

In the
Supreme Court of Ohio

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|----------------------------|---|-----------------------------|
| STATE OF OHIO EX REL. |) | Supreme Court of Ohio |
| GLEN P. STEWART, et al., |) | Case No. 2014-1792 |
| |) | |
| Relators, |) | Original Action in Mandamus |
| |) | |
| vs. |) | |
| |) | |
| THE OHIO LOCAL GOVERNMENT |) | |
| INNOVATION COUNCIL, et al. |) | |
| |) | |
| Respondents. |) | |

**RELATORS' MOTION TO STRIKE THE AFFIDAVIT OF DARYL HENNESSY
ATTACHED TO RESPONDENTS' MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO STAY THE PROCEEDINGS IN THE CASE**

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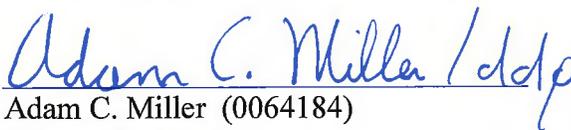
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Counsel for Respondents

Relators respectfully request that the Court strike the entire affidavit of Daryl Hennessy which was attached to Respondents' Motion to Dismiss. The exhibits to Mr. Hennessy's affidavit are rife with unreliable hearsay statements. In addition, the statements in and the exhibits to Mr. Hennessy's affidavit lack any foundation because they are not based upon personal knowledge. A memorandum in support of this motion is attached below.

Respectfully Submitted,



Adam C. Miller (0064184)

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MEMORANDUM IN SUPPORT

INTRODUCTION

On December 17, 2014, Respondents filed their Motion to Dismiss or, in the Alternative, to Stay the Proceedings in this Case (“Motion to Dismiss”). The Motion to Dismiss relies entirely on the affidavit of Daryl Hennessy, Chief of the Business Services Division with the Ohio Development Services Agency (“Agency”), which is attached to the Motion to Dismiss. Mr. Hennessy’s affidavit and all the exhibits to this affidavit should be stricken. All of the exhibits attached to Mr. Hennessy’s testimony contain hearsay statements. In addition, Mr. Hennessy failed to establish that he has personal knowledge of any of the information contained in the exhibits or his affidavit. Because of these evidentiary flaws, Mr. Hennessy’s affidavit and exhibits should be stricken from the record.

LAW AND ARGUMENT

1. Mr. Hennessy's affidavit and all the exhibits to the affidavit should be stricken because all the exhibits contain hearsay statements.

Ohio Evid. R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ohio Evid. R. 801(A) provides that a "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. Exhibits A, B, and C, of Mr. Hennessy's affidavit constitute hearsay and should be stricken.

Exhibit A of Mr. Hennessy's affidavit is a letter from Mr. Hennessy to Richard Benson, Jr., Secretary of the Wooster-Ashland Regional Council of Governments ("November 18, 2014 Letter"). In their Motion to Dismiss, Respondents cite to portions of the November 18, 2014 Letter that purport to be exact quotations from the Relators' grant application and a November 7, 2011 cost savings study prepared by Cleveland State University ("November 7, 2011 Study"). Motion to Dismiss at 4. The statements in Exhibit A that originate from the grant application and the November 7, 2011 Study are hearsay. For example, Exhibit A states that "the Application promised to combine the dispatch services currently available in both Wayne and Ashland counties to achieve cost savings by 'reduc[ing] the number of facilities to be maintained.'" The grant application, however, is not attached to Mr. Hennessy's affidavit and was not attached to the Relators' Complaint. This document is nowhere in the record. Further, Exhibit A states that "the Application explicitly relied on the cost savings promised by the" November 7, 2011 Study, and purportedly summarizes statements from the November 7, 2011 Study. These statements in Exhibit A present two layers hearsay – (1) the grant application itself and (2) the purported

conclusions in the grant application that summarize the November 7, 2011 Study. Because of these various hearsay problems, all of Exhibit A should be stricken.¹

Exhibits B and C contain hearsay statements, too. Respondents rely on Exhibit B and C of Mr. Hennessy's affidavit to prove that the Local Government Innovation Council ("LGIC") is actively seeking to "reconsider" the grant application. Motion to Dismiss at 4. These e-mails were sent from Johnathan Stock of the Agency to Adam Miller, counsel for Relators. Matthew Green, counsel for Respondents was carbon copied on these e-mails. These e-mails are the written statements of Mr. Stock, not Mr. Hennessy. In addition, the Respondents are relying on the e-mails to prove the truth of the matter asserted (that being, that Respondents have rescheduled the "reconsideration" of the grant application on various occasions). Jonathan Stock would be the appropriate affiant to support Exhibit B and C, not Mr. Hennessy. Therefore, the Court should strike paragraphs 3 and 4 of Mr. Hennessy's affidavit, as well as Exhibits B and C.

There is no substance to Mr. Hennessy's affidavit once the exhibits are removed. Therefore, if the Court strikes the exhibits of Mr. Hennessy's testimony due to hearsay, Relators request that the Court strike paragraphs 2, 3, and 4 of the affidavit, as well.

- 2. Mr. Hennessy's affidavit and all the exhibits of Mr. Hennessy's affidavit should be stricken because Mr. Hennessy lacks personal knowledge of the information contained in these exhibits and lacks personal knowledge of his statement in paragraph 5.**

Ohio Evid. R. 602 states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

¹ Not only do the Respondents' citations to the grant application and the November 7, 2011 Study violate the rule against hearsay, but it also violates the "best evidence rule." Ohio Evid. R. 1002 states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." Instead of attaching the grant application or November 7, 2011 Study, the Respondents rely on a letter that summarizes portions of these documents. This is clearly inappropriate.

“Personal knowledge” is “[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.” *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002–Ohio–2220, 767 N.E.2d 707, ¶ 26. Affidavits not based upon personal knowledge, or that fail to set forth facts that would be admissible in evidence, are subject to a motion to strike. *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003–Ohio–5340, 798 N.E.2d 1141, ¶ 17 (10th Dist.). Ohio courts have held that the mere assertion of “personal knowledge” is not necessarily sufficient to establish that the affiant has personal knowledge. *Fed. Natl. Mtge. Assn. v. Brunner*, 2013-Ohio-128, 986 N.E.2d 565, ¶ 16 (6th Dist.)(the court held that the affidavit failed to establish the affiant’s duties, or why or how the affiant had personal knowledge of the matters attested to); and *Maxum Indem. Co. v. Selective Ins. Co. of S.C.*, 2012-Ohio-2115, 971 N.E.2d 372, ¶ 22 (9th Dist.)(the court held that the affidavit did not satisfy the personal knowledge requirement in part because it did “not disclose the position [the affiant] holds or *the scope of his job responsibilities*”)(emphasis added).

Mr. Hennessy lacks personal knowledge of the information contained in Exhibit A. Mr. Hennessy merely asserts that he is the “Chief of the Business Services Division with the Ohio Development Services Agency.” Affidavit at ¶ 1. He does not, however, explain what role he played, if any, in the review of the Relators’ grant application and the November 7, 2011 Study. He fails to explain if he has any personal knowledge of the LGIP process. In fact, Mr. Hennessy previously admitted to Linda S. Michael, the grant writer for Relators, that he was new to the Agency, and was unfamiliar with the nuances of the LGIP grant approval process. See Affidavit of Linda S. Michael (“Michael Affidavit”) at ¶ 7, attached hereto as **Exhibit 1**.

Due to his lack of personal knowledge of the processing of Relators' grant application, Mr. Hennessy misrepresents the Agency's previous position regarding its review and approval of the grant application. As explained in her affidavit, Ms. Michael coordinated closely with Agency staff in developing the Wooster-Ashland Innovation Fund grant application to ensure eligibility. Michael Affidavit at ¶¶ 3-6. Ms. Michael and Agency staff worked hand-in-hand in order to meet the criteria set forth by the Agency. *Id.* After the Agency's preliminary review of a draft of the grant application, Relators were informed by the Agency that certain items within the grant application needed to be addressed or changed. Michael Affidavit at ¶ 4-5, Attachment A. Ms. Michael personally worked with the Agency on revising the grant application to address any of the concerns of the Agency. Michael Affidavit at ¶ 5. On February 6, 2014, the revised grant application was electronically submitted to the Agency, and Ms. Michael was informed by Agency staff that the grant application was adequate, and the Agency indicated that the grant application was going to be scored as an LGIP grant for the February Round 8 meeting. Michael Affidavit at ¶ 6.² Mr. Hennessy discusses none of these facts, but this is not a surprise - he has no personal knowledge of the detailed review and approval of the Relators' grant application by the Agency because he was not involved in this process. Michael Affidavit at ¶ 7.

Exhibits B and C should be stricken for lack of personal knowledge, as well. These e-mails were not sent by Mr. Hennessy. He was not copied on these e-mails. Mr. Hennessy fails to explain how he has personal knowledge of the accuracy or authenticity of these e-mails. Mr. Hennessy does not explain how he knows that the information contained within the e-mail is true. Such an explanation is critical here because Respondents rely on the e-mails to prove the

² As an aside, Relators' position in this case is *not an attack on Agency staff*. In fact, Ms. Michael states in her affidavit that the Agency staff she worked with, specifically Ms. Beverly Cooper and Ms. Nicole Bent, were very professional and helpful. Michael Affidavit at ¶ 8. She believes that they were highly experienced and were very familiar with LGIF Innovation Funds programs. *Id.*

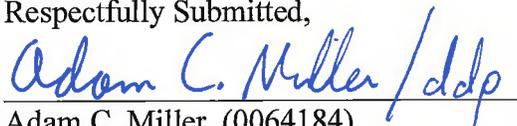
LGIC's ongoing intention to "reconsider" the grant application. Motion to Dismiss at 4. These e-mails lack foundation, and should be completely stricken by the Court. Simply because Mr. Hennessy works at the Agency with Mr. Stock does not mean he can lay the foundation for any and all e-mails that Mr. Stock drafts.

In addition, Mr. Hennessy lacks personal knowledge of the information regarding paragraph 5 of his affidavit. As stated above, Mr. Hennessy played a very limited role in the grant application process. Michael Affidavit at ¶ 7. Mr. Hennessy merely states that he believes the Wooster-Ashland Council of Governments may "reconsider" the grant application in the future, but fails to explain how he came to this belief, and fails to explain why his belief is of any value. Mr. Hennessy's bald assertion of personal knowledge is not enough. Paragraph 5 should be stricken.

CONCLUSION

For the foregoing reasons, Relators request that Mr. Hennessy's entire affidavit and all the exhibits attached to his affidavit be stricken.

Respectfully Submitted,

 Adam C. Miller / ddp

Adam C. Miller (0064184)

**Counsel of Record*

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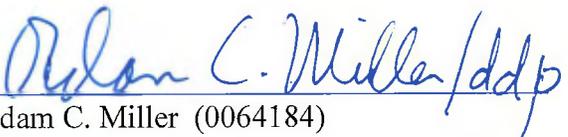
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mottley@taftlaw.com

Counsel for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **RELATORS' MOTION TO STRIKE THE AFFIDAVIT OF DARYL HENNESSY ATTACHED TO RESPONDENTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS IN THE CASE**, was served via email on this January 8, 2015 on Matthew T. Green, Assistant Attorney General, Counsel for all Respondents, at 30 East Broad St., 26th Floor, Columbus, Ohio 43215, email address matthew.green@ohioattorneygeneral.gov.


Adam C. Miller (0064184)

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STATE OF OHIO EX REL.)
GLEN P. STEWART, et al.,) Supreme Court of Ohio
) Case No. 2014-1792
)
Relators,) Original Action in Mandamus
)
vs.)
)
THE OHIO LOCAL GOVERNMENT)
INNOVATION COUNCIL, et al.)
)
Respondents.)

AFFIDAVIT OF LINDA MICHAEL

State of Indiana)
County of Allen) ss.

Affiant Linda S. Michael, being duly cautioned and sworn, hereby testifies and affirms as follows:

1. I am of full legal age and competent to testify on the matters set forth herein. I have personal knowledge of all facts set forth below.
2. In my capacity as a professional grant writer, I worked with Taft Stettinius & Hollister LLP to assist the Cities of Wooster and Ashland in their grant request to the Local Government Innovation Fund ("LGIF"), Round 8.
3. The LGIF application was developed in coordination with Ms. Beverly Cooper and Ms. Nicole Bent, LGIF program staff at the Ohio Development Services Agency ("OSDA").
4. On the day before the Round 8 due date, and at the direction of the agency staff named above, the Wooster-Ashland LGIF grant was submitted for the Innovation Fund rather

than Efficiency Fund. Agency staff advised that the grant draft on-line should be submitted under the Innovation Fund Program since the next-generation communications and related technology aspects of the emerging joint dispatch enterprise among local governments was more suited to the Innovation Fund's Guidelines and parameters.

5. In a subsequent correspondence dated January 27, 2014, (See Attachment A) I received a copy of a "cure letter" sent to Wooster Mayor Robert F. Breneman directing him to revise the LGIF Grant application along with certain specific aspects. Over the next 10 days and to the cure deadline of February 6, 2014, I worked with agency staff, following their specific recommendations to revise the Wooster-Ashland Innovation Fund grant application to ensure the eligibility predicates referred to in the "cure letter" correspondence were fully satisfied.

6. On February, 6, 2014, the revised grant was electronically submitted to ODSA. Ms. Cooper, ODSA LGIF program staff advised me telephonically that the LGIF grant application, as revised, satisfied conditions as set forth in the cure letter and was going to be scored as an LGIF grant for the February Round 8 meeting.

7. Mr. Daryl Hennessy was not involved in any of the extensive LGIF grant application coordination discussions which took place in December 2013 and January and February of 2014. Mr. Hennessy was not involved until a telephone conference call that took place in late August 2014. During that conference call, Mr. Hennessy told the participants that he was new to the program, that he had not been involved in previous LGIF Award Rounds, and that he recently joined that section of the Agency.

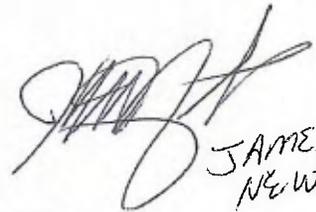
8. Ms. Cooper and Ms. Bent were very professional and extremely helpful. It was very clear to me that I was at all times dealing with experienced staff members who possessed great familiarity with the LGIF Innovation Fund programs. When I learned that the Wooster – Ashland Grant had received the highest score of all Round 8 applicants, I knew that was a testament to grant’s viability and to the expertise from ODSA staff in helping Wooster and Ashland find the right program for their innovative concept.

Further Affiant Sayeth Naught.


Linda Michael

Sworn to and subscribed in my presence this 7TH day of January, 2015.

Notary Public


JAMES M.
NEWTON 1/7/15

Notary Public - State of Indiana
Adams County
My Commission Expires:
February 3, 2017





**Development
Services Agency**

John R. Kasich, Governor

David Goodman, Director

January 27, 2014

Bob Brennaman, Mayor
Town of Wooster
538 North Market Street
Wooster, Ohio 44805

RE: Round 8 Local Government Innovation Program (LGIP) Application Cure Letter

Dear Mayor Brennaman:

Recently your Round 8 application to the Local Government Innovation Program was returned to you. This letter serves to provide notice of any issues with your application. The identified item(s) requiring your attention are listed on the attached page(s).

At this time, it is appropriate to revise your on-line application responses and/or attachments to address any deficiencies in your application. Failure to fully address all the identified items could lead to a competitive score reduction or ineligibility for Round 8 of the Local Government Innovation Program. Resubmit your application at the on-line application site for final review. Your revised application is due to ODSA no later than 5:00 p.m. on February 7, 2014.

While this cure letter represents the additional information needed for ODSA review, the Local Government Innovation Council continues to reserve the right to request additional information about your application.

Thank you for your participation in Local Government Innovation Program. Please contact the program staff at lgif@development.ohio.gov or 614-995-2292, if you have further questions regarding your application or the information requested in this letter.

Sincerely,

Thea J. Walsh, AICP
Deputy Chief, Office of Energy and Redevelopment

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Columbus, Ohio 43216-1001 U.S.A. 614 | 466 2480
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Attachment A



Local Government Innovation Program (LGIP) Completeness Review

APPLICATION NUMBER: LGIF 2013 0120

Lead Applicant: Town of Wooster

Project Name: Wooster and Ashland 9-1-1 Dispatch Consolidation

Number of validated partners based on the first review: 0

Application submitted for: X LGIP GRANT LGIP LOAN

Revise the application in response to the following issues:

The FEIN (Federal Employer Identification Number) is not included.

The lead applicant is not an eligible applicant. An eligible LGIP lead applicant is an Ohio political subdivision, as defined by ORC 2744 (http://codes.ohio.gov/orc/2744).

The project as described is not eligible for LGIP funding. Refer to the LGIP program policies available at the Local Government Innovation Fund Website (http://development.ohio.gov/cs/cs_localgovfund.htm).

The project description should be improved.

X The application is incomplete; review application and complete all fields.

X The project budget is incomplete. Note that total sources must equal total uses, and applicant must provide a minimum 10% match based on the total project cost.

X The program budget is incomplete. Include adequate information for reviewers to understand the potential financial gain when the project is implemented. Explain assumptions used for the budget projections. Base projections on research, case studies or industry standards and include a thoughtful justification.

X The ROI (Return on Investment) narrative section is incomplete. Review all ROI sections of the application to make sure they adequately explain any cost savings, cost avoidances, and increased revenues.

The grant amount requested exceeds the maximum award amount available. Refer to the LGIP program policies available at the Local Government Innovation Fund Website (http://development.ohio.gov/cs/cs_localgovfund.htm).

The application does not include all required attachments; the missing attachments are:

X Authorizing resolution(s) or letter(s) from lead applicant and each collaborative partner.

X A partnership agreement signed by authorized representatives of the lead applicant and each collaborative partner.

(for loan applications) The feasibility study upon which the loan-funded project is based.

Other: The application references a grant request of \$45,000 and \$50,000. Correct the application to be consistent in describing the correct amount. Use the narratives, collaborative partners section, and attachments to clearly define the collaborative partners working with Wooster on this project. Explain the need for an additional feasibility study.

Your on-line application has been unlocked. Make the required corrections and resubmit the application by 5:00 p.m. on February 7, 2014 to be considered for an LGIP grant award during Round 8.

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