

IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

STATE OF OHIO, ex rel.
MARK MILLER,

CASE NO. CA2012-05-034

Relator

ENTRY GRANTING
MOTION TO DISMISS

vs.

OHIO STATE HIGHWAY
PATROL, et al.,

COURT OF APPEALS
FILED
NOV 21 2012
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

Respondents.

The above cause is before the court pursuant to a complaint for writ of mandamus filed by relator, Mark W. Miller, on May 10, 2012; an answer filed by counsel for respondents, Ohio State Highway Patrol and Jeff Maute, on June 6, 2012; the affidavit of Mark Miller filed on September 10, 2012; a motion to strike and motion to dismiss filed by counsel for respondents on September 21, 2012; the brief of relator, Mark Miller, filed on September 25, 2012; a "unified submission in response to the court's entry to show cause and in opposition to the motion to strike and motion to dismiss" filed by counsel for relator on October 2, 2012; and a motion to strike and reply to relator's memorandum in opposition to the motion to strike and dismiss filed by counsel for respondents on October 9, 2012.

The present mandamus action was filed by relator on May 10, 2012.¹ The complaint indicates that on September 9, 2011, relator tendered a public records request to the Ohio State Highway Patrol. The actual emailed request attached to the

1. This action was previously filed and dismissed by relator without prejudice. See *State ex rel. Miller v Ohio State Highway Patrol, et al.*, Clermont No. CA2011-10-074.

complaint and the affidavit of Mark Miller is undated; the certified mail receipt appended to the affidavit which purportedly shows delivery of the September 9, 2011 public records request inexplicably indicates that the item was delivered on June 3, 2011. The request sought a number of public records related to the activities of Ohio State Highway Patrol trooper Joseph Westhoven during the summer of 2011.

It appears that respondents complied with the public records request with the exception of certain video and audio recordings and impaired driver reports relating to a traffic stop, detention, arrest and transport involving an individual named Ashley Ruberg which occurred between July 15 and July 16, 2011. According to the complaint, respondents notified relator that these particular records involved investigative work product and were therefore not subject to disclosure under Ohio public records law. Exhibit "D" to the complaint and Exhibit "C" attached to the affidavit of Mark W. Miller purport to be a letter from respondents notifying relator that all public records requested except those concerning Ashley Ruberg will be disclosed. However, the letter was clearly written in response to another public records request, apparently made by Christopher P. Finney, Esq., one of the attorneys representing relator, on February 16, 2012.

Pursuant to Loc.App.R. 20(H), a petitioner's (relator's) brief shall be filed within 15 days after the completion of an agreed statement of evidence. Pursuant to Loc.App.R. 20(N), unless all evidence is presented and the petitioner's brief is filed within four months after the filing of a complaint, an original action shall be dismissed, after notice to counsel of record, for want of prosecution unless good cause is shown to the contrary. As indicated above, this mandamus action was filed on May 10, 2012. Accordingly, relator's agreed statement of evidence and brief were due on or before

September 10, 2012.

The documents filed by the parties indicate that counsel for relator sent an email to counsel for respondents on Thursday, September 6, 2012 which stated that he was "planning on" drafting an agreed statement of facts that day, and stated "I can forward those on for you [sic] review and edits." This was the first time that respondents' counsel had been contacted regarding an agreed statement of facts. Respondents' counsel indicated that she would not be able to review the matter with her clients and agree to a statement of facts prior to September 10, 2012, which was the deadline for filing the agreed statement and relator's brief pursuant to Loc.App.R. 20(N). Respondents' counsel further indicated that she could not agree to a proposed joint motion for extension of time to file the agreed statement of facts. Relator's counsel responded that he would "simply file the brief on the tenth, with no stipulations, and let [respondents' counsel's] correspondence speak for itself."

The affidavit of relator Mark Miller was filed on September 10, 2012. On September 24, 2012, this court filed an entry directing relator to show cause why this action should not be dismissed because an agreed statement of evidence and a brief had not been filed. Relator's brief was filed the next day, September 25, 2012.

In their motion to strike and motion to dismiss, respondents contend that the affidavit of Mark Miller should be stricken because it is not an agreed statement of facts, stipulation or deposition as detailed in Loc. App.R. 20(G). The rule states that evidence in all original actions before this court "shall be submitted to the court by means of an agreed statement of facts, or stipulations, or depositions; oral testimony will not be heard." While affidavits are not mentioned in the rule, relator's affidavit will be considered by the court for whatever evidentiary value it may have. The motion to

strike the affidavit is accordingly DENIED.

With respect to whether this action should be dismissed, relator has presented the court with his affidavit and a brief in support of his petition for writ of mandamus. To be entitled to mandamus, relator must demonstrate a clear legal right to the relief prayed for, that respondents are under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45 (1997).

A writ of mandamus is the appropriate remedy to compel compliance with the Ohio Public Records Act. *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St.3d (1995). The custodian of public records has the burden of proof to establish an exemption. *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261 (1997). However, the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence. *State ex rel. Donner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117.

In the present case, relator has submitted an affidavit indicating that he made a public records request, and that the public records request was not complied with in part because certain records were withheld based upon the investigative work product exception to the public records act, R.C. 149.43(A)(2)(c). Documentation attached to relator's affidavit in support of this position pertains, in part, to a different public records request made by Christopher P. Finney. The date that relator made his public records request appears in the affidavit, but is not supported, and is in fact contradicted by the attached documentary evidence.

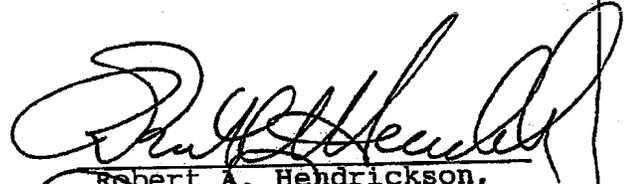
Based upon the record, the court cannot conclude that relator has established

entitlement to mandamus due to a violation of the public records law by clear and convincing evidence. He has not established a clear legal right to the records involving Ashley Ruberg, or that respondents have a clear legal duty to provide them. The evidence submitted shows that relator made a public records request, and that it was complied with except for documents withheld based upon the investigative work product exception to the public records law. No evidence, other than the statements in relator's affidavit, has been submitted indicating that relator's specific request, which did not even mention the name "Ashley Ruberg," was ever denied, improperly or otherwise.

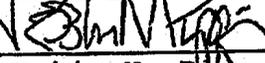
Significantly, relator's counsel decided not to obtain an extension of time to submit an agreed statement of evidence which may have resolved these matters, but instead elected to file a single affidavit containing partially inaccurate documentation and a brief.

Based upon the foregoing, the motion to dismiss is GRANTED. This case is hereby DISMISSED, with prejudice, costs to relator.

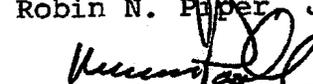
IT IS SO ORDERED.



Robert A. Hendrickson,
Administrative Judge



Robin N. Piper, Judge



Michael E. Powell, Judge