[Cite as *State ex rel. Youngstown Publishing Co. v. Youngstown*, 2006-Ohio-7272.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE EX REL. THE YOUNGSTOWN PUBLISHING COMPANY, et al.,	)	
	)	CASE NO. 05 MA 66
APPELLANTS,	)	
	)	
- VS -	)	O P I N I O N
	)	
CITY OF YOUNGSTOWN, et al.,	)	
	)	
APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 03CV3861.

JUDGMENT: Affirmed.

APPEARANCES:

For Appellants:

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For Appellees:

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JUDGES:

Hon. Joseph J. Vukovich,
Hon. Gene Donofrio
Hon. W. Don Reader, Retired Judge of the Fifth District Court of Appeals, Sitting By Assignment.

Dated: May 11, 2006

VUKOVICH, J.

{¶1} Appellants The Youngstown Publishing Company and Andrea Wood appeal the decision of the Mahoning County Common Pleas Court which denied them attorney fees in their public records action against appellees the City of Youngstown, its Mayor and its Law Director. The issue on appeal is whether the trial court abused its discretion in denying attorney fees. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} In February 2003, appellants filed a public records request in the name of the newspaper, The Business Journal. The request was addressed to the City's Law Director and its Economic Development Director. Appellants sought documents concerning various aspects of a project known as the Convocation Center. For instance, appellants sought records dealing with matters such as negotiations for the purchase of the property from RSA, environmental site assessments, studies on costs, communications regarding relocation of a sewer line and written communications to and from MS Consultants since the beginning of 2000. The December 19, 2001 purchase agreement with an extension, a 2,000 page environmental site assessment and various other documents were provided to appellants. In April and May 2003, two more public records requests were addressed to the Law Director. More documents were provided.

{¶3} In October 2003, a reporter from appellants' competitor, the Youngstown Vindicator, filed a public records request. However, rather than ask for production of categories of documents, that reporter used the alternative option and asked to conduct an entire file review on the Convocation Center project. In conducting that file review, the reporter found a letter from the City of Youngstown to Elias Alexander of RSA mentioning a purchase price of $1,500,000. An editorial then ran in the Vindicator mentioning this letter.

{¶4} Appellants did not receive this letter in its public records request. They also did not receive an estimate regarding relocation of a sewer line that they alleged the City was hiding. Thus, appellants filed the within public records mandamus action

against the City of Youngstown, its Mayor, and its Law Director in their official capacities.

{¶5} Thereafter, the Law Director advised that appellants should request file reviews from specific departments to find the information they are seeking. The Law Director then spent fourteen hours over a four-day period with appellants' representatives reviewing files held by eight city departments. Appellants obtained approximately one hundred documents from this file review and approximately sixty were claimed to be improperly withheld in the City's responses to appellants' prior public records requests.

{¶6} Evidentiary hearings were held before a magistrate in January and February 2004. Testimony established that the letter to Alexander was a form letter required by federal law merely to establish that the sale was voluntary and arms length. Thus, the Law Director opined that letter may not have been responsive to appellants' public records request. (Tr. 154, 187). Regardless, the Law Director explained that he did not know this document existed until the file review, which was not requested by appellants until after they filed this action. (Tr. 189).

{¶7} Testimony also established that the letter concerning the sewer line had been placed in the file for a different project, the BJ Alan project, and this is why it was not discovered in preparing the public records request for appellants or in appellants' later file review. Testimony also revealed that the sewer line letter was not believed to be relevant to the Convocation Center project as the sewer line did not need to be relocated in order to build the Convocation Center. Rather, it would only need to be moved for the BJ Alan project if the City allowed BJ Alan to build on part of the land on which the Convocation Center would rest.

{¶8} Other documents were introduced by appellants and alleged to be improperly withheld by the City. The City presented testimony that the record requests were not specific as to exact documents and that they believed that many of these documents now alleged to be improperly withheld would not have been responsive to the requests.

{¶9} Appellants contended that the Mayor was singling it out due to a critical article on the project. Appellants placed much emphasis on the fact that the Mayor

instructed city officials that they should not speak to the media about the project and that they should direct all such inquiries to him. The Law Director stated that the Mayor actually limited his request to just Business Journal reporters, but two other city officials stated that it applied to all media. Either way, the City established that this mayoral request did not preclude city officials from responding to proper public records requests as it dealt only with interviews.

{¶10} The magistrate did not release its decision until December 22, 2004. The magistrate concluded that the mandamus action was moot as all documents had been provided since the action was filed. The magistrate denied injunctive relief, finding that there was no likelihood of future problems. The magistrate denied the request for the statutory $1,000 forfeiture per violation as there was no evidence of destruction or disposal of records.

{¶11} As for attorney fees, the magistrate found it unreasonable to provide the letter with a $1,500,000 offer to the Vindicator and not the Business Journal. The magistrate also found that failure to provide appellants with the letter on the sewer line was unreasonable. The magistrate noted, however, that the other documents were either not within the scope of appellants' public records requests, were received by the City after appellants' last request or fell under attorney-client privilege.

{¶12} The magistrate noted that there was a significant public benefit in knowing the facts surrounding the Convocation Center and any connection to Representative James Traficant, disbarred attorney George Alexander and their problems. The magistrate noted that the Law Director's good faith combined with the Mayor's ill will made attorney fees a difficult topic. However, the magistrate granted attorney fees to appellants and ordered them to submit a bill with documentation.

{¶13} The City filed various objections to the magistrate's decision. For instance, the City urged that the Mayor's directive to refrain from speaking to the media about the project because he would be the spokesperson does not equate to instructing officials to deny public records requests. The City also stated that the mere existence of a Vindicator article using an undisclosed document does not show that the City improperly withheld this document from the Business Journal. The City argued that the magistrate failed to consider its good faith efforts to provide the

documents requested and its reasonable interpretation of the non-specific records requests.

{¶14} On March 17, 2005, the trial court adopted much of the magistrate's decision; however, the trial court found that attorney fees were not warranted. The court found that the Vindicator only received the disputed letter through its own file review, not by the City's picking and choosing what paper should get what documents. The court also believed the testimony that the letter concerning the sewer line was in the BJ Alan file and was not relevant to the Convocation Center project.

{¶15} The court opined that many of appellants' requests were generalized and thus the City's response to them was reasonable and in good faith. The court noted that appellants could have conducted a file review before filing suit in order to make their requests more specific. The court found that in most cases, the City did the best they could with less than specific requests. The court stated that even if the requests were considered specific, there is no indication of a lack of good faith in attempting to comply with the records requests. The court also determined that there was no evidence that the Mayor directed anyone to withhold records. The court concluded that there was no constructive purpose in awarding fees here and in punishing the City for trying to comply where they already had to pay their own outside counsel fees. Appellants filed timely notice of appeal.

PUBLIC RECORDS LAW

{¶16} With certain exceptions, all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. R.C. 149.43(B)(1). Upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. Id. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division. Id.

{¶17} If a person allegedly is aggrieved by the failure of a public office to promptly prepare or copy a public record and to make it available to the person for inspection as required above, that person may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public

record to comply and that awards reasonable attorney fees to the person that instituted the mandamus action. R.C. 149.31(C). The mandamus action may be commenced in the court of common pleas of the county in which noncompliance occurred, in the court of appeals, or in the Supreme Court. Id.

{¶18} Attorney fees can be granted even if the mandamus action has become moot by virtue of the fact that the relator has received the requested documents after filing the action. *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 175. However, fees are not mandatory. The Supreme Court has interpreted R.C. 149.31(C) as allowing but not requiring an award of attorney fees where public records are found to be improperly withheld under the Public Records Act. *State ex rel. Beacon Journal Pub. Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶59, citing *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108.

{¶19} In reviewing the grant or denial of attorney fees in a public records case, this court must determine whether the trial court abused its discretion. Id., citing *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 314. An abuse of discretion requires an action that is unreasonable, arbitrary, or unconscionable. Id., citing *State ex rel. Hamilton Cty. Bd. of Commrs. v. State Emp. Relations Bd.*, 102 Ohio St.3d 344, 2004-Ohio-3122, ¶17.

{¶20} In exercising its discretion to award fees, the trial court considers the reasonableness of the government's noncompliance with the public records request and the degree to which the public will benefit from release of the desired records. Id., citing *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶47. It is because the award is punitive that the courts view the reasonableness of the government’s failure to comply with the records request. See *State ex rel. Beacon Journal v. Maurer* (2001), 91 Ohio St.3d 54, 58; *State ex rel. Multimedia Inc. v. Whalen* (1990), 51 Ohio St.3d 99, 100. In doing so, the court should ask whether the reasons given for nondisclosure arguably have some merit or whether there was good faith in the attempts to comply. See id.

{¶21} Thus, even if there is sufficient public benefit for a newspaper to receive certain significant information, attorney fees can be denied if there is no bad faith on the part of government in failing to release the records or if there were reasonable

legal arguments for refusing to release the records. See, e.g., *State ex rel. The Cincinnati Enquirer v. Dinkelacker* (2001), 144 Ohio App.3d 725, 734-735 (1st Dist.).

ASSIGNMENT OF ERROR

{¶22} Appellants' sole assignment of error provides:

{¶23} "IT WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT TO OVERTURN THE MAGISTRATE'S DECISION TO AWARD ATTORNEYS' FEES TO RELATORS."

{¶24} Appellants set forth seven issues under this assignment of error. First, appellants complain that the trial court focused only on two documents, the letter to Alexander and the letter regarding the sewer line, rather than all of the documents they alleged were improperly withheld. Second, appellants urge that the trial court should not have justified the City's failure to comply by stating that appellants' requests were not sufficiently specific. Third, appellants complain that the trial court essentially requires them to inspect all records rather than ask for copies. Fourth, appellants state that the reason for withholding the sewer line letter was not credible or reasonable. Fifth, appellants contend that the trial court failed to consider the public benefit they achieved. Sixth, appellants urge that the court should not have determined that the City acted in good faith. Lastly, appellants complain that the court considered the City's outside counsel fees as sufficient punishment to prevent future violations.

ANALYSIS

{¶25} First, the trial court did consider all records alleged to be improperly withheld. It is obvious that the court focused on the two main documents that precipitated this lawsuit because these were the only two documents found to warrant attorney fees by the magistrate. The magistrate concluded that most of the other documents were either properly provided to appellants, were not generated until after the requests, were covered by attorney-client privilege or were not responsive to the text of the requests. The trial court adopted those magisterial findings. The City notes that appellants did not object to those findings and thus is now barred from contesting them as per Civ.R. 53. They raise this argument throughout whenever appellants try to take issue with a finding of the magistrate.

{¶26} In any case, at least some of the documents could be argued in good faith to be unresponsive to appellants' requests. For instance, the Law Director testified that he did not believe that approximately thirty documents were responsive to a request for records regarding negotiations or attempts to purchase since they merely dealt with closing and were generated long after the purchase agreement was signed. The magistrate and trial court agreed. At the very least, the Law Director's argument can be considered reasonable and not a bad faith attempt to withhold documents.

{¶27} Furthermore, the trial court stated that it considered the entire file including the transcripts and the exhibits. We can further glean that the court considered all allegedly withheld documents because notwithstanding its denial of attorney fees, the court still warned the City to find a better record-tracking system and to attempt even more thorough searches in the future.

{¶28} In response to appellants' second argument, many of appellants' requests were not specific. The Law Director testified that requestors normally seek specific documents. For instance, appellants set forth a specific request for the purchase agreement. However, asking for all records concerning when and where negotiations took place and between whom is not a request for a specific document.

{¶29} The requestor must identify the records sought with reasonable clarity. *State ex rel. Consumer News Serv. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶41 (request for the resumes of the applicants who interviewed for the treasurer position is made with reasonable clarity). This does not state that the requestor can merely identify the information sought with reasonable clarity. Case law has established that city officials do not have a duty to perform research projects to ensure they discover every single city document that may contain a certain phrase or that may contain information desired to be collected by the requestor.

{¶30} The Supreme Court has found that a relator failed in her duty to identify documents with sufficient clarity where she asked for "any and all records generated * * * containing any reference whatsoever to Kelly Dillery." *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 315. In doing so, they cited certain enlightening case law. For instance, one Eighth District case they cited held:

{¶31} "Nevertheless, relator's attempts to request records do not indicate what records relator would like to examine as much as what information he would like to receive. Although relator contends that several of GCRTA's forms contain the information which relator requests and he lists several of these forms in his response to respondent's Motion to Dismiss, he has not elected to make a request for any of these specific records.

{¶32} "Relator has not cited any authority under which this court could--pursuant to R.C. 149.43--compel a governmental unit to do research or to identify records containing selected information. That is, relator has not established that a governmental unit has the clear legal duty to seek out and retrieve those records which would contain the information of interest to the requester. * * * Rather, it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue. *Franklin Cty. Sheriff's Dept.*, supra, is not, therefore, controlling because, in that case, a specific investigatory file was requested. In this case, however, relator has requested information and not records. As a consequence, relief in mandamus would not be appropriate." *State ex rel. Fant v. Tober* (May 20, 1993), 8th Dist. No. 63737.

{¶33} Thus, the requests seeking information instead of particular documents can be considered non-specific. And so, the trial court's mention of non-specific requests does not invalidate the court's decision to deny attorney fees. Regardless, as the court stated, even if all requests could be considered specific, the Law Director's response to them still could be considered to be made in good faith and as reasonable attempts at compliance.

{¶34} Moreover, in appellants' attempt to specify a category of documents, appellants ended up leading the Law Director to believe that the request excluded closing documents that appellants believed should have been included. Even if the request was made with "reasonable clarity," one could find the Law Director's efforts generally constituted a good faith effort to comply.

{¶35} Third, the mention of the availability of the file review was not an attempt by the court to force appellants to conduct file reviews from now on rather than filing requests for copies of documents. Rather, the availability of the file review establishes

how the requestor can make their requests for copies more specific. As mentioned in the *Fant* case quoted above, asking for an entire file is considered specific in itself. The trial court mentioned the Vindicator's method only to show how specific documents, which could then be specifically requested, can be discovered through a thorough file review by the requestor.

{¶36} Contrary to the magistrate's finding that the City gave a desired document to the Vindicator and not the Business Journal, the trial court legitimately determined that the evidence established that the Vindicator received the document only through its own investigative efforts during a public records request in the form of a file review. But, appellants did not attempt to do such legwork for itself until after they filed a mandamus action.

{¶37} Appellants cite a case upholding a request for all documents relating to any aspect of the project known as Northeast Ohio Correctional Center. *State ex rel. Youngstown Bd. of Educ. v. City of Youngstown* (1998), 84 Ohio St.3d 51, 52. However, that case just proves the trial court's point regarding the purpose of a file review; that is what the request was in *Youngstown Bd. of Educ.*, a request for a file review. We also note that in that case, the respondents offered no reasons for noncompliance and did not even file documents in opposition. Id. at 54.

{¶38} Fourth, the trial court could rationally choose to believe the City's explanation for how the sewer document ended up in the BJ Alan file and that the document is not pertinent to the Convocation Center project itself. The Finance Director testified that the estimate for the cost of relocating a sewer line was only received as a result of BJ Alan desiring to build a warehouse in the renewal zone and seeking input on whether it would be feasible to locate that warehouse behind and next to the Convocation Center. (Tr. 48, 69-84). He testified that the sewer line did not need to be relocated for purposes of the Convocation Center project. (Tr. 84). The architect from MS Consultants, from where the letter originated, confirmed this testimony. (Tr. 94-102).

{¶39} Fifth, the existence of a public benefit achieved by this action does not require an award of attorney fees. The magistrate found that there was a significant public benefit to knowing much of the requested information, and the trial court

adopted this finding. Thus, the trial court did consider the public benefit in making its decision.

{¶40} Although the court is permitted to rely on public benefit to use its discretion to make an award of attorney fees, it need not. *State ex rel. Mazzarto v. Ferguson* (1990), 49 Ohio St.3d 37, 41. Rather, the court can use its discretion to find that an award is not warranted due to the City's good faith efforts to comply or reasonable arguments for noncompliance. Id. Moreover, since the sewer line letter was found to be properly part of the BJ Alan file, the public benefit diminished a bit from the magistrate's decision to the trial court's decision. Additionally, the public benefit regarding the Alexander letter for instance may not be as compelling as appellants believe since the letter was already public knowledge as it was released to the Vindicator upon its file review, a task that appellants could have performed months before. Finally, much of the background given to establish a public benefit was counsel's opinions given in closing argument and not established by evidence. Such matters and other statements seemingly created by the magistrate about the project's background and possible nefarious connections should not have been included as rationale in an entry as judicial notice of such community news cannot be taken.

{¶41} Sixth, the trial court did not abuse its discretion in determining that the City acted in good faith in responding to the public records requests. As aforementioned, many of the Law Director's reasons for not including certain documents were valid or at least reasonably debatable. For instance, some requests did not seek specific documents but rather sought a collection of information. The court could properly determine that the Law Director, to whom the requests were directed, did his utmost to comply with these requests. We refer back to the file review option and the fact that city officials do not act unreasonably by failing to engage in major research projects to find every document from every city department that could be construed by someone as relating to negotiations. As the trial court found, the Mayor's request that all media (or even just Business Journal reporters) be referred to him for interviews and quotes, was not related to the Law Director's good faith efforts to comply with the public records requests herein.

{¶42} Lastly, there is nothing reversible about the trial court's statement that the City spent at least $30,000 on outside counsel fees and should have learned a lesson. In fact, the court cited and quoted appellants' own application for $23,429 in attorney fees, which mentioned and relied upon the amount spent by the City and which spoke of lessons learned. Moreover, this was not the trial court's main statement regarding its denial of attorney fees; it was merely one among many.

CONCLUSION

{¶43} The trial court's discretionary decision to deny attorney fees based upon its finding that the City made reasonable or at least good faith attempts to comply is not unreasonable, arbitrary or unconscionable. The evidence herein was subject to interpretation and certain implications could be made or not depending on the trier of fact's angle of construction. An appellate court does not substitute its judgment for that of the trial court on a public records attorney fees denial in the absence of an abuse of discretion.

{¶44} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, P.J., concurs.
Reader, J., concurs.