[Cite as *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 2011-Ohio-117.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95277

STATE OF OHIO, EX REL., MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS' LABOR COUNCIL

RELATOR

vs.

CITY OF CLEVELAND

RESPONDENT

JUDGMENT: COMPLAINT DISMISSED

Writ of Mandamus
Motion Nos. 435522 and 438001
Order No. 440214

RELEASE DATE: January 7, 2011

ATTORNEY FOR RELATOR

Stewart D. Roll
Climaco, Wilcox, Peca, Tarantino & Garofoli
55 Public Square
Suite 1950
Cleveland, Ohio 44113

ATTORNEYS FOR RESPONDENT

Robert J. Triozzi
Director of Law
Barbara A. Langhenry
Chief Counsel
Joseph F. Scott
Chief Assistant Director
Room 106 - City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114

COLLEEN CONWAY COONEY, J.:

On June 15, 2010, the relator, the Municipal Construction Equipment Operators' Labor Council (the "Union"), through its attorney Stewart D. Roll, commenced this public records mandamus action pursuant to R.C. 149.43, against the City of Cleveland ("Cleveland") for records relating to the chlorine gas operations of Cleveland's Water Department and certain street repairs. The parties have certified the status of the record requests, and, on September 30, 2010, the Union moved for the payment of court costs and attorney fees.

Cleveland filed its brief in opposition on October 14, 2010, and the Union filed a reply brief on October 18, 2010. For the following reasons, this court dismisses the public records mandamus action as moot, and awards attorney fees and court costs to the Union.

On May 21, 2010, the Union, through its attorney, via e-mail, made the following public records request: "This request relates to chlorine gas operations of Cleveland's Water Department. Please **email** to me a copy of Cleveland's records from January 1, 2010 to the present that address Cleveland's compliance with OSHA requirements on this topic. This public records request includes your provision to me of Cleveland's emergency response plan for addressing chlorine gas leaks, and an operational plan for addressing problems that could occur during chlorine cylinder changes." (Emphasis in the original.)

Cleveland acknowledged receipt of the request and its start of processing a response on the same day. On May 28, 2010, the Union also requested records with respect to street repair performed for Cleveland by the Shelly Co. at certain streets, as well as a follow-up e-mail on the first request. Cleveland acknowledged the receipt of this request and stated that it was still collecting records for the first request. On June 10, 2010, the Union's attorney e-mailed another reminder about the requests.

When no records were forthcoming, the Union commenced this mandamus action, along with a request for an alternative writ, on June 15, 2010. On June

17, 2010, Cleveland e-mailed the records for the street repair request and the "Chlorine Emergency Response Plan for the Garrett A. Morgan Water Treatment Plant" and two pieces of correspondence with the Ohio Bureau of Workers' Compensation, Division of Safety and Hygiene (the "Bureau"). On June 21, 2010, this court issued an alternative writ of mandamus, ordering Cleveland to produce the records or show cause why they should not be produced and also to certify the status of the requests.

On July 7, 2010, Cleveland certified that it had completely satisfied the requests and moved to dismiss on the grounds of mootness. On July 13, 2010, the Union opposed the motion to dismiss and Cleveland's certification because Cleveland had not produced the Emergency Response Plan for the Crown Plant. This is the only record the Union complained was missing. Later, the Union certified that it considered the street repair request to be satisfied. On July 20, 2010, Cleveland replied that because the City and the Union had been discussing the chlorine operations at the Morgan Plant just before May 21, 2010, it concluded that the Union was limiting its public record request to the Morgan Plant. Moreover, Cleveland distributes the chlorine emergency response plan for the Crown Plant to the Union's members annually. Thus, it concluded that the Union was not requesting that record.

On August 9, 2010, Cleveland released a copy of the Crown Plant chlorine emergency response plan. Nevertheless, in a certification filed September 28,

2010, the Union complained that Cleveland had not released all the requested records because it had not produced an amendment to the Morgan Plant emergency response plan. As evidenced by letters attached to the Union's certification, Cleveland agreed in August 2010 to amend that emergency response plan to address concerns raised by the Bureau. This is the only record that the Union complained was still not produced.

After reviewing all of the filings, this court concludes that Cleveland has satisfied the Union's May 21 and May 28, 2010 public records requests. The Union admits that it is satisfied with the street repair request from June 17, 2010. The Union's complaints with the request for chlorine gas operations were that the emergency response plan for the Crown Plant was not initially released and that Cleveland had not released the amendment to the emergency response plan. Cleveland released the Crown Plant plan in August. The amendment is outside the scope of the May 21, 2010 request because it did not exist at the time of the request, and a public entity does not have the duty to produce records which do not exist at the time of the request. *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 1999-Ohio-114, 715 N.E.2d 179, and *State ex rel. Scanlon v. Deters* (1989), 45 Ohio St.3d 376, 544 N.E.2d 680 (no duty under R.C. 149.43 to supplement responses with after-acquired information). Thus, Cleveland has satisfied the Union's requests.

Subsection (C)(2)(b) of the Ohio Public Records Act permits reasonable attorney fees if the court renders a judgment that orders compliance with the Act. This section requires reasonable attorney fees when the public office "failed to respond affirmatively or negatively to the public records request in accordance with the time allowed" under R.C. 149.43(B), which provides that "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," and that copies shall be made available within a reasonable period of time. The court may reduce attorney fees if the public office reasonably believed that its conduct did not constitute a failure to comply with the statute and that its conduct served underlying public policy.

This court finds that an award of attorney fees is appropriate. This court issued an alternative writ ordering compliance with the statute. More importantly, the lapse of time from May 21, 2010, to June 17, 2010, was not reasonable to secure and release the two emergency response plans and the two pieces of correspondence, especially because Cleveland did not communicate with the Union on the status of the request after June 2, 2010, and the Union had requested at least an explanation on June 10, 2010.

Furthermore, the delay in releasing the Crown Plant plan confirms the appropriateness of attorney fees. Cleveland's argument that the Union necessarily restricted its request to the Morgan Plant because Cleveland and the

Union had been discussing that plant is unpersuasive. The request did not limit itself to the Morgan Plant but referred to the "chlorine gas operations of Cleveland's Water Department." As the Supreme Court of Ohio has long held, the Public Records Act favors broad access and any doubt should be resolved in favor of disclosure. *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, and *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 2010-Ohio-5995. By filtering the request through the lens of recent discussions and not reading the request as presented, Cleveland did not serve the public policy of broad access to public records.

Stewart Roll asks for $6,558.75 in attorney fees for himself; this represents 24.75 hours of work at $265 per hour. The Union also asks for $640 for attorney David Neel who reviewed Roll's work and prepared an affidavit stating that the amount of hours worked and the billing rate were reasonable. Neel submits an invoice for 3.2 hours of work at $200 per hour for reading the pleadings and Roll's bill and affidavit, and conferring with Roll. Finally, Roll seeks $67.90 in expenses, for outside copying expenses, document reproduction, and a docket fee.

The court finds that the rate of $265 per hour is reasonable. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, Cuyahoga App. No. 94226, 2010-Ohio-2108 ("*Municipal Construction I")*. The court also finds that most of the time billed was reasonable. However, the court makes the following

reductions: On June 18, 2010, Roll spent 4.25 hours conferring with a Mr. Madonia and preparing a letter to Mr. Rea complaining about Cleveland's noncompliance with applicable regulations. On June 22, 2010, Roll reviewed and responded to e-mail from Rea for 0.25 hours. On August 2, 2010, Roll spent a half-hour reviewing the file and preparing an e-mail to Rea. On August 9, 2010, Roll exchanged e-mails with Rea regarding a chlorine complaint to Workers' Compensation for 0.25 hours. On August 19, 2010, Roll spent another half-hour reviewing correspondence from and conferencing with Rea, and preparing e-mails to other people. On August 30, 2010, Roll spent 0.25 hours reviewing and forwarding a letter from Rea regarding chlorine operations. The attachments to various filings show that Rea is an Industrial Safety Administrator for the Bureau. Thus, the correspondence to and from Rea did not directly advance the public records case. The Union and its attorney may have conceptualized such matters as part of the public records case because such correspondence may have been the objective for making the request in the first place. However, this court finds that the above-referenced work is too tangential to this public records mandamus action to award attorney fees for it.

Cleveland also objects to the half-hour spent on September 27, 2010, for reviewing this court's order, reviewing correspondence exchanged between the Bureau and Cleveland, and preparing a response to this court's order concerning the status of the case. Although some of the time spent may have been

reviewing matters before the Bureau, it appears that most of the half-hour was spent in direct response to this court's order. Thus, the court will allow attorney's fees for this matter.

The sum of the time spent on correspondence to the Bureau was six hours. Subtracting six hours from the 24.75 hours billed results in 18.75 hours. Multiplying 18.75 hours by $265 per hour results in a total of $4,968.75.

This court will also allow $640 to David Neel for his supporting affidavit and opinion. Cleveland makes a strong argument that this fee should be disallowed. This court in *Municipal Construction I* held that $265 per hour was a reasonable fee for Roll in pursuing a public records mandamus claim for the Union. Moreover, this court reached that conclusion without the aid of Neel's affidavit and opinion because in that case Neel omitted the billing rate. Thus, Cleveland argues Neel's opinion and affidavit was unnecessary. Moreover, Cleveland questions the reasonableness of the time spent. Reading the two invoices together, Cleveland concludes that Neel spent approximately three hours reading the pleadings in this case. Cleveland notes that the pleadings were neither long nor numerous and submits that three hours is excessive.

However, R.C. 149.43(C)(2)(c) provides in pertinent part: "Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees." Thus, the attorneys relied upon and followed the statute in submitting

Neel's affidavit. This court will not penalize the attorneys for prudently following the statute. Moreover, including the time necessary to prepare and execute the affidavit renders Neel's time more reasonable.

In *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 2001-Ohio-193, 750 N.E.2d 156, the Supreme Court of Ohio disallowed litigation expenses, such as copying, mailing, filing, and telephone expenses in a public records case. More recently, in *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, the Supreme Court of Ohio followed *Dillery* in ruling that litigation expenses are not recoverable. Thus, except to the extent that the litigation costs are otherwise covered by court costs, this court will not award $67.90 for expenses incurred.

Accordingly, this court grants the Union's motion for attorney fees as follows: $4,968.75 to Stewart Roll and $640 to David Neel. This court, sua sponte, dismisses this public records mandamus action as moot because the respondent fulfilled the records request in full after the commencement of the mandamus action. This court denies the respondent's motion to dismiss as moot. Respondent to pay court costs. This court directs the clerk to serve upon all parties notice of this judgment and its date of entry upon the journal pursuant to Civ.R. 58(B).

COLLEEN CONWAY COONEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
LARRY A. JONES, J., CONCUR