[Cite as *Burfitt v. Greene*, 2020-Ohio-639.]

LAWRENCE R. BURFITT Requester v. LARRY GREENE, WARDEN'S ADMINISTRATIVE ASSISTANT Respondent	Case No. 2019-00766PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶1} Ohio's Public Records Act, R.C. 149.43, provides a remedy for production of records under R.C. 2743.75 if the Court of Claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). The policy underlying the Act is that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft,* 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. Therefore, the Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. *State ex rel. Glasgow v. Jones,* 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶2} On January 25, 2019, requester Lawrence Burfitt made a public records request to respondent Larry Greene, Warden's Assistant at the Southern Ohio Correctional Facility (SOCF), for a copy of the Ohio Department of Rehabilitation and Correction (ODRC) record retention schedule and the SOCF J-1 Post Orders. Greene responded that "Post Orders are not public record, and please forward a cash slip with your request for DRC Record Retention Schedule." (Complaint at 3.) On July 1, 2019, Burfitt filed a complaint under R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). On September 12, 2019, the court granted Greene's motion to stay proceedings pending the outcome of a related case before the Ohio Supreme Court. On September 27, 2019, the court lifted the stay. On October 15, 2019, Greene filed a motion to dismiss the complaint (Response), and an unredacted copy of the

withheld records under seal. On November 6, 2019, Burfitt filed a reply. On November 13, 2019, Greene filed a sur-reply. On January 8, 2020, Greene filed an additional brief in support of the motion to dismiss.

Motion to Dismiss

{¶3} In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

{¶4} Greene moves to dismiss the complaint on the grounds that it provided Burfitt with copies of the Ohio Department of Rehabilitation and Correction (ODRC) records retention schedule, and of the SOCF J-1 Post Orders, prior to determination of the claim by this court. Although the J-1 Post Orders were heavily redacted, Greene notes that identical redactions to the same document in response to a separate public records request were accepted by the Ohio Supreme Court in *State ex rel. McDougald v. Greene*, 157 Ohio St.3d 1419, 2019-Ohio-3798, 131 N.E.3d 941. Green argues that Burfitt's challenges to Greene's bases for the redactions are thus barred by res judicata. Greene alternatively asserts that the redacted portions of the J-1 Post Orders are either 1) infrastructure and security records, or 2) records the disclosure of which would endanger the life or safety of law enforcement personnel or a witness, or 3) information that may be withheld pursuant to R.C. 5120.21(D) (listed security plans).[1]

[1] Because the underlying claim for production is barred by res judicata, the court need not reach the merits of the asserted public records exceptions. For completeness, I note that Greene did not submit support for any exception beyond bare assertions and conclusory statements. *See State ex rel. Rogers v. Dept. of Rehab. & Corr.,* 155 Ohio St.3d, 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 7-22; *Conley v. Corr. Reception Ctr*., 141 Ohio App.3d 412, 416-417, 751 N.E.2d 528 (4th Dist.2001); *Shaffer v. Budish*, Ct. of Cl. No. 2017-00690-PQ, 2018-Ohio-1539, ¶ 11-26.

Suggestion of Mootness

{¶5} In an action to enforce R.C. 149.43(B), a public office may produce the requested records prior to the court's decision and thereby render the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. Greene asserts that he has provided Burfitt with a copy of the requested ODRC record retention schedule ("schedule"). Burfitt demurs that the copy he received (Motion to Amend Complaint, Exh. A) was an outdated 2009 version. However, the header of the schedule clearly states "Updated 2/2014." (*Id*. at 1.) Greene attests that this was the then-current version of the schedule. (Memorandum in Opposition to Requester's Motion for Leave to Amend, Greene Aff. at ¶ 6-9.) I find that Greene provided Burfitt with the requested ODRC record retention schedule, rendering the claim regarding this record moot.

{¶6} Greene also asserts that he has provided Burfitt with a properly redacted copy of the J-1 Post Orders. (Response; Sehlmeyer Aff. with delivery slip and redacted J-1 Post Orders, Glasgow Aff. with letter explaining redactions.) Burfitt agrees that he received the redacted J-1 Post Orders (Reply, Burfitt Aff.), but asserts that some of the redactions are unsupported, relying on analysis from the dissenting opinion in *McDougald, supra,* of the unredacted J-1 Post Orders. (Reply, *passim*.) As explained below, Green's identical redactions to the same J-1 Post Orders were upheld in *McDougald*, thus disposing of that aspect of this case. Accordingly, I find that the claim as to production of the J-1 Post Orders has been rendered moot.

Stare Decisis and Claim Preclusion

{¶7} The doctrine of stare decisis applies where the facts of a subsequent case are substantially the same as a former case. Black's Law Dictionary 1406 (6th Ed.1990); *Rocky River v. State Emp. Relations Bd*. 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989). "Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their

correctness, until they have been reversed or overruled * * *." 21 Corpus Juris Secundum 343, Courts, Section 197. Vertical stare decisis binds lower courts to the precedent set by higher courts (to which the parties to the lower court action can appeal). *Bormuth v. Jackson*, 870 F.3d 494, 520 (6th Cir.2017) (Rogers, J., concurring). The principle conserves court and party resources by precluding repeat litigation of a matter conclusively resolved by the court of last resort. Thus,

> Under the doctrine of stare decisis, a determination of a point of law by a court of last resort will be followed by inferior courts in subsequent cases presenting the same legal problem, even though different parties are involved in the subsequent case. *Battig v. Forshey* (1982), 7 Ohio App.3d 72, 454 N.E.2d 168.

Nelson v. Ohio Supreme Court, 10th Dist. Franklin No. 94APE05-624, 1994 Ohio App. LEXIS 4549, *6.

{¶8} Separately, the principle of defensive claim preclusion provides that "A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp*. (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus. For the purposes of res judicata, a "transaction" is defined as a "common nucleus of operative facts," which in turn rests on whether the same facts or evidence would sustain both the previous and the current action. *Bd. of Cty. Commrs. v. Roop*, 4th Dist. Ross No. 13CA3369, 2013-Ohio-5926, ¶ 14-17. Defensive claim preclusion prevents a second plaintiff from duplicating an action already resolved against a plaintiff with whom he or she is in privity. *O'Nesti v. DeBartolo Realty Corp*., 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 7. A person is typically in "privity" with another if he or she directly succeeds to an estate or an interest formerly held by another. However:

> What constitutes privity in the context of *res judicata* is somewhat amorphous. A contractual or beneficiary relationship is not required:
> "In certain situations * * * a broader definition of 'privity' is warranted. As a general matter, privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough

> to include that other within the *res judicata*.' *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring)." *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 184, 1994 Ohio 358, 637 N.E.2d 917, 923.
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> We find that a mutuality of interest, including an identity of desired result, creates privity between the plaintiffs in this case and those in *Wall*. In neither case did the plaintiffs seek personally tailored relief to fit their unique circumstance or factual situation. All have sought the general disallowance of [an ordinance] as residents and taxpayers within the city of Dayton. We find that their legal interests are the same and that they are in privity with each other for purposes of *res judicata*. To find otherwise would be to allow the Ordinance to come under constant attack simply by replenishing the ranks of plaintiffs.

Brown v. Dayton, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000).

{¶9} In *McDougald, supra*, inmate Jerome McDougald made a public records request on January 21, 2019 for the SOCF J-1ERH cell-block post orders from Larry Greene, public records custodian for the Southern Ohio Correctional Facility. *Id.* at ¶ 1, 5 (Kennedy, J., dissenting). Greene asserts, and Burfitt does not dispute, that these are the same J-1 Post Orders requested by Burfitt on January 25, 2019. (Motion to Stay at 3; Response at 3-5.) Burfitt's public records request is substantially the same as, if not identical to, the request made in *McDougald*. Greene asserted the same public records exceptions in *McDougald* as he does in this case. (Compare the quote from Greene's *McDougald* answer, Response at 3-4; with Response at 5-7, 11, and Glasgow Aff., denial letter.) Greene provided the same redacted version of the J-1 Post Orders to both McDougald and Burfitt. (Response at 5.) Therefore, the same facts and evidence would sustain the claim for production of records in both cases, and the same legal questions are posed as to compliance with the Public Records Act. [2]

[2] *McDougald* was brought under the alternative form of public records enforcement, an action in mandamus. See R.C. 149.43(C)(1). However, the determination of violations of R.C. 149.43(B) in mandamus and under R.C. 2743.75 both utilize the same statutory and case law, and the same burden of proof. R.C. 2743.75(F)(1); *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.).

{¶10} On September 25, 2019, the Supreme Court dismissed McDougald's complaint. *McDougald, supra*, Merit Decision Without Opinion. An involuntary dismissal, other than for lack of jurisdiction or failure to join a necessary party, constitutes adjudication on the merits unless the dismissal order specifies to the contrary. Civ.R. 41(B)(3); *State ex rel. Acres v. Ohio Dept. of Job & Family Servs*., 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170, ¶ 14-15. Nor is this "Merit Decision Without Opinion" less final and binding than one issued with a formal opinion. *Mubashshir v. Sheldon*, 3d Dist. Marion No. 9-10-39, 2010-Ohio-4808, ¶ 7-11.

{¶11} The record shows that Burfitt and McDougald sought identical relief, available to any member of the general public, and did not seek personally tailored relief to fit their unique circumstances or factual situations. Indeed, public records requests may not be conditioned on a "requester's identity or the intended use of the requested public record." R.C. 149.43(B)(4).[3] Like taxpayer suits, public records actions enforce "a right of action on behalf of and for the benefit of the general public." *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 40, 295 N.E.2d 665 (1973); *Carlson v. Green*, Ct. of Cl. No. 2016-00783PQ, 2016-Ohio-8606, ¶ 9-13. Thus, Burfitt and McDougald share a mutuality of interest in the desired result – disclosure of the J-1 Post Order – which they sought through the common right of access by "any person" to public records. R.C. 149.43(B)(1). This is the type of situation where the broader definition of privity is warranted. I find that the common facts and circumstances of their public records actions place Burfitt and McDougald in privity with each other for purposes of res judicata.[4]

{¶12} Based on the foregoing, I find that Burfitt's public records claim for production of the J-1 Post Orders is based on the same "transaction or occurrence" as

[3] Certain public records requests, requesters, and records are subject to conditions of special limitation or entitlement, but no such conditions are implicated in this action, or in *McDougald*.

[4] Preclusion of repeat litigation over the current version does not preclude future requests for SOCF J-1 Post Orders when amendment thereof erodes the "common nucleus of operative facts."

was the cause of action in *McDougald*, and that both cases present the same legal problem. I find that both stare decisis and defensive claim preclusion apply, and that the merit decision in *McDougald* must be followed by this court. Green is thus entitled to judgment as a matter of law as to redaction of the J-1 Post Orders. This renders Burfitt's claim as to their production moot.

The Redacted J-1 Post Orders were not Provided Within a Reasonable Period of Time

{¶13} In mandamus, the production of requested records will not render an entire public records action moot if an additional claim remains to be determined. *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, 918 N.E.2d 515, ¶ 10 (attorney fees); *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 52, 689 N.E.2d 25 (1998) (claim of untimely production). Likewise, under R.C. 2743.75(F)(3)(b) the Court of Claims may order recovery by the requester of his filing fee and other costs associated with the action that were incurred, if it "determines that the public office * * * denied the aggrieved person access to the public records in violation of division (B) of section 149.43 of the Revised Code." A person has been "denied access to public records" during any period that they were withheld beyond "promptly" or a "reasonable period of time." R.C. 149.43(B)(1). *See Foulk v. Upper Arlington*, Ct. of Cl. 2017-00132PQ, 2017-Ohio-4249, ¶ 9-11. The court also assigns court costs based in part on determination of violations.

{¶14} Determination of a timeliness violation has the salutary effect of recognizing and sanctioning unreasonable delay. Assignment of fees and costs expended due to untimely production serves to deter "strategic delay" in records production:

> If no fees could be awarded unless the court had ordered a party to produce records, it would allow a public office to sit on a public-records request until a mandamus case was filed and then turn over the records before the court had a chance to issue an order. It would thereby prevent

> a requester from obtaining records within a reasonable time, while the public office would escape liability for attorney fees altogether, ***.

State ex rel. DiFranco v. S. Euclid, 138 Ohio St.3d 367, 2014-Ohio-538, 7 N.E.3d 1136, ¶ 42 (Kennedy, J., dissenting).[5] The assessment of available compensation

> is a check on a public office's ability to inappropriately deny a public-records request and choose instead protracted litigation.

State ex rel. Rogers v. Dept. of Rehab. & Corr., 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 31-32 (attorney fees, unreasonable delay of inmate request). The *Rogers* Court also ordered DRC to reimburse the court costs Rogers paid to file the action. *Id*. at ¶ 41.

{¶15} Burfitt states that Greene violated his duty to timely provide available, redacted J-1 Post Orders by not producing them until well after this action was filed. (Reply at 6-7.) Burfitt's request was made on January 25, 2019. (Response, Greene Aff. at ¶ 3.) Greene initially denied Burfitt's request for the J-1 Post Orders in their entirety (*Id*. at ¶ 4; Complaint at 3), just as he had in *McDougald*. Greene subsequently created a redacted version of the J-1 Post Orders, and provided it to McDougald on March 21, 2019. (Response at 4.); *McDougald* at ¶ 6. However, instead of promptly correcting his response to Burfitt with the version of the J-1 Post Orders conceded to be proper in *McDougald*, Greene did not provide it to Burfitt until October 3, 2019 – more than six months after it was created and three months after this action was filed.

{¶16} The Public Records Act requires a public office to provide copies "within a reasonable period of time." R.C. 149.43(B)(1). The duration of a "reasonable period of time" is evaluated based on the facts and circumstances of each case. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 12. In this case, Greene offers no factual justification for his delay. *See State ex rel. Miller v. Ohio*

[5] For further analysis of the timeliness issue in *DiFranco*, see *Sutelan v. Ohio State Univ*., Ct. of Cl. 2019-00250PQ, 2019-Ohio-3675, ¶ 21-24.

Dept. of Educ., 10th Dist. Franklin No. 15AP-1168, 2016-Ohio-8534, ¶ 8. I find that six months is far in excess of any reasonable period of time to produce a record already fully reviewed, redacted, and provided to another requester. I conclude that Greene violated his obligation to provide the existing, redacted J-1 Post Orders to Burfitt within a reasonable period of time.

Conclusion

{¶17} Upon consideration of the pleadings and attachments, I recommend the court issue an order dismissing requester's claims for production of the ODRC records retention schedule and for a less-redacted copy of the J-1 Post Orders. I further recommend the court find that respondent violated his obligation under R.C. 149.43(B)(1) to provide the J-1 Post Orders within a reasonable period of time. I recommend the court order that requester is entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that he has incurred. I recommend court costs be assessed to respondent.

{¶18} *Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity*

all rounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).

JEFF CLARK
Special Master

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