

IN THE SUPREME COURT OF OHIO

JEAN A. ANDERSON	)	CASE No.: 12-0943
	)	
APPELLANT,	)	ON APPEAL FROM THE
	)	ERIE COUNTY COURT OF APPEALS
V.	)	SIXTH APPELLATE DISTRICT
	)	COURT OF APPEALS E-10-0040
CITY OF VERMILION C/O BRIAN	)	
HUFF, FINANCE DIRECTORS,	)	
	)	
APPELLEES.	)	
	)	

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APPELLEE, CITY OF VERMILION'S MERIT BRIEF

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## INTRODUCTION

Realtor, Jean Anderson (“Anderson” and/or “Realtor”) is the former Mayor of the City of Vermilion. The sole issue in this matter revolves around her May 25, 2010 public records request which among other things sought “all itemized billing statements received from Kenneth Stumphauzer, Stumphauzer & O’Toole, Marcie Butler, for January, February, March, and April of 2010.”<sup>1</sup> As this Court has now made clear, itemized billing statements between an attorney and their client are exempted from a public records request pursuant to R.C. §149.43(A)(1)(v). *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009.

Anderson states several times in her merit brief that she is not challenging this Court’s decision in *Bloom-Carroll* or the application of the attorney-client privilege to itemized billing records. Instead, Anderson intimates that *Bloom-Carroll* should be modified to require Vermilion to produce virtually blank sheets of paper by performing an unreasonable and impracticable redaction of the itemized billing statements submitted to the Sixth District Court of Appeals for an *in camera* review. In reality, Anderson’s suggested modification is nothing more than a veiled attempt to make this appeal seem something other than frivolous. Additionally, Anderson’s suggested change is sought to somehow provide a scintilla of support for her otherwise improper request for statutory damages and then attorney fees under the

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<sup>1</sup> As no party will contest, the other items requested in Realtor’s May 25, 2010 public records request were provided.

Public Records Act. Vermilion requests that this Court reject Anderson's request and affirm the Sixth District Court of Appeal's denial of the Writ requested.

### **STATEMENT OF THE FACTS**

On May 25, 2010, Anderson submitted a public record request to the City of Vermilion Finance Director, Brian Huff, for copies of the following:

All checks paid to the law firm of Stumphauzer & O'Toole and Margaret O'Brian for January, February, March and April 2010;

All itemized billing statements received from Kenneth Stumphauzer, Stumphauzer & O'Toole, Marcie Butler, for January, February, March and April 2010;

All itemized billing statements/and all bills received from Lynn Miggins and KS Associates for the months of January, February, March and April 2010.

(See, Mandamus Complaint, Exhibit C).

Vermilion's Law Director, Kenneth Stumphauzer acknowledged receipt of the record requests and on May 27, 2010, advised that he didn't believe the items were disclosable. (See, Vermilion Brief in Opposition to Summary Judgment, Exhibit D). Thereafter, Mr. Stumphauzer's partner, Abe Lieberman, advised Anderson that the request for itemized legal bills was improper since the documents were protected by the attorney-client privilege. (*Id.* at Exhibit E).

On August 12, 2010, attorney Andrew Bemer, on Anderson's behalf, rejected Vermilion's position stating that legal bills containing attorney-client communication must be disclosed and produced. (*Id.* at Exhibit F).

On August 23, 2010, Vermilion explained in detail why Anderson was incorrect and summed up its legal position on the itemized billing statements:

We do not have and never have had an objection to providing your client, Jean Anderson, with copies of checks issued by the City to Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA ("Stumphauzer O'Toole"). The City does not issue checks to Margaret O'Brian for her legal services. Rather, she is paid through direct deposit. If your client wishes to obtain copies of the direct deposit statements, please advise, and we will provide them to you.

In your August 12<sup>th</sup>, letter you stated that Anderson requested copies of payments made to Kenneth Stumphauzer in her May 25, 2010 correspondence. You may want to revisit that issue as she only requested copies of billing statements.\*\*\*Stumphauzer has never submitted a billing statement so there are no documents in response to that request.

\*\*\*

We also do not object to providing you with billing statements from Lynn Miggins and KS Associates.

\*\*\*

We agree that all of the documents mentioned above are public records and are not subject to the attorney client privilege. In fact, we previously advised the City to release these records, at or about the time your client's public request was made, and have been advised that Ms. Anderson was promptly provided with copies of checks

issued by the City to Stumphauzer O'Toole through April 29, 2010, with copies of bills submitted to the City by KS Associates through March 31, 2010, and with copies of checks issued by the City to KS Associates through April 15, 2010. The City has a copy of the receipt given to your client at the time she picked up those records. \*\*\*

(*Id.* at Exhibit G) (Emphasis added).

On September 14, 2010, Anderson filed with the Sixth District Court of Appeals a Verified Petition for Writ of Mandamus only seeking the release of the itemized attorney-client billing statements. On November 3, 2010, Vermilion answered the Verified Petition and set forth its affirmative defenses, including, but not limited to, that the documents were protected by the attorney-client privilege. (See, Vermilion Answer). In further response to the Verified Petition, Vermilion attached all of the other public records which were produced as requested. (*Id.* at Exhibit A). The responses included detailed check reports and expense materials which detailed which attorneys received work and how much was financially expended during the requested timeframe.

The parties moved for summary judgment. While those motions were pending, the Sixth District ordered Vermilion to produce the requested itemized attorney billing records for an *in camera* inspection. The Sixth District reviewed those documents and thereafter held that the documents were attorney client communications and subject to the privilege:

In the case before us, the attorney fee statements and billings which respondent has submitted to us for *in camera* inspection contain narrative descriptions of legal services performed by counsel for the City of Vermilion. The invoices submitted to the city by Marcie & Butler state the date, a description of the professional service rendered, the time spent on each service and hourly rate, and the total amount due for each date listed. The invoices submitted to the city by Stumphauzer & O'Toole state under separate headings which identify the general matter or case involved, detailed descriptions of the professional services rendered, the time spent on those services and the legal fees associated with each matter. Consistent with *Dawson*, we must hold that the subject itemized billing records are protected by the attorney-client privilege and are therefore exempt from disclosure under the Public Records Act.

*State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-1868 (6<sup>th</sup> Dist.) at ¶11.

After that decision and subsequent to this appeal, Anderson requested different billing information which would provide only the attorneys' name, the name of any file the attorney worked on and the amount charged. While there are no documents as specifically requested, Vermilion did provide existing summary documents which contain some of that information. Arguably, this subsequent public records request and production moots Anderson's continued drum beat for such information.<sup>2</sup>

Indeed, Anderson's merit brief is littered with recitation to this after-the-fact request which drastically altered Anderson's original May 25, 2010 request. Anderson is attempting to deceive the reader into a belief that this extremely limited information

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<sup>2</sup> This court has held that a mandamus action will be moot where the Relator has obtained access to the information requested. *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007 at ¶13 citing *State ex rel. Toldeo Blade Co. v. Toledo-Lucas Cty. Port. Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767 at ¶14.

is all she ever wanted. Vermilion asks that this Court not accept Anderson's ploy. Anderson, as Vermilion's former Mayor, knows exactly the type of records the City maintains and always has maintained.

In sum, Anderson has abandoned her initial request for detailed itemized billing records which was the sole basis for this Mandamus action and in reality has not asked this Court for any relief other than an award of attorney fees for her now waived original Public Records request.

## LAW AND ARGUMENT

- I. **Proposition of Law No. I: Detailed Itemized Billing Statements Between An Attorney And Their Client Are Protected By The Attorney Client Privilege And Thus Exempted From Disclosure Pursuant To R.C. §149.43(A)(1)(v), *State Ex Rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, applied.**
- II. **Proposition of Law No. II: The Redaction Of Public Records Which Are Otherwise Exempt From Disclosure Is Neither Necessary Nor Appropriate Where The Redaction Of The Exempted Information Would Render The Documents Meaningless.**

The Ohio Public Records Act, R.C. §149.43, requires the production of a requestor's specifically identified documents which are not otherwise exempted from disclosure. *State ex rel. Frank Recker & Assoc. Co., LPA v. Montgomery* (1997), 79 Ohio St.3d 1502; *State ex rel. Fant v. Tober* (1993), 68 Ohio St.3d 117; *State ex rel. Thomas v. Ohio State University* (1994), 71 Ohio St.3d 245 (1994-Ohio-261). The Public Records Act sets forth numerous exemptions which if applicable remove a document from the definition of a "Public record". In this matter, Vermilion claimed and the Sixth District agreed, that itemized billing records between an attorney and its client were exempted from the definition of a "public record" under R.C. §149.43(A)(1)(v) which excludes from the public records definition records "...the release of which is prohibited by state or federal law." This Court has recognized that where the issue upon review is whether particular records are exempt from disclosure under a statutory exception set forth in The Public Records Act, that issue is reviewed by this

Court on an abuse of discretion standard. *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 136-137 (1993); *State ex rel. Hamblin v. Brooklyn*, 67 Ohio St.3d 152, 153 (1993).

As this Court is well aware, the abuse of discretion standard denotes more than the error of law or judgment but, rather, implies that the lower court's attitude was completely unreasonable, arbitrary, or unconscionable. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The abuse of discretion standard was aptly defined by this Court in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, wherein the Court held in relevant part:

[A]n abuse of discretion involves far more than a difference in \*\*\* opinion \*\*\*. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather a passion or bias.

Anderson, Vermilion's former Mayor, requested detailed itemized attorney-client billing records. Vermilion asserted in its immediate response to Relator's request for records, as well as in response to this Mandamus action, that her request seeking detailed itemized billing records between Vermilion and its counsel, was improper because such records were not "public records" under R.C. §143.49. More specifically,

Vermilion stated that the itemized billing records were protected from disclosure under the attorney-client privilege.

Ohio Law has long provided that the attorney-client privilege protects and insulates the communications between attorneys and their clients and prevents the dissemination of any information attained in the confidential relationship. *American Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991); *Duttenhofer v. The State*, 34 Ohio St. 91, 94 (1977); *In Re: Klemann*, 132 Ohio St. 187, 192 (1936). It logically follows that the records between the attorneys and their clients must be protected from disclosure under the Ohio Public Records Act. *State ex rel. Tax Payers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 392, 1999-Ohio-114 (“[I]n addition, the respondents had no duty to provide access to records related to attorney fees that .... were covered by the attorney-client privilege....., *Nix*, 83 Ohio St.3d at 383.”)

In *State ex rel. v. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, this Court reaffirmed that documents which are communications between an attorney and their client are cloaked with the attorney-client privilege and are not “public records” since disclosure would be prohibited by state law. See, R.C. §149.43(A)(1)(v). Indeed, “[T]he attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Bloom-Carroll, supra* at ¶26; *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767 at ¶21, each respectively citing *Swidler & Berlin v. United States* (1998), 524

U.S. 399, 403. The United States Supreme Court has noted that the attorney-client privilege is “intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice.’” *Bloom-Carroll, supra* at ¶26 quoting *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389.

In furtherance of these noble goals and promises to clients that their communications with legal counsel will be protected from another’s ears and/or eyes, the Law has demanded that the attorney-client privilege must cover those records detailing communications between attorneys and their clients. *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542.

In the case *sub judice*, Anderson, although stating that she wasn’t challenging *Bloom-Carroll*, seems to claim that this Court went too far in its decision in *Dawson* and that this Court should force political subdivisions to excise from lengthy fee bills all written communications contained therein except for a date, an attorneys name or initials, the general matter in which the work is being performed and the amount the attorney charged a client for the legal services rendered. Vermilion believes that even some of this limiting information may still fall within the attorney-client privilege because it would reveal confidences<sup>3</sup>. If all of the arguably privileged materials were

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<sup>3</sup> While an attorneys name or date may not in and of itself be confidential information, there are some occasions when the matter an attorney was hired to work on would

surgically excised leaving just simple information such as the date of a time charge or the amount of that time charge, this innocuous text would represent only approximately 2-5% of the entire document. Moreover, this material in the document is so inextricably intertwined with all of the privileged materials that the entire attorney fee billing should be held protected as the Sixth District held and this Court stated in *Bloom-Carroll*:

The school district refused to make the requested itemized attorney-billing statements available to Dawson because the statements contained detailed descriptions of work performed by the district's attorneys, statements concerning their communications to each other and insurance counsel, and the issues they researched. The withheld records are either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure.

*Dawson, supra* at ¶29; *see, also, State ex rel. Tax Payers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385 at 392("In addition, respondents had no duty to provide access to records related to attorney fees that...were covered by the attorney-client privilege,....").

As the *in camera* inspection by the Sixth District Court of Appeals revealed, the records contained:

In the case before us, the attorney fee statements and billings which respondent has submitted to us for *in camera* inspection contain narrative descriptions of legal services performed by counsel for the City of Vermilion. The invoices submitted to the city by Marcie & Butler state the date, a description of the professional service rendered, the time

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itself be confidential, such as a general matter which referred to the potential termination of an employee or intellectual property or security matters or other references which could be confidential.

spent on each service and hourly rate, and the total amount due for each date listed. The invoices submitted to the city by Stumphauzer & O'Toole state under separate headings which identify the general matter or case involved, detailed descriptions of the professional services rendered, the time spent on those services and the legal fees associated with each matter.

*State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-1868 (6<sup>th</sup> Dist.) at ¶11.

The information now sought by Anderson and in fact now in her possession through a subsequent Public Records request, (*i.e.* date of the time charge, attorney handling matter, general description of the matter and amount of dollars expended for each matter), is either information which is still arguably privileged or so inextricably intertwined with the clearly privileged detailed communications that production would be burdensome and provide no meaningful or useful documents. This Court has previously cautioned that practical difficulties result if a court were to require surgical redactions be performed to excise all potentially privileged information. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767; see also, *Polovischak v. Mayfield*, 50 Ohio St.3d 51 (1990), *State ex rel. McGee v. Ohio State Board of Psychology*, 49 Ohio St. 3d 59 (1990). Other Ohio courts have also stated that there are situations where releasing the unredacted content is futile and thus no redaction must occur. *State ex rel. Strothers v. McFaul*, (1997) 122 Ohio App. 3d 327, 331, 332; see also *State ex rel. Parker v. Lucas County Job and Family Services* (2008), 176 Ohio App.3d 715, 721.

After these facts and issues are considered, the only information which Anderson claims to still seek begs the question as to how such innocuous information would further the goals of the public records laws or render the document at all meaningful when 95% or more of the document is redacted under privilege? It is for these reasons that this Court's decisions in *Lakewood* and *Bloom-Carroll* protecting the entire record as a communication between the attorney and their client is not only the correct one, but required.

Finally, under these facts, where the Appellate Court conducted an *in camera* inspection and determined that documents contain "detailed descriptions of the professional services rendered," and that the documents are "protected by the attorney-client privilege and are therefore exempt from disclosure under the Public Records Act.", no abuse of discretion by this Court can be found.

### **III. Proposition Of Law No. III: Statutory Damages And Attorneys' Fees May Not Be Awarded Where The Respondent's Actions Were Reasonable.**

The award of attorney's fees for a public records request is not mandatory. *See, State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108. In *State ex rel. Wadd v. Cleveland* (1998), 81 Ohio St.3d 50, 54, this Court set forth the standard to be utilized when determining whether attorney's fees are warranted:

In granting or denying attorneys fees under R.C. 149.43(C), Courts consider the reasonableness of the government's failure to comply with the public records request and a degree to which the public will benefit from relief from the records in question.

*Id. at 54.*

Stated differently, Ohio law in the public records area has supported the legal proposition that a respondent's refusal to make available disputed records where acting in good faith will not serve as a basis for an award of statutory damages or attorneys fees under the Ohio Public Records Act. In this matter, Vermilion's response to Anderson's public records request has been completely reasonable. As the Sixth District determined and Anderson does not truly contest, the rejection of Anderson's request for itemized attorney-client billing statements was proper because the attorney-client privilege exempts and prevents disclosure. Vermilion did produce all other material which was not exempt from disclosure. Vermilion asserts that its response was both reasonable and in good-faith.

In *State ex rel. Sun Newspapers v. Westlake Board of Education*, 76 Ohio App.3d 170 (8<sup>th</sup> Dist. 1991), the appellate court was confronted with a similar situation where the public entity had refused to release records under the claim that they were exempt pursuant to the attorney-client privilege. Although the appellate court did require some documents to be released following a redaction, the court refused to award statutory damages holding that the public entity acted in good faith:

Relator also requested this court order respondent to pay the attorney fees incurred by relator by having to bring this action. Attorney fees are not appropriate under the circumstances of this action. Respondent had a good-faith basis for its refusal to make available the disputed records. Furthermore, upon being contacted orally by court personnel,

respondent responded to relators' complaint very promptly -- including submission of the disputed records under seal. Under the circumstances, present in this action, therefore, we deny relator's request for attorney fees.

*Id.* at \*7.

In this matter, there can not be any reasonable argument that Vermilion did not act in good faith by claiming that the itemized attorney billing records were communications subject to the attorney-client privilege. Of great significance, Anderson is no longer even seeking that these detailed billing records be produced. In essence, she has waived her original public records request and therefore no damages could follow.

Additionally, when the Sixth District Court of Appeals requested to review the subject billing records *in camera*, Vermilion immediately complied and the Sixth District agreed that the records were privileged. Under such circumstances, Vermilion submits that statutory damages, including attorney's fees, would not be appropriate.

Similarly, assuming *arguendo* that this Court would require a surgical and nearly complete redaction of the itemized billing records, attorney fees and statutory damages would still not be proper since Anderson's claims were for the most part without merit. *See, State ex rel. Mahajan v. State Medical Board of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995 at ¶60 *citing and quoting State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542 (relator is not entitled to an award of attorney's fees in public records mandamus case because its

claims, “[f]or the most part,” lack merit); *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St.3d 379, 385, 1998-Ohio-290 (relators in public-records mandamus case were not entitled to an award of attorneys fees “because their record’s requests were largely meritless”).

### **CONCLUSION**

Twice in the last thirteen years, this Court has recognized that a detailed itemized attorney fee billing statement was a record completely protected by the attorney-client privilege and not subject to dissemination. *State ex rel. v. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009 at ¶28; *see, also, State ex rel. Tax Payers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 392, 1999-Ohio-114. Nothing has been presented in this matter for the Court to alter or modify those decisions.

Moreover, to require attorney-client communications to be excised or redacted is, in and of itself, a dangerous process and leads to the potential for an inadvertent release of privileged material. Similarly, the fact that documents subjected to such a surgical redaction would become virtually meaningless makes the act of redaction a futile exercise.

Accordingly, this Court should affirm the Sixth District's decision and deny Anderson's requested relief and damages.

Respectfully submitted,

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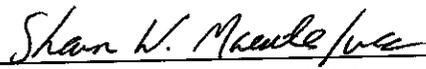
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 4<sup>th</sup> day of September, 2012, to the following:

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