

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel.	:	
Emilie DiFranco	:	Case No. 14-0831
	:	
Relator,	:	Original Action in Mandamus
	:	
v.	:	
	:	
City of South Euclid, et al.	:	
	:	
Respondents	:	

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**MERIT BRIEF OF  
RESPONDENTS THE CITY OF SOUTH EUCLID AND LEE WILLIAMS**

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**FILED**  
 NOV 13 2014  
 CLERK OF COURT  
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**RECEIVED**  
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## I. STATEMENT OF FACTS

Relator has a long history of making public record requests to the City. (See, *Merit Brief of Appellees, State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538). Over that time, Relator has made dozens upon dozens of public records requests directly to various City officials. *Id.* As a result of these requests, the City of South Euclid has provided her thousands of pages of documents. If in each and every past instance wherein Relator made a public records request, and she felt that either the request had not been fulfilled or she thought there was some delay in the response, she would regularly contact a City official and inquire about the matter. *Id.*

While the request in the instant matter remained outstanding, Relator had two (2) other public records cases pending before this Honorable Court – Case Nos. 2012-1704 and 2012-1893. On February 19, 2014, the Court denied her appeal as to the request for an award of attorney’s fees in both cases, but reversed and remanded Case No. 2012-1704 for a determination by the appellate court as to the award of statutory damages. See, *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538. Relator filed a Motion for Reconsideration that was denied by this Court on May 14, 2014.

Relator then filed the instant action in mandamus on May 21, 2014, *pro se*.

Respondent Lee Williams has been and continues to be the Executive Assistant to the Mayor and Law Director and Purchasing Agent for Respondent the City of South Euclid, Ohio. (See Respondents’ *Submission of Evidence*, Exhibit A, Affidavit of Lee Williams at ¶2.)

On September 5, 2013, Ms. Williams received a public records request from Relator Emilie DiFranco, a true and accurate copy of which was attached to the Complaint as Exhibit B. *Id.* at

¶3. On September 5, 2013, at 4:14 p.m., Ms. Williams sent Relator an email confirming receipt of the public records request, a copy of which is attached to the Complaint as Exhibit D. *Id.* at ¶4. On October 24 2013 at 4:26 p.m. and November 1, 2013 at 3:52 p.m., Ms. Williams sent emails to Relator forwarding numerous documents that were responsive to Relator's public records request. *Id.* at ¶5.

Consistent with her behavior in *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538 and *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-539, at no time after November 1, 2013, did Relator ever attempt to contact Ms. Williams via email, telephone or in person to finalize procurement of the public records she requested, until the this lawsuit in mandamus was served upon the City of South Euclid on or about May 27, 2014. *Id.* at ¶11 and Supreme Court's docket in this matter. Due to the document volume and the need to gather same from various City Departments, Ms. Williams inadvertently omitted to send the remaining documents to Relator until May 30, 2014. *Id.* at ¶6.

Ms. Williams sent emails to Relator dated May 30, 2014 at 12:40 p.m. and May 30, 2014 at 1:37 p.m., forwarding all remaining documents that had been requested by Relator. *Id.* at ¶¶7-11. These included: Land Accounting Fund documents; Legal Accounting documents; Maintenance records; Overtime records; OBM Demo bid documents; B & B Wrecking bid documents; Badger Construction bid documents; Bauman Enterprises bid documents; Imperial Waterproofing bid documents; Katanas Corp. bid documents; and City of South Euclid Resolution No. 38-07.

As of May 30, 2014, Respondents had sent Relator any and all documents that were responsive to her public records request.

## II. LAW AND ARGUMENT

### **Proposition of Law No. 1**

The rule in Ohio is that public records are the people's records and that the officials in whose custody they happen to be are merely trustees for the people.

### **Proposition of Law No. 2**

If an office denies a request in part or in whole, the public office must provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the requester made the initial request in writing, then the office must also provide its explanation for the denial in writing.

### **Proposition of Law No. 3**

When an official responsible for records has denied a public records request, no administrative appeal to the official's supervisor is necessary before filing a mandamus action in court.

In order for Relator to succeed in her mandamus and the award of statutory damages per O.R.C. § 149.43(B), she must have requested public records, Respondent must have been obligated to honor that request, subject to certain exceptions in O.R.C. § 149.43(B), and they must have either wrongfully refused to provide those records to her or failed to provide them to her within a reasonable time. Most importantly, Relator must be "aggrieved" by the denial of or failure to provide responsive documents within a reasonable time. *See*, O.R.C. § 149.43(C).

The General Assembly did not provide a definition for the term "aggrieved" as it is used in either O.R.C. § 149.43(C) or the Public Records Act provisions on civil forfeiture penalties for the wrongful destruction of public records, as is set forth in O.R.C. § 149.351(B). However, in construing the word "aggrieved" in the context of an O.R.C. § 149.351(B) civil forfeiture violation, this Court has held that "aggrieved" is commonly defined as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." *Rhodes v. City of New Phila.*, 129 Ohio St. 3d 304, 308-309, 2011 -Ohio- 3279, ¶¶15-20. Therefore, in order for the Relator in the instant case to be aggrieved, the alleged improper conduct of the Respondents must have infringed upon her legal rights.

Relator's rights pursuant to the Ohio Public Records Act grants any person the "substantive right to inspect and copy public records." *State ex rel. Beacon Journal Publishing Co. v. Waters*, 67 Ohio St.3d 321, 324 (1993). In construing O.R.C. § 149.43(B), this Court has consistently held that a public office is obligated to honor a records request by "any person" and that a person does not have to explain his or her reasons for wanting to inspect and copy a public record in order to validly request the record. *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188 (1993); *Gilbert v. Summit Cty.*, 104 Ohio St. 3d 660, 2004 Ohio 7108, ¶ 10.

However, the General Assembly did not utilize the same wording to establish the right to bring an action for a writ of mandamus, attorneys' fees and statutory damages per O.R.C. § 149.43(B). Those remedies are only available to a person who has been "aggrieved" by the public office's or person's violation.

As this Court stated in *Rhodes*, it cannot ignore the General Assembly's use of the term "aggrieved," and concluded that the General Assembly did not intend to impose a civil forfeiture when the requester's legal rights were not infringed, because the requester's only intent was to obtain a monetary windfall. *Rhodes, supra*. By analogy, public records requestors such as Relator's are not aggrieved when her sole purpose is to possibly subject the public office or person responsible for responding to records to an award of attorney's fees or statutory damages.

Relator argues that she was "aggrieved" because the Respondents failed to comply with her public records request within a reasonable time. Relator has a seven year history of making dozens and dozens of public record requests to the City. Most of the time past requests were done by Relator through face to face conversation with City personnel, at a public meeting or through an e-mail communication. As a result of these requests, the City of South Euclid has provided her thousands of pages of documents. In each and every past instance that the Relator

made a public records request, if she felt the City either had not fulfilled her request or she thought there was some delay in the response, she would immediately contact him to inquire about the matter.

In a repeat of the behaviors she exhibited in *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538 and *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-539, Relator wholly failed to contact anyone at the City after her initial request. In the spirit of the Ohio Public Records Act, Relator is being disingenuous and furtive. She understands the Ohio Public Records Act and the process very well. She could have avoided filing suit and any claim for statutory damages or attorneys' fees had she followed her previously normal pattern of interaction with City official as in the past eight (8) years. A simple phone call or an email would have provided her the records she sought, thereby avoiding the need for her to file suit. Relator's conduct, or lack thereof after sending her request, smacks of gamesmanship and "sandbagging."

It is logical to infer that her failure to cooperate with City officials in obtaining her records **for a third time** was designed so that the City could possibly be held responsible for her attorney's fees provision of O.R.C. § 149.43(C). After the Court's rulings in *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538 and *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-539, it became apparent that while she would not be entitled to fees, she may be entitled to statutory damages. Therefore, Relator filed the instant action *pro se*.

Relator was not an "aggrieved" person per the statutory requirement. She continues to abuse the Ohio Public Records Act in an effort to obtain a monetary windfall.

Respondents are well aware that this Honorable Court rejected the above argument in *State ex rel. DiFranco v. South Euclid*, 2014-Ohio-538, and that based upon the events in the instant matter, they may be held responsible for the award of statutory damages pursuant to

O.R.C. § 149.43(B). However, Respondents urge this Honorable Court to impute a duty of good faith, fair dealing and overt cooperation by requestors of public records, so that public offices are not subjected to unscrupulous and devious behaviors which result in needless lawsuits and strain public resources. A phone call or email by Relator could have avoided three lawsuits between Relator and the City. Enough is enough.

### **III. CONCLUSION**

Therefore, Respondents respectfully request that the writ of mandamus and any statutory damages pursuant to the Ohio Public Records Act sought by Relator be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Merit Brief of Respondents The City of South Euclid and Lee Williams* has been sent via email to Emilie DiFranco, Pro se Relator, 3867 W. 226<sup>th</sup> Street, Fairview park, Ohio 44126 at [emdifranco@sbcglobal.net](mailto:emdifranco@sbcglobal.net), on this 12<sup>th</sup> day of November 2014.



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One of the Attorneys for Respondents