

ORIGINAL

In the  
Supreme Court of Ohio

STATE EX REL. KENT LANHAM,

Relator,

v.

DANNY R. BUBP,  
STATE REPRESENTATIVE

Respondent.

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: Case Number 2012-0131  
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: Original Action in Mandamus  
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RESPONDENT'S MOTION TO DISMISS

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SUPREME COURT OF OHIO



## MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

### I. INTRODUCTION

Relator challenges Respondent's provision of documents responsive to a public records request. Relator's request was not a proper request for records under the Ohio Public Records Act. Respondent nonetheless has now provided all records responsive to Relator's request, mooted his primary claim, and has provided the required explanation and legal authority for withholding attorney-client communications, as well as a privilege log. Because Respondent fulfilled his obligations, if any, under the Ohio Public Records Act, Relator's complaint should be dismissed as a matter of law.

### II. STATEMENT OF FACTS

On November 17, 2011, Relator<sup>1</sup> submitted a public records request to receptionist Matthew Kalina on the 13<sup>th</sup> Floor of the Riffe Tower. Compl., ¶¶ 6, 48, 49, Exh. A. The request sought four categories of records generally related to discussion or evaluation of the legal ability of Respondent "to simultaneously hold the public offices of state representative and magistrate in a mayor's court." *Id.*<sup>2</sup>

On January 24, 2012, Relator commenced this action pursuant to the Ohio Public Records Act, R.C. 149.43(C), alleging that Respondent had failed to respond to his public records request (Complaint, ¶¶53-54, 57, 65) and to explain any denial of the request (Complaint, ¶59). On January 25, 2012, Respondent provided 67 pages of responsive

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<sup>1</sup> Although Kent Lanham is named as the Relator in this action, the public records request on which this lawsuit is based was made by Mr. Lanham's counsel, Curt C. Hartman. All communications with Respondent regarding the public records request and this lawsuit have been conducted by Mr. Hartman. Therefore, for the purposes of this Motion to Dismiss, references to "Relator" includes communications with Mr. Hartman, Relator's counsel.

<sup>2</sup> The court may consider documents attached to or incorporated into the complaint in a motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). Here, Relator's complaint cites to and relies upon four attached exhibits labeled "Exhibit A" through "Exhibit D."

documents.<sup>3</sup> See Respondent's Motion for Protective Order at 2-3 & Exh. G thereto. Respondent completed delivery of the responsive records on February 21, 2012. See *id.* at 3 & Exh. C thereto; and Relator's Memo Opposing Protective Order, p. 4, & Exh. B thereto. Some of the documents responsive to the request for records were communications with Respondent's legal counsel. Respondent notified Relator that he was withholding 31 pages of such documents and provided the required explanation and legal authority regarding privileged attorney-client communications. Respondent's Motion for Protective Order at 3 & Exhs. C, E, F thereto; Relator's Memo Opposing Protective Order, Exh. A.

On February 13, 2012, the matter was referred to mediation. See docket, case no. 2012-0131. Relator contemporaneously pursued discovery, including interrogatories, requests for production of documents, and requests for dates to depose various witnesses, including a notice to take the deposition of Respondent Bubp. See, generally, Relator's Memo Opposing Protective Order. On March 23, 2012, the parties held a telephone mediation conference. As a result of the mediation, the parties were able to narrow the time period of Relator's subpoena, which sought records of hundreds of other public records requests and responses from the House Majority Counsel. Further, and although not required under Ohio public records law, Respondents provided Relator with a privilege log of the documents withheld pursuant to the attorney-client privilege. Respondent's Motion for Protective Order, Exhs. E & F; see also Relator's Memo Opposing Protective Order, p. 7, fn. 9. On April 16, 2012, the Court returned this matter to the regular docket. See docket, case no. 2012-0131.

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<sup>3</sup> To determine whether a case is moot, a court may accept appropriate documents to consider outside of the complaint without converting a 12(B)(6) motion into a motion for summary judgment. *State ex rel Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, at ¶ 8; *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 15, 1996-Ohio-231, 661 N.E.2d 170 (1996), citing *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (finding that, in deciding 12(b)(6) motions, courts may make "narrow exceptions for documents the authenticity of which are not disputed by the parties"); see also *State ex rel. Daniel v. Lucci*, 11th Dist. No. 2010-L-122, 2011-Ohio-1012, ¶ 12. See also "Standard of Review," pp. 5-6, *infra*, and cases cited there.

Relator asserts that Respondent's response was untimely and speculates that some or all of the withheld records may not be subject to the attorney-client privilege.<sup>4</sup> However, Respondents have fully complied with their obligations under the Ohio Public Records Act. Based on the facts, and as a matter of law, Relator is not entitled to the relief he seeks and Respondent respectfully asks this Court to dismiss this case.

### III. ARGUMENT

#### A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. A court must accept the factual allegations of the complaint as true and "the plaintiff must be afforded all reasonable inferences possibly derived therefrom." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "Additionally, in order to dismiss a complaint under Civ. R. 12(B)(6), it must appear beyond doubt that relator can prove no set of facts warranting relief." *State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Educ.*, 72 Ohio St.3d 106, 108, 1995-Ohio-251, 647 N.E.2d 799.

However, the Court may take judicial notice of evidence of mootness or other appropriate matters in a mandamus case without converting the motion to dismiss to a motion for summary judgment. *State ex rel. Findlay Publ. Co. v. Schroeder*, 76 Ohio St. 3d 580, 581, 669 N.E. 2d 835 (1996) (holding public records mandamus action moot based on relator's admission that "it now has been provided with some of the records it requested"), citing *State ex rel. Neff v.*

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<sup>4</sup> To date, Relator has not identified any basis to question Respondent's assertions of privilege but, instead, avers that he is not required to take on its face Respondent's assertion or the privilege log in support and, further, that he is entitled to depose attorneys to probe more deeply into any assertions of privilege. See Relator's Memo Opposing Protective Order at pp. 7-10.

*Corrigan*, 75 Ohio St. 3d 12, 16, 1996-Ohio-231, 661 N.E.2d 170 (citing federal cases interpreting federal rule 12(b)(6); court may take judicial notice of adjudicative facts under Evid. R. 201). “In fact, ‘an event that causes a case to be moot may be proved by extrinsic evidence outside the record.’” *State ex rel. Nelson v. Russo*, 89 Ohio St. 3d 227, 729 N.E.2d 1181 (2000) (*per curiam*) (court could have taken judicial notice of mootness of action for writ). *See also State ex rel. Womack v. Marsh*, 128 Ohio St. 3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 8 (court properly took judicial notice of journalized entry attached as exhibit to motion to dismiss mandamus action); *State ex rel. Grove v. Nadel*, 84 Ohio St. 3d 252, 253, 703 N.E.2d 304 (1998) (same; “Neither procedendo nor mandamus will compel the performance of a duty that has already been performed.”); *State ex rel. Konoff v. Shafer*, 80 Ohio St.3d 294, 295, 685 N.E.2d 1248 (1997) (courts may take judicial notice of evidence of mootness).

The court “may take judicial notice of certain relevant facts, regardless of whether the parties request it.” *Disciplinary Counsel v. Sargeant*, 118 Ohio St. 3d 322, 2008-Ohio-2330, 889 N.E.2d 96, ¶ 22, citing Evid. R. 201(C). A fact may be judicially noticed if it is “not subject to reasonable dispute” in that it is generally known or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonabl[y] be questioned.” *Id.*, quoting Evid. R. 201(B).

**B. Relator’s Request for a Writ of Mandamus must Fail**

A court will issue a writ of mandamus pursuant to R.C. 149.43(C) only when: (1) the relator has a clear legal right to the relief requested, and (2) the respondent has a clear legal duty to perform the requested relief. *State ex rel. ACLU v. Cuyahoga Co. Bd. of Commr’s*. 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶¶20-22. The lack of an adequate remedy at law, generally required for a writ of mandamus, does not apply to public records actions. *Id.* Relator

cannot establish the requisite clear legal right, or corresponding clear legal duty, to warrant issuance of a writ of mandamus in this action.

***1. Relator's request for information did not constitute a proper public records request to which Respondent was obliged to respond.***

Relator's request of November 17, 2011 (Relator's Exhibit A), contains four requests, not for particular records, but for Respondent to conduct a search through all data storage in his office, without regard to date, operation category, or any other identifier, for records containing a type of information of interest to Relator. Although Respondent went above and beyond his duties in attempting to accommodate Relator's inquiry, Relator's request was fundamentally improper, and therefore unenforceable.

This Court has repeatedly stated that public records requests must be framed as a description of existing records, and not as a search, research, or hunt for information wherever it may exist in an office's files. *See State ex rel. Morgan v. Strickland*, 121 Ohio St. 3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶¶ 14-15 ("communications \* \* \* which reference in a substantive manner the 'evidence-based model' or education funding in general" described as arguably overbroad and therefore improper request for information); *see also State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 314, 750 N.E.2d 156 (2001), where Dillery's attorney requested "any and all records generated, in the possession of your department, containing any reference whatsoever to Kelly Dillery." *Id.* This was a request to apply "search terms" across all of respondent's records, as Relator Lanham demanded here that all of Respondent Bulp's records be searched for correspondence and counsel regarding a certain topic.

The request in the case at bar bears close resemblance to *State ex rel. Lanham v. State Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997), where a request for records

establishing “qualifications of APA members” was found to be improper. Likewise, here, the Relator’s request sought information regarding Respondent’s ability (or qualification) to hold two public offices. In addition, as in *State ex rel. Fant v. Tober*:

“Relator has not cited any authority under which this court could—pursuant to R.C. 149.43—compel a governmental unit to do research or to identify records containing selected information. That is, relator has not established that a governmental unit has the clear legal duty to seek out and retrieve those records which would contain the information of interest to the requester. Cf. *State ex rel. Cartmell v. Dorrian* (1984), 11 Ohio St.3d 177, 179, 464 N.E.2d 556. Rather, it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.” *Id.*

8th Dist. No. 63737, 1993 Ohio App. LEXIS 2591, 3-4 (Apr. 28, 1993), *affirmed*, 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993). In *Fant*, as here, “relator’s attempts to request records do not indicate what records relator would like to examine as much as what information he would like to receive.” *Id.* Despite receipt of this improper request for information, Respondent attempted to accommodate Relator and has provided all records which can be determined to be responsive.

An improper request does not invoke the duties and obligations of R.C. 149.43(B), or support an action in mandamus under R.C. 149.43(C). *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 29; *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 314, 750 N.E.2d 156 (2001); *State ex rel. Dehler v. Spatney*, 8th Dist. No. 2009-T-0075, 2010-Ohio-3052, ¶¶ 16 – 23, *aff’d at* 2010-Ohio-5711; *State ex rel. Strothers v. Murphy*, 132 Ohio App.3d 645, 650, 725 N.E.2d 1185 (8th Dist. 1999). Therefore, Relator’s complaint should be dismissed for failing to allege the existence of a fundamental condition precedent to the action—a proper request.

**2. Relator's demand for a writ of mandamus compelling Respondent to produce requested records, and explanation including legal authority for any records withheld, is moot.**

“[I]n general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot.” *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 312, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 43; *see also Strothers v. Norton*, Slip Opinion No. 2012-Ohio-1007, ¶ 13; *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 27. Relator bears the burden to submit “clear and convincing proof to the contrary.” *Strothers*, ¶ 13; *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 3 syllabus (“Relators in mandamus cases must prove their entitlement to the writ by clear and convincing evidence.”)

Relator has admitted in documents filed on this Court's docket that he received documents responsive to his request and that only 31 pages were withheld, on grounds of attorney-client privilege. *See* Relator's Memo Opposing Motion for Protective Order at 4 (acknowledging that only 31 pages of documents were withheld); *id.* at 7, fn. 9 (acknowledging receipt of privilege log and its contents). The Court can take judicial notice of these facts because Relator has admitted them in these proceedings. *See Findlay Publ. Co.*, 76 Ohio St. 3d at 581; *Sargeant*, 2008-Ohio-2330, ¶ 22; Evid. R. 201. Thus, to the extent Relator's complaint is for records responsive to his public records request, and for the required explanation and legal authority for records withheld, those claims have been rendered moot and should be dismissed.

**3. The Ohio Public Records Act does not require a public office to disclose unredacted versions of documents protected by attorney-client privilege.**

Relator does not have a clear legal right to the privileged documents which Respondent has withheld as protected by attorney-client privilege, and Respondent has no clear legal duty to

provide unredacted versions of the documents to him. Attorney-client privileged documents are exempted from release under the Ohio Public Records Act because the common law attorney-client privilege “is a state law prohibiting release of [privileged] records.” R.C. 149.43(A)(1)(v); *State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27, quoting *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542, 721 N.E.2d 1044 (2000). The attorney-client privilege applies equally to both private attorneys and government attorneys. *State ex rel. Leslie v. Ohio Housing Finance Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 24.

The Ohio Public Records Act does not require a public entity to provide privilege logs for documents redacted or withheld based on attorney-client privilege in response to a public records request. *See* R.C. 149.43; *Hartzell v. Breneman*, 7th Dist. No. 10 MA 67, 2011-Ohio-2472, ¶ 19. Further, this Court has underscored that the Ohio Public Records Act creates no obligation for a public office to create new records in response to a public records request. *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 707 N.E.2d 496 (1999). Nevertheless, in the interest of trying to resolve this matter, Respondent has gone above and beyond his obligations under the Ohio Public Records Act and provided Relator with a privilege log. Respondent’s Motion for Protective Order, Exhs. E, F; Relator’s Memo. In Opposition to Motion for Protective Order at 7, fn. 9. Respondent owed Relator no further details of the records withheld, and indeed the provision of any further detail regarding the redacted material would risk revealing privileged information, something that attorneys are obliged to avoid. Prof.Cond.R. 1.6(a).

In the event this Court chooses not to grant Respondent’s Motion to Dismiss in this regard, Respondent would welcome the issuance of an alternative writ permitting him to produce the 31 withheld pages in their unredacted form for an *in camera* inspection. When a

governmental body asserts that public records are exempt from disclosure and that assertion is challenged, an *in camera* inspection may be warranted. See *State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-3549, 832 N.E.2d 711, ¶ 23, citing *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 31, 661 N.E.2d 180 (1996); *State ex rel. Nat'l Broad. Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 85, 526 N.E.2d 786 (1988) (“When a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question.”) An *in camera* review of the six documents would be an efficient and objective means for resolving this issue and disposing of this mandamus action, should this Court find that Relator submitted a proper request.

#### ***4. Respondents have met their obligations under the Public Records Act.***

A public office is obligated only to provide copies of records within a reasonable period of time and to explain with legal authority the reasons for any withholding. R.C. 149.43(B)(1), (B)(3). The Ohio Public Records Act contains no obligation to satisfy a requester of the applicability of the attorney-client privilege. As detailed above, Relator’s requests have been satisfied in full, accompanied by the required explanation for any records withheld. Relator’s only remaining claim of violation is that the records were not provided within a reasonable period of time. R.C. 149.43(B)(1).

Although Respondent may submit and has submitted evidence of the mootness of the substantive claims in this matter, the question of timeliness is not an issue subject in this case to a mootness argument, but one which must await the full submission of Respondent’s evidence explaining the timeline in this case, if the case proceeds beyond the currently pending motions.<sup>5</sup>

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<sup>5</sup> Respondent’s motion to strike is pending before the Court.

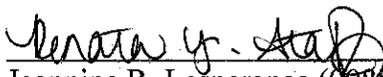
However, the case is still amenable to dismissal in its entirety, based on Relator's failure to make a proper public records request in the first instance.

**CONCLUSION**

Relator does not have a clear legal right to the relief he requests, nor does Respondent have a clear legal duty to perform it. In the first instance Relator fails to allege that he made a proper public records request compelling a response. Further, even were Relator's request proper under R.C. 149.43(B), based on facts admitted by Relator, Respondent fulfilled any obligations under the Ohio Public Records Act. Respondent provided all records responsive to Relator's request, other than those properly withheld in accordance with law and provided the required explanation and legal authority. Based on the above, Respondent respectfully requests that the Court dismiss Relator's complaint.

Respectfully submitted,

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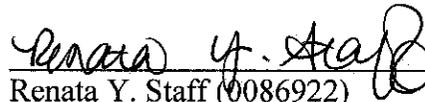
*Attorneys for Respondent*  
*Danny R. Bulp, State Representative*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Respondent's Motion to Dismiss* was sent by regular U.S. mail on May 18, 2012 to the following:

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