

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. RALEIGH M. STRIKER	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J.
	:	
Relator	:	
	:	
-vs-	:	Case No. 2008-CA-0336
	:	
CLERK OF COURT, DANIEL F. SMITH	:	<u>OPINION</u>
	:	
Respondent	:	

CHARACTER OF PROCEEDING: Complaint for Writ of Mandamus

JUDGMENT: Granted in part; denied in part

DATE OF JUDGMENT ENTRY: February 8, 2010

APPEARANCES:

For Relator

LORI A. MCGINNIS
3183 Wally Road
Loudonville, OH 44842

For Respondent

DAVID L. REMY
30 North Diamond Street
Mansfield, OH 44902

Gwin, P.J.

{¶1} Relator, Raleigh M. Striker, has filed a Complaint for Writ of Mandamus against Respondent, Daniel F. Smith, Clerk of Courts alleging Respondent has failed to comply with the “Sunshine Law.” Respondent has filed a brief in opposition. In addition, Relator has filed a “Motion for Supplemental (sic) Pleading” detailing additional allegations which occurred after the initial complaint was filed.

{¶2} Initially, we granted Relator’s motion to supplement the Complaint. Civ.R. 15(A) permits a party to amend a pleading as a matter of course prior to the filing of a responsive pleading. Relator filed the motion to supplement the complaint on January 15, 2009. Respondent did not file an answer until January 23, 2009, therefore, Relator is able to amend his original complaint without leave of court.

{¶3} Relator essentially raises two claims in his Complaint in addition to a request for statutory damages and attorney fees. First, he requests this Court issue a writ of mandamus because Respondent did not provide copies of public records promptly upon Relator’s request. Second, Relator avers Respondent has failed to properly post its public records policy.

I. First Claim: Public Records

{¶4} Relator’s first claim involves a public record request for three documents: “(1) 1/02/07 remand SC, (2) 1/31/07 memorandum, and (3) 4/30/07 JE.” There was a fourth item requested, however, the parties agree the fourth item was not a public record subject to disclosure. Relator went to Respondent’s office and made an oral request for these documents on December 4, 2008. Relator was advised the file containing the documents was in the office of the judge assigned to the case, therefore,

the request could not be fulfilled at that time. Upon hearing this, Relator left the building. On December 29, 2008, Relator presented a written request for the documents to Respondent. Respondent made a notation on the request, "Waiting on Judge Payton, Dan Smith 12-29-08." Relator took the written request with him. Relator filed the instant Complaint the next day on December 30, 2008. Respondent provided the requested documents on January 20, 2009.

{¶5} Respondent raises three arguments in his defense. First, Respondent states the file containing the documents sought by Relator was in the possession of the trial court judge at the time Relator made his request. Respondent argues R.C. 149.43(B)(1) merely requires public records to be made available to a requestor "within a reasonable period of time". Because the file was not in the possession of the clerk at the time of the request, Respondent could not instantly fulfill the request. Both times Relator appeared at the Clerk's office, Respondent notified Relator of the immediate unavailability of the documents. Upon learning this, Relator left the office each time without leaving the request.

{¶6} This act of leaving the office is the crux of Respondent's second argument. Respondent argues Relator withdrew his request by failing to leave a copy of the request with Respondent.

{¶7} We will address these arguments together as they are intertwined. The Tenth District Court of Appeals has examined the duty of a public office pursuant to a public records request, "[P]ublic 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 three 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 (2005) 994.” *State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.* 2008 WL 5381924, 6 (Ohio App. 10 Dist.).

{¶8} Other courts have examined the number of days which may be considered reasonable or unreasonable. Ten business days has been held to be reasonable while 32, 37, and 79 business days have been held to be unreasonable. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009 WL 3387654, 1 (Ohio App. 8 Dist.) (ten business days not violation); *State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.*, 2009 WL 250867, 7 (Ohio App. 10 Dist.) (37 days not reasonable); *State ex rel. Bardwell v. Rocky River Police Dept.*, 2009 WL 406600, 7 (Ohio App. 8 Dist.) (32 business days unreasonable); *Bardwell v. Cleveland*, 2009 WL 3478444, 5 (Ohio App. 8 Dist.) (79 days unreasonable). In the instant case, the records were given to Relator on the 13th business day after the request was made in writing. We cannot say 13 days is unreasonable under these circumstances.

{¶9} We find the oral request made on December 4, 2009 was withdrawn when Relator left the office. Relator did not indicate he would return for the records nor did he leave information for Respondent to contact him once the file had been retrieved.

{¶10} Again, Relator took his written request with him on December 29, 2008. Respondent was not in possession of a list of the records sought until Respondent was served with a copy of the Complaint on January 5, 2009. Once Respondent was in

possession of the list of records, they were provided to Relator on the tenth business day following Respondent's receipt of the request.

{¶11} Whether we consider the request made on December 29 or January 5, we find Respondent provided the copies requested promptly within a reasonable time in either case.

{¶12} Finally, Respondent's third contention is the instant complaint is moot. Upon receiving a copy of the complaint in this case, Respondent learned the list of documents Relator wanted. Respondent made copies of those documents and furnished them to Relator which Respondent argues makes this cause of action moot.

{¶13} The Supreme Court addressed an analogous fact pattern in *State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Comp. et al.* (2005), 106 Ohio St.3d 113. In *Toledo Blade*, the Blade requested certain records from the Ohio Bureau of Workers' Compensation (BWC). After the Complaint was filed, the BWC provided certain records. The Supreme Court held, "The Blade's mandamus claim for unredacted audit reports of coin-inventory records is moot because respondents have now provided these records. See *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, 814 N.E.2d 1218, ¶ 23, quoting *116 *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 8 ("In general, the provision**715 of requested records to a relator in a public-records mandamus case renders the mandamus claim moot' "). *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp.* (2005), 106 Ohio St.3d 113, 115-116, 832 N.E.2d 711, 714 – 715.

{¶14} We find Relator's claim to be moot based upon Respondent's having provided the requested documents to Relator. Further, even had the claim not been moot, we do not find Respondent failed to comply with his duty under the Public Records Act.

II. Second Claim: Posting of Public Records Policy

{¶15} Relator claims Respondent has failed to post its public records policy. R.C. 149.43(E)(2) provides in part, "The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branches." The parties filed an Agreed Statement of Facts which states, "A Public Records Rights poster is not posted in the Clerk of Courts Office. However, copies of such rights are located in the City's Mail Bulletin Board located on the Third Floor of the Administration Building and at certain other locations throughout the building."

{¶16} Respondent argues the posters in the Administration Building comply with the statute. The statute requires the poster to be displayed in the public office. The parties agree the poster is not located in the Clerk of Court's office. Although the parties agree the poster appears throughout the building, Respondent has failed to prove the posters appear sufficiently close to his office to comply with the statute. Because Respondent concedes the poster is not located in his office, the writ of mandamus is granted with respect to placement of the poster only.

III. Third Claim: Award of Statutory Damages and Attorney Fees

{¶17} R.C. 149.43(C) requires an award of statutory damages in cases where a written request is made and where the public office has failed to comply with the written

request. Relator did not transmit a written request until the filing of the Complaint. Because we have found Respondent did not fail to comply with a written request, statutory damages should not be awarded.

{¶18} R.C. 149.43(C)(2)(b) allows an award of attorney fees only if judgment is rendered ordering a public office to comply with division (B) of the Public Records Act. Because we have not rendered a judgment against Respondent for violation of division (B), attorney fees cannot be awarded.

{¶19} A writ of mandamus is issued relating only to the posting of the public records policy. Respondent shall immediately post his public records policy poster in the office of the clerk of courts.

{¶20} WRIT DENIED IN PART AND GRANTED IN PART.

{¶21} COSTS TO RELATOR.

{¶22} IT IS SO ORDERED.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

