Supreme Court of Ohio Clerk of Court - Filed May 16, 2016 - Case No. 2016-0615

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. LAUREN KESTERSON,	:	
Relator,	:	Case No. 2016-0615
v.	:	**Original Action in Mandamus**
KENT STATE UNIVERSITY	:	
Respondent.	:	

MOTION TO DISMISS OF RESPONDENT KENT STATE UNIVERSITY

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Pursuant to Ohio Civ. Rule 12(B)(6) and S.Ct.Prac.R. 12.04(A), Respondent Kent State University hereby moves this Court to dismiss Relator's petition for a writ of mandamus. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Kent State University fulfilled its obligations under the Ohio Public Records Act by appropriately and timely responding to Relator's public records request. Although the specific relief Relator seeks in this action is not clear, Relator's complaint and exhibits establish that Respondent Kent State University: timely provided all responsive records to Relator's public records request; applied redactions pursuant to clear legal authority; and provided its legal authority to Relator in writing. Because Kent State met its obligations under the Public Records Act (and any other relief Relator requests is unsupported by a clear legal right or duty), Relator is not entitled to a writ of mandamus and this lawsuit should be dismissed.

II. STATEMENT OF FACTS

On February 2, 2016, Relator[1] submitted a public records request to Kent State University. Compl., ¶ 12; Relator's Ex. 1.[2] The request sought, generally:

1. Personnel records of five employees;

2. Records of information provided to the Kent State softball team, from 2012 forward, about "Title IX, gender equity, sexual harassment, sexual assault, Sexual and Relationship Violence Support Services, or the University's policies or procedures for reporting instances of gender-based harassment or sexual assault[;]" and

3. Records of student reviews of the softball coach from 2010 until her resignation in 2015.

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[1] Although Lauren Kesterson is named as the Relator in this action, the public records request on which this lawsuit is based was made by Ms. Kesterson's counsel, Ashlie Case Sletvold. All subsequent communications with Kent State regarding the public records request have been conducted by Ms. Sletvold. For purposes of this motion to dismiss, references to "Relator" include communications with Ms. Sletvold.

[2] The Court may consider documents attached to or incorporated into the complaint in deciding a motion to dismiss without converting it into a motion for summary judgment. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). Here, Relator's complaint cites to and relies upon several attached exhibits.

Compl., ¶ 13; Relator's Ex. 1.

The next day, Kent State acknowledged receipt of the request in writing, and Associate Counsel Nichole DeCaprio began to assemble and review responsive records. Compl., ¶ 15; Relator's Ex. 3. Just two weeks after submitting the public records request, Relator followed up by letter to threaten the initiation of a mandamus lawsuit. Relator's Ex. 4. Ms. DeCaprio responded in an email to explain that Kent State was continuing to process the request, the request involved a number of records that required legal review and redaction, and that Kent State anticipated responding to the request early the following week. Relator's Ex. 5. Still, three business days later, Relator's counsel again wrote to threaten litigation. Relator's Ex. 6.

As a courtesy to Relator, and in an effort to meet counsel's imposed deadlines, Kent State provided records on a rolling basis. On February 24, 2016, Kent State provided the first set of responsive records, which included over 700 pages of personnel records for five Kent State employees. Compl., ¶ 20; Relator's Ex. 7; *see also* Relator's Ex. 9 n.7 (referencing Bates-numbered documents through KSU000728). The next day, Kent State completed its response to the public records request by providing an additional 29 pages of records, which comprised the existing records of student reviews of the Kent State softball coach. Compl., ¶ 21; Relator's Ex. 8; *see also* Relator's Ex. 10 (referencing Bates numbers KSU000728-757).

Ms. Sletvold continued to follow up on the public records request. By letters dated February 25, March 2, and March 7, Ms. Sletvold articulated her concerns about redactions made to the records provided. Relator's Exs. 9-11. While this public records request was pending, Ms. Sletvold also submitted additional public records requests to Kent State. *See* Relator's Ex. 11 ("As may have become clear by now, we anticipate submitting public-records requests to

KSU with some regularity in the coming months."); *see also* Relator's Ex. 13 ("Re: Follow up on February 2, 2016 and February 24, 2016 public-records requests").

On March 14, 2016, Kent State sent Relator's counsel a detailed letter addressing each and every concern raised about Kent State's response to the public records request at issue here. Compl., ¶ 25; Relator's Ex. 12. Kent State also took the opportunity to again review the responsive records to be sure redacted material was supported by appropriate legal authority. *See* Relator's Ex. 12 at p.1. In particular, Kent State advised the requester that all records pertaining to student reviews of the softball coach had been provided; pursuant to Kent State's records retention policy, the handwritten reviews were compiled and typed for retention. *See* Relator's Ex. 12 at p. 5 (numbered item 15). Kent State also advised the requester that it had completed its response to the request for training materials provided to the softball team about sexual harassment and violence, and invited her to revise her request if she had not received the records she needed. *See* Relator's Ex. 12 at p. 6 (numbered item 20). Finally, Kent State supplied seven more pages of records in response to two *additional* public records requests Relator made during Ms. Sletvold's correspondence with Kent State. *See* Relator's Ex. 12 at p. 3 (numbered items 8 and 10).

On April 21, 2016, Relator filed this action in mandamus. While far from clear, it appears that Relator believes that: student reviews of the Kent State softball coach were improperly destroyed (Compl., ¶¶ 25, 37); Kent State has withheld training materials provided to the softball team about gender issues and sexual violence without "suggest[ing] that such records to [sic] not exist or are exempt from disclosure" (Compl., ¶ 36); Kent State has not completed its response to the public records request at issue (Compl., ¶ 31); Kent State has failed to provide a line-by-line list of legal authority for redacted material (Compl., ¶ 39); and Kent State has

improperly redacted some unspecified information (Compl., ¶ 38). Relator therefore requests a writ of mandamus compelling Kent State "to make responsive public records available promptly and without improper redactions" and to award attorney's fees and costs. Compl., Prayer.

III. LAW AND ARGUMENT

A. <u>Standard of Review</u>

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d. 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. A court must accept the factual allegations of the complaint as true and "the plaintiff must be afforded all reasonable inferences possibly derived therefrom." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Dismissal under Civ. R. 12(B)(6) is required if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); see also *State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Educ.*, 72 Ohio St.3d 106, 108, 1995-Ohio-251, 647 N.E.2d 799.

B. <u>Relator's request for a writ of mandamus must fail.</u>

Relief in mandamus is extraordinary relief. *State ex rel. DeDonno v. Mason*, 128 Ohio St.3d 412, 2011-Ohio-1445, 945 N.E.2d 511, ¶ 2. A court will issue a writ of mandamus only when: (1) the relator has a clear legal right to the relief he or she requests; (2) the respondent has a clear legal duty to perform the requested relief; and (3) the relator has no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996). Relator bears the burden to "prove [its] entitlement to the writ by clear and convincing evidence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235,

¶ 3 syllabus; *see also Strothers v. Norton*, 131 Ohio St.3d 359, 361, 2012-Ohio-1007, 965 N.E.2d 282, 285, ¶ 13.

Here, Kent State met all of its obligations under the Public Records Act: it provided copies of all responsive records, redacted information pursuant to appropriate legal authority, and timely responded to Relator's request. Kent State also attempted, as a courtesy, to comply with Relator's counsel's imposed deadlines and responded to two additional public records requests Relator posed in the process. Relator's complaint in mandamus must therefore fail because Kent State has met its statutory obligations under the Public Records Act and Relator has no legal right to the relief sought.

1. Kent State has provided all records responsive to Relator's request.

It appears that Relator believes that Kent State has not provided all the records responsive to her request. In her complaint, Relator notes concerns that student reviews of the Kent State softball coach were improperly destroyed (Compl., ¶¶ 25, 37); that Kent State has withheld training materials provided to the softball team about gender issues and sexual violence without "suggest[ing] that such records to [sic] not exist or are exempt from disclosure" (Compl., ¶ 36); and that Kent State has not completed its response to the public records request at issue (Compl., ¶ 31). Correspondence with Relator's counsel notes the same concerns. *See* Relator's Ex. 10 at p. 2; *see also* Relator's Ex. 13.

But Relator's exhibits demonstrate that Kent State completed its full response to Relator's public records request. In its record productions on February 24 and 25, Kent State provided over 750 pages of responsive records. Compl., ¶¶ 20-21; Relator's Ex. 7-8; *see also* Relator's Ex. 9-10 (referencing Bates-numbered documents through KSU000757). And in its March 14 letter to Relator's counsel, Kent State specifically addressed each of these concerns. Relator's Ex. 12.

First, Kent State clarified that it did not maintain the handwritten student reviews of the softball coach: "The handwritten responses were treated as transient records and not maintained after the contents were type-written, which is consistent with Kent State University's record retention policy. R.C. 149.011(G); Kent State University Policy 5-15; Inter-University Council Record Retention Manual (2009 ed,)." Relator's Ex. 12 at p. 5 (numbered item 15). A public office, of course, is under no obligation "to create or provide access to nonexistent records." *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 25, citing *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 15. If a record does not exist, access to it cannot be compelled by a writ of mandamus. *See State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629, ¶ 15 (finding relator is "not entitled to a writ of mandamus to compel what would be tantamount to an impossible act"). Relator does not have a clear legal right to access records that do not exist, and Kent State has no clear legal duty to provide them.

Second, Kent State clarified that it had provided all records responsive to Relator's request for training materials provided to the softball team on issues of gender equity and sexual violence or harassment. *See* Relator's Ex. 12 at p. 6 (numbered item 20) ("You were provided with the student handbook, which is responsive to this request."). Kent State additionally advised Relator that:

> Training provided to the softball team, specifically and separately from training provided to student-athletes, or even the general student body, about Title IX and sexual assault issues, is not centrally maintained. Training materials on these issues are kept by the sponsoring departments and organizations, not the softball team. If you would like to revise your request to seek training materials or records from sponsoring departments or organizations, you are free to revise your request. See *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 214, 2012-Ohio-2690, 970 N.E.2d 939, 943, (2012).

Relator's Ex. 12 at p. 6 (numbered item 20). In other words, Kent State provided all records responsive to Relator's particular request, but invited her to revise if she sought additional documents.

To the extent Relator is asking Kent State to expand its search to locate other training documents she might be interested in, her request is inappropriate. A requester must identify the records he or she is seeking "with reasonable clarity," so that the public office can identify responsive records based on the manner in which it ordinarily maintains and accesses its records. *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶¶ 26, 33; *see also State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17. Moreover, the Public Records Act does not require a public entity to guess at, and then provide, records with specific information of interest to the requestor. *See State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994-Ohio-261; *State ex rel. Fant v. Tober*, 8th Dist. No. 63737, 1993 Ohio App. LEXIS 2591 (April 28, 1993) (holding office had no duty to seek out records which would contain information of interest to requester), *aff'd.* 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993). Finally, R.C. 149.43 does not impose a duty on public offices to organize records in any particular manner, or to conform their organizational methods to a public records request. *State ex rel. Bardwell v. City of Cleveland*, 126 Ohio St.3d 195, 2010-Ohio-2367.

Kent State provided the responsive records it located, explained how similar materials are maintained at Kent State, and advised Relator that she could revise her request. Relator's Ex. 12 at p. 6 (numbered item 20). Relator does not have a clear legal right to records she did not ask for, nor does Kent State have a clear legal duty to seek out records Relator did not request, or records that may contain information of interest to Relator.

Relator therefore fails to state a claim on which this Court can grant relief under the theory that either Kent State failed to provide all records responsive to her request, or that Kent State improperly destroyed records of student reviews. To the extent Relator raises a claim to this effect, her complaint should be dismissed.

2. All redactions are supported by proper legal authority.

It appears that Relator's primary concern with the redactions made to the responsive documents is that Kent State did not provide a line-by-line list of legal authority to support each one. *See* Compl., ¶ 39; *see also* Mem. in Support at 6. Relator is certainly correct that a public office must, in writing, "provide the requester with an explanation, including legal authority, setting forth why the request was denied." R.C. 149.83(B)(3). But Kent State did just this. *See* Relator's Exs. 7, 8, 12. To the extent Relator requests anything more, she does not have a clear legal right to the relief she seeks, nor does Kent State have a clear legal duty to provide it.

In communications with Kent State, Relator's counsel also raised a number of substantive concerns about redactions made to the responsive public records. In response, Kent State re-reviewed the redactions made, and provided Relator with a point-by-point explanation for each of the concerns raised. Relator's Ex. 12. It is not clear from Relator's complaint which, if any, redactions Relator challenges in this suit. Relator only requests a writ of mandamus compelling Kent State "to make responsive public records available promptly and without improper redactions." Compl., Prayer. To the extent Relator challenges any of the redactions made to the responsive records, Kent State incorporates the legal authority previously provided to Relator. See Relator's Exs. 7, 8, 12; *see also State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641, 644 (1989) (holding a mandamus complaint must allege "the existence of the legal duty…sufficient particularity so that the respondent is given reasonable notice of the claim asserted").

3. Kent State timely responded to Relator's public records request.

Finally, Relator appears to contend that Kent State has not completed its response to her public records request. Compl., ¶ 31 (contending that the public records request has been outstanding for 78 days). According to Relator's exhibits, however, Kent State responded with over 750 pages of responsive records on February 24 and 25. Compl., ¶¶ 20-21; Relator's Exs. 7, 8. Kent State also provided a final letter on March 14 addressing all of Relator's concerns about the sufficiency of the responsive records and the redacted material, along with some additional records that Relator requested in subsequent requests. Relator's Ex. 12. At the very latest, then, the response to Relator's public records request was completed on March 14, 2016.

Public offices have a reasonable amount of time to respond to requests for copies of public records, which includes the time to identify records and perform a legal review. R.C. 149.43(B)(2), (5); *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2008-Ohio-1901, ¶¶ 16-17. That is, the Public Records Act "envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials." *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 16 (internal citation omitted) (noting that "[g]iven the broad scope of the records requested, the governor's office's decision to review the records before producing them, to determine whether to redact exempt matter, was not unreasonable"). For example, a response time of 56 days was not unreasonable where the public records request involved a "large request for documents" and the requester "requested other records during the period in which [the public office] was attempting to respond to his first request." *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶¶ 3, 22. As another example, a response time of 95 days to supply 776 pages of records was not unreasonable. *State ex rel. Pine Tree Towing & Recovery, Inc. v. McCauley*, No. 14 CA 07, 2014-Ohio-4331, ¶¶ 16-20 (5th Dist.).

Here, Relator's complaint and exhibits establish that she received all responsive records within a reasonable amount of time. By February 25, 2016, Relator had received over 750 pages of responsive records, all of which had to be gathered and subjected to legal review. Many of the responsive documents involved student information that potentially implicated FERPA protections, a federal law which prohibits release of protected student information. *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶¶ 19-22. Most of the remaining records involved personnel files of Kent State employees, which include a variety of personal information, like government identification numbers and state retirement system information. *See* Relator's Ex. 12. By Kent State's final March 14 letter, Relator had also received records responsive to two additional public records requests, and had one more request outstanding with Kent State. *See* Relator's Ex. 12 at p. 3 (numbered items 8 and 10); *see also, e.g.*, Relator's Ex. 13 (referencing a February 24, 2016 public records request). Relator fails to state a claim of unreasonable delay in responding to her public records request.

Following Kent State's final letter on March 14, Relator continued to correspond with Kent State regarding the February 2 and February 24 public records requests. *See* Relator's Exs. 13-16. To the extent Relator demanded any additional response to her February 2 public records request in these communications, Kent State had no obligation to provide a response to duplicative requests. *State ex rel. Laborers Internat'l Union of N. Am. v. Summerville*, 122 Ohio St.3d 1234, 2009-Ohio-4090, ¶ 6 (holding that a "follow-up letter [did not] constitute a separate records request for purposes of R.C. 149.43" because it "was merely a reiteration of [the] first request for the same records and did not require an additional response"). Therefore, Relator does not have a clear legal right to a further response from Kent State, nor does Kent State have an obligation to provide one.

IV. CONCLUSION

For these reasons, Respondent Kent State University respectfully requests that this Court dismiss Relator's complaint. Kent State fully complied with its obligations under R.C. 149.43: it timely provided all responsive records to Relator's public records request, applied redactions pursuant to clear legal authority, and provided its legal authority to Relator in writing. In the alternative, and to the extent Relator requests this relief, Kent State requests that this Court dismiss Relator's claims regarding improper destruction of records, unreasonable delay in responding to the public records request, and insufficient written legal authority for redactions.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail via the U.S. Postal Service on May 16, 2016, upon the following:

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