

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEAN A. ANDERSON)
)
 Appellant,)
)
 v.)
)
 CITY OF VERMILION C/O)
 BRIAN HUFF, FINANCE)
 DIRECTORS,)
)
 Appellees.)

CASE NO. 12-0943
 On Appeal from the
 Erie County Court of Appeals
 Sixth Appellate District
 Court of Appeals E-10-0040

**BRIEF IN OPPOSITION TO
 RELATOR'S MOTION FOR RECONSIDERATION**

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 SUPREME COURT OF OHIO

Relator, Jean Anderson, the former mayor of the City of Vermilion, concedes that this Court has statutory authority to determine whether attorney's fees or damages should be awarded in a public records mandamus matter. *See*, Anderson's Motion for Reconsideration at page 4. Indeed, because this Court modified its prior decision in *State Ex Rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, and thereby reversed the Sixth District's reliance thereon, it is this Court and not the Sixth District Court of Appeals which logically is empowered with the determination of whether statutory damages are appropriate. *See*, R.C. §149.43(C).

As this Court has stated several times, the award of attorney fees is not mandatory but discretionary. *State Ex. Rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 1996-Ohio-161; *State Ex Rel Fox v. Cuyahoga Cty. Hosp. Sys.*, 39 Ohio St.3d 108 (1988). In determining whether attorney's fees under R.C. §149.43(C) are appropriate, a court analyzes several factors including (1) whether a political subdivision acted in good faith in denying a public request; (2) whether the applicable subdivision's actions were reasonable; (3) whether the public would benefit from the release of the records in question; and (4) whether a petitioner's claims were, for the most part, with or without merit. *See, e.g. State Ex Rel Wadd v. Cleveland*, 81 Ohio St.3d 50, 54 (1998); *State Ex Rel Mahajan v. State Medical Board of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995 at ¶¶60-64; *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542; *State Ex Rel Nick v. Cleveland*, 83 Ohio St.3d 379, 385, 1998-Ohio-290.

Notably, Ms. Anderson acknowledges that this Court engaged in such analysis in its original Opinion and Judgment. Consequently, reconsideration is not even appropriate pursuant to this Court's Rules of Practice. *See*, S. Ct. Prac. R. 11.2(B). Notwithstanding, this fact that Anderson is merely rearguing issues this Court already addressed, Vermilion respectfully states that neither statutory damages nor attorneys fees would be appropriate since the City's actions were entirely reasonable and in good faith based on existing law which this Court solidified in *State Ex Rel Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009.

Moreover, it must be highlighted that, unlike the Relator in *Dawson, supra*, Ms. Anderson specifically requested only "itemized billing statements". *See*, Mandamus Complaint, Exhibit C. Because the Former Mayor specifically identified records she wanted produced, there could be no summary or such which could even remotely satisfy her request, like in *Dawson*. Recall that in *Dawson*, the request to the political subdivision specified "copies of any and all invoices received from any and all law firms providing services relating to any matters * * *." *Id.* at ¶2. This Court, based on such a request and because summaries were already provided since they would meet the very broad and general documents request, stated that itemized billing statements were completely protected by the attorney-client privilege:

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.

While this Court has now modified its decision in *Dawson* to require redaction, such determination does not alter or change Vermilion's good faith and reasonable reliance that detailed itemized billing statements are privileged. See, e.g., *State Ex Rel Tax Payer's Coalition v. Lakewood*, 86 Ohio St.3d 385, 392 (1999); *State Ex Rel Nick v. Cleveland*, 83 Ohio St.3d 379, 385, 1998-Ohio-290. This Court's initial opinion, in the case *sub judice*, recognizes such and Vermilion suggests that there is no basis for this Court to reconsider its determination that Vermilion could properly withhold the itemized billing statements from disclosure. See, *State Ex Rel. Anderson v. City of Vermilion*, ____ Ohio St.3d ____, 2012-Ohio-5320 at ¶26.

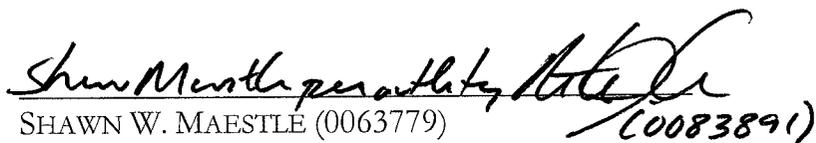
Finally, even though this Court has ordered a surgical redaction of the itemized billing records, attorney fees and statutory damages would still not be proper since Anderson's claims were, for the most part, without merit. *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542; *State Ex Rel Nick v. Cleveland*, 83 Ohio St.3d 379, 385, 1998-Ohio-290. On this issue it must be recalled that at the initiation of this public records request and mandamus action, Anderson was demanding the itemized billing records be completely disclosed without any redaction. See Mandamus Complaint. Only later did Anderson alter her request and suggest that she would accept summaries or redacted copies. Notably, the former mayor certainly knew what documents existed prior to the inception of this action. Because this Court has maintained that nearly all of the information contained in Vermilion's itemized billing records are privileged,

Anderson's mandamus action and claims were largely without merit likewise justifying a denial of statutory damages and/or attorney fees.

CONCLUSION

In sum, this Court adequately and fully addressed the attorney fee and statutory damage issue presented by R.C. §149.43(C) in its initial decision and, therefore, reconsideration under this Court's rule is not proper. Notwithstanding, this Court's decision to deny Anderson's request for fees and damages was appropriate since Vermilion's actions in withholding the itemized billing statements were completely reasonable, in good faith and proper under a fair reading of this Court's decision in *State Ex Rel Tax Payer's Coalition v. Lakewood*, 86 Ohio St.3d 385, 392 (1999) and other case law which has now been reaffirmed in *State Ex Rel Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009..

Respectfully submitted,

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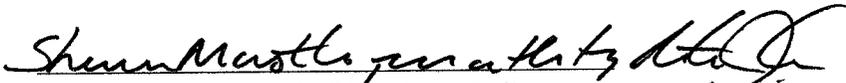
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CERTIFICATE OF SERVICE

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 10th day of December, 2012, to the following:

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