

**IN THE SUPREME COURT OF OHIO**

**KOKOSING CONSTRUCTION  
COMPANY, INC.,**

**Case No. 11-2100**

**Original Action  
in Mandamus**

**RELATOR,**

**V.**

**CITY OF ZANESVILLE, OHIO, ET AL.,**

**RESPONDENTS.**

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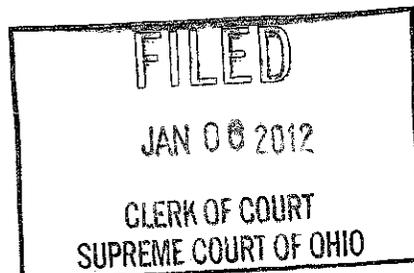
**RESPONDENT CITY OF ZANESVILLE, OHIO'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

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**Jack R. Rosati, Jr. (0042735)  
(COUNSEL OF RECORD)  
Mark E. Evans (0073623)  
Benjamin B. Hyden (0083265)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Email: [jrosati@bricker.com](mailto:jrosati@bricker.com)  
Phone: (614) 227-2300  
Fax: (614) 227-2390  
Counsel for Respondent  
City of Zanesville, Ohio**

**Michael W. Currie (0013100)  
(COUNSEL OF RECORD)  
Matthew R. Wushinski (0080017)  
KOKOSING CONSTRUCTION  
COMPANY, INC.  
6235 Westerville Road  
Westerville, Ohio 43081  
Email: [mwc@kokosing.biz](mailto:mwc@kokosing.biz)  
Phone: (614) 212-5700  
Fax: (614) 212-5711  
Attorney for Relator  
Kokosing Construction Company, Inc.**

**Jeffrey W. Hutson (0022064)  
(COUNSEL OF RECORD)  
Lane, Alton & Horst  
Two Miranova Place, Suite 500  
Columbus, Ohio 43215-7032  
Email: [jhutson@lanealton.com](mailto:jhutson@lanealton.com)  
Phone: (614) 228-6885  
Fax: (614) 228-0146  
Counsel for Respondent  
CH2M Hill**



**MOTION FOR JUDGMENT ON THE PLEADINGS**

Respondent, City of Zanesville, Ohio, by and through counsel, and pursuant to Rule 10.5(B) of the Supreme Court Practice Rules, hereby moves the Court to issue an Order granting Respondent judgment on the pleadings as to the claims set forth in Relator's Complaint. The grounds for this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,



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Jack R. Rosati, Jr. (0042735) (COUNSEL OF RECORD)

Mark E. Evans (0073623)

Benjamin B. Hyden (0083265)

BRICKER & ECKLER LLP

100 South Third Street

Columbus, Ohio 43215-4291

Email: [jrosati@bricker.com](mailto:jrosati@bricker.com)

Email: [mevans@bricker.com](mailto:mevans@bricker.com)

Email: [bhyden@bricker.com](mailto:bhyden@bricker.com)

(614) 227-2300

Counsel for Respondent

City of Zanesville, Ohio

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

As will be discussed below, despite the fact that Relator, Kokosing Construction Company, Inc. ("Kokosing") submitted an overbroad public records request to the Respondent, City of Zanesville, Ohio (the "City") covering nearly eight years, all of the public records were made available to Kokosing prior to the filing of this Mandamus action. In fact, Kokosing rushed to file this action when they had in their hands a commitment from the City to produce an external hard drive containing copies of the CH2M Hill documents and an electronic disc containing copies of emails that had been previously produced in exchange for the reasonable cost of producing those electronic documents. Rather than providing payment and making arrangements to pick up the electronic documents, Kokosing filed this unwarranted and meritless action and waited until December 20, 2011 to provide the check and pick up the electronic documents.

It should be clear to this Court from the tone of Kokosing's pleadings that this Mandamus action was not filed for the purpose of obtaining public records, but rather for the purpose of leveraging Kokosing's dubious claims against the City on a construction project and engaging in a personal attack on legal counsel for the City. It is clear that Kokosing's goal is to increase the City's costs of defense and coerce the City into waiving legitimate contractual defenses. The "technical defenses" apparently being referred to by Kokosing's General Counsel include defenses that are well recognized by this Court and by courts around the United States including, but not limited to: 1) the defense of failure to provide timely notice of a claim in accordance with the contract documents; 2) the defense of failure to provide timely backup documentation in support

of claims; and 3) the defense that, by accepting change orders for various items of alleged additional work, Kokosing accepted full and final payment for those items and waived its rights to seek additional compensation from the City based on those same items.

The only documents that have not been produced to Kokosing are clearly attorney-client privileged communications. Contrary to Kokosing's claims in this action, it does not need to see copies of those privileged communications. Kokosing has been provided a written decision from the design professional on each of its claims and can challenge the conclusions and decisions contained in those written decisions regardless of whether they are challenging those decisions on factual, legal or contractual grounds.

Ironically, although Kokosing is alleging the City has failed in its public record duties, Kokosing continues to create road blocks to the City obtaining copies of Kokosing's documents for purposes of evaluating Kokosing's claims (which claims include, for example, a claim for \$736,673 of "additional supervision" on a project that, at the time the claim was submitted, had no increase in the contract amount and had less than \$400,000 of additional labor and materials approved through the contract contingency). This level of alleged "additional supervision" should be closely scrutinized. Also ironically, Kokosing is alleging the undersigned counsel has delayed resolution of its claims when 1) it was Kokosing's General Counsel who first suggested that mediation should wait until after project completion (Answer at 40) and 2) CH2M Hill, the Project Engineer, has continued to process and the City has continued to pay valid change orders both before and after the engagement of Bricker & Eckler.

## II. FACTUAL BACKGROUND

On February 4, 2004, the City and BBS Corporation Consulting Engineers entered into the Agreement for Engineering Services in Connection with Water Treatment Plant Expansion (the "Agreement"). (Ex. 1.)<sup>1</sup> CH2M Hill subsequently purchased BBS Corporation Consulting Engineers. (Answer at 5.) The City and CH2M Hill entered into subsequent modifications of the Agreement (Exs. 2 and 3), including the October 17, 2007 Modification No. 2 to Agreement ("Modification No. 2") under which CH2M Hill agreed to provide a Resident Project Engineer. (Ex. 3.)

The City entered into a contract with Kokosing for construction of the Project on October 13, 2009. (Answer at 21.) During the course of the Project, Kokosing has submitted a number of requests for alleged additional work/cost/time. (Answer at 32.) As CH2M Hill is the City's representative on the Project, the City has relied on CH2M Hill to conduct negotiations on such requests subject to the City's approval. (Id.)

On July 8, 2011, at the request of Kokosing a meeting was attended by the City Service Director, the Mayor, the Law Director, CH2M Hill's Project Engineer, and Kokosing to discuss pricing of certain proposed change orders. (Answer at 39.) Unfortunately, at that meeting the City and Kokosing were not able to reach consensus as to all of the proposed change orders. (Id.)

Under Sections 3.5 and 3.6 of the Agreement between the City and CH2M Hill, the City has an obligation to provide any legal services needed by the City or reasonably requested by CH2M Hill with regard to legal issues on the Project. (Ex. A.) The City determined to provide such legal services through the undersigned legal counsel to the

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<sup>1</sup> Exhibits to the Complaint are referenced in numerical order, 1 through 25. Exhibits to the Answer are referenced in alphabetical order, A through J.

City and to CH2M Hill in its capacity as the City's agent. (Answer at 39.) In fact, Kokosing admits CH2M Hill's capacity in its Complaint. (Complaint at 7.) Importantly, emails cited by Kokosing between Mike Sims, the City Service Director, and Gary Long of CH2M Hill regarding the tracking and accounting of legal services provided by Respondent's legal counsel were exactly that. (Ex. 7.) When read in their entirety, these emails did not include any sort of directive that CH2M Hill run everything through the City's legal counsel. (Id.) Rather, the emails simply discussed the tracking and accounting of such legal services for the City's approval and payment purposes when counsel was consulted. (Id.)

It should also be noted that Kokosing, not the City or its legal counsel, was the party that requested the tolling of the contractual time limitation for initiating litigation contained in the Contract Documents for the Project and further requested that mediation be delayed until after completion of the Project. (Answer at 40.) There is no basis for Kokosing's allegations that the process has been delayed by the undersigned counsel.

In an effort to evaluate Kokosing's claims for additional time and money, the City through its representative, CH2M Hill has requested documentation from Kokosing in support of its claims. (Answer at 47.) Kokosing had a contractual obligation to provide these documents to the City. Ironically, while Kokosing claims bad faith by the City in this matter, Kokosing continues to create road blocks to the City obtaining copies of Kokosing's documents for purposes of evaluating Kokosing's claims (which include, for example, a claim for \$736,673 of "additional supervision" on a project that, at the time, had no increase in the contract amount and had less than \$400,000 in additional labor and materials approved through the contract contingency). (Id.)

In response to CH2M Hill's requests for documentation in support of Kokosing's claims, Kokosing sent to CH2M Hill its September 9, 2011 letter requesting broad categories of documents from CH2M Hill as well as the City. (Ex. 8.) Kokosing's September 9, 2011 letter made no reference to it being a public records request and further, was not addressed or sent to the City. (Id.)

On September 23, 2011, Kokosing sent to both the City's legal counsel and CH2M Hill a public records request. (Ex. 11.) Kokosing's public records request sought 11 broad categories of documents from the City and 18 broad categories of documents from CH2M Hill. (Id.) Further, Kokosing's public records request stated that documents could be provided by hard copy or in unspecified electronic format. (Id.)

On October 5, 2011, Kokosing's General Counsel sent the City's legal counsel a letter asserting that the City was under a 10-day time limitation to provide the documents responsive to the September 23, 2011 public records request. (Ex. 12.) By letter of that same date, the City's legal counsel responded as follows:

Ohio public records law provides that documents must be made available within a reasonable time. To the extent the documents you have requested are public records, the City will respond within a reasonable time. Your client agreed by contract to provide the documents within 10 days. There is no 10 day requirement within which the City must respond. The City intends to comply with Ohio's public records law and you have no basis for alleging that it has failed to do so.

(Ex. B.) Kokosing willingly agreed to such a time limit on the production of its documents under its contract with Respondent and in light of the fact that the documents requested from Relator relate to Relator's specific claims. However, the City is under no such 10-day contractual or legal time limitation on the production of public records to Relator, especially in light of Relator's overbroad requests spanning nearly eight years.

(Answer at 62.) Similarly, despite Kokosing's repeated assertions to the contrary, the City was under no obligation under the Ohio Public Records Act to attempt to produce documents in stages and to do so would have created duplication of efforts and delay in the ultimate disclosure of all responsive documents. (Answer at 67.)

On October 12, 2011, the City's legal counsel notified Kokosing that the City's responsive public records would be available in the next two weeks. (Ex. 14.) By subsequent email dated October 28, 2011, the City's legal counsel notified Kokosing's General Counsel that the City's responsive public records would be available on November 1, 2 or 3, 2011 between 9:00 a.m. and 4:00 p.m. at Mike Sims' office, provided the address of Mr. Sims' office and requested the date and time Kokosing wanted to review the documents. (Ex. C.)

The City made its responsive public records available for Kokosing's review on November 1, 2011. (Answer at 70.) At the time of production, by a letter dated November 1, 2011, the City notified Kokosing of the nondisclosure of attorney-client privileged documents and provided support for the application of the privilege to such documents as well as support for the City's position that it was under no obligation to provide a privilege log to Kokosing under the Ohio Public Records Act. (Ex. D.) Documents selected by Kokosing for copying during this inspection were copied onto a disc, which was provided to Kokosing on November 3, 2011. (Answer at 70.) In follow-up to additional clarifications and requests from Kokosing, the City produced its additional responsive public records by a subsequent disclosure on November 22, 2011. (Answer at 71.) Accordingly, copies of all of the City's responsive documents were provided to Kokosing as of November 22, 2011. (Id.) Thus, the remaining responsive

documents were those of CH2M Hill. Disclosure of these documents required additional time given the volume of documents requested, the electronic transfer of those documents to the City, and the review of those electronic documents for privilege issues. (Id.)

On November 4 and 10, the City's legal counsel addressed various concerns Kokosing raised with respect to Respondent's public records disclosure. (Exs. E and 19.) Notably, the City notified Kokosing that the remaining requested records were being kept by CH2M Hill pursuant to CH2M Hill's record keeping obligations under the Agreement and, accordingly, would be turned over to Kokosing in CH2M Hill's public records disclosure. (Id.) Despite Kokosing's assertions to the contrary, the City had no legal or contractual duty or obligation to keep duplicate records of such project records in the City's files. Additionally during this time, Kokosing requested scanned copies of emails, which were previously produced by the City to Kokosing on November 1, 2011. (Answer at 76.)

On December 9, 2011, the City's legal counsel notified Kokosing of the availability of the CH2M Hill documents. Specifically, Kokosing was notified that not only had the City "acted in good faith and . . . voluntarily assembled an extensive volume of records for Kokosing," but also that "[t]hese documents are available to Kokosing electronically. Upon receipt of a check for \$144.00, we will download the documents onto a 250 GB external hard drive and provide the drive to you." The City further notified Kokosing that "[t]he City is currently in the process of making copies of the emails, which were previously made available to Kokosing for inspection. These documents will be made available to Kokosing next week." (Ex. 22.) See R.C.

149.43(B)(1) (providing that copies of public records do not have to be provided until payment of reasonable copying costs).

Notably, in that same correspondence, the City estimated the production of between 1,000,000 and 2,000,000 additional documents from CH2M Hill. (Ex. 22.) However, the number of pages of documents produced on the hard drive, although over 100,000 pages, was less than originally anticipated. (Answer at 72.) CH2M Hill estimated the number of pages based on the amount of electronic memory needed to store the data. (Id.) Based on the total size of the data, CH2M Hill estimated that there were between 850,000 and 2.5 million pages of documents. (Id.) However, it was later discovered that a substantial volume of memory was used to store drawings, which are larger files than document files. (Id.) Thus, the actual number of pages, while still substantial, was less than originally estimated. (Id.)

Despite Kokosing's assertions to the contrary, the City did indicate that the additional documents being made available via external hard drive were from the files of CH2M Hill. The City's December 9, 2011 letter specifically made separate reference to two categories of electronic documents: (1) copies of the emails, which had been previously produced to Kokosing, which would be available in the next week, and (2) extensive records then available to Kokosing that would be downloaded to a 250 GB external hard drive upon receipt of a check for \$144.00. (Ex. 22.) All of the City's responsive documents had been disclosed to Kokosing. Category (1) referenced Kokosing's subsequent request for scanned emails previously produced by the City and category (2) clearly referred to the CH2M Hill documents. Further, in response to a December 12, 2011 letter from Kokosing's General Counsel (Ex. F), in which

Kokosing's General Counsel indicated he would deliver the \$144.00 check on that date, the City's legal counsel sent a letter dated December 14, 2011, giving instructions for the check to reimburse Respondent for its costs of production. (Ex. G.) Included as part of that letter was an invoice with an itemized breakdown of the cost of "1 External Hard Drive with CH2M Documents Bates Nos. CH00001-CH119623 \$144.38." (Id.) The invoice also included an itemized breakdown of the costs of scanning the emails, which were previously produced by the City, in the amount of \$260.77. (Id.)

Accordingly, CH2M Hill's responsive public records were made available to Kokosing on December 9, 2011, upon payment of \$144.00 to reimburse the City for the cost of copying such records on a 250 GB hard drive as stated in the City's legal counsel's letter of that date. On December 12, 2011, prior to the filing of this action, Kokosing's General Counsel indicated that he would deliver the check for the hard drive to the City's legal counsel on that date but did not do so. (Ex. F). On December 14, 2011, the City's legal counsel provided Kokosing with instructions for delivery of the check along with an itemized invoice specifically referencing the external hard drive containing the CH2M Hill documents. (Ex. G.) However, Kokosing did not deliver a check for the hard drive containing the CH2M Hill records until December 20, 2011. (Answer at 86.)

In spite of the clear case law prohibiting overbroad public records requests, and Kokosing's own failure to simply pay the costs and pick up the documents, Kokosing has continued to make unsupported and inaccurate allegations regarding the conduct of the City, including falsely stating that the City is "disingenuous" or acting in "bad faith" with respect to the public records request. Kokosing's allegations themselves are

“disingenuous” and in “bad faith” considering the fact that the City has voluntarily chosen to produce its records to Kokosing even though Kokosing’s public records requests are overbroad and unenforceable. The voluntary effort on the part of the City to provide all non-privileged documents to Kokosing has required the City to expend a great deal of time and resources. The only improper conduct here has been by Kokosing in serving such overbroad and unenforceable public records requests, in harassing the City, and in filing this action after all of the responsive documents were made available by the City, all in an effort to leverage its dubious claims for money.

### **III. STANDARD OF REVIEW**

Rule 10.5(B) of the Supreme Court Practice Rules provides that “[t]he respondent may file a motion for judgment on the pleadings at the same time an answer is filed.” A motion for judgment on the pleadings presents only questions of law and the court’s inquiry is restricted to allegations in the pleadings as well as any material incorporated by reference or attached as exhibits to those pleadings. See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113; *Drozeck v. Lawyers Title Ins. Corp.* (2000), 140 Ohio App.3d 816, 820, 749 N.E.2d 775.

This Court may grant a motion for judgment on the pleadings if no dispute of material fact exists and the pleadings demonstrate that the movant is entitled to judgment as a matter of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 664 N.E.2d 931. The standard applicable to motions for judgment on the pleadings is essentially the same as that applied to motions to dismiss with one important exception: while a motion to dismiss must be judged on the face of the complaint alone, a

motion for judgment on the pleadings permits consideration of both the complaint and the answer. *Id.* at 569-70.

#### IV. LAW AND ARGUMENT

**A. Kokosing's Complaint fails to state a claim upon which relief can be granted as Kokosing's public records request was overbroad and failed to comply with the Ohio Public Records Act.**

Under Ohio law a requestor has the duty to "identify the records \* \* \* wanted with sufficient clarity." *State ex rel. Dillery v. Icsman* (2001) 92 Ohio St.3d 312, 314. The failure to do so renders the request overbroad and unenforceable. *See, e.g., State ex rel. Glasgow v. Jones* (2008), 119 Ohio State 3d 391; 2008 Ohio 4788 (finding a request for all e-mail received over a six-month period overly broad); *State ex rel. Morgan v. Strickland* (2009), 121 Ohio St. 3d 600, 2009 Ohio 1901 (finding a request that the Governor produce all e-mails that refer to the evidence-based model of education funding is arguably overly broad); *State ex rel. Dehler v. Spatny* (2010), 127 Ohio St.3d 312, 2010 Ohio 5711, 2010 Ohio Lexis 2863 (finding a request for all records of prison's purchase and receipt of clothing and shoes over a seven-year period overly broad); *State ex rel. Davila v. City of East Liverpool* (7<sup>th</sup> App. Dist., Columbiana, 2011) 2011 Ohio 1347 (finding a request can become so voluminous that it is overbroad and unenforceable).

Rather than identifying specific records in its public records request, Kokosing asked to review extremely broad categories of documents, resulting in the City having to gather and disclose over 100,000 pages of documents spanning nearly eight years in its effort to respond. A review of the items included in Kokosing's public records request

demonstrates the overbroad nature of that request and Kokosing's failure to identify with sufficient clarity the documents Kokosing wanted to inspect.

First, Kokosing requested from Respondent and CH2M Hill "all design files produced by CH2M Hill." (Ex. 11, Request No. 1 to City and Request No. 1 to CH2M Hill.) This request was overbroad as to the time period and the scope of documents encompassed in the request. With respect to the time period encompassed in the request, CH2M Hill was engaged to perform design services for the Project beginning on February 4, 2004. Hence, Kokosing's request was for "all design files" generated over a 91-month period. Similar to *State ex rel. Glasgow v. Jones* (2008), *supra*, where this Court held that a request for all e-mail received over a six-month period was overbroad, Kokosing's request for "all design files" generated over a 91-month period is overbroad. With respect to the scope of documents included in this request, Kokosing's General Counsel's letter dated November 11, 2011 evidences that this request is improperly overbroad in this regard as well. (Ex. 20.) Specifically, in his first bullet point on page 2, Kokosing's General Counsel claimed that the contract between the City and BBS, CH2M Hill's predecessor, fell within this category of requested documents. If a contract between the City and CH2M Hill's predecessor falls within "all design files produced by CH2M Hill," then potentially every one of the documents obtained and produced from CH2M Hill, which turned out to be over 100,000 documents, falls within this overbroad category of documents. Additionally, it should be noted that Kokosing's request for "all design files" dating back to February 2004 is overbroad in that all that is even arguably relevant to Kokosing's claim are the design documents upon which Kokosing based its bid, not every "design file" dating back 5 years prior to Kokosing's involvement on the

Project and nearly eight years prior to the request. (See Ex. A, Article 3 Contract Documents.) If a request can become so voluminous that it is overbroad and unenforceable as found in *State ex rel. Davila v. City of East Liverpool, supra*, Kokosing's request that arguably encompassed over 100,000 documents spanning nearly eight years is undeniably overbroad.

Second, Kokosing requested "all correspondence (including email) between the City of Zanesville and CH2M Hill related to the design of the project" and "related to the construction of the project." (Ex. 11, Request Nos. 2 and 3 to City and Request Nos. 2 and 3 to CH2M Hill.) These requests basically included every piece of correspondence between the City and CH2M Hill (and in Kokosing's opinion, CH2M Hill's predecessor) relating to the Project over a 91-month period. Again, if a request for email over a 6-month period is overbroad as this Court found in *State ex rel. Glasgow v. Jones, supra*, Kokosing's request for all correspondence, including email, over a 91-month period is undeniably overbroad.

Third, Kokosing requested "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." (Ex. 11, Request No. 4 to City and Request No. 4 to CH2M Hill.) This request asks for the minutes of any type of meeting attended by any City representative relating in any way to the Project. As the request fails to identify specific types of meetings and again encompasses a 91-month timeframe, this request is overbroad.

Fourth, Kokosing requested "all documents relating in any way to the funding for the project," "all documents relating to any financial contingencies established for the project," "all financial information relating to the project," and "all documents relating to

the sources and uses of funds for the project.” (Ex. 11, Request Nos. 5, 8, 10, and 11 to City and Request Nos. 5 and 8.) As with the previously described requests, these requests are overbroad in both time and scope.

Fifth, Kokosing requested “all reports of any nature relating to the project.” (Ex. 11, Request No. 9 to City and Request No. 11 to CH2M Hill.) Again, Kokosing’s General Counsel’s letter dated November 11, 2011 letter demonstrates the overbroad nature of this request. (Ex. 20.) Specifically, in that letter Kokosing’s General Counsel opined as to at least 3 different categories of “reports” that fall within this request (progress reports, technical memoranda, and the 2006 Water Treatment Plant Expansion and Upgrade Report). As Kokosing made no effort to specify the scope of “reports” it wished to inspect, this request did not identify the “reports” Kokosing wanted to inspect with sufficient clarity.

Notably, Kokosing’s repeated demands upon the City to explain how Kokosing’s requests did not encompass various categories of documents are the very heart of the issue. Kokosing’s requests were so overbroad that potentially any document Kokosing subsequently claimed to seek could be argued to fall under one, if not several, of Kokosing’s overbroad requests. If there has been any lack of good faith in this matter, it has been by Kokosing in serving such overbroad requests on the City in what can only be characterized as an attempt to harass the City and create a non-existent issue of bad faith on the City’s part.

Kokosing’s assertions that the City has acted in bad faith in responding to Kokosing’s overbroad public records requests have no basis in fact. In fact, to a large extent, the documents Kokosing requested have no bearing whatsoever on Kokosing’s

alleged claims. While the City had no obligation to respond to Kokosing's improperly overbroad requests, the City did so at excruciating length and cost to the City. If Kokosing truly wanted specific documents within a specific timeframe, it had the ability to craft an appropriate public records request to accomplish this task. Instead, the City was forced to gather an extensive number of documents in response to Kokosing's overbroad request. As Kokosing's public records request was overboard and unenforceable, Kokosing's Complaint fails to state a claim upon which relief can be granted.

- B. Kokosing's Complaint fails to state a claim upon which relief can be granted as the City made the City's and CH2M Hill's responsive public records available to Kokosing in accordance with the Ohio Public Records Act and the City's Public Records Policy prior to the filing of Kokosing's Complaint.**

Kokosing's Complaint and Memorandum misrepresent the status of the City's response to Kokosing's public records request. In reality, Kokosing rushed to file this action when it had in its hands a commitment from the City to produce the hard drive and electronic disc containing copies of the remaining responsive documents in exchange for the reasonable cost of producing those electronic documents. Rather than providing payment and making arrangements to pick up the electronic documents, Kokosing filed this unwarranted and meritless action and waited until December 20, 2011 to provide the check and pick up the electronic documents.

Importantly, Kokosing did not submit its public records request until September 23, 2011. Kokosing's September 9, 2011 letter was not a public records request. (Ex. 8.) By Kokosing's own admission in its October 12, 2011 letter, this letter was not a public records request. (Ex. 13.) Not only did Kokosing make no such reference in that letter,

but it sent the letter only to CH2M Hill. While CH2M Hill is the City's representative on the Project, CH2M Hill is not the City's representative for purposes of the service of a public records request under the Ohio Public Records Act or the City's Public Records Policy. If Kokosing had actually intended its September 9, 2011 letter to be a public records request, it not only should have stated so, but it also should have sent it to the City.

In response to Kokosing's September 23, 2011 public records request, the City made its files available to Kokosing for inspection on November 1, 2011, which was only 39 days after Kokosing submitted its overbroad and invalid public records request. (Answer at 70.) The City provided Kokosing with additional responsive documents on November 22, 2011. (Id. at 71.) Finally, the City made the hard drive with over 100,000 CH2M Hill documents, and the subsequently requested copies of emails provided during Kokosing's November 1, 2011 inspection, available to Kokosing on December 9, 2011, which was only 77 days after Kokosing submitted its overbroad and invalid public records request. (Answer at 77.)

With respect to the disclosure of the City's documents, Kokosing asserts in its Memorandum that "the City apparently takes the position (through the lack of their production) that . . . it has no internal email or communications, only one set of final drawings . . . , none of the progress reports generated by its engineer, and essentially none of the meeting minutes during the design or construction phase . . . and . . . that categories of documents were not requested when, in fact, they were." (Memorandum at 17.) Kokosing's assertions are blatantly false and/or misleading. First, the City provided internal emails to Kokosing on November 1, 2011, which emails Kokosing later

requested be scanned and were so scanned and made available to Kokosing on disc as of December 9, 2011. (Ex. 22.) Further, with respect to the City's copies of drawings, progress reports and meeting minutes, these files were being kept by CH2M Hill pursuant to its obligations under the Agreement and the City had no obligation or duty to keep additional or duplicate copies in its files so long as they were maintained by CH2M Hill. (Answer at 72.) Any hard copies with any handwritten notes that were kept by the City were made available to Kokosing on November 1, 2011. (Answer at 71 and 72.) Finally, the fact that Kokosing failed to request specific categories of documents or identify the documents it wished to inspect with sufficient clarity was addressed in detail above.

With respect to the disclosure of the CH2M Hill documents, on December 9, 2011, the City's legal counsel sent Kokosing's General Counsel a letter that stated:

Although Kokosing's public records request is invalid under Ohio law, the City of Zanesville has acted in good faith and has voluntarily assembled an extensive volume of records for Kokosing. These documents are available to Kokosing electronically. Upon receipt of a check for \$144.00, we will download the documents onto a 250 GB external hard drive and provide the hard drive to you. (emphasis added).

(Ex. 22.) In response to that December 9, 2011 correspondence, Kokosing's General Counsel stated on December 12, 2011:

We will deliver a check today in the amount of \$144.00 in exchange for the hard drive referenced in your letter. Please advise us of the location at which you wish for this exchange to occur. (emphasis added).

(Ex. F.) The City's legal counsel responded on December 14, 2011 and stated:

. . . the check to reimburse the City for its costs of the production in the amount of \$405.15 should be made out to the City of Zanesville and should be sent to my attention at Bricker & Eckler LLP, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069. An enclosed invoice showing the costs incurred by the City is enclosed.

(Ex. G.) The invoice accompanying that December 14, 2011 correspondence not only included an itemized breakdown of the cost of the hard drive which held the more than 100,000 CH2M Hill documents and the cost of other documents requested by Kokosing, but it also stated:

Please remit payment payable to the City of Zanesville and forward payment to the attention of:

Mark E. Evans  
Bricker & Eckler LLP  
9277 Centre Pointe Drive, Suite 100  
West Chester, Ohio 45069

(Id.) Based on these communications regarding the production of the hard drive, Kokosing's position that the CH2M Hill documents were not available to Kokosing as of the filing of Kokosing's Complaint in this action is simply false. As discussed above, the hard drive containing these documents was actually available to Kokosing as of December 9, 2011.

In addition to these facts, it should also be noted that on December 14, 2011, the same day that Kokosing was given instructions for delivery of the check, Kokosing's Assistant General Counsel orally indicated to Mark Evans that it was acceptable to either have the hard drive delivered to Kokosing or for Kokosing to deliver the check to and pick up the hard drive at Bricker & Eckler's Columbus office. (Answer at 86.) Thus, as of December 14, 2011, Kokosing had provided instructions stating that Kokosing would deliver the check and pick up the hard drive and that it did not matter to Kokosing if Kokosing picked up the hard drive or if it was delivered to Kokosing. (Id.) Accordingly, Kokosing was aware that the hard drive with the CH2M Hill documents was available on December 9, 2011, 6 days prior to the filing of this action. On December 12, 2011, 3

days prior to the filing of this action, Kokosing's General Counsel said that he would deliver a check to the City for the hard drive. The City's legal counsel provided Kokosing with instructions on December 14, 2011, the day prior to the filing of this action, for delivery of the check. However, Kokosing failed to deliver a check for the hard drive until December 20, 2011. See R.C. 149.43(B)(1) (providing that copies of public records do not have to be provided until payment of reasonable copying costs is provided).

As the City provided the City's and CH2M Hill's responsive public records prior to the filing of Kokosing's Complaint, Kokosing's Complaint fails to state a claim upon which relief can be granted.

**C. Kokosing's Complaint fails to state a claim upon which relief can be granted as the City properly redacted attorney-client privileged communications from the public records provided to Kokosing.**

Under R.C. 149.43(B)(1), the City is only required to do the following in regard to redactions: "[w]hen 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." The City notified Kokosing of the redactions by stamping the word "redaction" on the records containing the redactions. (Ex. 24.) Further, all documents that were redacted were done so under the attorney-client privilege.

"R.C. 149.43(A)(1)(p) defines 'public record' as 'any record that is kept by any public office \* \* \* except \* \* \* records the release of which is prohibited by state or federal law.' The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the records of

communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting the release of these records." *The State ex. rel. Nix v. City of Cleveland* (1998), 83 Ohio St.3d 379, 383; see also *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2003 Ohio App. LEXIS 5856, 2003 Ohio 6560, *affirmed in part and reversed in part by* 105 Ohio St. 3d 261, 2005 Ohio 1508, 824 N.E.2d 990, 2005 Ohio LEXIS 701 (2005) (finding records of communications between attorneys and their state-government clients pertaining to the attorneys' legal advice are excepted from disclosure under the Public Records Act); *State ex rel. Benesch, Friedlander, Coplan & Arnoff, L.L.P. v. City of Rossford* (2000), 140 Ohio App. 3d 149, 746 N.E.2d 1139, 2000 Ohio App. LEXIS 1719 (finding drafts of bond documents reflecting information provided by public authorities, and the legal advice flowing from that information, were protected by the attorney-client privilege except to the extent that the information in them actually appears in public documents). Hence, the Ohio Public Records Act exempts the disclosure of records subject to the attorney-client privilege as a recognized exception by state and federal law. See *Woodman v. Lakewood* (1988), 44 Ohio App.3d 118; see also RC 149.43(A)(1)(v). For this reason, the City was not required to produce records which are subject to the attorney-client privilege.

Further, R.C. 2317.021 states that the attorney-client privilege applies to communications made between an attorney and the client's agent, employee, or representative. Specifically, in R.C. 2317.021 the term "client" is defined as:

[A] person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either

directly or through an agent, employee, or other representative, with such attorney.” (emphasis added)

Thus, the General Assembly made it abundantly clear that the attorney-client privilege applies not just to direct communication between the attorney and the client—who may be a corporation or other association (such as a city)—but also to indirect communication between the client’s agent or representative and the attorney. *Foley v. Poschke* (1941), 137 Ohio St. 593 (finding that communications including the client's agents are privileged). Moreover, Kokosing’s unsupported assertions that the common law attorney-client privilege does not encompass such indirect communications are absolutely false. See e.g. *Bowers v. State* (1876), 29 Ohio St. 542 (finding under common law attorney-client privilege that communications including the client's agents or representatives are privileged).

Pursuant to its contract with the City, CH2M Hill is the duly authorized representative/agent of the City on the Project which Kokosing acknowledges in its own Complaint. (Complaint at 7.) Specifically, under Section 1 of the Agreement, CH2M Hill agreed to “serve as the OWNER’s engineering representative for the Project . . . .” (Ex. 1.) Similarly, Section 9 of the General Conditions states that “[t]he Engineer will be the Owner’s representative during the construction period. . . .” (Ex. A.) In fact, Kokosing admits CH2M Hill’s capacity in its Complaint. (Complaint at 7.)

Additionally, under Sections 3.5 and 3.6 of the Agreement between the City and CH2M Hill, the City agreed to the following Owner Responsibilities:

- 3.5 Examine all studies, reports, sketches, Drawings, Project Manuals, proposals and other documents presented by the ENGINEER; obtain advice of an attorney, insurance counselor and other consultants as OWNER deems appropriate for such examination

and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the ENGINEER.

- 3.6 Provide such accounting, independent cost estimating and insurance counseling services as may be required for the Project, and such legal services as OWNER may require or ENGINEER may reasonably request with regard to legal issues pertaining to the Project. (Ex. A (emphasis added)).

Accordingly, the City is required under the Agreement to obtain the advice of an attorney for examining and rendering decisions on documents presented by the Engineer and to provide all of the legal services as the City may require or CH2M Hill may reasonably request with regard to any legal issues pertaining to the Project. This privileged consultation is clearly contemplated within the scope of CH2M Hill's agency. Despite Kokosing's unsupported arguments to the contrary, legal services relating to legal issues pertaining to the Project would include legal advice pertaining to issues with Kokosing's work or Kokosing's claims.

Moreover, any such consultation with legal counsel did not preclude CH2M Hill from rendering impartial, good faith decisions on Relator's claims. In fact, it is simply a fallacy to argue that consultation with legal counsel constitutes legal counsel assuming control over the ultimate decisions rendered by CH2M Hill on Relator's claims. Lawyers consult, they do not make the ultimate decisions. Moreover, Relator has cited to no case law that would indicate that an engineer is not permitted to consult with counsel when evaluating claims submitted by a contractor (especially a contractor such as Relator that has a full-time, experienced in-house construction litigator taking the leading role in pursuing those claims, as has been the case here). It is industry standard that legal counsel for the project is supplied to the design professional by the Owner at the Owner's expense as occurred here. This eliminates the need for the design professional to include

such costs in its proposal. The City hereby incorporates that pleading and any exhibits thereto on this issue by reference into this Motion for this Court's consideration. CH2M Hill's decisions are written and subject to challenge on their face by Relator in the appropriate forum. If incorrect legal advice was given that affected those decisions, any conclusion affected by that advice will be apparent from the face of the decision itself and that decision will be subject to legal challenge in the appropriate forum. It is anticipated that CH2M Hill may provide this Court with additional arguments, pleadings and exhibits in support of this position and those portions of CH2M Hill's pleadings are hereby incorporated by reference herein.

Additionally, contrary to Kokosing's claims in this action, it does not need to see copies of such communications. Kokosing has been provided a written decision from the design professional on each of its claims and can challenge the conclusions and decisions contained in those written decisions regardless of whether they are challenging those decisions on factual, legal or contractual grounds. (Answer at 82.)

Finally, Kokosing's statements regarding two alleged lawsuits against the City's legal counsel for interference with contract or otherwise disparaging the City's legal counsel in this matter are without basis, irrelevant to a public records action, reckless and designed solely to vex and harass. The fact relevant to a public records request is that CH2M Hill was a duly authorized representative/agent of the City and by the express terms of its Agreement, the City was contractually required to provide legal services to CH2M Hill for the Project within the scope of that representation/agency under the express terms of the Agreement. Documents exchanged between the City's attorneys and CH2M Hill must be protected by the attorney-client privilege, or these provisions of the

contract would be impossible to carry out in a meaningful way. Accordingly, any records which contain communications with CH2M Hill that fall under Sections 3.5 and 3.6 of the Agreement are subject to the attorney-client privilege and are exempted from production under the Ohio Public Records Act. Kokosing is free to challenge CH2M Hill's written decisions, based on the content of those decisions as communicated to Kokosing, in a proper forum.

**D. Kokosing's Complaint fails to state a claim upon which relief can be granted as the action was not brought in the name of the State on the relation of the person applying for mandamus as required by Ohio Revised Code Section 2731.04.**

Ohio Revised Code Section 2731.04 requires that "[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. . . ." R.C. 2731.04 (emphasis added). Kokosing's Complaint, however, was not filed in the name of the State on the relation of Kokosing. Instead, the Complaint was filed simply in Kokosing's name.

Failure to comply with R.C. 2731.04 by failing to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition. *State v. Klein*, Cuyahoga App. No. 82283, 2003 Ohio 1177, at P3 (citing *Maloney v. Court of Common Pleas of Allen County* (1962), 173 Ohio St. 226, 181 N.E.2d 270 and finding that "R.C. 2731.04 requires that an application for a writ of mandamus 'must be by petition, in the name of the state on the relation of the person applying.' This failure to properly caption a mandamus action is sufficient grounds for denying the writ and dismissing the petition."); see also *Blankenship v. Blackwell* (2004), 103 Ohio St.3d 567, 2004 Ohio 5596, 817 N.E.2d 382; *Farmakis v. City of Conneaut*, 2005 Ohio App. LEXIS 3455, 2005 Ohio 3776, (2005); *Washington v. Ohio Dep't of Job & Family Servs.*,

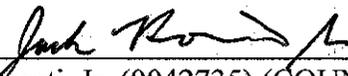
2004 Ohio App. LEXIS 1752, 2004 Ohio 2022, (Apr. 21, 2004); *Ort v. Hutchinson* (1961), 114 Ohio App. 251, 181 N.E.2d 807.

As Kokosing failed to properly caption its Complaint for mandamus in the name of the State on the relation of the person applying, Kokosing's Complaint fails to comply with R.C. 2731.04 and accordingly, fails to state a claim upon which relief can be granted.

#### V. CONCLUSION

For the reasons set forth herein, the City respectfully requests that this Court grant the City judgment on the pleadings as to the claims set forth in Kokosing's Complaint.

Respectfully submitted,



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Jack R. Rosati, Jr. (0042735) (COUNSEL OF RECORD)

Mark E. Evans (0073623)

Benjamin B. Hyden (0083265)

BRICKER & ECKLER LLP

100 South Third Street

Columbus, Ohio 43215-4291

Email: [jrosati@bricker.com](mailto:jrosati@bricker.com)

Email: [mevans@bricker.com](mailto:mevans@bricker.com)

Email: [bhyden@bricker.com](mailto:bhyden@bricker.com)

(614) 227-2300

Counsel for Respondent

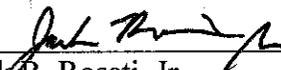
City of Zanesville, Ohio

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of **RESPONDENT CITY OF ZANESVILLE, OHIO'S MOTION FOR JUDGMENT ON THE PLEADINGS** was sent by regular U.S. Mail, postage prepaid, delivery on this 6th day of January, 2012 upon the following:

Michael W. Currie  
Matthew R. Wushinski  
KOKOSING CONSTRUCTION COMPANY, INC.  
6235 Westerville Road  
Westerville, Ohio 43081  
Attorney for Relator

Jeffrey W. Hutson  
Lane, Alton & Horst  
Two Miranova Place, Suite 500  
Columbus, Ohio 43215-7032  
Counsel for Respondent  
CH2M Hill

  
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Jack R. Rosati, Jr.