

[Cite as *State ex rel. Strothers v. Keenon*, 2016-Ohio-405.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103313

STATE OF OHIO, EX REL.
GERALD O. STROTHERS, JR.

RELATOR

vs.

DR. UNA H.R. KEENON, PRESIDENT

RESPONDENT

JUDGMENT:
WRIT GRANTED IN PART; DENIED IN PART

Writ of Mandamus
Motions Nos. 488837 and 488979
Order No. 492614

RELEASE DATE: January 29, 2016

FOR RELATOR

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MARY J. BOYLE, J.:

{¶1} Relator, Gerald O. Strothers, Jr. (“Strothers”) petitions this court in mandamus to compel respondent, Dr. Una H.R. Keenon, President of East Cleveland Board of Education (the “Board” or respondent) to produce public records that he requested in letters dated July 1, 2015, July 9, 2015, and July 20, 2015. Respondent and Strothers have both moved for summary judgment. For the reasons that follow, both motions are granted in part and denied in part. The Board is instructed to release public records, as permitted by federal and state law, that are contained in personnel files, if any, of adult individuals who were the subject of Executive Session meetings between January 2015 and July 2015. For all remaining claims, respondent’s motion for summary judgment is granted and relator’s motion for summary judgment is denied for the reasons that follow.

{¶2} Beginning on July 1, 2015, Strothers sent the East Cleveland Board of Education and various individuals’ letters requesting to review and inspect a number of documents. The letters at issue in this action are attached to relator’s brief filed on July 30, 2015 and are dated July 1, 2015, July 9, 2015 and July 20, 2015. The Board, through its attorneys, sent responses to Strothers, which are dated July 8, 2015, July 17, 2015, and July 30, 2015. In several of its responses, the Board sought clarification of what it considered to be overly broad and ambiguous requests.

{¶3} On July 30, 2015, the Board produced numerous records to Strothers by electronic mail. Strothers has provided sworn affidavits that he never received the documents. These documents, however, are available on a website that is allegedly associated with Strothers.

{¶4} Respondent’s motion for summary judgment alleges that the majority of Strothers’s requests are moot based on the documents that have been provided. Relator’s motion

for summary judgment insists no documents have been received and that he is entitled to summary judgment. However, relator's motion and reply in support of summary judgment dated September 29, 2015, indicate that he has received documents from the Board. This court sought clarification from Strothers as to what documents have not been produced. Strothers filed a fourth affidavit in response indicating that no documents have been produced. The Board responded that the documents have been produced and are on Strothers's website, which has been confirmed by reference to the website. The record also contains a number of emails dated July 30, 2015, which have been authenticated by uncontroverted averments in an affidavit. The eight emails were sent to the email address that Strothers had provided on his public records requests. These eight emails refer to subject attachments that indicate "Documents in Response to Public Records Request."

{¶5} Based on his broad denials contained in his summary judgment pleadings, this court instructed Strothers "to provide any evidence he has that records exist that have not been produced that would contradict the allegations of the affidavit submitted in support of respondent's motion for summary judgment." Strothers's response was that "there is no way [he] can present anything in writing showing that the records have not been received and that is why the initial public records request was submitted in July 2015." Fourth affidavit filed November 23, 2015, paragraph 3. He insisted that the Board's affidavit in support of summary judgment "was not the truth" and that he has not received the documents. *Id.* at paragraph 14.

{¶6} In addition to denying receipt of the documents, Strothers indicates he wants to review and inspect and copy the documents himself.

{¶7} The court resolves the competing motions for summary judgment below.

Public Records Law.

{¶8} Relator has filed a mandamus action, which is the appropriate remedy to compel compliance with Ohio’s Public Records Act. *State ex rel. Ohio v. Fitzgerald*, Slip Opinion No. 2015-Ohio-5056, ¶ 19, citing, R.C. 149.43(C)(1) (other citation omitted). The Public Records Act is to be construed liberally in favor of access to public records, however, “the relator must still establish entitlement to the requested extraordinary relief *by clear and convincing evidence*.” (emphasis added.) *Id.*, quoting *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16.

{¶9} The Ohio Supreme Court has held that where the uncontroverted evidence establishes that a citizen has been given access to requested records, this renders a mandamus claim for those records moot. *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶ 13, citing *Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22, quoting, *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, ¶ 14 (“In general, providing the requested records to the relator in a public-records mandamus case renders mandamus claim moot.”).

{¶10} Further, this court should not consider any claim concerning records that were not requested prior to commencing the action because they are not included in the mandamus petition. *Id.* at ¶ 14 , quoting, *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 390, 715 N.E.2d 179 (1999) (“R.C. 149.43 requires a prior request as a prerequisite to a mandamus action.”). Accordingly, the numerous post-petition records requests that Strothers has made are not part of the action before the court and will not be considered.

{¶11} In commencing this action, Strothers filed an “affidavit specifying [the] details of claim,” a praecipe, a docketing statement, an affidavit of indigence, and “relator’s brief.”

Strothers attached as exhibits to relator's brief correspondence dated July 1, 2015, July 9, 2015, and July 20, 2015. The correspondence was from him to East Cleveland Board of Education and others requesting certain information and referencing other public records actions where he had been a party. Strothers also attached correspondence he received from respondents' counsel regarding his requests dated July 8, 2015, and July 17, 2015.

The July 1, 2015 Request.

{¶12} Strothers addressed this correspondence to the East Cleveland Board of Education, Dr. Una H.R. Keenon, Gloria Avery-Pease, Dr. Patricia A. Blochowiak, Eve Lynn Westbrooks, Tiffany Fisher, Myrna Loy Corley, and Mary Ann Nowak. The following requests were made:

1. To review, inspect and or copy at cost all documents and records that necessitated an Executive Session of the East Cleveland Ohio Board of Education from January 2015 to July 2015.
2. Much of this request is going to center around what records are public and which are confidential. To clarify the records wanted to review, inspect and or copy at cost many cases can be found in the Ohio courts. I am not asking for juvenile records which are prohibited from release. Instead the records requested are adult over 18 year olds that may have been the focus for the frequent Executive Sessions in year 2015. [referenced to case citation omitted].

* * *

5. Executive Session: Discussion of employment, dismissal, compensation and investigation of charges against a public employee. This appears to be what most of the sessions are dealing with and those records, documents including complete personnel records are requested to be reviewed, inspected and copied at cost.

* * *

This request is not overbroad and only deals with the reason the East Cleveland Board of Education continues to go to Executive Session.

{¶13} Respondent's counsel responded on July 8, 2015 and denied the request on the grounds that it was ambiguous and overly broad. The Board did not understand what specific records Strothers was requesting. They explained the requests were overly broad by seeking all documents and records that necessitated an Executive Session of the East Cleveland Ohio Board of Education from January 2015 to July 2015 and indicated that documents do not necessitate meetings. Strothers was asked to submit a revised request allowing the Board to identify specific public records.

The July 9, 2015 Requests.

{¶14} Exhibit C to relator's brief indicates that this correspondence was addressed to the same individuals and the Board but was also sent by certified mail to respondent's counsel.

{¶15} Although Strothers seemed to clarify that his July 1st request had pertained only to records concerning "people disciplined since January 2015," he proceeded to make requests for additional and new records that had not been included within the scope of his initial records request. The following is quoted from the July 9, 2015 request:

1. All staff personnel records and this request includes teachers, custodians and anyone currently employed or dismissed by the East Cleveland Ohio Board of Education. * * * The original letter request simply asked for the people disciplined since January 2015 but that request was denied.
2. All food bills from the Executive Session catered meals including the most recent Bar-B-Que dinner for board members. Since it appears that this board gets a gourmet meal every meeting the receipts and venders [sic] names, invoices are requested.
3. The oath of office from all school board officers elected to office, the date signed and filed;
4. Copy of all drug test results pertaining to the principals and vice-principals at every East Cleveland Ohio School.
5. Copies of all memos, letters, documents which specifically pertain to the contract between East Cleveland Teachers Union and the board, prior to July 2015;

6. A copy of every check stub and cancelled check made to local lawyers, a list of all lawyers who have been paid monies and amounts paid from 2014 to present. Additionally a copy of the most recent contract and appointment to the current position as school board legal counsel * * * .

{¶16} Respondent's counsel responded on July 17, 2015. The Board agreed to produce numerous categories of identifiable public records documents as requested in paragraphs 2, 3, 5 and 6. Strothers was advised of the Board's position that documents requested in paragraph 4 are not public records, but even if they were, none existed. Specifically, Strothers was advised that "the Board has not conducted any drug tests of the principals or vice principals that it employs in the District." The only category of documents the Board denied to release were in response to Strothers's request for all staff personnel records set forth in paragraph 1 above on the basis that it was overbroad and the Board provided citation to case law precedent. Nonetheless, Strothers was invited to revise the request to identify specific personnel files that the Board indicated it would make available to him.

July 20, 2015 Correspondence.

{¶17} Strothers followed up with a letter to the Board indicating that he did not want copies of the documents he requested but wanted to review the records.

{¶18} He indicated his "original request from July 1, 2015 would have only at max consisted of no more than twenty-four personnel records based on [the] board meeting at least twelve times a year and most of the meeting held in Executive Session."

{¶19} He clarified that he was "requesting complete meeting minutes for every meeting held from July 2014 to July 2015 up to this last special executive session meeting."

{¶20} He asked for a “copy of the Agreement with the WORD Church and monetarily [sic] receipts.”

{¶21} The remainder of the correspondence provides relator’s interpretation of the public records law and his opinion of what information is subject to redaction in the public records, including social security numbers and bank information but not residential addresses. Then Strothers filed this action.

{¶22} Both relator and respondent have filed motions for summary judgment. For the reasons that follow, respondent’s motion is granted in part and denied in part and Strothers’s motion for summary judgment is likewise granted in part and denied in part. The uncontroverted evidence reflects that the requested public records have been provided to Strothers and otherwise involved overly broad requests, which Strothers has not revised to date despite being provided the opportunity to do so. However, a fair reading of the totality of Strothers’s requests does sufficiently specify a request to review the personnel files of adult persons that were the subject of Executive Session meetings between January 1, 2015 to July 1, 2015, which is reasonably limited in scope and complying with this request should not unreasonably interfere with the Board’s ability to discharge its duties. Accordingly, the Board is instructed to make public records that are contained in these files available to Strothers.

Analysis.

All Personnel Records (July 1st Request and Item 1 of July 9th Request).

{¶23} Strothers has requested all staff personnel records. He has not limited his request to specific staff, nor to staff that is currently employed, nor has he identified any specific public records within the files, nor has he provided any time limit to the documents that would be covered by his request. The Board has advised him that it currently employs 368 individuals

and some of those files contain thousands of pages and that the request is overly broad. This number does not include the personnel files of the Board's former employees, which also appear to be covered by his request. The Board asked Strothers to revise his request to identify certain employees and indicated it would make available to him public records contained in those personnel files. Strothers did not revise the request but has on several occasions clarified that his initial request was limited to the personnel files of adults that were the subject of Executive Session meetings between January 2015 and July 2015. The Board has not provided any personnel records.

{¶24} After reviewing Strothers's July 1st, July 9th, and July 20th requests, as well as the checklists he included in his various filings to this court, it was necessary for this court to seek clarification of exactly what specific personnel records Strothers was asking to review. Strothers's July 1st request, as clarified by his July 9th and July 20th requests (and items contained in the checklist of his motion for summary judgment) appeared to limit the request to personnel files of adults that were the subject of Executive Session meetings or discipline between January 2015 and July 2015. Strothers confirmed, however, that he is actually seeking to review all personnel records without limitation. He maintains this "is not too much of a burden to [him] or the treasurer or HR person." Strothers believes this broad request to review all personnel files is supported by *State ex rel. Strothers v. Rish*, 8th Dist. Cuyahoga No. 81862, 2003-Ohio-2955. However, in *Rish*, Strothers sought to review specific personnel files, not every file of every person ever employed by the Maple Heights Board of Education. *See id.* at ¶ 4, 14 (seeking review of personnel files of board members and substitute teachers).

{¶25} In *Rish*, this court held that documents contained in personnel files may contain information that is exempted from disclosure, such as any records prohibited from disclosure by

federal or state law, including R.C. 3309.22(A). *Id.* at ¶ 25-26. The Ohio Supreme Court has recognized that not all items in a personnel file may be considered public records. *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 385, 481 N.E.2d 632 (1985). A “public record” is “any record that is kept by any public office * * *.” R.C. 149.43(A)(1). However, a “record” is something that is “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). To the extent that any item contained in a personnel file is not a “record,” i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed. To the extent that an item is not a public record and is “personal information,” as defined in R.C. 1347.01(E), a public office “would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure.” *Id.*

{¶26} Because the law requires the Board to prevent disclosure of some documents that may be contained in the very large number of personnel files covered by Strothers’s request, it would place quite a burden on the Board to accommodate his request. The Board cannot simply turn over the files for Strothers’s inspection as he contends. It must first review and remove any documents that are not public records and are prohibited by federal and state law from disclosure, and the Board must also make copies if any information needs to be redacted on a document such as social security numbers.

{¶27} Strothers’s request for all personnel records is overly broad and involves a voluminous category of files kept by the Board.

A records request is not specific merely because it names a broad category of records listed within an agency’s retention schedule. “[I]t is the responsibility

of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.” *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶29, 857 N.E.2d 1208, quoting *State ex rel. Fant v. Tober*, 68 Ohio St.3d 117, 1993 Ohio 154, 623 N.E.2d 1202. “In identifying the records at issue, the Public Records Act ‘does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies.’” *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 2008-Ohio-4788, ¶17, 894 N.E.2d 686, quoting *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624, 1994 Ohio 5, 640 N.E.2d 174.

State ex rel. Zidonis v. Columbus State Community College, 10th Dist. Franklin No. 10AP-961 2011-Ohio-6817, ¶ 5.

{¶28} In *Zidonis*, the court noted that a request for all “litigation files” and “complaint files” over a six-year period was unreasonable in scope and would have required a complete duplication of a broad category of documents.

{¶29} Strothers’s request for personnel records does not contain any limitations as to the time frame, the subject matter of the specific public records from the personnel files that are being sought, and does not identify records relating to any specific employee or set of employees. It is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue, and the Public Records Act does not contemplate a complete duplication of voluminous files kept by government agencies. *See, e.g., State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 29; *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624, 640 N.E.2d 174 (1994); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist.1989). _Case

law provides that a writ of mandamus will not issue to compel prompt responses to vague and overly broad public records requests. *Id.* See also *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001). Strothers's request for personnel records is all encompassing, overly broad, and would unreasonably interfere with the discharge of the Board's duties in order to accommodate it.

{¶30} Notwithstanding the foregoing, the initial request, as later clarified, pertains to public records contained in personnel files of adults who were the subject of Executive Session meetings between January 1, 2015 to July 1, 2015. Providing these documents should not place an unreasonable burden on the Board. Therefore, the Board is instructed to provide any public records, subject to federal and state law, that are contained in the personnel record of any adult who was the subject of an Executive Session meeting between January 1, 2015 to July 1, 2015 to Strothers. Although we grant Strothers summary judgment on this limited class of documents in this mandamus action, the Board did not act unreasonably by not responding to, and seeking clarification of, Strothers's ambiguous requests. It is still somewhat unclear to this court as to whether Strothers completely abandoned this more limited request when he made his much larger subsequent demand to review *all* personnel files maintained by the Board. These public records are being ordered released in the spirit of R.C. 149.43, which requires the Public Records Act to be liberally construed in favor of disclosure.

Remaining Requests Contained in Items 2-6 of July 9th Request.

{¶31} In moving for summary judgment, the Board indicated it had given relator copies of the public records that were responsive to the items he requested in Items 2, 3, and 6¹ of his

¹The Board's motion for summary judgment renumbered the items to include the July 1st request as Item 1. This opinion refers to the items by corresponding paragraph number contained in the July 9th request.

July 9th correspondence. In addition, the Board provided him a copy of the tentative agreement between the Board and the East Cleveland Education Association in response to Item 5. The Board asked for clarification for any further public records that were being requested by Item 5 based on the disclosure exemptions of R.C. 4117.21 and 121.22 and the attorney-client privilege.

Strothers did not provide any clarification. The Board indicated there are no public records that are responsive to Item 4.

{¶32} In support, the Board provided an affidavit from its treasurer who serves as the Board's clerk and is responsible for keeping official files of all correspondence and pertinent reports and bulletins. The treasurer averred that the Board had provided a written response to all of Strothers's pending public records requests and provided, by email, an electronic copy of substantially all of the records responsive to his requests that were not denied as ambiguous or overbroad. The Board provided copies of the following class of documents:

- food bills;
- a copy of the tentative agreement between the Board and the East Cleveland Education Association;
- resolutions appointing legal counsel and a copy of the ledger listing all legal fees and check numbers for payment of legal fees;
- the complete meeting minutes for every Board meeting held between July 2014 and July 2015;
- a copy of the agreement between the Board and the WORD Church for use of school district facilities with a list of all funds received by the Board from the WORD Church; and
- oaths of office of Board President, Una H.R. Keenon, Board Vice President Eve Lynn Westbrooks, and Board Member Tiffany Fisher.

{¶33} The Board continued to compile responsive documents and provided a supplemental response to relator via email. The Board provided copies of these additional documents:

- a roster containing the names of all employees in the District;
- the oath of office of Board Member Gloria Avery-Prease and Board Member Patricia A. Blochowiak.

{¶34} Strothers responded with his motion for summary judgment and affidavit claiming that none of the records had been reviewed or inspected. In addition, Strothers attempted to expand his public records request to include “all food records from years 2011, 2012, 2013, 2014 and 2015.” This request is outside the scope of this action. Strothers did acknowledge that he had received two of the requested oaths of office by email. Strothers’s affidavit states he has not been able to review or look at the records and that the treasurer’s affidavit is a “lie.”

{¶35} On September 29, 2015, Strothers submitted a reply brief in support of summary judgment where he references the 805 documents that the Board produced to him but also indicates that he has not received the documents stated.

{¶36} This court directed Strothers

“to notify the court on or before November 30, 2015 exactly which documents (besides the over 300 files of employee personnel files and the records that pertain to the negotiations process between the East Cleveland teachers union and the board) he alleges have not been produced in response to the specific requests he has made to respondent. Relator is further instructed to provide any evidence he has that records exist that have not been produced that would contradict the allegations of the affidavit submitted in support of respondent’s motion for summary judgment.”

{¶37} Strothers filed a “fourth affidavit” and stated, “There is no way I can present anything in writing showing that the records have not been received and that is why the initial public records request was submitted in July 2015.” Strothers insists he has “not been provided 805 pages of data sworn to by the school board treasurer * * * they are not telling the truth.” He states “I have NOT received the 805 pages of documents.”

{¶38} The parties both refer the court to a website that is allegedly maintained by Strothers, 41112News.com. The court has referenced the site, which does contain hundreds of documents that the Board states were produced to Strothers. These documents are publicly available. Strothers's sworn but otherwise unsupported representations to the court that he never received these documents, without more, does not satisfy the clear and convincing evidence standard necessary to refute the affidavits and other evidence the Board has presented that establishes that the documents were provided to Strothers.

{¶39} Strothers may be arguing that he be allowed to inspect and review the original records, in addition to having already received copies of them. To the extent he maintains the copies prevent his ability to detect some type of fraud, he has not provided any evidence or law to support this argument and has not provided anything indicating that the Board is prohibited from providing copies of the public records in lieu of making them available for inspection and copying by him. He raised a similar argument to the Ohio Supreme Court in *Norton*, 131 Ohio St.3d 359. The court in *Norton* found that relator had been given access to all of the records where relator had refused to accept delivery of copies of some of the documents and failed to contact the city to set an appropriate time to review the records.

{¶40} The law provides that a respondent meets its burden of proving that a public records claim is moot by providing an affidavit that the requested public records have been provided. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St. 3d at 540. In *Striker*, the Ohio Supreme Court found that a claim for public records in a mandamus action was moot where the public office had provided copies of the documents requested. *Striker* at ¶ 22.

{¶41} The evidence establishes that the remainder of Strothers's public records requests are moot because he has received the documents he requested, and he has failed to present any clear and convincing evidence to the contrary.

{¶42} The evidence presented establishes that only one of the three requests was sent by certified mail and the scope of the request for personnel records was inconsistent or overly broad.

Accordingly, statutory damages are not warranted. R.C. 143.43(C); *see also State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 64 (denying request for statutory damages and attorney fees for reasons including that most of the public-records claims lacked merit).

{¶43} Based on the foregoing, both motions for summary judgment are granted in part and denied in part. Relator's motion is granted and respondent's motion is denied to the extent that the Board is instructed to release public records documents, as permitted by federal and state law, that are contained in personnel files, if any, of adult individuals who were the subject of executive session meetings between January 2015 and July 2015. Respondent shall make arrangements to allow relator to inspect and/or copy the requested documents within a reasonable period of time from the date of this opinion. On all other remaining claims, respondent's motion for summary judgment is granted and relator's motion for summary judgment is denied. Parties to share the costs equally. It is further ordered that the clerk shall serve upon all parties notice of this judgment and date of entry pursuant to Civ.R. 58(B).

{¶44} Writ granted in part, denied in part.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
SEAN C. GALLAGHER, J., CONCUR