[Cite as *State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-1868.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio, ex rel. Jean A. Anderson — Court of Appeals No. E-10-040

Relator

v.

City of Vermilion, c/o Brian Huff, Finance Director — **DECISION AND JUDGMENT**

Respondent — Decided: April 25, 2012

* * * * *

Andrew D. Bemer, for relator.

Shawn W. Maestle, Timothy R. Obringer and Jeffrey R. Lang, for respondent.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court as an original action in mandamus. Relator, Jean A. Anderson, seeks an order from this court directing respondent, the city of Vermilion, by and through its finance director, Brian Huff, to comply with her previous public records requests and make available all itemized billing statements for attorney

services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler. In support of her petition, relator has filed a motion for summary judgment, which relator has opposed in its brief in opposition. The matter is now decisional.

{¶ 2} The undisputed facts of this case are as follows. On May 14, 2010, relator presented Kenneth S. Stumphauzer, the law director of the city of Vermilion, with a public records request pursuant to R.C. 149.43. In her request, relator asked for copies of a letter submitted by Barb Brady to the Ohio Ethics Commission ("OEC"), and the OEC's response thereto, which letter and response had been identified by Stumphauzer in a Vermilion City Council meeting on May 3, 2010. The letter and response allegedly referred to Vermilion's allowing Stumphauzer to hire his law firm, Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA ("Stumphauzer & O'Toole"), to do city business while Stumphauzer was an employee of Vermilion. Stumphauzer did not respond to the request and on May 25, 2010, relator resubmitted her request. In an email response, Stumphauzer denied that the information that she sought from him was a public record. Also on May 25, 2010, relator submitted a public records request to Brian Huff for (1) copies of all checks paid to the law firm of Stumphauzer & O'Toole and to Margaret O'Brian for the months of January, February, March and April 2010, (2) copies of all itemized billing statements received from Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler, another law firm, for the months of January, February, March and April 2010, and (3) copies of all itemized billing statements or bills received from

engineers Lynn Miggins and KS Associates for the months of January, February, March and April 2010.

{¶ 3} Eventually, relator obtained the documents regarding the OEC's ethics opinion from another source. In addition, respondent provided realtor with copies of the checks requested and the billing statements from Lynn Miggins and KS Associates. Relator also obtained, although through a different source, a copy of a summary billing statement dated February 16, 2010, that Stumphauzer & O'Toole submitted to respondent for legal fees covering legal services rendered through February 15, 2010. To date, however, respondent refuses to provide relator with the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler.

{¶ 4} "'Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act.'" *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 21, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). The Public Records Act implements the state's policy 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. "'Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.'" *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d

1049, ¶ 13, quoting *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶ 5} Generally to be entitled to the issuance of a writ of mandamus, the relator must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent's part to perform the act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). Where the allegation relates solely to a public records request, the Supreme Court has held that the requirement of the lack of an adequate legal remedy, as an element of a petition for writ of mandamus, does not apply. *State ex rel. Glasgow, supra*, at ¶ 12. When the release of a public record is challenged, it is the function of the courts to analyze the information to determine whether it is exempt from disclosure. *See, State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 85, 526 N.E.2d 786 (1988).

{¶ 6} Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. As used in R.C. 149.43, a "public record" means "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *." R.C. 149.43(A)(1). Moreover, "records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public

office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). A "public office" includes "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). "Exceptions to disclosure under the Public Records Act * * * are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

{¶ 7} Respondent asserts that the records at issue, the attorney fee statements and billings, are exempt from disclosure under R.C. 149.43 because they are protected by the attorney-client privilege and work product doctrine. In order to properly examine the issues before us, we ordered respondent to submit the unredacted copies of the records to the court for an in camera inspection. Respondent filed those records on March 16, 2012.

{¶ 8} R.C. 149.43(A)(1)(v) exempts from disclosure "[r]ecords the release of which is prohibited by state or federal law." In *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27, the Supreme Court of Ohio clarified this exemption as it relates to the attorney-client privilege:

> "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of those records." *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 542, 2000-Ohio-475, 721 N.E.2d 1044. In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), which provides a testimonial privilege, and by common law, which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24.

{¶ 9} In *Dawson*, the relator, Dawson, had filed a petition for a writ of mandamus to compel the respondent, the school district, to provide her with access to itemized invoices of law firms who had provided legal services to the school district pertaining to Dawson and her children. Prior to filing her petition with the Supreme Court, Dawson had filed a public records request with the school district. While the school district provided Dawson with summaries of invoices which noted the attorney's name, the invoice total and the matter involved, the school district refused to provide Dawson with the itemized invoices themselves. The school district asserted that the invoices contained confidential communications between the district and its attorneys and were therefore exempt from disclosure. The Supreme Court agreed and held that "[t]o the extent that narrative portions of attorney-fee statements are 'descriptions of legal services performed

by counsel for a client,' they are protected by the attorney-client privilege because they 'represent communications from the attorney to the client about matters for which the attorney has been retained by the client.'" *Dawson, supra,* at ¶ 28, quoting *State ex rel. Alley v. Couchois,* 2d Dist. No. 94-CA-30, 1995 WL 559973, * 4 (Sept. 20, 1995). In reaching this conclusion, the court noted:

> "While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the [attorney-client] privilege." *Hewes v. Langston* (Miss.2003), 853 So.2d 1237, ¶ 45. As a federal appellate court observed, "billing records describing the services performed for [the attorney's] clients and the time spent on those services, and any other attorney-client correspondence * * * may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. * * * [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.'" *In re Horn* (C.A.9, 1992), 976 F.2d 1314, 1317-1318, quoting *In re Grand Jury Witness (Salas)* (C.A.9, 1982), 695 F.2d 359, 362.

{¶ 10} The court further held, however, that the school district properly responded to Dawson's request for the itemized invoices of law firms by providing her with summaries of the invoices, which included the attorney's name, the fee total, and the

general matter involved. Accordingly, that information does fall within the realm of matters that are subject to disclosure under the Public Records Act.

{¶ 11} In the case before us, the attorney fee statements and billings which respondent has submitted to us for an in camera inspection contain narrative descriptions of legal services performed by counsel for the city of Vermilion. The invoices submitted to the city by Marcie & Butler state the date, a description of the professional service rendered, the time spent on each service and the hourly rate, and the total amount due for each date listed. The invoices submitted to the city by Stumphauzer & O'Toole state under separate headings which identify the general matter or case involved, detailed descriptions of the professional services rendered, the time spent on those services and the legal fees associated with each matter. Consistent with *Dawson*, we must hold that the subject itemized billing records are protected by the attorney-client privilege and are therefore exempt from disclosure under the Public Records Act.

{¶ 12} Although as a general matter R.C. 149.43(A) "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. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994), the court in *Dawson* did not discuss redaction but, rather, exempted the entire record. We further note that while the respondent in *Dawson* provided the relator with summaries of the invoices at issue, it is well established that a public office is not required to generate a new document in

response to a public records request. *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 382, 700 N.E.2d 12 (1998).

{¶ 13} Because the itemized billing statements for attorney services rendered to the city of Vermilion by Kenneth Stumphauzer, Stumphauzer & O'Toole, and Marcie & Butler are exempt from disclosure under the Public Records Act, there remains no genuine issue of material fact and respondent is entitled to judgment as a matter of law. Relator's motion for summary judgment is denied. Relator's action in mandamus is hereby ordered dismissed at relator's cost. The clerk is directed to serve all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DISMISSED.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE