

IN THE SUPREME COURT OF OHIO

Jean A. Anderson	:	On Appeal from the Erie County
Appellant,	:	Court of Appeals,
v.	:	Sixth Appellate District
City of Vermilion c/o Brian Huff,	:	Court of Appeals Case No. E-10-0040
Finance Director	:	Supreme Court Case No. 12-0943
Appellee.	:	

**RELATOR/APPELLANT JEAN A. ANDERSON'S MOTION FOR
RECONSIDERATION OF THE COURT'S ORDER OF NOVEMBER 21, 2012
ON THE ISSUE OF ATTORNEY FEES AND STATUTORY DAMAGES**

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MOTION AND MEMORANDUM IN SUPPORT

I. INTRODUCTION

Now comes Relator-Appellant, Jean A. Anderson (hereinafter “Appellant” or “Anderson”) and for the reasons set forth in the following Memorandum, moves this Court pursuant to S. Ct. Prc. 11.2(B)(4) to reconsider its decision dated November 21, 2012, regarding the separate issue of a denial of attorney fees and statutory damages to Appellant. The issue of fees and damages was never considered by the Court of Appeals, as they had granted summary judgment to the Appellee City of Vermilion on the underlying mandamus claim for public records. Accordingly, this Court should have reviewed the claim for fees and damages *de novo* rather than under an abuse of discretion standard.

II. **WHILE THE SUPREME COURT PROPERLY CONDUCTED A *DE NOVO* REVIEW OF THE SUMMARY JUDGMENT DECISION OF THE LOWER COURT ON APPELLANT’S UNDERLYING MANDAMUS CLAIM FOR PUBLIC RECORDS, THIS COURT FAILED TO ALSO CONDUCT A *DE NOVO* REVIEW OF APPELLANT’S CLAIM FOR ATTORNEY FEES AND STATUTORY DAMAGES.**

A. **The Issue of Attorney Fees and Statutory Damages Was Never Considered by Either the Lower Court or This High Court.**

This High Court properly applied the long held standard of *de novo* review of summary judgment in determining whether there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-5320, at ¶9. However, this Court contradicted itself on the issue of attorney fees and statutory damages, in that the Court stated “in assessing this claim, we review whether the Court of Appeals abused its discretion in

denying the request.” Id. at ¶25, citing *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093 ¶12.

The Court of Appeals never addressed the issue of attorney fees and statutory damages, as that Court merely denied summary judgment to Appellant on the underlying predicate claim of public records request by determining that the itemized billing statements for attorney services were exempt in their entirety from disclosure. The Court of Appeals never addressed the question of attorney fees or statutory damages in view of its decision on the underlying public records claim; in fact, there is no mention whatsoever in the opinion from the court on the issue. As the Court of Appeals incorrectly determined that the underlying predicate claim was without merit, the Court never got to the issue of Appellant’s request for damages and fees.

Accordingly, the review of the award of fees and damages by this Court cannot be conducted under an abuse of discretion standard, as there was no meritorious fact review under Civil Rule 56 by the Court of Appeals. As the High Court ruled in Appellant’s favor in reversing the granting of summary judgment to Appellee, this High Court was further obligated to review *de novo* the question of entitlement to attorney fees and statutory damages.

B. There is No Case Precedent for Avoiding a Complete *De Novo* Review of Summary Judgment.

This Court’s authority citation to *State ex rel. Patton v. Rhodes, supra* is inapposite. In that case, the court did address the issue of statutory damages and attorney fees, while denying the same. In *Patton*, there was a specific determination under Rule 56 that there was no genuine issue of material fact, as the county auditor posted the requested unaudited financial records online once the auditor had received clearance from

the State Auditor's office, resulting in a concession by the relator that the request had been satisfied. However, the *Patton* relator's motion for attorney fees and statutory damages was denied in view of the determination the mandamus action was moot.

Here Appellant is not asking the court to review a decision denying attorney fees and damages based on a review of the facts as had occurred in *Patton*; Appellant contends that when there is no fact review on the issue of fees and damages, the reviewing court must make a *de novo* review on all aspects of summary judgment, especially when no determination has been made on the collateral issue of fees and damages.

Moreover, the decision of *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, does not provide guidance, as that case involved a Supreme Court review on a grant of summary judgment to the relator, which intrinsically also included a review of an award of \$2,000.00 in attorney fees, together with \$1,000.00 as statutory damages and court costs. Again, this Appellant does not question that an actual fact determination on the issue of fees and damages shall be reviewed under an abuse of discretion standard. Because there was no such review by either the Sixth District or this High Court on the issue of Appellant's entitlement to fees and damages, that issue should have been given a *de novo* review by this Court, as done for the summary proceedings in the underlying mandamus claim.

The Supreme Court recently ruled in the case of *Arnott v. Arnott*, 2012-Ohio-3208, that the abuse of discretion standard is not appropriate in the review of issues of law in a declaratory judgment matter, as the *de novo* standard must be applied in that regard, as compared with the judiciable question of declaratory judgment. The matter at

hand compels a similar analytical review. A *de novo* review of the underlying predicate claim of mandamus for public records, further compels a review of the issue of attorney fees and statutory damages, as that issue was never considered in the denial of the underlying predicate mandamus claim.

C. This Court Has Not Made a *De Novo* Review of the Statutory Facts to be Considered on the Issues of Attorney Fees and Damages.

It is acknowledged that this High Court reviewed the statutory provisions of R.C. 149.43(C) (Anderson, 2012-Ohio-5320 at ¶26); however this appears to be nothing more than a review of statutory guidelines without any factual application to the case *sub judice*. This Court never considered any of the gamesmanship that had been played by Respondent throughout the proceedings. Even though fees and damages is now a statutory directive of remediation rather than punitive in nature, and reasonableness and good faith may be an issue for consideration according to *Smith*, this Court never had the opportunity to consider the actual facts at hand. The gamesmanship alluded to concerns the published information that Appellee had created two sets of attorney fee billings, one which included narrative privileged information, but the other was in the non-privileged form of general nature of case name, hours spent and total amount expended by the City of Vermilion; this second non-privileged fee statement which was never disclosed nor revealed, but subsequently disclosed during a journalist interview following the publication of the appellate opinion. (See Appendix C, Vermilion PhotoJournal, May 10, 2012, previously attached to Appellant's Reply Brief as Exhibit "A") Such disregard, in failing to disclose the existence of the "non-privileged" fee statements and instead, contesting the narrative privileged fee statements, is unconscionable and clearly in dereliction of any duty of an attorney representing a public official or body.

This Court must not sanction or otherwise allow public officials and their counsel to avoid the responsibilities mandated under the Public Records Act under the presumption that a choice can be made whether to disclose a public record on the basis that the requestor is on the other side of a political issue or otherwise “non-favored”. In essence, the Court’s decision in the instant matter creates an avenue of avoidance of the public records law. This Court therefore must review the issue of whether Appellee’s actions constituted bad faith or unreasonable conduct in avoiding its statutory obligations. Appellee should not be permitted to circumvent its responsibilities to release the summaries of the legal fee billings based on the context of the circumstances. *State ex rel. Morgan v. City of Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365. Such conduct should never be looked upon as constituting good faith. *State ex rel. Multi Media Inc. v. Whalen*, 51 Ohio St.3d 99 (1990). Are the legal duties of representatives of public bodies so light as to allow a position to be taken that “a well-informed public office could have reasonably believed” that, while they are in possession of two sets of attorney fee billings, there is no obligation to release the non-privileged copy, merely because there happened to be a privileged copy also in existence? Such a rank legal assertion cannot be tolerated when dealing with issues of taxpayer expenditures.

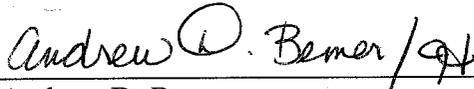
Indeed, the public benefit which would be created by the release of the records in question is a factor for the court to consider in the reasonableness of the governments failure to comply with the public records request. *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50 (1998); *Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884. There can be no dispute that the public is benefited by knowing how and why taxpayer funds have been expended on attorney fees.

III. CONCLUSION

As the issue of attorney fees and statutory damages was never considered in the summary proceedings before the Sixth District Court of Appeals, there was no factual determination whatsoever regarding this issue. Certainly, as this Court reviewed the summary judgment proceedings in the lower court on a *de novo* basis, the Court also was required to address in some fashion the fact considerations concerning fees and damages as well. This could only have been done on a *de novo* review on the statutory issues contained in R.C. 149.43(C), including: the remedial nature of fees; the loss of use of information and documentation of the expenditure of tax payer dollars for attorney fees; the lack of good faith concerning Appellant's public records request through feigned ignorance. At the very least the non-privileged summaries of attorney fee billings were required to be released.

It is therefore submitted that a *de novo* review of the question of attorney fees and statutory damages is required in order to properly adjudicate the within matter. For these reasons, it is further submitted that Appellant's Motion for Reconsideration should be granted.

Respectfully submitted,
Andrew D. Bemer

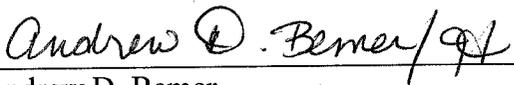


Andrew D. Bemer

COUNSEL FOR RELATOR-APPELLANT,
JEAN A. ANDERSON

Certificate of Service

I certify that a copy of this Relator/Appellant Jean A. Anderson's Motion for Reconsideration of the Court's Order of November 21, 2012 on The Issue of Attorney Fees and Statutory Damages was sent by ordinary U.S. mail to counsel for respondent-appellee, Shawn W. Maestle, Esq. and Timothy Obringer, Esq., Weston Hurd LLP, The Tower at Erieview, 1301 East 9th Street, Suite, 1900, Cleveland, Ohio 44114-1862 on November 29, 2012.



Andrew D. Bemer

COUNSEL FOR RELATOR-APPELLANT,
JEAN A. ANDERSON

APPENDIX

A – Decision and Judgment of the Sixth District Court of Appeals dated April 25, 2012.

B – Supreme Court Opinion dated November 21, 2012.

C – Vermilion PhotoJournal May 12, 2012.

APPENDIX A

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio, ex rel. Jean A. Anderson

Court of Appeals No. E-10-040

Relator

v.

City of Vermilion, c/o Brian Huff,
Finance Director

DECISION AND JUDGMENT

Respondent

Decided:

APR 25 2012

Andrew D. Berner, for relator.

Shawn W. Maestle, Timothy R. Obringer and Jeffrey R. Lang, for respondent.

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court as an original action in mandamus. Relator, Jean A. Anderson, seeks an order from this court directing respondent, the city of Vermilion, by and through its finance director, Brian Huff, to comply with her previous public records requests and make available all itemized billing statements for attorney

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services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler. In support of her petition, relator has filed a motion for summary judgment, which relator has opposed in its brief in opposition. The matter is now decisional.

{¶ 2} The undisputed facts of this case are as follows. On May 14, 2010, relator presented Kenneth S. Stumphauzer, the law director of the city of Vermilion, with a public records request pursuant to R.C. 149.43. In her request, relator asked for copies of a letter submitted by Barb Brady to the Ohio Ethics Commission ("OEC"), and the OEC's response thereto, which letter and response had been identified by Stumphauzer in a Vermilion City Council meeting on May 3, 2010. The letter and response allegedly referred to Vermilion's allowing Stumphauzer to hire his law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA ("Stumphauzer & O'Toole"), to do city business while Stumphauzer was an employee of Vermilion. Stumphauzer did not respond to the request and on May 25, 2010, relator resubmitted her request. In an email response, Stumphauzer denied that the information that she sought from him was a public record. Also on May 25, 2010, relator submitted a public records request to Brian Huff for (1) copies of all checks paid to the law firm of Stumphauzer & O'Toole and to Margaret O'Brian for the months of January, February, March and April 2010, (2) copies of all itemized billing statements received from Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler, another law firm, for the months of January, February, March and April 2010, and (3) copies of all itemized billing statements or bills received from

engineers Lynn Miggins and KS Associates for the months of January, February, March and April 2010.

{¶ 3} Eventually, relator obtained the documents regarding the OEC's ethics opinion from another source. In addition, respondent provided realtor with copies of the checks requested and the billing statements from Lynn Miggins and KS Associates. Relator also obtained, although through a different source, a copy of a summary billing statement dated February 16, 2010, that Stumphauzer & O'Toole submitted to respondent for legal fees covering legal services rendered through February 15, 2010. To date, however, respondent refuses to provide relator with the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler.

{¶ 4} "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 21, quoting *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). The Public Records Act implements the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d

1049, ¶ 13, quoting *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶ 5} Generally to be entitled to the issuance of a writ of mandamus, the relator must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent's part to perform the act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). Where the allegation relates solely to a public records request, the Supreme Court has held that the requirement of the lack of an adequate legal remedy, as an element of a petition for writ of mandamus, does not apply. *State ex rel. Glasgow, supra*, at ¶ 12. When the release of a public record is challenged, it is the function of the courts to analyze the information to determine whether it is exempt from disclosure. See, *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 85, 526 N.E.2d 786 (1988).

{¶ 6} Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. As used in R.C. 149.43, a "public record" means "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *." R.C. 149.43(A)(1). Moreover, "records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public

office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.011(G). A “public office” includes “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 149.011(A). “Exceptions to disclosure under the Public Records Act * * * are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.” *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

{¶ 7} Respondent asserts that the records at issue, the attorney fee statements and billings, are exempt from disclosure under R.C. 149.43 because they are protected by the attorney-client privilege and work product doctrine. In order to properly examine the issues before us, we ordered respondent to submit the unredacted copies of the records to the court for an in camera inspection. Respondent filed those records on March 16, 2012.

{¶ 8} R.C. 149.43(A)(1)(v) exempts from disclosure “[r]ecords the release of which is prohibited by state or federal law.” In *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27, the Supreme Court of Ohio clarified this exemption as it relates to the attorney-client privilege:

“The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of those records.” *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542, 2000-Ohio-475, 721 N.E.2d 1044. In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24.

{¶ 9} In *Dawson*, the relator, Dawson, had filed a petition for a writ of mandamus to compel the respondent, the school district, to provide her with access to itemized invoices of law firms who had provided legal services to the school district pertaining to Dawson and her children. Prior to filing her petition with the Supreme Court, Dawson had filed a public records request with the school district. While the school district provided Dawson with summaries of invoices which noted the attorney’s name, the invoice total and the matter involved, the school district refused to provide Dawson with the itemized invoices themselves. The school district asserted that the invoices contained confidential communications between the district and its attorneys and were therefore exempt from disclosure. The Supreme Court agreed and held that “[t]o the extent that narrative portions of attorney-fee statements are ‘descriptions of legal services performed

by counsel for a client,' they are protected by the attorney-client privilege because they 'represent communications from the attorney to the client about matters for which the attorney has been retained by the client.'" *Dawson, supra*, at ¶ 28, quoting *State ex rel. Alley v. Couchois*, 2d Dist. No. 94-CA-30, 1995 WL 559973, * 4 (Sept. 20, 1995). In reaching this conclusion, the court noted:

"While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege." *Hewes v. Langston* (Miss.2003), 853 So.2d 1237, ¶ 45. As a federal appellate court observed, "billing records describing the services performed for [the attorney's] clients and the time spent on those services, and any other attorney-client correspondence * * * may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. * * * [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.'" *In re Horn* (C.A.9, 1992), 976 F.2d 1314, 1317-1318, quoting *In re Grand Jury Witness (Salas)* (C.A.9, 1982), 695 F.2d 359, 362.

{¶ 10} The court further held, however, that the school district properly responded to Dawson's request for the itemized invoices of law firms by providing her with summaries of the invoices, which included the attorney's name, the fee total, and the

general matter involved. Accordingly, that information does fall within the realm of matters that are subject to disclosure under the Public Records Act.

{¶ 11} In the case before us, the attorney fee statements and billings which respondent has submitted to us for an 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 the 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.

{¶ 12} Although as a general matter R.C. 149.43(A) "envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials," *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994), the court in *Dawson* did not discuss redaction but, rather, exempted the entire record. We further note that while the respondent in *Dawson* provided the relator with summaries of the invoices at issue, it is well established that a public office is not required to generate a new document in

response to a public records request. *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 382; 700 N.E.2d 12 (1998).

{¶ 13} Because the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler are exempt from disclosure under the Public Records Act, there remains no genuine issue of material fact and respondent is entitled to judgment as a matter of law. Relator's motion for summary judgment is denied. Relator's action in mandamus is hereby ordered dismissed at relator's cost. The clerk is directed to serve all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DISMISSED.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.
CONCUR.

Peter M. Handwork

JUDGE

Mark L. Pietrykowski

JUDGE

Thomas J. Osowik

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.

LUVADA S. WILSON, CLERK OF COURTS
Erie County, Ohio

By *Betty A. Martin*

APPENDIX B

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SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio ex rel. Jean A. Anderson

Case No. 2012-0943

v.

JUDGMENT ENTRY

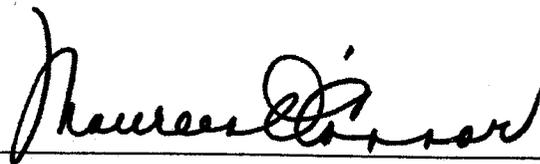
City of Vermilion, c/o Brian Huff, Finance
Director

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Erie County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed in part, affirmed in part, and remanded to the court of appeals for further proceedings, consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Court of Appeals for Erie County by certifying a copy of this judgment entry and filing it with the Clerk of the Court of Appeals for Erie County.

(Erie County Court of Appeals; No. E-10-040)



Maureen O'Connor
Chief Justice

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Anderson v. Vermilion*, Slip Opinion No. 2012-Ohio-5320.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-5320

**THE STATE EX REL. ANDERSON, APPELLANT, v. THE CITY OF
VERMILION, APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets,
it may be cited as *State ex rel. Anderson v. Vermilion*,
Slip Opinion No. 2012-Ohio-5320.]

Public records—R.C. 149.43(A)(1)(v)—Information on itemized attorney-billing statements that was not protected by the attorney-client privilege should have been disclosed.

(No. 2012-0943—Submitted November 14, 2012—Decided November 21, 2012.)

APPEAL from the Court of Appeals for Erie County,
No. E-10-040, 2012-Ohio-1868.

Per Curiam.

{¶ 1} Appellant, Jean A. Anderson, appeals from a judgment denying her request for a writ of mandamus to compel appellee, the city of Vermilion, Ohio, to provide copies of certain itemized billing statements for attorney services rendered to the city. Because the city did not establish that the entirety of the

SUPREME COURT OF OHIO

requested statements are exempt from disclosure under the Public Records Act, we reverse that portion of the judgment of the court of appeals and remand the cause for further proceedings. We affirm the portion of the judgment denying Anderson's request for an award of statutory damages and attorney fees.

Facts

{¶ 2} Anderson served as the mayor of Vermilion from January 2006 through December 2009. During her administration, the law firm of Marcie & Butler, L.P.A. ("Marcie & Butler") provided legal services to the city, and the firm's provision of services extended into the next mayor's term. The new mayor, Eileen Bulan, appointed Kenneth Stumphauzer as the city's director of law. Stumphauzer's law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., L.P.A. ("Stumphauzer & O'Toole"), billed the city over \$27,000 for legal services provided during the first six weeks of the new mayor's administration.

{¶ 3} Because she thought that the annual legal fees expended by the new administration would far exceed the fees incurred during her administration, Anderson made several records requests to permit public scrutiny of the city's expenditure of funds for legal services. On May 25, 2010, Anderson personally delivered a written public-records request to the city's finance director for copies of certain records, including "all itemized billing statements received from Kenneth Stumphauzer, Stumphauzer & O'Toole, [and] Marcie & Butler, for January, February, March and April 2010."

{¶ 4} The city acknowledged its receipt of Anderson's request but denied it on the basis that the requested legal bills are exempted from disclosure by the attorney-client privilege:

[T]he detailed billing statements, describing the specific work performed for and advice rendered to the City by Stumphauzer

O'Toole and any other lawyers rendering services to the City are covered by the attorney-client privilege. In particular, bills submitted by Stumphauzer O'Toole to the City describe each matter with respect to which legal services were rendered, the dates on which such legal services were rendered and the specific tasks performed. As a result, we cannot agree to provide you with those detailed itemized billing statements.

{¶ 5} In September 2010, Anderson filed a petition in the court of appeals. Anderson sought a writ of mandamus to compel Vermilion to provide copies of the nonexempt portions of the requested itemized attorney-billing statements. Anderson also requested an award of statutory damages and attorney fees. The court granted an alternative writ, and the city submitted an answer to the petition. Anderson filed a motion for summary judgment, and the city filed a brief in opposition. The court of appeals granted Anderson's motion for an in camera review of the requested attorney-billing statements, and the city filed the statements under seal.

{¶ 6} On April 25, 2012, the court of appeals denied Anderson's motion for summary judgment, granted summary judgment in favor of Vermilion, and denied the writ.

{¶ 7} This cause is now before the court on Anderson's appeal as of right.

Analysis

Summary Judgment

{¶ 8} The court of appeals denied Anderson's motion for summary judgment and, in essence, granted summary judgment in favor of Vermilion by determining that "there remains no genuine issue of material fact and [the city] is entitled to judgment as a matter of law." 6th Dist. No. E-10-040, 2012-Ohio-

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1868, ¶ 13. *See also Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 17 (“When a party moves for summary judgment, the nonmovant has an opportunity to respond, and the court has considered all the relevant evidence, the court may enter summary judgment against the moving party, despite the nonmoving party’s failure to file its own motion for summary judgment”).

{¶ 9} “Summary judgment is appropriate when an examination of all relevant materials filed in the action reveals that ‘there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12, quoting Civ.R. 56(C). “In reviewing whether the trial court’s granting of summary judgment was proper, we apply a de novo review.” *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶ 6.

Mandamus

{¶ 10} The court of appeals entered summary judgment in favor of Vermilion on Anderson’s mandamus claim for itemized attorney-billing statements. “Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6. “We construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.” *State ex rel. Rucker v. Guernsey Cty. Sheriff’s Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

{¶ 11} Vermilion claims—and the court of appeals found—that the requested itemized attorney-billing statements are exempt from disclosure based on the attorney-client privilege. “Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an

exception.” *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

Attorney-Client Privilege

{¶ 12} R.C. 149.43(A)(1)(v) excludes “[r]ecords the release of which is prohibited by state or federal law” from the definition of “public record” for purposes of the Public Records Act. “The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of [those] records.” *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542, 721 N.E.2d 1044 (2000).

{¶ 13} More specifically, we have held that the narrative portions of itemized attorney-billing statements containing descriptions of legal services performed by counsel for a client are protected by the attorney-client privilege. *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 28-29; *see also State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, ___ Ohio St.3d ___, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 36.

{¶ 14} Anderson requested itemized attorney-billing statements for services provided to Vermilion by Stumphauzer, Stumphauzer & O’Toole, and Marcie & Butler for January, February, March, and April of 2010. The Stumphauzer & O’Toole billing statements include the title of the matter being handled, e.g., the case name or general subject, a narrative description of the legal services provided, the hours expended, and the amount due. The Marcie & Butler statements include the dates the services were rendered, a narrative description of the services rendered, the hours and fee rate for the services provided, and the amount of money billed.

{¶ 15} Under the Public Records Act, insofar as these itemized attorney-billing statements contain nonexempt information, e.g., the general title of the

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matter being handled, the dates the services were performed, and the hours, rate, and money charged for the services, they should have been disclosed to Anderson. “If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.” R.C. 149.43(B)(1).

{¶ 16} The parties submitted the requested attorney-billing statements under seal for the court of appeals’ review. As we have held, the nonexempt portions of the records submitted under seal in public-records mandamus cases must be disclosed:

“[W]hen 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. *If the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.*”

(Emphasis added.) *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 31, 661 N.E.2d 180 (1996), quoting *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988), paragraph four of the syllabus.

{¶ 17} Consequently, in *McCaffrey*, ___ Ohio St.3d ___, 2012-Ohio-4246, 976 N.E.2d 877, at ¶ 35-37, we held that the respondents in a public-records mandamus case had complied with a records request by providing copies of civil-case logs that had been redacted to exclude the narrative portions of the logs that were covered by attorney-client privilege.

{¶ 18} The city nevertheless posits three separate arguments to support the court of appeals' conclusion. Vermilion first claims that Anderson waived her right to the nonexempt portions of the requested attorney-billing statements because after the court of appeals' judgment, she requested summaries of the information in attorney bills excluding attorney-client information and the city satisfied that request. It is true that providing the requested records to a relator generally renders moot a public-records mandamus claim. *See State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22. But Anderson's postjudgment records request was for records for a different period of time—June 2010 through May 2012—than the period at issue in this case—January through April 2010. Therefore, Anderson did not waive her mandamus claim or appeal by seeking and receiving different records than those at issue in this case.

{¶ 19} The city next claims that it need not provide copies of the nonexempt portions of the requested attorney-billing statements because after redacting the narrative portions that are covered by the attorney-client privilege, the remainder would be “meaningless.” But there is no indication that the city's subjective belief concerning the value of this information is true. The provision of information concerning the hours expended and rate charged for attorney services may have some value to the requester. Nor is there any exception to the explicit duty in R.C. 149.43(B)(1) for public offices to make available all information that is not exempt after redacting the information that is exempt.

{¶ 20} Finally, the city contends that the statements were either exempt from disclosure under the attorney-client privilege or so inextricably intertwined so as to also be privileged. The court of appeals agreed with that assertion based on our decision in *Dawson*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, where we noted that attorney-billing statements withheld by a school district

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were “either covered by the attorney-client privilege or so inextricably intertwined with the privileged materials as to also be exempt from disclosure.” *Id.* at ¶ 29.

{¶ 21} Nevertheless, in the very same paragraph cited by the city and relied on by the court of appeals, we emphasized that the school district did not have to provide the nonexempt portions of the statements to the requester in that case because the district had already provided summaries containing the nonexempt information:

Therefore, the school district properly responded to Dawson’s request for itemized invoices of law firms providing legal services to the district in matters involving Dawson and her children by providing her with summaries of the invoices including the attorney’s name, the fee total, and the general matter involved. No further access to the detailed narratives contained in the itemized billing statements was warranted.

Id.

{¶ 22} In essence, the relator in *Dawson* was not entitled to the nonexempt portions of the requested itemized attorney-billing statements, because she had already been provided that information by the school district in the summaries. This rendered the relator’s claim for that part of the records moot. *Striker*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, at ¶ 22.

{¶ 23} This is the crucial fact that distinguishes this case from *Dawson*. Vermilion did not provide Anderson with alternate records that contain the nonexempt information from the requested attorney-billing statements for January 2010 through April 2010. Therefore, her claim for these records is not moot, and she is entitled to that portion of the statements after they have been redacted to prevent disclosure of the narrative portions that are covered by the attorney-client

privilege. R.C. 149.43(B)(1); *Natl. Broadcasting Co.*, 38 Ohio St.3d 79, 526 N.E.2d 786, at paragraph four of the syllabus. By concluding otherwise, the court of appeals erred.

{¶ 24} Therefore, the court of appeals erred in denying Anderson's motion for summary judgment and granting summary judgment in favor of the city on Anderson's public-records mandamus claim. Anderson established her entitlement to a writ of mandamus to compel Vermilion to provide her with copies of the nonexempt portions of the requested itemized attorney-billing statements.

Statutory Damages and Attorney Fees

{¶ 25} Anderson claims that the court of appeals also erred in denying her request for statutory damages and attorney fees. In assessing this claim, we review whether the court of appeals abused its discretion in denying the request. *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, 950 N.E.2d 965, ¶ 12.

{¶ 26} The court of appeals did not abuse its discretion in denying Anderson's request, because a large part of the requested statements are exempt from disclosure. *See State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 64 (denying request for statutory damages and attorney fees for reasons including that most of the public-records claims lacked merit). In addition, a well-informed public office could have reasonably believed, based on our decision in *Dawson*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, at ¶ 29, that the nonexempt portions of the attorney-billing statements could be withheld from disclosure. *See* R.C. 149.43(C)(1) and (2); *see also State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 37 and 40.

Conclusion

{¶ 27} Based on the foregoing, the court of appeals erred in granting summary judgment in favor of the city and denying Anderson's claim for a writ of mandamus. We reverse that portion of the judgment of the court of appeals and remand the cause for further proceedings consistent with this opinion. We affirm the portion of the judgment denying Anderson's request for statutory damages and attorney fees.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

Seeley, Savidge, Ebert & Gourash Co., L.P.A., and Andrew D. Berner, for appellant.

Weston Hurd, L.L.P., Shawn W. Maestle, and Timothy R. Obringer, for appellee.

APPENDIX C

Public records case against the city dismissed; then re-filed

By Karen Cornelius

Law director Ken Stumphauer reported to Vermilion City Council on Monday, May 7, that a public records case concerning legal bills was dismissed by the Sixth District Court of Appeals on April 25. The case was initiated by former mayor Jean Anderson against the city. On May 1, Anderson's attorney filed a motion for reconsideration of the court's decision and judgment.

According to Stumphauer of Stumphauer/O'Toole, he provides the city with two bills. The first is a general one with the case name, the hours spent, and total amount which is public record. Concurrently he files a second bill which is a detailed breakdown of the legal work as far as what was involved, who was involved, who was deposed, etc. Only the mayor sees this detailed breakdown which includes information that would be attorney/client privileged. The law director said Anderson sued the city to determine how much money his firm was getting paid. He stated Anderson wanted these details records which are not public record because they contain attorney/client privilege, a time-honored tradition. Anderson's attorney had asked for statutory damages of \$1,000 per page and if successful would have cost the city thousands of dollars.

Stumphauer said that prior to the Sixth District ruling, there was a request to produce specific records for the three

judges to look at in chambers. That was done and Stumphauer said the court ruled in the city's favor that the detailed bills are not public documents. He said the case was dismissed. Since no good deed goes unpunished, said Stumphauer, Anderson's attorney, Andrew Berner of Sealey, Sawidge, Ebert & Gourash, filed a motion of re-consideration at the same Court of Appeals. He said the judges' opinion has strong language in supporting Vermilion and will not go to the Ohio Supreme Court. "We'll respond to the Sixth District Court in Toledo and hopefully this will then be concluded," said the law director.

After the council meeting, Stumphauer said according to the law, the city is not required to create another public record such as the one Anderson's attorney appears to want for the motion of re-consideration. He speculates that the motion was filed on the basis that the general billing records didn't identify the lawyer. It appears that the re-consideration is asking the court to redact these fee statements with the argument that as a result the privileged communications will be protected and at the same time will protect the public's right to know what legal issues confront the city and the legal costs involved. Stumphauer added that Anderson was supplied with copies of the checks the city wrote his firm.

On Tuesday, May 8, Anderson was

Public records case against the city dismissed; then re-filed

eager to respond because she felt there was a misrepresentation of the facts concerning her interest in this public records case. She said she was not foolish enough to ask for what she knows is privileged information. All she wanted was a basic fee bill statement with the account number, case name, the hours spent, and the total amount. "That's all I'm looking for, no more detail than that," said Anderson. She stated that it is important for the taxpayers to know what they're paying for and it's important for city council to know what they are approving to pay, not just see a total figure and no breakdown. She alleged if there is no itemization then council can't see what they are approving and the citizens aren't seeing it either. "That's a concern."

She bases the lack of itemization in fee invoices to her request for public records for January/February of 2010 when the basic billing did show the case, hours, and total. She alleged when she wanted the same records for March, April, and May of 2010 the city would not share them with her claiming attorney/client privilege. "All I was looking for was a set similar to February's. I got nothing." She alleged that between February/March the format of the billing statements was changed and that format went to the court which included the attorney/client privileged information. Anderson said that the first statement she

received had nothing in it that was privileged, but she alleged the bills submitted to the court were different than this first statement in her hands. She acknowledged that she did receive copies of the checks sent to the law firm from the city, but contended just seeing a total amount on a check was not the information she wanted.

"The court did not redact the information from the billing, or blot out the information if it was privileged," said Anderson. She said she only wanted what the public was allowed to see. "Redact what I can't see, they do that all the time." Her concern is the lack of transparency to know fully what tax dollars are paying for and the concern for the media which depends on public records, Anderson alleged when privileged information is included it denies everyone the opportunity to see and closes the door to public record information.

"It's the public's right and responsibility to know about our tax dollars and to ensure transparency," Anderson said this is not political, it's about the public's right to know. If access is being denied, she is taking that seriously. "I don't want to see privileged information, I know better. I want a basic fee bill statement." She stated she feels this case has generated enough concern to go to the Ohio Supreme Court and she expects her attorney to file there.