COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, EX REL.,
BRIAN J. ESSI, :

Relator, :

No. 104659

v. :

CITY OF LAKEWOOD, OHIO, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: MOTION GRANTED
DATED: May 10, 2019

Writ of Mandamus
Motion No. 524118

Appearances

DannLaw, Marc E. Dann, and Donna J. Taylor-Kolis, for *relator*.

Mazanec, Raskin & Ryder Co., L.P.A., John T. McLandrich, and Terence L. Williams, *for respondent*.

McGown & Markling Co. L.P.A., Matthew John Markling, Patrick S. Vrobel, and John T. Sulik, Jr., *for intervenors*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} This matter is before the court on relator Brian Essi's motion pursuant to R.C. 149.43(C) for statutory damages and attorney fees.

Procedural and Factual Background

{¶ 2} Beginning on March 15, 2016, Essi began a comprehensive public records request endeavor to obtain the records relating to the closure and sale of Lakewood Hospital by sending the city of Lakewood 173 public records requests through certified mail. He followed those requests with 48 more requests sent by certified mail on May 13, 2016. Lakewood complied completely with approximately 22 of the requests. When Essi was not satisfied that Lakewood had complied with all of the requests, he commenced this mandamus action on June 24, 2016.

{¶ 3} Throughout the summer of 2016, extending into early August, Lakewood provided more records. On September 20, 2016, Essi sent 97 more requests to Lakewood through certified mail. When Essi concluded that Lakewood had not fulfilled those requests, he moved on October 7, 2016, to amend his mandamus complaint to include the additional requests, which this court allowed. Thus, Essi made approximately 320 separate public records requests.

{¶ 4} The case dragged on as Lakewood continued to release records. The court's mediation program did not resolve the case. On February 16, 2017, Essi served notice of discovery. These requests for production of documents were identical to the outstanding public records requests. When Lakewood did not

fulfill these requests, Essi moved to compel discovery on March 27, 2017. Lakewood filed its brief in opposition, and Essi filed a reply brief. This court denied the motion on April 6, 2017, ruling: "A party should not be able to obtain indirectly what cannot be obtained directly. Moreover, the 9,000 pages of records already produced should provide a sufficient basis of other means of discovery, e.g., depositions."

{¶ 5} At approximately the same time, Lakewood moved for judgment on the pleadings because, inter alia, the requests were oppressive, overbroad, indefinite, improper, and required Lakewood to do too much research to discern what records were desired. The court denied that motion and directed the parties to keep trying to resolve the case through the disclosure of public records.

{¶ 6} Also, in March 2017, the court issued directions and a briefing schedule "to ensure that this case proceeds to resolution." By May 1, 2017, Lakewood was to comply with Essi's requests by preparing and releasing an "Index of Records Supplied, Supplied with Redactions, or Withheld" along with the appropriate records to Essi and filing a copy of the Index with the court. If Lakewood had made redactions, it was to submit those records under seal for an in camera inspection. Both parties were to submit briefs supporting their positions, along with evidence, if appropriate. At Lakewood's requests, the court extended the deadline to June 6, 2017.

{¶ 7} The parties continued to contest whether the requests were proper. R.C. 149.43(B)(2) provided that if a request is ambiguous or overly broad or if the

records custodian has difficulty in understanding the request, the custodian shall provide the requester the opportunity to revise the request and inform the requester how records are kept. Both parties maintained that they had tried to fulfill Subsection (B)(2). Specifically, Essie had represented that he had spent hours explaining his requests to the law director. Because it was not clear to the court what had happened in these efforts to clarify the requests, the court directed Essi "to certify to the court what specifically he explained, clarified and/or narrowed about his public records request." (June 16, 2017 entry.) If after reviewing Essi's submission, Lakewood still believed that the requests were improper, it could refile its motion for judgment on the pleadings. Essi withdrew approximately half of his requests.

{¶ 8} Lakewood sought and obtained several extensions of time to submit its Index and briefs. Lakewood finally filed its complete amended Index on October 10, 2017. The Index itself was over 1,000 pages long and showed that Lakewood had released over 27,000 pages of records to Essi. Lakewood submitted many records for in camera inspection.

{¶ 9} The court conducted the in camera inspection and issued the writ of mandamus to compel the disclosure of disallowed redactions. In summary, the court considered the requests, the evidence submitted, including the parties' certifications, the 27,000 pages of released records, and the relevant law and concluded that eventually Lakewood had fulfilled its duty to produce the requested

records. *State ex rel. Essi v. Lakewood,* 8th Dist. Cuyahoga No. 104659, 2018-Ohio-5027.

Statutory Damages

{¶ 10} The court awards Essi $1,000 in statutory damages. At the relevant time, R.C. 149.43(C)(1) provided that if a requester transmits the requests by certified mail or hand delivery, the requester shall be entitled to recover statutory damages if the court determines the public records custodian failed to comply with an obligation in R.C. 149.43(B), which provided in pertinent part: "all records responsive to the request shall be promptly prepared and made available * * * upon request a public office or person responsible for public records shall make copies of the requested public records available at cost and within a reasonable time." Subsection (C)(1) further provided that statutory damages shall be fixed at $100 for each business day during which the records custodian fails to comply with an obligation in Subsection (B), beginning with the day the requester filed the mandamus action, up to a maximum of $1,000. Although Lakewood promptly complied with a few of the requests and although Essi's requests were massive and often problematic, Lakewood took over 15 months from the filing of the complaint and approximately a year from the allowance of the amended complaint to satisfy Essi's public records request on an important civic matter. The delay in over a year to fulfill the requests was not promptly making the records available within a reasonable time. Lakewood's actions were not in accord with the principle that

public records are the people's records. Accordingly, the award of the full amount of statutory damages is proper.

Attorney Fees

{¶ 11} At the relevant time, R.C. 149.43(C)(2)(b) provided that "[i]f the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section." The award of attorney fees is mandatory, subject to reduction under (C)(2)(c), if the records custodian failed to respond affirmatively or negatively to the public records request in accordance with Subsection (B).

{¶ 12} Subsection (C)(2)(c) first states that reasonable attorney fees shall be construed as remedial and not punitive. In other words, the attorney fees are to compensate those who have had to file a lawsuit to obtain the records. The section then allows a court to reduce attorney fees (1) if a well-informed records custodian reasonably would believe that the conduct or threatened conduct did not constitute a failure to comply with an obligation under Subsection (B), and (2) that the well-informed records custodian would believe that the conduct or threatened conduct would serve the public policy that underlies the authority as permitting the conduct.

{¶ 13} In the present case, the court ordered Lakewood to comply with R.C. 149.43 by issuing the mandamus to compel the release of some of the redacted records and by ordering Lakewood to comply with Essi's requests by preparing

and releasing the "Index of Records Supplied, Supplied with Redactions, or Withheld" along with the appropriate records to Essi. Thus, the requisites for an award of attorney fees are met.

{¶ 14} However, the court finds that the requested fees are not reasonable. Essi employed two law firms during this litigation. The first, McGown & Markling Co., L.P.A. ("McGown") seeks $173,245 for 547.80 hours of work. McGown's bill, a total of 82 pages, is generally divided into three parts. The first part covers the time period of February 11, 2016, through March 11, 2016, and consists of conferences between the law firm and Essi on status and strategy. This part is also covered by the payment of $2,929.95. The second part covers the time period from March 12, 2016, through April 5, 2016, and the attorneys billed at the rate of $225 per hour. The third period, which constitutes the vast majority of the bill, covers April 23, 2016, through September 1, 2017, and the attorneys billed at the rate $350 per hour. The time billed is attorney time, as compared to paralegal or office staff time. The court further notes the last entries of this bill, mainly for June 2017 and two from September 2017, concern the transfer of the case to the second law firm and a possible settlement.

{¶ 15} Essi's second law firm is DannLaw, the law firm of Marc Dann. It seeks $58,725 for 170.2 hours of work, covering the period from June 13, 2017, to the present. Of that time, 55.1 hours is paralegal and office staff time, billed at the rate of $125 per hour to $250 per hour. This includes 8.5 hours of a third-year law student/paralegal who was admitted to the bar in November 2017; his billing rate

was $250 per hour. The two lawyers in the firm who worked on this matter billed initially at the rate of $395 per hour. After September 1, 2017, Marc Dann billed at the rate $450 per hour, and the other attorney billed at the rate $425 per hour.

{¶ 16} To determine a reasonable fee, the court must determine a reasonable hourly rate and then multiply that by the numbers of hours reasonably expended. The court may adjust the fee award upward or downward based on the factors listed in Prof.Cond.R. 1.5(a), such as the novelty or difficulty of the questions involved, and time limitations imposed by the client or circumstances. Hours that are excessive, redundant, or otherwise unnecessary should be excluded. Ultimately what factors to apply and the amount of fees awarded are within the sound discretion of the court. *State ex rel. Harris v. Rubino,* ___Ohio St.3d _____, 2018-Ohio-5109, _____N.E.3d _____; and *Bittner v. Tri-County Toyota, Inc.,* 58 Ohio St.3d 143, 569 N.E.2d 464 (1991).

{¶ 17} In *State ex rel. Doe v. Smith,* 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 41, the Supreme Court of Ohio noted that the hourly rate of $250 in a public records mandamus action was "at the very top of the acceptable range for similar legal services in [the] area." In the Eighth District, this court has allowed an hourly rate of $265. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland,* 8th Dist. Cuyahoga No. 94226, 2010-Ohio-2108, and *State ex rel. Mun. Constr. Equip. Operators' Labor Council,* 8th Dist. Cuyahoga No. 95277, 2011-Ohio-117. Accordingly, this court rules that $265 is the reasonable hourly rate.

{¶ 18} The court finds that the 547.80 hours billed by the McGown firm is excessive. The first remarkable item in the bill is the number of client conferences and interoffice conferences. The court counted over 350 communications between Essi and the McGown firm and over 160 interoffice conferences. It is difficult to determine exactly how much time was spent in each of these activities because the bill shows the evils of block billing.[1] For example, the notation for May 6, 2016, states that the lawyer had a telephone conference with Essi concerning potential complaints, reviewed the law regarding filing procedures and proper venue, reviewed a voicemail from the Ohio Attorney General's mediation office, emailed Essi about the voice message, and had an interoffice conference about these topics. These activities consumed 1.30 hours, but the court cannot discern how much time was spent in research, how much time spent in interoffice conference, and how time spent in communicating with Essi.

{¶ 19} The court further notes that the flow of communication between Essi and his lawyers was peculiar. Usually, the lawyers for each party will communicate among themselves and then inform the client. However, in the present case, the bill indicates that Lakewood sent the records first to Essi, and then Essi communicated with his attorneys about what was sent. The bill also indicates that at times Essi communicated directly with counsel for Lakewood and then reported the conversation to the McGown firm. Although it is difficult to

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[1] The court accepts the bill as filed because the notations for services rendered were made in 2016 and 2017. The Supreme Court of Ohio did not condemn the practice until 2018 in *Rubino*, 2018-Ohio-5109.

determine with precision how much of the bill was devoted to client conferences, the court counted at least 160 hours so expended. Similarly, at least 23 hours were spent in interoffice conferences.

{¶ 20} There were other endeavors that are excessive or for which Lakewood should not be charged. At least 60 hours were spent in preparing the discovery request for production of documents that was a reiteration of the public records request and the motion to compel that discovery and a reply brief. This court summarily denied the discovery and the motion to compel as an effort to obtain indirectly what could not be obtained directly. The bill also shows that in 2017, the parties endeavored to enlist the help of an independent mediator to help settle the case. At least 38 hours were spent pursuing this option, but Essi ultimately refused to participate. The McGown firm billed over nine hours relating to ending the client-counsel relationship with Essi and transferring the case to DannLaw.

{¶ 21} Moreover, in reviewing the bill, the court noted entries that seem irregular or irrelevant to the public records mandamus action. For example, the bill refers several times to analysis by Mark Kindt; advice to Essi on his need to stop posting on a certain forum; communications regarding links to the Ohio Attorney General's authority to protect the charitable sector; exploration of an open meetings claim; review of records for requests that were withdrawn; reviewing information about campaign contributions; reviewing data on hospital mergers; emails on illegal party activities, conflict of interest by Lakewood

officials, statements by Lakewood officials, compliance by Lakewood officials on public records training, and other lawsuits involving Lakewood; computer difficulties; and consideration of SEC issues.

{¶ 22} The court will allow the time spent for the following activities: formulation of public records request; periodic review to determine whether requests have been fulfilled; investigating the Ohio Attorney General's mediation process, which Lakewood declined; preparation and filing of the mandamus complaint and the amended complaint; review of Lakewood's court filings and communications directly to the law firm; review and responses to court orders; and review of issues in public records law. The sum of all of the allowable hours is 185.70. Multiplying 185.70 by $265 equals $49,210.50. The court awards $49,210.50 to McGown & Markling Co., L.P.A., pursuant to R.C. 149.43(C).

{¶ 23} In reviewing the DannLaw bill, the court disallows all of the hours for the paralegal staff and the office staff, including all of the hours billed by the third-year law student who was admitted to the bar during the litigation. Additionally, the court disallows the following: the duplicative time spent reviewing all the records, including court records, caused by retaining new counsel; notations of sending emails or making telephone calls that do not specify to whom they are made; conferences with the McGown firm regarding settlement and the McGown bill; and notations in which there is no description of the services rendered. The court allows the time spent reviewing current public records law, preparing filings to the court, and reviewing filings and records submitted by

Lakewood. The sum of all allowable hours is 93.47. Multiplying 93.47 by $265 equals $24,769.55. The court awards DannLaw $24,769.55 pursuant to R.C. 149.43(C).

{¶ 24} The court has already assessed court costs against Lakewood. The court makes no award of office costs, such as postage. *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 13.

Kathleen Ann Keough

KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR