

ORIGINAL

Case No. 2014-1141

**Supreme Court
of the State of Ohio**

**STATE OF OHIO *ex rel.*
OHIO REPUBLICAN PARTY,**

Relator,

v.

EDWARD FITZGERALD, County Executive, County of Cuyahoga County,

and

COUNTY OF CUYAHOGA and KOULA CELEBREZZE,

Respondents.

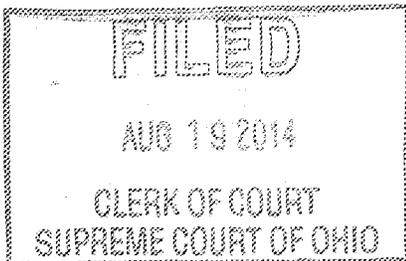
**RELATOR'S MEMORANUDM
IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

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STATE OF OHIO <i>ex rel.</i>	:	Case No. 2014-1141
OHIO REPUBLICAN PARTY,	:	
	:	
Relator,	:	
	:	
v.	:	
	:	
EDWARD FITZGERALD, <i>et al.</i> ,	:	RELATOR'S MEMORANUDM
	:	IN OPPOSITION TO RESPONDENTS'
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The State of Ohio, on relation to the Ohio Republican Party (hereinafter, "Relator"), hereby tenders the following Memorandum in Opposition to Respondents' Motion to Dismiss (filed on August 12, 2014). This action arises from the failure of the Respondents to comply with their legal duties to produce *all* public records in their possession, custody and control which are responsive to Relator's public records request. Specifically, Relator has sought to obtain copies of Cuyahoga County's key-card swipe data that shows when County Executive Edward FitzGerald enters and/or leaves a county building or county parking facilities, yet the Respondents continued to refuse to produce all records responsive thereto.

Instead of recognizing the "fundamental principle of judicial review in Ohio that courts should decide cases on their merits, not on minor or technical violations," *State ex rel. Sudlow v. Hancock Cty. Bd. of Comm'rs*, 93 Ohio St.3d 1224, 1226, 757 N.E.2d 375, 2001-Ohio-1612 (2001), Respondents feign a baseless procedural issues concerning: (i) the use of a verified complaint versus a supporting affidavit; and (ii) the personal knowledge requirement to attest to the facts supporting an original action. And even beyond such frivolous procedural contentions, Respondents posit the amazing (tough frivolous) contention that this mandamus action has

become moot notwithstanding their acknowledgment that they still have not produced to Relator *all* records responsive to the public records request at issue herein.

As developed in the following memorandum, Respondents effort to avoid an adjudication on the merits is clearly without merit and, thus, the motion to dismiss must be denied.

MEMORANDUM IN OPPOSITION

A. Not only has this Court regularly accepted verified complaints in original actions, but a verified complaint is the functional equivalent to a supporting affidavit.

Initially, Respondents attempt to create a non-existent procedural issue concerning the filing herein of a verified complaint, as opposed to a supporting affidavit, in order to commence this original action. (*See* Motion to Dismiss, at 6-8.) While this Court has “routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge,” *State ex rel. Hackworth v. Hughes*, 97 Ohio St. 3d 110, 776 N.E.2d 1050, 2002-Ohio-5334 *24, this Court has never found a verified complaint to be insufficient to satisfy the affidavit required. And in fact, this Court regularly and routinely accepts verified complaints in lieu of affidavits in original actions. *See, e.g., State ex rel The Warren Newspapers v. Hutson*, 70 Ohio St.3d 619, 627, 640 N.E.2d 174, 1994-Ohio-5 (1994)(“[p]ursuant to R.C. 149.43(C), this action was filed as an original action in mandamus in this court. The verified complaint for writ of mandamus was filed on September 8, 1993”); *State ex rel. Richfield v. Laria*, 135 Ohio St.3d 1468, 989 N.E.2d 68, 2013-Ohio-2512 (2013)(“[u]pon consideration of relator's motion for leave to file a verified complaint for a writ of mandamus and other filings under seal ..., it is ordered by the court that the motion to file the case under seal ... are granted”); *State ex rel. City of Toledo v. Board of*

Comm'rs of Lucas Cty., 32 Ohio St.3d 352, 353, 513 N.E.2d 769 (1987)(“Toledo filed a verified complaint with this court and requested a writ of mandamus”).

As is self-evident, a verified complaint and a supporting affidavit are functionally equivalent. *See, e.g., State ex rel. Spencer v. East Liverpool Planning Com'n*, 80 Ohio St.3d 297, 298, 685 N.E.2d 1251, 1997-Ohio-77 (1997)(“[s]worn pleadings constitute evidence for purposes of Civ.R. 56, and courts are not limited to affidavits in determining a summary judgment motion”)¹; *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991)(“[a] verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge”); *Kelly Services, Inc. v. Greene*, 535 F.Supp.2d 180, 181 n.1 (D.Me. 2008)(“[a] verified complaint may be ‘treated as the functional equivalent of an affidavit’” (quoting *Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991))); *Maiworm & Associates, Inc. v. Maiworm GmbH & Co.*, 467 F.Supp. 975, 976 (D.S.C. 1979)(“[t]he accompanying verified petition, which for the purposes of this case will be treated as a verified complaint, is the equivalent of an affidavit”). For a verified complaint and a supporting affidavit both tender evidence before a court at the outset of a case so as to demonstrate sufficient and actual facts (as opposed to mere averments) so as to prove (and not simply allege) the existence of a colorable claim for relief. It this basic principle which is the reason this Court requires verified factual statements in support of the filing of an original complaint. And, thus, this Court has regularly accepted and considered both verified complaint

¹ Respondents cite to language in Ohio R. Civ. P. 65(A) which makes reference to both an affidavit or a verified complaint as somehow compelling the conclusion that when reference is made elsewhere only to an affidavit it necessarily leads to the conclusion that such reference precludes a verified complaint. (*See Motion to Dismiss*, at 7.) Of course, Ohio R. Civ. P. 56 makes no reference to a verified complaint as being evidence which may support or oppose a motion for summary judgment, yet, as noted above, verified complaints have been found to be akin or equivalent to affidavits and, thus, permissible evidence.

and supporting affidavits to establish the predicate facts in support of initiating an original complaint.

And even if this Court is inclined to find some merit in Respondents' hyper-technical reading the requirement of a support affidavit versus a verified complaint, to dismiss this action would be contrary to the fundamental principle of judicial review noted above "that courts should decide cases on their merits, not on minor or technical violations." *Sudlow*, 93 Ohio St.3d at 1226. For "[f]airness and justice are best served when a court disposes of a case on the merits. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds." *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 193, 431 N.E.2d 644, 647 (1982); see *State ex rel. Wilcox v. Seidner*, 1996-Ohio-390, 76 Ohio St.3d 412, 414, 667 N.E.2d 1220 (Ohio 1996)("it appears that only S.Ct.Prac.R. VI(1)(B)(5)(a) was technically violated. Given the relatively minor violation of this rule and the fundamental tenet of judicial review in Ohio that courts should decide cases on their merits, this court denies appellee's request to strike appellants' briefs"); *Drake v. Bucher*, 5 Ohio St.2d 37, 40, 213 N.E.2d 182 (1966)("[i]n order to promote justice, the court exercises a certain liberality in enforcing a strict attention to its rules, especially as to mere technical infractions."). In light of this Court's long history of accepting verified complaints in lieu of supporting affidavits, as well as the lack of any claimed prejudice to Respondents, there is no flagrant, substantial disregard for the court rules, especially in light of the well-established principle that a verified complaint and affidavit are functionally equivalent.

B. *The affiant to the verified complaint clearly possessed personal knowledge of the facts allegations therein.*

Next, Respondents attempt to create an issue concerning whether Christopher Schrimpf, the individual who verified the factual allegations in the complaint, possessed personal knowledge of those facts. (See Motion to Dismiss, at 9-10.) “The averments in a verified complaint ... may be accepted as evidence only to the extent that, like an affidavit, they present evidence within the personal knowledge of the affiant.” *Brunner Firm Co., L.P.A. v. Bussard*, 2008-Ohio-4684 ¶14 (10th Dist. 2008).

Initially, Respondents bemoan that the verified complaint includes legal conclusion and that Mr. Schrimpf cannot attest to the truth of such legal matters. Respondents premise this assertion on the proposition that only an attorney, judge or otherwise competent expert can testify to various legal conclusions within a verified complaint or even via an affidavit. (See Motion to Dismiss, at 9.) Such an argument demonstrates, however, a fundamental misunderstanding as to the role of witnesses versus the role of the courts. For witnesses generally provide testimony concerning factual matters, not legal conclusions. In fact, it is improper for any witness to provide testimony regarding the law itself. See *Struna v. Ohio Lottery Comm’n*, 2003-Ohio-4011 ¶12 (Ct. Claims 2003) (“testimony regarding matters of law is not appropriate because the court may not abdicate its role as finder of law”). For it is the role of the courts and a judge *ex cathedra*, and not witnesses (including experts), to make pronouncements on the law. See *Escape Enterprises, Ltd. v. Gosh Enterprises, Inc.*, 2005-Ohio-2637 ¶43 (“[u]nder Ohio law, ‘an expert’s interpretation of the law should not be permitted, as that is within the sole province of the court’” (quoting *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App.3d 7, 19 (1983))). And if a witness – be it in a verified complaint or affidavit – should make inadmissible pronouncements on the law, such pronouncements are simply ignored when

considering factual matters. See *Bishopsgate Properties, LLC v. Heiland*, 2011-Ohio-4707 ¶7 (9th Dist. 2011)(“to the extent the affidavit makes bare legal conclusions, we will disregard it in our review”); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(“the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions... While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations”); *Papasan v. Allain*, 478 U. S. 265, 286 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). And the laundry list of matters within the verified complaint which Respondents contend that Mr. Schrimpf “is [not] an attorney, judge, or expert competent to testify about” (Motion to Dismiss, at 9) are legal conclusions, not factual matters.²

Furthermore, Mr. Schrimpf clearly satisfied the personal knowledge requirement to attest to the factual contentions in the complaint. Firstly, Mr. Schrimpf attested under oath and unequivocally that he possessed personal knowledge of the facts within the verified complaint. See *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981)(syllabus ¶2)(“[u]nless controverted by other evidence, a specific averment that an affidavit ... is made

² The only factual matter within that laundry list concerns the Respondents’ refusal to produce the same public records at issue herein to *The Cleveland Plain Dealer*. (See Verified Complaint ¶¶12-15.) But as the pertinent statements in the Verified Complaint indicate, Mr. Schrimpf did not testify as to the veracity of the content of the newspaper article itself but only to the existence of the newspaper article and its content, *i.e.*, the newspaper article was not offered for the truth of the matters asserted therein (and, thus, not hearsay) but was simply being offered to relay what was actually being public reported. See *Dellick v. Eaton Corp.*, 2005-Ohio-566 ¶¶25-26 (while “the newspaper articles were inadmissible to prove the truth of the matter asserted ... appellee could still use the articles for another purpose. Here, appellee wanted to use the newspaper articles merely to demonstrate their existence”); see also *Consumer Portfolio Services, Inc. v. Staples*, 2007-Ohio-1531 ¶28 (6th Dist. 2007)(“[w]hile newspaper articles are self-authenticating pursuant to Evid.R. 902(6), they are inadmissible if offered to prove the truth of a matter asserted in an out-of-court statement”). Additionally, the report by *The Cleveland Plain Dealer* of its unsuccessful efforts to obtain the same public records at issue herein simply provided background and context as to the request subsequently submitted by Relator – again, demonstrating that the articles are not being offered for the truth of the matters asserted therein.

upon personal knowledge ... satisfies the Civ.R. 56(E) requirement that affidavits supporting and opposing motions for summary judgment show that the affiant is competent to testify to the matters stated”); *Household Realty Corp. v. Henes*, 2007-Ohio-5846 ¶12 (8th Dist. 2007) (“[w]here the affiant avers that he or she has personal knowledge of the transaction this fact cannot be disputed absent evidence to the contrary”). Thus, while this Court has “routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge,” *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 857 N.E.2d 88, 2006-Ohio-5439 ¶31 (2006), the verification by Mr. Schrimpf made the requisite express statement without equivocation or conditional language. *See, cf., id.* ¶32 (personal-knowledge requirement not met where affiant stated that the facts in the complaint were “true and correct to the best of his knowledge”); *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 776 N.E.2d 1050, 2002-Ohio-5334 ¶24 (affidavit of relator's attorney stating that the facts in the complaint were “true and accurate to the best of her knowledge and belief” did not satisfy personal knowledge requirement as it did not expressly state that the facts in the complaint were based on the affiant's personal knowledge).

“Additionally, in the absence of a specific statement, personal knowledge may be inferred from the contents of an affidavit.” *Wells Fargo Bank v. Smith*, 2013-Ohio-855 ¶16; *accord State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 985 N.E.2d 467, 2013-Ohio-199 ¶15 (2013)(“p]ersonal knowledge can be inferred from the nature of the facts in the affidavit and the identity of the affiant”). The pertinent and critical facts in a public records mandamus action are the tendering of a request and the response (or lack of a response) by the public office or person responsible for the records. In addition to identifying his position with the Relator, Mr.

Schrimpf is the specific individual who actually tendered the request and engaged in follow-up communications seeking the key-card swipe data that shows when County Executive Edward FitzGerald enters and/or leaves a county building or county parking facilities (which Respondents acknowledge in their motion has not been provided to Relator).

Mr. Schrimpf, to the exclusion of anyone else, clearly satisfied the personal knowledge requirement regarding the material facts concerning the public records request at issue herein. Respondents' effort to the contrary are unavailing.

C. As Respondents have not provided copies of all records responsive to Relator's public records request, this case has not become moot through the Respondents' production of some responsive records.

And in a last ditch effort to avoid this Court deciding this case on its merits, Respondents contend that the claim for mandamus has become moot because, according to Respondents, they "[h]ave [p]rovided [r]esponses to Relator's [p]ublic [r]ecords [r]equest". (Motion, at 10.) In making such an argument, Respondents fail to appreciate a distinction between simply *providing some response or acknowledgement* to a public records request versus complying with the legal duty to *actually produce all of the public records requested*.

"[I]n general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot." *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Comm'rs.*, 120 Ohio St.3d 372, 899 N.E.2d 961 2008-Ohio-6253 ¶ 43 (2008); *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 128, 781 N.E.2d 163, 166, 2002-Ohio-7041 ¶8; *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 396-97, 894 N.E.2d 686, 691-92, 2008-Ohio-4788 ¶¶ 27-28. However, this rule becomes application only when the public office or person responsible for the public records produces *all* of the requested records, not a partial and incomplete production.

Yet, even Respondents have acknowledged that “the key card swipe data for Mr. Fitzgerald would not be released.” (Motion, at 11.) Thus, it borders on the frivolous for Respondents to claim that this action is moot while, at the same time, acknowledging that they are withholding records responsive to Relator’s public records request. Nonetheless, by Respondents’ own admission, certain records responsive to Relator’s public records request have not been released; thus, there is clearly still a dispute regarding the propriety of the refusal of Respondents to release those records and, in particular, the applicability *vel non* and validity *vel non* of a claimed exemption allowing the withholding of the still-unproduced responsive records.³ “Cases are not moot when an actual controversy exists between adverse litigants.” *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518, 687 N.E.2d 661, 1997-Ohio-75; *see Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO, v. Ohio Dep’t of Transp.*, 104 Ohio App.3d 340, 343, 662 N.E.2d 44 (1995)(question becomes moot “[w]here, prior to the rendition of a final decision, an event occurs, without the fault of either party, which renders it impossible for the court to grant effectual relief in a case”). This case is not moot and,

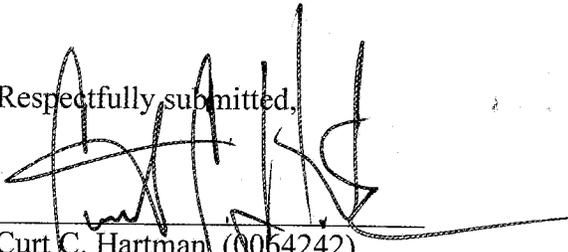
³ Respondents acknowledge that the “key card swipe data for Mr. FitzGerald would not be released pursuant to Ohio Rev. Code §149.433 in light of the fact that the Sheriff’s Department has confirmed the existence of verifiable security threats.” (Motion to Dismiss, at 11.) But Respondents have not cited to, and cannot cite to, any public records mandamus action in which the action was dismissed based upon the *ipse dixit* of the public office or person responsible for the public records that responsive records were exempted from disclosure. *See, e.g., State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 637 N.E.2d 911, 1994-Ohio-246 (where university withheld responsive public records, claiming they were exempted under the Public Records Act, alternative writ issued). As is well-established, “[a] governmental body refusing to release records has the burden of proving that the records are excepted from disclosure by R.C. 149.43.” *State ex rel. Nat. Broadcasting Co., Inc. v. City of Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988). And “exceptions to disclosure are to be construed strictly against the custodian of public records and doubt should be resolved in favor of disclosure.” *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169, 637 N.E.2d 911, 912 (1994). Thus, the proper and correct resolution of the application *vel non* of a claimed exemption under the Public Records Act is ultimately through the development and submission of evidence and briefing on that issue, not through a motion to dismiss where a public office’s self-serving declarations are not subject to independent review, discovery and cross-examination.

accordingly, the motion to dismiss should be denied and either an alternative or peremptory writ of mandamus should issue.

CONCLUSION

The Respondents' Motion to Dismiss lacks merit and, accordingly, must be denied and the appropriate writ issue from this Court.

Respectfully submitted,



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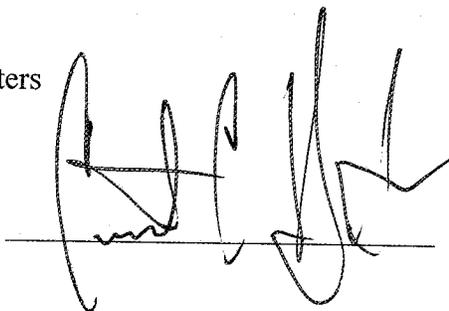
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail on the 19th day of August 2014:

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Robin M. Wilson
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Cuyahoga County Administrative Headquarters
2079 East Ninth Street, 7th Floor
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A handwritten signature in black ink, appearing to be 'M. Wilson', written over a horizontal line.