informing the requestor of the manner in which the office keeps its records.

* * *

Section 2.3

Public records are to be available for inspection during regular business hours, with the exception of published holidays. Public records must be made available for inspection promptly. Copies of public records must be made available within a reasonable period of time. "Prompt" and "reasonable" take into account the volume of records requested; the proximity of the location where the records are stored; and the necessity for any legal review of the records requested.

Section 2.4

Each request should be evaluated for an estimated length of time required to gather the records. Routine requests for records should be satisfied immediately if feasible to do so. . . . If fewer than 20 pages of copies are requested or if the records are readily available in an electronic format that can be e-mailed or downloaded easily, these should be made as quickly as the equipment allows.

All requests for public records must either be satisfied (see Section 2.4) or be acknowledged in writing by the (public office) within three business days following the office's receipt of the request. If a request is deemed significantly beyond "routine," such as seeking a voluminous number of copies or requiring extensive research, the acknowledgement must include the following:

Section 2.4a – An estimated number of business days it will take to satisfy the request.

Section 2.4b - An estimated cost if copies are requested.

Section 2.4c - Any items within the request that may be exempt from disclosure.

Section 2.5

Any denial of public records requested must include an explanation, including legal authority. If portions of a record are public and portions are exempt, the exempt portions are to be redacted and the rest released. If there are redactions, each redaction must be accompanied by a supporting explanation, including legal authority.

A true and accurate copy of the City of Zanesville's Public Records Policy is attached to the Complaint herein as Exhibit 9.

There can be no question but that the September 9 and September 23, 2011, letters sought the production of what are defined as public records under the Act and the Policy. The response of Respondent City to these requests has been one of semantic game playing, has been incomplete and in context raises significant questions whether Respondent City made any real attempt to produce the requested documents.

Respondent City on the one hand (1) apparently takes the position (through the lack of their production) that despite the fact that the project in question involves the complete design and construction of a \$20 million project beginning in 2004, it has no internal email or other communications, only one set of final design drawings (i.e., not one preliminary, schematic or design development drawing), none of the progress reports generated by its engineer, and essentially none of the meeting minutes during the design phase or construction phase, and (2) plainly asserts that categories of documents were not requested, when, in fact, they were. On the other hand, Respondent City is quick to point out that many of its documents will be produced when Respondent CH responds to the request by producing millions of pages of documents at some indeterminate point in the future. In regard to this latter ploy, it merits noting that Respondent CH has not responded in any way to the requests served upon it. It may be the case that Respondent CH is unaware of these representations by Respondent City, or does not

intend to produce the documents in question. In either case, the production by Respondent CH of documents is not the same as Respondent City's production of its own records as the latter likely contain handwritten notes on the design documents and meeting minutes.

By letter dated December 9, 2011, on the eve of the complaint herein being filed, Bricker advised that the City was producing "an extensive volume of records" electronically. A true and accurate copy of this letter is attached to the Complaint herein as Exhibit 22. This letter does not indicate whether these are records in addition to those previously produced, or whether they are simply the email files that Kokosing requested be produced a second time so that the issue of the City's failure to include the attachments could be evaluated.

This December 9, 2011, letter also represented that the City was now making 1,000,000 to 2,000,000 documents available this week. Kokosing had previously asked whether these records were from the City's files or from the files of CH. The City has not answered this question in its letter. As of the date of the filing of this complaint no further documents have been produced as represented.

The response, or lack of response, by Respondent City and Respondent CH to the September 9 and September 23, 2011, public records requests violates both the Act and the Policy. Under both the Act and the Policy, Respondent City's response to the public records request is required to be timely and complete. It has now been almost *four months* since the initial request for the records. Obviously, Respondent City's response has not been timely and it now remains to be seen whether the production offered in the December 9, 2011, letter is responsive. There can be no question from the exhibits attached to the complaint but that Respondent City's response has thus far been incomplete, that much has been admitted by Respondent City's own letters. Further, both the Act and the Policy require that, to the extent a

claim of exemption is made, it must be spelled out in writing. With the exception of the claim of attorney-client privilege, no exemption has been claimed; hence, all documents should be produced. While several of Respondent City's letters claim that the request is "overly broad", no specific objection by Respondent City has been made.

Respondent City simply continues the tact of claiming that Kokosing's requests do not comply with the Ohio Records Act (without ever delineating why not), claiming documents were not requested when they, in fact, were, asserting that the requests were not specific enough, asserting that documents were produced, when they were not, suggesting that documents will be produced by Respondent City in the future, with no date, or stating that they will be produced by Respondent CH. Apparently, the belief is that if Respondent City, through its counsel, can continue to "kick the can down the road", Kokosing will simply give up trying to obtain the records.

B. The Communications Between Counsel For Respondent City And Respondent CH Are Not Protected By The Attorney-Client Privilege

Bricker has asserted that the communications between it and Respondent City's project engineer, Respondent CH, are not subject to Kokosing's public records request because those communications are protected by the attorney-client privilege pursuant to R.C. 2317.02 and the definition of "client" contained in R.C. 2317.021. Bricker is correct that the definition of "client" included in R.C. 2317.021 includes "a person, firm, partnership, corporation, or other association that ... communicates, either directly or **through an agent** ... with such attorney[.]" Bricker asserts that Respondent CH is the agent for Respondent City such that the communications between Bricker and Respondent CH are subject to the attorney-client privilege that exists between Bricker and Respondent City. This argument fails for two independent reasons.

First, R.C. 2317.02 and 2317.021 have no application here.⁴ R.C. 2317.02 provides that "[t]he following persons shall not **testify** in certain respects" and precludes attorneys from testifying about confidential communications with their clients. (Emphasis added). The Ohio Supreme Court has held that "R.C. 2317.02(A), by its very terms, is a mere **testimonial** privilege precluding an attorney from testifying about confidential communications." *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.* (2009), 121 Ohio St.3d 537, 541, 905 N.E.2d 1221, 2009-Ohio-1767 at ¶ 24 quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18. Where the issue is not testimonial, the attorney-client privilege inquiry is governed by common law. *Jackson v. Greger* (2006), 110 Ohio St.3d 488, 490, 854 N.E.2d 487, 2006-Ohio-4968 at ¶ 7 quoting *Leslie, supra*.

Kokosing has not yet sought to compel any testimony.⁵ Kokosing has merely sought the production of certain documents in Respondent City's and Respondent CH's possession. Therefore, R.C. 2317.02 and 2317.021 have no application here, and any claim of attorney-client privilege must be analyzed under the common law.

Under the common law, the Ohio Supreme Court has long held that "the attorney-client privilege is destroyed by voluntary disclosure to others of the content of the statement." *State v. Post* (1987), 32 Ohio St.3d 380, 385, 513 N.E.2d 754 citing *Travelers Indemnity Co. v. Cochrane* (1951), 155 Ohio St. 305, 316, 98 N.E.2d 840. "Waiver of the attorney-client privilege by disclosure to third parties is premised on the principle that "[t]he privilege assumes,

⁴R.C. 2317.021 provides the definition of "client" as that term is used in R.C. 2317.02.

⁵It is a certainty that Kokosing will seek testimonial evidence from representatives of Respondent CH based upon the assertion of privilege with respect to the documents it seems certain that Bricker will, on behalf of Respondent City, object to any question that seeks to determine to what extent representatives of Respondent CH had discussion with or guidance from Bricker. For the reasons set forth herein, the attorney-client privilege should not apply to any such communication between counsel for Respondent City and representatives of Respondent CH.

of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure * * * ceases when the client does not appear to have been desirous of secrecy." *Id.* quoting 8 *Wigmore, supra*, at 599, Section 2311. (Footnotes omitted.) *Emley v. Selepchak* (1945), 76 Ohio App. 257, 31 O.O. 558, 63 N.E.2d 919.

Bricker has an attorney-client relationship with Respondent City. Respondent CH is an outside third-party with respect to that relationship and does not have an independent attorney-client relationship with Bricker. Therefore, any communication between Respondent CH and Bricker is not subject to the attorney-client privilege. *See Flynn v. Univ. Hosp., Inc.* (Ohio App.1 Dist.), 172 Ohio App.3d 775, 779, 876 N.E.2d 1300 (holding that a necessary element of the attorney-client privilege is an attorney-client relationship between the parties). Moreover, the attorney-client privilege that may exist between Bricker and Respondent City is destroyed for any communication where Respondent CH was also included because such communications were disclosed to a third party outside the attorney-client relationship.

Even if R.C. 2317.02 and 2317.021 did apply here (and they do not), Bricker's argument would still fail because Respondent CH is not the agent of Respondent City for purposes of the communications at issue. Those communications relate to Respondent CH's responsibilities under Section 9.08 of the contract between Kokosing and Respondent City. As discussed above, that section provides that "when functioning as the interpreter and judge ... [Respondent CH] **will not show partiality** to [Respondent City] or [Kokosing] and will not be liable in connection with any interpretation or **decision rendered in good faith.**" (Emphasis added). That obligation absolutely precludes Bricker's contention that Respondent CH was serving as Respondent City's agent for purposes of the communications at issue here.

"In general, an agency relationship is a contractual relationship created by an express or implied agreement between the parties." *Amerifirst Savings Bank of Xenia v. Krug* (Ohio App. 2 Dist. 1999), 136 Ohio App.3d 468, 483, 737 N.E.2d 68 citing *Johnson v. Tansky Sawmill Toyota, Inc.* (Ohio App. 10 Dist. 1994), 95 Ohio App.3d 164, 642 N.E.2d 9. Here, the contract language makes it clear that Respondent CH was precluded from acting as the owner's agent with respect to claims between the parties and that Respondent CH owed an independent duty to each.

The Ohio Supreme Court has held that "the relationship of principal and agent or master and servant exists only when one party exercises the **right of control** over the actions of another, and those actions are directed toward the **attainment of an objective which the [principal] seeks.**" *Hanson v. Kynast* (1986), 24 Ohio St.3d 171, 173, 494 N.E.2d 1091, citing *Baird v. Sickler* (1982), 69 Ohio St.2d 652, 654, 433 N.E.2d 593; *Councell v. Douglas* (1955), 163 Ohio St. 292, 126 N.E.2d 597; *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, 191-192, 64 N.E.2d 829; *see, also*, Restatement of the Law 2d, Agency (1958) 7, Section 1 (emphasis added). "The **most important element** in determining whether an agency relationship exists is the **principal's right to control the conduct of the agent.** *Acme Steak Co., Inc. v. Great Lakes Mech. Co.* (Ohio App. 7 Dist.), 2000-Ohio-2566 citing *Hanson, supra* (emphasis added). The Ohio Supreme Court has further clarified that:

[t]he relation of principal and agent ... is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did, the relation is that of principal and agent[.] If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor.

Councell v. Douglas (1955), 163 Ohio St. 292, 295, 126 N.E.2d 597 quoting *Miller v. Metropolitan Life Ins. Co.* (1938), 134 Ohio St. 289, 291, 16 N.E.2d 447.

Here, Respondent City had no right to control the mode and manner by which Respondent CH performed its work with respect to its obligation to analyze and interpret "the Contract Documents and judge *** the acceptability of the Work thereunder." See Contract between Kokosing and Respondent City at Section 9.08(A). Section 9.08(D) expressly provides that Respondent CH may show no partiality to Respondent City. In fact, Section 9.08 provides that Respondent CH's decisions as to the relevant issues must be unbiased and made in good faith. Thus, Respondent City has no right to control Respondent CH's actions.

Respondent CH is obligated to independently interpret the Contract Documents and determine whether Kokosing's work is acceptable and to then report that decision to Kokosing and Respondent City. Respondent City was certainly interested in the ultimate result, but that merely renders Respondent CH an independent contractor of Respondent City—not an agent. Therefore, the communications between Respondent CH and Bricker, as well as communications between Respondent CH and Respondent City where Bricker was copied, are not subject to the attorney-client privilege and must be disclosed pursuant to Kokosing's proper request under the Ohio Records Act.

The argument advanced by Respondent City that communications between its counsel and its third-party engineer, Respondent CH, should also fail on policy grounds. If the Court were to accept this interpretation of the attorney-client privilege, all one need do to protect/hide facts held by a third party is include a provision in a contract that suggests that in any circumstance chosen by the other party legal services could be rendered on the third party's behalf. As soon as the operative facts need cloaked, the other party need simply have matters communicated through counsel. Here, the reality is that Respondent City's attorneys took over

the management of the Project and instructed Respondent CH how it was to respond to claims, despite the fact that by contract Respondent CH had an obligation to render unbiased decisions.

Shrouding such records in secrecy through the false application of the attorney-client privilege in no way advances the public policy underlying either the Public Records Act or Respondent City's own Public Records Policy.

C. Respondent CH's Failure To Respond

There can be no dispute but that the documents relating to the Project that are in the possession of Respondent CH are public records. See *State, ex rel. Cincinnati Enquirer v. Krings*, (2001) 93 Ohio St. 3d 654. Despite this, Respondent CH has not produced a single document in response to either the September 9, 2011, or September 23, 2011, public record requests. Not only has Respondent CH not produced a single document, it has not responded in any way to the requests.

IV. CONCLUSION

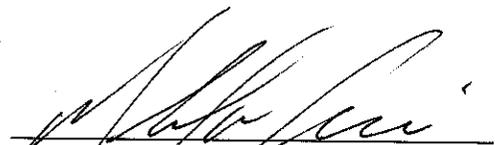
Respondent City has made virtually no effort to comply or meaningfully respond to the public records request at issue. Rather, Respondent City's counsel has employed means to simply side-step Respondent City's obligation to respond, such as continually "kicking the can down the road" by claiming that documents were produced when they were not, claiming that documents were not requested, when in fact they were, claiming the application of the attorney-client privilege where it clearly does not apply, and asserting that the request in question was overly broad, when it was not, and without identifying how.

Respondent CH has, on the other hand, simply not responded at all.

Petitioner Kokosing is entitled to an order in mandamus as to each Respondent that all responsive documents be made available immediately and to an award of its attorneys' fees as a

consequence of the clear bad faith on the part of the Respondents with respect to this public records request.

Respectfully submitted,



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