

IN THE SUPREME COURT OF OHIO

AUTUMN HEALTH CARE OF
ZANESVILLE, INC.,

Relator,

v.

OHIO ATTORNEY GENERAL MIKE
DEWINE, et al.

Respondents.

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) CASE NO. 2013-1884
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) Original Action in Mandamus
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MEMORANDUM CONTRA OF AUTUMN HEALTH CARE OF ZANESVILLE, INC.
TO STATE RESPONDENTS OHIO ATTORNEY GENERAL MIKE DEWINE, OHIO
DEPARTMENT OF HEALTH AND OHIO DEPARTMENT OF MEDICAID'S
MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Respondents in this case request judgment on the pleadings contending Relator Autumn Health Care of Zanesville, Inc. has failed to comply with the requirements of the Public Records Act in submitting a public records request to Respondents. They have attempted to bolster their motion pursuant to Civ. R. 12(C) and demonstrate grounds for the motion with affidavits and evidentiary matters outside the four corners of the Complaint and Answer and the attachments thereto filed in these proceedings. This is a tacit admission that Respondents' motion cannot meet the standard for judgment on the pleadings and fails where it cannot present matters outside the pleadings.

II. STATEMENT OF THE FACTS

On or about June 6, 2013, on the premises of Autumn's facility, Respondents held a press conference where they disclosed that they had placed hidden video cameras in Autumn's facility, monitoring its residents. *See* Complaint at ¶4. As a result of this press conference and the information disclosed thereby, on or about July 26, 2013, Autumn, through its counsel, sent written public records requests to Respondents for documents of and relating to the press conference. *Id.* As a part of its records requests, Autumn requested the following:

- (1) The agencies' most recent document retention policy, including but not limited to the policy for the retention of electronic mail;
- (2) Any and all records relating to, concerning or documenting in any way, any and all interaction or communication, including but not limited to e-mail communication, to, by or with the Agencies concerning:
 - a) "Autumn Health Care,"
 - b) a press conference on June 6, 2013, described in the request letter and/or
 - c) the patients or employees of "Autumn Health Care,"

all within the last year;

- (3) Any and all records relating to, concerning or documenting in any way, any and all interaction or communication, including but not limited to e-mail communication, concerning the press conference held on or about June 6, 2013 at Autumn Healthcare of Zanesville;

(4) Any and all records, including but not limited to e-mail communication, relating to, concerning or documenting in any way for calendar years 2012 through 2014, planning and/or briefing meetings for media coverage of the activities of the Ohio Attorney General's office or of the Ohio Attorney General, himself, Mike DeWine, and any or all of the other Agencies concerning nursing home regulatory compliance and enforcement, and

(5) Any and all records, including but not limited to e-mail communication, relating to, concerning or documenting in any way, any and all interaction or communication by, to or with any individuals or entities that mention, relate to or concern "Autumn Health Care" or any derivative or permutation of said name.

(6) Unless otherwise noted, you may limit the scope of this request to twelve (12) months prior to the date of this letter.

Id. at ¶5. *See also* Exhibits A-J to Complaint.

At the time of the press conference, Autumn had no other information other than that disclosed at the press conference; indeed, Respondents did not provide any documentation until August 30, 2013, one month following Autumn's request. *Id.* at ¶6. Given the limited information available to Autumn, it attempted to describe its requested records as specifically as possible. In its initial letter July 26, Autumn requested any "communication" including e-mails concerning Autumn Health Care and the press conference June 6, 2013. *Id.* at ¶5. Autumn limited the scope of this request to all documents created within the last year. *Id.* Additionally, Autumn requested any e-mail communication involving the briefing schedule for media coverage for Respondent Attorney General Mike DeWine, who was the sole speaker at the press event June 6. *Id.* As a means of limiting the scope of this request, Autumn requested only events related to "nursing home regulatory compliance and enforcement" for a period of one year prior to the press event, and one year following the press event. *Id.* Autumn's requests limited Respondents' production of public records to a period of no more than one year prior to the press event and one year following, concerning one Respondent and his interaction with three other agencies.

Respondents distributed its responses to Autumn's public records request piecemeal, providing documents on August 30, 2013, October 1, 2013 and November 1, 2013, however none

of these documents contained responses prior to June 3, 2013. *Id.* at ¶6. In response to Respondents' failure to produce documents prior three days before the press conference, Autumn filed its Complaint in mandamus on November 30, 2013, requesting these documents be produced pursuant to its public records request. *See* Complaint. As a part of its Complaint, Autumn attached Exhibit K, a document titled "Projected Timeline for Autumn Health Care of Zanesville." *See* Exhibit K to Complaint. This timeline outlined the events of the administrative actions to be taken by Respondents concerning Autumn before these events were to occur. *See* Complaint at ¶9 and Exhibit K. The timeline was produced to Autumn with the public records requests responses provided by Respondents. *Id.*

The timeline is dated June 4, 2013 at the bottom left corner and begins at June 3, 2103, three days prior to the press conference and ends fifteen days into 2014. *Id.* The timeline includes several events requiring the co-operation of Respondents including informal dispute resolution from June 6 through August 2, a hearing for proposed license revocation on July 5, a meeting between the Department of Aging and Medicaid "Mid July 2013," a second hearing on the license revocation "Fall 2013," and the Director issuing a final order on revocation "End of 2013." *Id.* The timeline represents a thoughtful and planned approach to Autumn's license revocation, two days prior to the press conference, before any of the events took place and/or should have been planned. *Id.* In preparing the timeline, it is Autumn's contention that Respondents would have had to meet and confer on these issues prior to June 6, resulting in meeting minutes, e-mails coordinating meetings between the three separate agencies and possible memoranda produced as a result with the recommendations of the agencies. *See* Complaint at ¶13. In its public records requests, Autumn received no documents relating to the timeline and the coordination of the agencies, other than the timeline itself. *Id.* at ¶6, 8. Where Autumn has requested all documents in the one year prior to the press conference June 6 relating to the organization and coordination in preparing for the

conference and has received no documents pursuant to this request, Autumn may file its Complaint in mandamus to demand production of the same. With the best information available to Autumn under the circumstances at the time of the press conference, and with Exhibit K to the Complaint, Autumn has provided the most specific public records request possible and its claim should not be dismissed.

III. LAW AND ARGUMENT

A. Standard for judgment on the pleadings.

Civ. R. 12(C) permits any party to move for judgment on the pleadings after the pleadings are closed but “within such time as not to delay the trial.” *Rothchild v. Humility of Mary Health Partners*, 163 Ohio App.3d 751, 2005-Ohio-5481, 840 N.E.2d 258, ¶6 citing Civ. R. 12(C). The standard for ruling on a Civ. R. 12(C) motion is the same as that used for motions under Civ. R. 12(B)(6). *Id.* As for motions under Civ. R. 12(B)(6), when reviewing a motion for judgment on the pleadings a court must “limit its determination of [the] motion solely to the allegations in the pleadings and any writing attached to the pleadings.” *Ferchill v. Beach Cliff Bd. of Trustees*, 162 Ohio App.3d 144, 2005-Ohio-3475, 832 N.E.2d 1238, ¶6. However, unlike a motion under Civ. R. 12(B)(6), the trial court must consider both the complaint and the answer when ruling on a Civ. R. 12(C) motion. *Rothchild*, 163 Ohio App.3d, ¶6, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996). Dismissal is only appropriate under Civ. R. 12(C) where a court construes the material allegations in the complaint “with all reasonable inferences drawn in favor of the nonmoving party as true” and “finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *Id.*, citing *Flanagan v. Williams*, 87 Ohio App.3d 768, 772, 623 N.E.2d 185 (4th Dist. 1993), reversed on other grounds.

Respondents are not entitled to a motion for judgment on the pleadings where they cannot satisfy the Civ. R. 12(C) standard of review and where they have attached evidence outside the

pleadings to their Motion which this Court cannot consider when deciding the Motion.

Respondents cannot show that Autumn can “prove no set of facts that would entitle [it] to relief” since, as further established below, Autumn has provided as specific of public records request as possible to warrant a response. *Id.* Where Autumn can show it is entitled to a response from Respondents, its claim should proceed. Respondents have also attached evidence outside the pleadings which cannot be considered for the purposes of a Civ. R. 12(C) motion. In support of their Motion for Judgment on the Pleadings, Respondents have attached four (4) affidavits from Erin Butcher-Lyden, Heather Coglianesse, Cheryl R. Hawkinson and David H. Dokko. *See* Exhibits 1-4 to Motion for Judgment on the Pleadings. These affidavits are supplied by the parties responsible for producing the records requests for the agencies and each state that the records were produced and that “the request was overly broad.” *Id.* These affidavits cannot be considered for the purposes of Respondents’ Civ. R. 12(C) motion since they are outside of the pleadings and were not attached to Respondents’ Answer. Respondents have therefore not provided sufficient information to be granted a Civ. R. 12(C) motion and Autumn’s claim should be permitted to continue.

B. Autumn’s public records request is sufficiently specific to satisfy the requirements of the Public Records Act.

Given the limited information available to Autumn at the time of the press conference, Autumn has provided a public records request which is specific to satisfy the standard of the Public Records Act and to permit Respondents an opportunity to locate the documents Autumn requests. To be subject to disclosure under the Public Records Act, materials must fall under the definition of “public record.” *State ex rel. Beacon Journal Publ’g Co. v. Bodiker*, 134 Ohio App.3d 415, 422, 731 N.E.2d 245 (10th Dist. 1999), citing *State ex rel. Rea v. Ohio Dept. of Edn.*, 81 Ohio St.3d 527, 529, 692 N.E.2d 596 (1998). A public record is “any record that is kept by any public office.” *Id.*, citing R.C. 149.43(A). A “record” is “any document, device, or item, regardless of physical form or

characteristic, created or receive by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” *Id.*, citing R.C. 149.011(G).

Courts construe the Public Records Act broadly, ruling in favor of broad access to records. *State ex rel. O’Shea & Assocs. Co., LPA v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶17. Minutes of meetings are records within the meaning of the Public Records Act and must be produced upon request. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 973, ¶27. Further, the Ohio Sunshine Law, R.C. 121.22, requires public bodies to prepare minutes for any regular or special meeting. *Id.*, citing R.C. 121.22(C).

When requesting public records, “it is the responsibility of the person who wishes to inspect and/or copy the records to identify with reasonable clarity the records at issue.” *State ex rel. O’Shea & Assocs. Co., LPA v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶9, citing *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 391, 715 N.E.2d 179 (1999). Identifying records with reasonable clarity does not hold the requester to identifying specific items, indeed a public records request will be considered “in the context of the circumstances surrounding it.” *Id.*, citing *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶33. In requesting public records, the requester is not required to “specify the author and date of the records requested.” *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶37, citing *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 320, 631 N.E.2d 1048 (1994). The *Morgan* court held that while providing specific names and authors “may be helpful in identifying the requested records, the failure to do so does not automatically result in an improper request for public records, particularly where, as here, it is evident that the public office was aware of the specific records requested. We do not require

perfection in public records requests.” *Id.* The *Morgan* court also found that a request will be sufficiently specific where it is modeled on a response from the public office. In *Morgan* the relator requested records from the city of New Lexington related to her termination from her position and relating to 18 charges against her in a criminal investigation. *Id.* at ¶33. Where the relator structured her request to “mirror the city’s letter specifying 18 separate charges against her,” her request was sufficiently specific. *Id.*

Given Autumn’s limited information at the time of the press conference on June 3, Autumn has provided the most specific request possible and has complied with the requirements of the Public Records Act. In its letter July 26, Autumn requested any “communication” concerning the press conference June 3 and limited the scope of its request to one year prior to the July 26 letter. *See* Exhibit A to Complaint. Autumn also requested the briefing schedule for Respondent Attorney General Mike DeWine, the sole speaker at the press event, and limited the scope of its request to events related to “nursing home regulatory compliance and enforcement” for a period of one year prior to the press event and one year following the press event. *Id.* Autumn’s requests were limited to only the records of the agencies relating to the planning and coordination of a single event occurring on one day at a sole location. Where Autumn only knew that the press conference occurred, this was the most limited, specific request it could make prior to receiving any documents from Respondents.

In addition, once Autumn received documents from Respondents, it attempted to further tailor its request to specific meetings it then knew to have occurred from the public records. In Exhibit K attached to Autumn’s Complaint, Autumn produced a timeline provided by Respondents in their public records request that outlined every hearing and meeting held by the agencies in preparation for revoking Autumn’s license. *See* Exhibit K to Complaint. The timeline was dated June 4, two days prior to the press conference, and continued through “End of 2013,” listing

hearings for the proposed license revocation on July 5 and “Fall 2013,” a meeting between the Department of Aging and Medicaid “Mid July 2013,” and a final order to be issued by the Director “End of 2013.” *Id.* Each of these events required Respondents to meet and confer regarding the next step of action; however, in the records requests Autumn did not receive any meeting minutes, e-mails coordinating schedules of Respondents or any memoranda about the upcoming meetings. Given the significant amount of coordination required to have all parties present for the events listed on the timeline, which did eventually occur, it is highly unlikely that no records surrounding these events were ever produced. As such, in spite of Autumn’s attempts to tailor its requests to the specific events listed on the timeline, Autumn has yet to receive the entirety of the public records responsive to its request.

C. Autumn’s request is not moot where it has not received all responsive documents to its request.

Autumn has not received all responsive documents to its request and its mandamus claims is not moot. As a general rule, when a mandamus action is filed to enforce a public records request and the records are subsequently produced, the mandamus action becomes moot. *State ex rel. WBNS 10 TV v. Franklin Cty. Sheriff’s Office*, 151 Ohio App.3d 437, 2003-Ohio-409, 784 N.E.2d 207, ¶13, citing *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000). Respondents allege that Autumn’s claim is moot since it has produced responsive documents on August 30, October 1 and November 1; however, these responses are not complete. As shown in Exhibit K to Autumn’s Complaint, meetings and hearings occurred according to the timeline for which Autumn has not received records. Given the extent of coordination required to convene three agencies, that no records exist as to the organization and existence of the meetings seems infeasible.

Additionally, Respondents have provided inadmissible evidence in support of their contention that they have produced responsive records. As means of showing they have produced

responsive records, Respondents cite the affidavits of Erin Butcher-Lyden, Heather Coglianesse, Cheryl Hawkinson and David Dokko. *See* Motion for Judgment on the pleadings at pp. 12. For a motion under Civ. R. 12(C), Respondents are prohibited for introducing evidence that is outside the pleadings in the case. *Fercbill v. Beach Cliff Bd. of Trustees*, 162 Ohio App.3d 144, 2005-Ohio-3475, 832 N.E.2d 1238, ¶6. Respondents therefore cannot use the four affidavits attached to their Motion for Judgment on the Pleadings to support their contention that no other responsive records exists. As such, Respondents' Motion should be denied.

D. Autumn can show it is entitled to a writ of mandamus.

Autumn can show it should receive a writ of mandamus for the responsive records it has not received pursuant to the public records request. To receive a writ of mandamus, a relator must show that it “(1) has a clear legal right to the relief prayed for, (2) the respondent is under a clear legal duty to perform the requested act, and (3) the relator has no plan and adequate remedy at law.” *State ex rel. Beacon Journal Publ'g. Co. v. Bodiker*, 34 Ohio App.3d 415, 420, 731 N.E.2d 245 (10th Dist. 1999), citing *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 451 N.E.2d 225 (1983). A relator meets all three requirements when a public office fails to comply with R.C. 149.43(B) requirements for public access to public records. *Id.*, citing *State ex rel. Dist. 1199, Health Care & Social Serv. Union, SEIU, AFL-CIO v. Gulyassy*, 107 Ohio App.3d 729, 733, 669 N.E.2d 487 (10th Dist. 1995). R.C. 149.43(B) states that “[u]pon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during business hours.” For the purposes of R.C. 149.43(B), a “record” is defined as “any document, device or item . . . created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions policies, decisions, procedures, operations or other activities of the office.” R.C. 149.011(G).

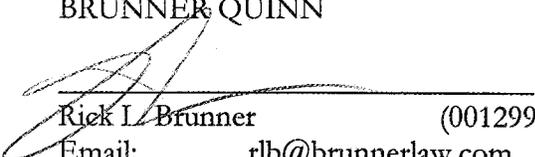
Autumn has properly requested records within the meaning of R.C. 149.011(G) which it has not received and it is therefore entitled to a writ of mandamus. In its public records request, Autumn requested “communication” between Respondents concerning Autumn and the press conference June 6, any documents relating to the media coverage by Respondent Attorney General Mike DeWine and Respondent’s document retention policies. *See* Complaint at ¶5. All three of these requests “document the organization[s]” of Respondents by showing the planning and coordination of Respondents as they prepared for the press conference June 6. Each of these requests required the use of public funds in participating in Respondents’ business and each of these requests falls within the meaning of the public records request and should have been produced to Autumn. Autumn has received no records for the organization of the press conference June 6 in response to its request. Where Respondents were coordinating the appearance of three agencies and the Attorney General of Ohio, that no e-mails, schedules, agenda, memoranda or meeting minutes exist is nearly impossible. Autumn has made a valid public records request and is entitled to a writ of mandamus to enforce it.

IV. CONCLUSION

Autumn has made a request in mandamus that should be honored by this Court and Respondents should be required to turn over the responsive documents pursuant to Autumn’s request. With the limited information available to Autumn at the time of its request, Autumn has made its requests as specific as possible. Moreover, Autumn has attempted to tailor its request to prevent undue burden on Respondents by providing Exhibit K, listing the specific events for which Autumn requests records. Autumn has satisfied the standard of the Public Records Act and should receive its writ of mandamus.

Respectfully Submitted,

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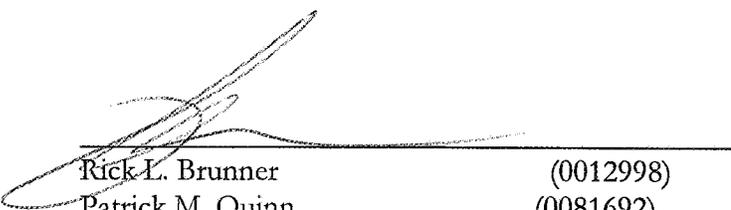
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via regular mail on June 19, 2014.

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