THE STATE EX REL. RUSSELL ET AL., *v.* THOMAS ET AL.

[Cite as *State ex rel. Russell v. Thomas* (1999), ___ Ohio St.3d ___.]

Mandamus to compel Eastern Ohio Regional Wastewater Authority to provide access to various records — Writ denied, when — Claim moot when parties reach agreement providing relators access to requested records — Relators entitled to attorney fees, when.

(No. 98-43 — Submitted January 26, 1999 — Decided March 24, 1999.)

IN MANDAMUS.

Respondent Eastern Ohio Regional Wastewater Authority ("EORWA") is a regional wastewater treatment authority organized under R.C. Chapter 6119 that operates a wastewater treatment plant in Belmont County and a sewage collection system serving various municipalities in the region. EORWA employs respondent David Thomas as an office manager, respondent Paul Pollock as its superintendent, relator Paul Russell as a sewage collection system supervisor, and relator Lynn Zeller as an assistant operator.

In September 1996, the Ohio Attorney General filed a complaint in the Belmont County Court of Common Pleas against EORWA. The Attorney General alleged that EORWA had committed numerous violations of Ohio's water pollution control laws, R.C. Chapter 6111. In January 1997, the common pleas court entered a consent order permanently enjoining EORWA from violating the requirements of R.C. Chapter 6111 and the rules adopted thereunder, ordered EORWA to comply with the terms and conditions of its National Pollution Discharge Elimination System permit, and imposed a civil penalty on EORWA of over $230,000.

In August 1997, relator Russell requested that respondents, EORWA, Thomas, Pollock, and the EORWA Board of Trustees, permit him to inspect and

copy EORWA's plant operational logs, safety equipment purchase records, collection system logs, records relating to bids or contracts to comply with the consent decree, and board of trustee minutes. In October 1997, respondent Thomas rejected the request because it was "too broad." In October 1997, relator Zeller requested access to the same records, and respondents again refused on the basis that the request was "too broad." Relators asserted in their requests that they needed access to these records in order to properly perform their job duties.

At the time of relators' requests, respondents had a public records policy that required persons requesting copies to pay one dollar per page even though the actual cost of copies was significantly less. All EORWA employees acknowledged and signed a handbook, which stated that the policy of EORWA was to ensure that the operations, activities, and business affairs of EORWA were "kept confidential to the greatest possible extent." According to relators, respondents Thomas and Pollock maintain public records and are responsible for compliance with R.C. 149.43 as part of their employment with EORWA.

Following respondents' refusal to provide them with access to the requested records, relators filed this action for a writ of mandamus to compel respondents to provide access to the records and to provide copies at a charge of no more than two cents per page. Relators also requested attorney fees. Respondents filed an answer, a memorandum in opposition to relators' request for peremptory and/or an alternative writ, and an affidavit. Respondents Thomas and Pollock filed a motion to dismiss the claims against them on the basis that they were not proper respondents. Relators filed a motion suggesting the need for a discovery schedule.

Pursuant to this court's mediation program, we held a mediation conference in April 1998. In November 1998, we issued an order for the parties to show cause why we should not proceed to our determination under S.Ct.Prac.R. X(5).

Respondents filed a response in which they noted that the parties had reached an agreement settling relators' mandamus claim, leaving only relators' request for attorney fees unresolved. Respondents noted that the attorney fees request was unresolved because relators' "counsel would not substantiate the requested attorneys fees, and refused to disclose the data supporting the requested fees." Relators have also agreed that the parties settled their mandamus claim and that they were unable to resolve the issue of relators' entitlement to attorney fees and the amount of such fees.

Under the parties' settlement, respondents agreed to permit relators to inspect and copy as public records, EORWA's plant operational logs from 1988 to the present, EORWA's collection system logs from 1988 to the present, EORWA's OSHA-related safety equipment purchases, minutes of EORWA Board of Trustees meetings, and all records of bids or contracts for which EORWA must perform in order to comply with the consent order signed by EORWA, the Attorney General, and the Ohio Environmental Protection Agency. The parties further agreed that EORWA could charge ten cents per page for any public records copied by relators.

This cause is now before the court upon the parties' response to the show cause order.

E. Dennis Muchnicki and *Richard R. Renner*, for relators.

Hanlon, Duff, Paleudis & Estadt Co., L.P.A., and *Gerald P. Duff*, for respondents.

Per Curiam.

R.C. 149.43; Mandamus

Relators requested a writ of mandamus to compel respondents to provide access to the various records. As the parties apparently concede, this mandamus claim is now moot because of the parties' settlement agreement, which provides relators with access to the requested records. *State ex rel. Thomson v. Doneghy* (1997), 80 Ohio St.3d 222, 685 N.E.2d 537. Therefore, we deny the writ of mandamus based on mootness.

Request for Attorney Fees

Relators also request attorney fees. Under *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 661 N.E.2d 1049, syllabus, "A court may award attorney fees pursuant to R.C. 149.43 where (1) a person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person's request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and (4) the person receives the requested public records only after the mandamus action is filed, thereby rendering the claim for a writ of mandamus moot."

Relators made proper requests for public records under R.C. 149.43, and respondents failed to comply with these requests. Despite respondent Thomas's written refusal of access to the records because relators' requests were "too broad," the requests were sufficiently specific. See, *e.g., State ex rel. Wadd v. Cleveland* (1998), 81 Ohio St.3d 50, 54, 689 N.E.2d 25, 29; *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 624, 640 N.E.2d 174, 179. Relators did not request "complete duplication" of EORWA's files. *Wadd*, 81 Ohio St.3d at 54, 689 N.E.2d at 29. EORWA's confidentiality provision in its employee handbook did not alter the public status of the requested records. *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.* (1997), 80 Ohio St.3d 134, 137, 684 N.E.2d 1222, 1225. Nor were respondents Thomas and

Pollock, as they asserted in their motion to dismiss, relieved of their public records duties under R.C. 149.43 because they were not "governmental units." R.C. 149.43(C) expressly authorizes aggrieved parties to bring a public records action against "person[s] responsible for the public record" in addition to governmental units. This conclusion is further supported by the fact that respondent Thomas was the EORWA employee who rejected relators' record requests. The parties' settlement agreement also refers to the requested records as public records.

In addition, the one-dollar-per-page charge for copies of EORWA's public records did not represent respondents' actual copying costs. *Warren Newspapers*, 70 Ohio St.3d at 625-626, 640 N.E.2d at 180; *State ex rel. Heyduk v. Westlake* (Mar. 13, 1996), Cuyahoga App. No. 69443, unreported, 1996 WL 112451 ("[T]his court declines to sanction a charge of 25 cents per page for a copy of a public record. The respondent may charge only the actual cost.").

Relators also satisfied the remaining *Pennington* requirements. In other words, they were provided access to the requested records only after they filed this mandamus action. In this regard, although respondents claimed in their answer and memorandum in opposition to the writ that relators had received some of the requested records through their attorneys, who had represented a third party in separate litigation, relators noted that they had not been provided these records. In addition, respondents did not rescind their unsupported policy of charging one dollar per page for copies of public records until after relators commenced this mandamus action. Moreover, respondents implicitly concede that relators are entitled to an attorney fees award. Their response to the court's show cause order emphasizes that the fee issue remains unresolved due to relators' failure to substantiate the attorney fees requested.

Based on the foregoing, relators are entitled to attorney fees. See, *e.g.*, *Wadd*, 81 Ohio St.3d at 54-55, 689 N.E.2d at 29. Relators have established a sufficient public benefit by making respondents provide access to the requested records and by having them charge a public record copy fee closer to actual cost, and respondents refused to comply for reasons that were unreasonable and unjustifiable. *State ex rel. Toledo Blade Co. v. Hancock Cty. Bd. of Commrs.* (1998), 82 Ohio St.3d 34, 37, 693 N.E.2d 787, 788-789. Accordingly, we award attorney fees to relators and order their counsel to submit a bill and documentation in support of attorney fees in accordance with DR 2-106(B).

Judgment accordingly.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

DOUGLAS, J., concurs in judgment.