

IN THE SUPREME COURT OF OHIO

<p>CONSUMERS AGAINST DECEPTIVE FEES c/o The Chandra Law Firm LLC The Chandra Law Building 1265 W. 6th St., Suite 400 Cleveland, OH 44113</p> <p style="text-align: center;"><i>Relator,</i></p> <p style="text-align: center;">v.</p> <p>BARBARA LANGHENRY 601 Lakeside Ave. Cleveland, Ohio 44114</p> <p>and</p> <p>ROBERT L. DAVIS 1201 Lakeside Ave. Cleveland, Ohio 44114</p> <p>and</p> <p>CITY OF CLEVELAND 601 Lakeside Ave. Cleveland, Ohio 44114</p> <p style="text-align: center;"><i>Respondents.</i></p>	<p>Case No.</p>
VERIFIED PETITION FOR WRIT OF MANDAMUS	

Consumers Against Deceptive Fees respectfully alleges as follows:

PARTIES

1. Consumers Against Deceptive Fees is a non-profit organization that seeks to protect consumers from unfair and excessive utility costs.
2. Respondent Barbara Langherny is the City of Cleveland Director of Law. She represents the Mayor, City Council, and all City departments and commissions. She is designated by the City as the "person responsible" for its public records under the Ohio Public Records Act, R.C. 149.43 ("the Act").

3. Respondent Robert Davis is the Director of the City of Cleveland Department of Public Utilities. He is responsible for managing and overseeing all divisions within the City of Cleveland Department of Public Utilities and is the “person responsible” for its public records under the Ohio Public Records Act, R.C. 149.43 (“the Act”).

4. Respondent City of Cleveland is a political subdivision of the State of Ohio and a “public office” within the meaning of the Act and as that term is defined by R.C. 149.011(A).

5. As the person and public office responsible for the public records that they hold, Respondents are obligated under the Act to promptly prepare such records and make them available for inspection and copying upon request.¹

6. An affidavit verifying the facts below accompanies this Complaint.

JURISDICTION & VENUE

7. This Court has jurisdiction based on Section 2 of Article IV, Ohio Constitution, which establishes original jurisdiction over petitions for writs of mandamus; Ohio S. Ct. R. 10, which governs original actions in the Ohio Supreme Court; R.C. 2731.02, *et seq.*, which are the code sections governing mandamus actions; and R.C. 149.43, which is the statute establishing the public’s right to public documents.

8. Venue is appropriate in this Court under R.C. 2731.02 and R.C. 149.43(C).

FACTS

9. As authorized by Cleveland Codified Ordinance § 121.03, Respondents have designated Robert Davis as the person to receive and respond to requests under the Act for records from the City of Cleveland Department of Public Utilities.

¹ R.C. 149.43(B).

10. Relator electronically submitted a written request for records to Mr. Davis, on February 21, 2020. ("Request 1.")
11. That request sought access to the following records:
 - a. "The rate study by NewGen Strategies & Solutions (whether in draft or final form)";
 - b. "Records regarding funds expended for that rate study including record of payment (whether by check, wire transfer, or other means)."
12. On February 25, 2020, the Cleveland Public Records Center responded with an e-mail confirmation of receipt of the February 21, 2020 public-records request.
13. On March 10, 2020, Relator's counsel received an e-mail from the Cleveland Public Records Center claiming that the City "reviewed its files and determined there are no records that are responsive to [our] request."
14. On March 17, 2020, Relator's counsel submitted another request, requesting a response by March 25, 2020. ("Request 2.")
15. That request sought access to the following records:
 - a. "Records of any payments to NewGen Strategies and Solutions during 2018 or 2019. The funds would have been paid in relation to NewGen (or to any other vendor) in relation to the "Request for Proposal for Development of Comprehensive Financial Plans, including Costs of Service Studies and Rate & Fee Analyses for 2020–2024."
16. A response was not received by the requested date, March 25, 2020.
17. On June 11, 2020, Relator's counsel sent an email to Ms. Langhenry, summarizing the prior requests and articulating, among other things, the following:
 - a. "We know that the request records exist."

- b. "We demand that a PDF copy of the study, and the related financial records, be produced to us forthwith."
 - c. "We respectfully request not only that you arrange for the immediate production of the documents, but that Chief Assistant Prosecuting Attorney Karrie Howard investigate how it is that a false written response was given to us."
18. On June 17, 2020, Ms. Langhenry responded, providing the following:
- a. "The City responded to your first request for (1) the rate study by NewGen Strategies & Solutions (whether in draft or final form) and (2) records regarding funds expended for that rate study including records of payment (whether by check, wire transfer, or other means) by stating that there are no responsive records."
 - b. "As to the first part of the request, there is no rate study that is a public record as NewGen's engagement with the City is not complete or final."
 - c. "As to the second part of the request, the answer that there are no responsive records was made by mistake. Our public records staff should not have applied the answer to part one to part two."
 - d. "I want to point out that the second request was made on March 17, 2020. Because of the COVID-19 emergency, around the same time as that request, Ohio's Director of Health issued a Stay at Home Order for Ohioans. As a result, City Hall was closed to both the public and employees on Mondays, Thursdays, and Fridays and open for limited time periods for limited employees on Tuesdays and Wednesdays. Although I appreciate that three months from the date of the request is a

long time, the COVID-19 emergency has made responding to public records requests more difficult."

19. On June 17, 2020, The Cleveland Public Records Center provided the payment records Relator had requested on March 17, 2020.

20. On June 24, 2020, Mr. Chandra responded by letter to Ms. Langhenry's June 17, 2020 letter, again requesting the NextGen study based on the fact that it should be accessible under the Ohio Public Records Act. Mr. Chandra requested the following to be submitted by July 10, 2020:

- a. "All communications including documents, emails, and internal communications of any kind among city officials about the NextGen CPP study referenced in our previous request and here, and"
- b. "All communications between and city officials and any personnel or subcontractors with the NextGen vendor about the study."

("Request 3.")

21. On August 13, 2020, investigative reporter Mark Naymik of WKYC Channel 3, a Cleveland television station, reported about the CPP study and included what appears to be that study, including rate information, in his reporting. Nothing about that document suggests that it is not a public record as Langhenry claimed. Instead, the document plainly "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office" as required under R.C. 149.011.

22. Respondents apparently also provided an improperly and excessively redacted version of the study to Naymik, but failed to provide that to Relator.

23. And the document does not fit any recognizable exception in the Ohio Public Records Act.

24. Yet as of this filing, Respondents have not provided the requested records, except for the financial records from Request 1 and Request 2.

VIOLATIONS OF THE OHIO PUBLIC RECORDS ACT

Failure to make copies available within a reasonable time

25. Under the Act, a public office or person responsible for public records shall make copies of requested public records available to the requester within a reasonable period of time.²

26. Relator requested copies of the records, but Respondents did not make copies of them available within a reasonable period of time.

27. 174 days have passed since Relator's Request 1, 149 days since Request 2, and 50 days since Request 3—and Respondents have still not yet made copies of all of the requested records available.

28. The number of days that have elapsed since each request is not reasonable.

Failure to produce nonexempt portions of records containing exempt information

29. Under the Act, if a public record contains information that is exempt from disclosure, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.³

30. If Relator requested records that Respondents will now claim included both exempt and nonexempt information—which they have not yet done, Respondents nevertheless failed to produce nonexempt portions of the requested records.

² R.C. 149.43(B)(1).

³ R.C. 149.43(B)(1).

Failure to justify refusal to produce records

31. Under the Act, if a request is ultimately denied, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing.⁴

32. Relators initially falsely denied Request 1, and then denied the study portion of Requests 1 and 2, explaining that the “engagement with the City is not complete or final.” But Respondents provided no legal authority explaining why the request was denied. No such authority exists.

33. Relator submitted Request 3 for records, and Respondents have provided no explanation at all for failing to comply.

Failure to transmit records within a reasonable time

34. Under the Act, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy.⁵

35. Respondents did not transmit a copy of the requested records within a reasonable period of time after receiving Relator’s request.

36. 174 days have passed since Relator’s Request 1, 149 days since Request 2, and 50 days since Request 3—and Respondents have not transmitted all of the requested records available.

⁴ R.C. 149.43(B)(3).

⁵ R.C. 149.43(B)(7)(a).

37. The numbers of elapsed days is not reasonable.

STATUTORY DAMAGES

38. If a requester transmits a written request by hand delivery, electronic submission, or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, the requester is entitled to recover statutory damages if a court determines that the Respondents failed to comply with its obligation under R.C. 149.43(B).

39. Statutory damages equal \$100 for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of \$1,000.

40. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

41. Respondents have failed to comply with their obligations under R.C. 149.43(B) as listed above.

ATTORNEYS' FEES AND COSTS

42. The Court may award Relator's attorney's fees if it finds that the Respondents failed to respond affirmatively or negatively to the public-records request in accordance with the time allowed under division (B) of this section.

43. Respondents still have not fully complied with to Relator's request.

44. The time that has elapsed is not a reasonable time.

45. Both the propriety and the amount of an award of attorneys' fees may be affected by a determination of whether a "well-informed" public officer reasonably would

believe that its failure to comply was both well-founded⁶ and consistent with the public policy underlying any claimed exemption.⁷

46. Well-informed public officer would not reasonably believe that Respondents' refusal to provide the CPP records was well-founded.

47. Well-informed public officers could not reasonably believe that Respondents' refusal to provide the CPP records was consistent with the public policy underlying a claimed exemption.

48. A writ of mandamus in this case will serve the public interest.

49. The public benefit of releasing the records outweighs any private benefit that might exist.

ORAL ARGUMENT

50. If this Court finds that its decision process would be aided by oral argument, or finds itself hesitant to grant the relief requested, Relator respectfully requests such argument to address any of the Court's concerns.

PRAYER FOR RELIEF

Relator therefore requests that the Court:

- Issue a peremptory writ of mandamus directing Respondents to make responsive public records available promptly and without improper redactions;
- Award statutory damages, attorneys' fees, and costs; and
- Order any other relief available under R.C. 149.43 or R.C. 2731.01 *et seq.*, and any other relief as is appropriate.

⁶ R.C. 149.43(C)(2)(c)(i).

⁷ R.C. 149.43(C)(2)(c)(ii).

Respectfully submitted,

THE CHANDRA LAW FIRM LLC

/s/ Subodh Chandra

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Deceptive Fees*

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AFFIDAVIT OF SUBODH CHANDRA	

I, Subodh Chandra, having been duly sworn, state as follows:

1. I am over the age of 18 and competent to testify to the facts below based on personal knowledge.
2. The Chandra Law Firm LLC represents Consumers Against Deceptive Fees.
3. Consumers Against Deceptive Fees is an organization dedicated to ensuring that consumers pay reasonable rates for energy.

4. As authorized by Cleveland Codified Ordinance § 121.03, Respondents have designated Robert Davis as the person to receive and respond to requests under the Act for records from the City of Cleveland Department of Public Utilities.
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