

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas McCray,	:	
Relator,	:	
v.	:	No. 11AP-1055
Ohio Department of Commerce,	:	(REGULAR CALENDAR)
Division of State Fire Marshal,	:	
Respondent.	:	

D E C I S I O N

Rendered on June 29, 2012

Thomas McCray, pro se.

Michael DeWine, Attorney General, and Hilary R. Damaser,
for respondent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Thomas McCray, an inmate currently incarcerated at Southern Ohio Correctional Facility, commenced this original action in mandamus seeking an order compelling respondent, Ohio Department of Commerce, Division of State Fire Marshal, to respond to his public records request. Both relator and respondent have filed motions for summary judgment.

{¶ 2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that shortly after relator filed his complaint, respondent responded to his public records request and provided the requested documents. Therefore, to the extent that relator's

mandamus action seeks to compel respondent to produce those documents, the magistrate found that issue moot. However, the issue of statutory damages is not moot because statutory damages can be awarded even if the documents have been provided.

{¶ 3} The magistrate noted that relator has the burden to demonstrate that respondent's response to his public records request was unreasonably delayed. Here, relator requested documents falling within a number of different categories. An employee of respondent submitted an affidavit that outlines the steps respondent took to retrieve the requested documents. Respondent produced the requested documents to relator roughly 60 days following its receipt of his request. Given the diversity and scope of relator's document request and the fact that a number of different people were responsible for providing the records, the magistrate found that relator did not establish that respondent's response to his public records request was unreasonably delayed. Therefore, the magistrate has recommended that we grant respondent's motion for summary judgment and deny relator's motion for summary judgment.

{¶ 4} Although relator has filed objections to the magistrate's decision, his objections are nonspecific. Essentially, relator simply disagrees with the magistrate's decision. After reviewing relator's document request and the affidavit submitted by respondent, we agree with the magistrate that relator failed to meet his burden. For the reasons identified by the magistrate, relator failed to demonstrate that respondent's response to his public records request was unreasonably delayed. The efforts respondent took to respond to relator's public records request are set forth in the affidavit. Relator has not shown those efforts were unreasonable under the circumstances. Therefore, we overrule relator's objections.

{¶ 5} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's motion for summary judgment and grant respondent's motion for summary judgment.

*Writ of mandamus denied;
relator's motion for summary judgment denied;
respondent's motion for summary judgment granted.*

BRYANT and FRENCH, JJ., concur.

APPENDIX**IN THE COURT OF APPEALS OF OHIO****TENTH APPELLATE DISTRICT**

State of Ohio ex rel. Thomas McCray,	:	
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Relator,	:	
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v.	:	No. 11AP-1055
	:	
Ohio Department of Commerce,	:	(REGULAR CALENDAR)
Division of State Fire Marshal,	:	
	:	
Respondent.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 23, 2012

Thomas McCray, pro se.

*Michael DeWine, Attorney General, and Hilary R. Damaser,
for respondent.*

**IN MANDAMUS
ON MOTIONS**

{¶ 6} Relator, Thomas McCray, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Department of Commerce, Division of State Fire Marshal, to respond to his public records request.

Findings of Fact:

{¶ 7} 1. Relator is an inmate currently incarcerated at Southern Ohio Correctional Facility.

{¶ 8} 2. According to his complaint, relator sent a hand-written public record request for 13 different types of records to respondent on October 7, 2011.

{¶ 9} 3. Holly Johnson-Cook, Assistant Division Counsel for respondent, replied to relator's request in a letter dated October 11, 2011. At the outset of her letter, Johnson-Cook set forth the various documents relator sought as follows:

1. The current salary of each employee at the SFM from January 1, 2011 to October 7, 2011 (our receipt of your letter).
2. The retirement benefits of each employee currently employed at the SFM.
3. The medical benefits of each employee currently employed at the SFM.
4. The vacation pay of each employee currently employed at the SFM.
5. The amount of bonus pay paid out to any employee of the SFM since January 1, 2010.
6. The records for the amount of money spent on gas for business travel in any state or county vehicles at the SFM since January 1, 2011.
7. The amount of money spent on gas for privately owned employee vehicles used for business travel and the miles they traveled for 2011.
8. The State Fire Marshal's resume, his qualifications, and training.
9. The State Fire Marshal campus' maintenance records for 2011.
10. A copy of bids for all maintenance work performed at the Division of State Fire Marshal's campus from January, 2010 to October 7, 2011 (our receipt of your letter).
11. The contract for all winning bidders and their resumes from January 1, 2011 until October 7, 2011 (our receipt of your letter.)
12. A record of all money spent to educate the public on fire safety for 2011.
13. The records for any training employees of the Division of State Fire Marshal have received since January, 2011.

Johnson-Cook asked relator to let her know if the above did not reflect his request. Further, she informed relator that staff was processing his request and would provide responsive documents at five cents per page for copies or that, if he preferred, he could receive a CD for one dollar per CD.

{¶ 10} 4. Relator acknowledges that he received respondent's October 11, 2011 letter.

{¶ 11} 5. Thereafter, a series of emails was generated between Johnson-Cook to other various employees of respondent in an effort to determine where any of the

documents relator requested were kept and seeking to determine the individual or individuals responsible for maintaining those documents.

{¶ 12} 6. According to her affidavit, Johnson-Cook outlined the steps she took to retrieve documents responsive to relator's request as follows:

5. On October 26, 2011, I emailed the State Fire Marshal's executive assistant requesting a copy of the Fire Marshal's resume. She referred me to Human Resources the same day.

6. On October 28, 2011, the fiscal department responded that they were working on retrieving the documents.

7. On November 1, 2011 I received an email from the fiscal department stating the request was broad and may take some time. The fiscal department requested a meeting to go over the request.

8. On November 1, 2011 I emailed Human Resources requesting a copy of the State Fire Marshal's resume.

9. On November 2, 2011 I was referred to Andy Shuman, Human Resources Director. I emailed him requesting a copy of the State Fire Marshal's resume.

10. On November 3, 2011 I received the State Fire Marshal's resume from Human Resources.

11. On November 2, 2011, I met with fiscal staff. At that time fiscal staff indicated some requests were overly broad and they would check on the remaining request regarding the budget of the Ohio Fire Academy and the Fire Prevention Bureau.

12. On November 4, 2011, I received an email from the fiscal department with a document consisting of 6 pages providing wage information for Division of State Fire Marshal employees.

13. On November 17, 2011, I sent an email to the fiscal department requesting an update on the remaining request.

14. On or about November 17, 2011, I started to draft a response to Mr. McCray.

15. On November 28, 2011, I sent another email to the fiscal department requesting an update on the remaining request.

16. On November 28, 2011 I emailed the Chief Deputy State Fire Marshal, requesting him to ask the fiscal department for an update on the remaining request. The Chief Deputy replied that he would.

17. On November 28, 2011 I received the remaining information, a table prepared for the response to Mr. McCray, regarding the budget of the Ohio Fire Academy and Fire Prevention Bureau.

18. After November 28, 2011 I reviewed the responsive documents, made redactions where appropriate, and continued to draft a response to Mr. McCray.

19. On or about December 2, 2011 I met with my supervisor, Division Counsel, to review the response to Mr. McCray.

20. After December 2, 2011 I revised the response to Mr. McCray in accordance with my supervisor's recommendations.

21. On December 8, 2011, I mailed responsive documents to Mr. McCray with an explanation of why certain information was redacted and that some of his requests were overly broad. The letter requested Mr. McCray to clarify his request.

{¶ 13} 7. Respondent has provided a copy of that December 8, 2011 letter informing relator that certain portions of his request were overbroad and failed to identify the public record with sufficient clarity, explaining why certain portions were redacted. (These documents are contained at Exhibit A15 included with respondent's motion for summary judgment.)

{¶ 14} 8. Prior to respondent's December 8, 2011 letter to relator, relator filed his mandamus action in this court on December 1, 2011.

{¶ 15} 9. On January 11, 2012, relator filed a motion for summary judgment and asserts that, by admitting that respondent received his public records request, respondent has demonstrated that it failed to comply with his request, and, therefore, relator contends that he is entitled to an award of statutory damages.

{¶ 16} 10. On January 25, 2012, respondent filed its memorandum contra to relator's motion for summary judgment and a cross-motion for summary judgment. With its cross-motion for summary judgment, respondent included the affidavit of Johnson-Cook as well as copies of relator's public records request, respondent's October 11, 2011

reply thereto, copies of emails substantiating Johnson-Cook's assertions in her affidavit, and the December 8, 2011 response to relator's public records request.

{¶ 17} 11. The matter is currently before the magistrate on the parties' motions for summary judgment.

Conclusions of Law:

{¶ 18} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for summary judgment and grant respondent's motion for summary judgment in its favor.

{¶ 19} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 20} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

{¶ 21} The purpose of the Ohio Public Records Act "is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St.3d 261, 264 (1997), citing *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355 (1997). Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so government officials can be held accountable. *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 420 (1996).

{¶ 22} The appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act, is mandamus. *State ex rel. Physicians Commt. for Responsible Medicine v. Bd. of Trustees of Ohio St. Univ.*, 108 Ohio St.3d 288, 2006-Ohio-903. R.C.

149.43 must also be construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374 (1996).

{¶ 23} R.C. 149.43 pertains to availability of public records and provides, in pertinent part:

(A)(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *.

* * *

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) * * * If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing.

* * *

* * *

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section.

* * *

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information.

{¶ 24} As above indicated, public offices are required to promptly prepare records and transmit them within a reasonable period of time after receiving the request for the copy. The term "promptly" is not defined in the statute. However, statutes in other states give their agencies from between 3 and 12 days from the date the public records were requested to make the documents available. The word "prompt" is defined as "performed readily or immediately." *Webster's Eleventh New Collegiate Dictionary* 994 (2005).

{¶ 25} Respondent has provided relator with copies of the requested documents. As such, to the extent that relator's mandamus action seeks to compel respondent to produce those documents, the matter is moot. *See State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 23, citing *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 8. "In general, the provision of requested records to a relator in a public-records mandamus case renders the mandamus claim moot." *Id.*

{¶ 26} However, R.C. 149.43(C)(1) provides for an award of statutory damages, which can be awarded even if the documents have been provided. In his mandamus complaint, relator specifically sought an award of statutory damages. This determination is not rendered moot simply because respondent has now provided relator with the documents he requested.

{¶ 27} With regards to this mandamus action, inasmuch as it was filed before relator received the documents which respondent provided, the only issue which remains is whether or not respondent promptly responded to relator's public records request.

{¶ 28} With regard to relator's request for statutory damages, relator has the burden to demonstrate that respondent's response to his public records request was unreasonably delayed. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384. Further, a review of R.C. 149.43(B)(1) reveals that the state of Ohio has not set a required time period for a public office to respond to a request for copies of public records. The only requirement is that the copy be made available in a reasonable period of time.

{¶ 29} Relator submitted his public records request to respondent on October 7, 2011 and respondent responded to that request four days later on October 11, 2011. One of the purposes of this response was to ensure that respondent had correctly identified the record which relator, in his hand-written request, had requested. As indicated in the

findings of fact, relator sought 13 different types of documents: current salary of each State Fire Marshal employee; medical benefits of each employee; vacation pay of each employee; the amount of bonus pay paid out to any employee since January 2010; records for the amount of money spent on gasoline for business travel in any state; the amount of money spent on gas for privately owned employee vehicles used for business travel and the miles they traveled for 2011; State Fire Marshal's resume, qualifications, and training; maintenance records for 2011, the contract for all winning bidders and their resumes for the same time period; a record of all money spent to educate the public on fire safety in 2011; and records for any training the employees had received since January 2011. This list applies to more than just one area of records kept by respondent. As indicated in Johnson-Cook's affidavit, her first task was to determine who maintained these documents and whether or not to gather those documents and make them available for review. Johnson-Cook's affidavit and the emails attached thereto demonstrate her continuing efforts to locate and provide relator with the records he requested. Given the diversity of relator's request and the fact that different people were responsible for providing different records, the magistrate finds that relator has not met his burden of demonstrating that respondent's response to his public records request was unreasonably delayed.

{¶ 30} Relator cites this court's decision in *State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 08AP-21, 2009-Ohio-442, in support of his argument that respondent's response was too long. However, the overriding factor in the *Simonsen* case was that the agency acknowledged that it had received Simonsen's public records request but did not respond. In the present case, there is no evidence that respondent ignored or failed to respond to relator's public records request. Instead, all the evidence points to the fact that respondent immediately took steps to gather the records relator sought, review those records, redact whatever information was necessary, prepare a response for relator explaining why certain redactions had been made, and providing those documents to relator. Relator's request was not ignored and the magistrate finds that statutory damages would not be appropriate here.

{¶ 31} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that respondent failed to promptly respond to his public records request. As such, relator is not entitled to summary judgment. However, finding that respondent

did promptly respond, it is this magistrate's decision that this court should grant summary judgment in favor of respondent.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).