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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001526-MR

DOUGLAS A. WAIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE HON. ERNESTO SCORSONE, JUDGE
ACTION NO. 13-CI-04593

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant, Douglas Wain, appeals from an order of the Fayette Circuit Court granting summary judgment in favor of the Lexington-Fayette Urban County Government (hereinafter "LFUCG") on Wain's claims brought under the Kentucky Open Records Act (KORA). We affirm.

Background

Wain is the owner and director of "Win the War! Against Violence," a non-profit corporation based in Lexington which Wain describes as furthering "violence prevention education." On September 9, 2012, Wain sent a letter to Laura Hatfield, the Executive Director of Partners for Youth, an initiative of the LFUCG Mayor's office. This letter expressed Wain's disappointment that Partners for Youth had not asked his organization to participate in a July 2012 event tailored to the city's youth. Wain's letter also expressed "confusion" concerning the review and denial of a grant proposal he submitted to Partners for Youth earlier in 2012. Wain ended the letter by requesting that an initiative of his organization "be given proper, fair and due consideration" and that he be allowed to meet the LFUCG Social Services Commissioner. Wain met with the Commissioner eight days after sending his letter.

On September 24, 2012, Wain sent an eight-page letter to LFUCG Mayor Jim Gray. This letter, labeled "Investigation and Information Request," requested "an investigation into Partners for Youth and its Executive Director Laura Hatfield." Wain expressed "concerns that I and the organization I work for and represent *might* be receiving unfair treatment by the Partners for Youth…." The letter went on to make sixty-nine requests for "information and documentation" concerning various issues, including why various initiatives of Wain's organization were not included in area youth programs, who made these decisions, and why Hatfield "did not honor or answer our request for a meeting in

our September 9, 2012 letter…." Wain's letter also addressed several questions directly to Mayor Gray. These included, "why we stopped receiving any communication from [Hatfield] and Partners for Youth" and "why we were not offered an opportunity to be at this event and why were [we] even not contacted by Partners for Youth in any way about this event."

LFUCG received Wain's letter on September 27, 2012. On October 2, an attorney for LFUCG responded in writing to Wain's letter, which stated that "it is unclear whether you are making a request pursuant to the [KORA]. If you are …, please submit a signed request detailing, with reasonable specificity, the records you are seeking to review." Wain did not respond to this letter, or provide the requested clarity, until September 6, 2013, when he sent a "cease and desist" letter to Mayor Gray's office. This letter demanded that LFUCG not go forward with a planned "Prevent Youth Violence Conference" because it "interfered" with an event Wain's organization had planned for more than three weeks after the LFUCG's event. Wain requested new information and again requested the "information and documentation" mentioned in his prior letter without any additional description.

Three days after receiving Wain's cease and desist letter, LFUCG responded by acknowledging "two identifiable requests under [KORA]…." To the extent Wain's request sought records already in existence, LFUCG requested additional time to compile responsive records and estimated that this would take between five and seven days. To the extent Wain's requests sought non-existent

records or information outside the public record, LFUCG cited three Opinions of the Attorney General as authority in denying these requests. Seven days after LFUCG's initial response, it sent Wain a letter reiterating various exceptions under KORA, seeking clarification as to one request, and informing him that records responsive to the remaining two requests were available for inspection. Finally, on September 30, twenty-one days after Wain's cease and desist letter, LFUCG informed Wain that documents responsive to the lone pending request were available for his inspection.

On January 11, 2013, Wain filed a document with the Attorney General's Office which that office ultimately treated as an Open Records appeal concerning LFUCG's response to his 2012 and 2013 letters. The Attorney General responded in an opinion dated October 16, 2013, which expressly resolved the question of whether LFUCG's responses to Wain's various requests violated KORA. 13-ORD[1]-165. The Attorney General held that LFUCG did not violate KORA because it was unclear from Wain's September 2012 letter whether it was a request for public records, and because LFUCG took reasonable and timely steps to clarify the matter.

On November 7, 2013, Wain filed a complaint in Fayette Circuit Court seeking judicial review of LFUCG's actions and the Attorney General's decision. Wain's complaint also sought an award of penalties, fees, and costs. Wain also tendered interrogatories to which LFUCG objected, prompting Wain's

[1] Open Records Division.

motion to compel discovery. At a June 13, 2014 hearing, the trial court ruled that Wain's discovery requests were improper. Ultimately, in an August 28, 2014 order, the trial court granted LFUCG's motion for summary judgment based upon the court's conclusion that Wain's September 24, 2012 letter did not constitute a proper open records request. Wain now appeals from this August 18, 2014 order.

Standard of Review and the Summary Judgment Standard

The standard of review governing an appeal from a summary judgment is well-settled. Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

"The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary judgment appropriate only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03.

[2] Kentucky Rules of Civil Procedure.

Analysis

As a preliminary matter, LFUCG correctly observes that Wain's brief contains no citations to the record in its Statement of the Case and Argument sections, as required under CR 76.12(4)(c)(iv).[3] Wain also makes or insinuates several irrelevant and unsubstantiated accusations against individuals within Partners for Youth and LFUCG. Accordingly, LFUCG requests that we strike the unsupported portions of Wain's brief from the appellate record.

"An individual may file and practice his own lawsuit in any court within the Commonwealth. If he elects to do so, he is bound by the same rules and procedures as a licensed lawyer." *Taylor v. Barlow,* 378 S.W.3d 322, 326 (Ky. App. 2012). While this Court will show some lenity to *pro se* litigants when necessary, "the judiciary's conciliatory attitude is not boundless." *Smith v. Bear, Inc.*, 419 S.W.3d 49, 55 (Ky. App. 2013), *citing Beecham v. Commonwealth*, 657 SW.2d 234, 236 (Ky. 1983), and *Cardwell v. Commonwealth,* 354 S.W.3d 582, 585 (Ky. App. 2011).

This Court, within its discretion, can forgive a *pro se* litigant's failure to support a portion of his factual assertions with citations to the record. We will not forgive a complete disregard for the Civil Rules, especially when such disregard also takes the form of accusations which are unsubstantiated, irrelevant, and unaddressed at the trial court level. Therefore, we strike Wain's Statement of the Case from the appellate record. We further strike the unsupported accusations

[3] This rule requires "ample" citation to the record in support of factual statements made throughout both sections of a party's brief.

concerning Mayor Gray, Partners for Youth, and the trial court judge that Wain makes on pages eight and nine of his brief.

We now proceed to the substantive matter before us on appeal: whether genuine issues of material fact remained in the record concerning whether Wain's February 24, 2012 letter constituted a valid open records request and whether LFUCG's response was sufficient under KORA.

KRS[4] 61.872(2) states that

> [a]ny person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency.

KORA allows agencies to require requests be made in writing; however, it does not impose upon a requesting party any particularity or specificity requirement. *See Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). Furthermore, "failure to issue a timely response to an open records request [is] not excused by the requester's failure to identify the request as a request made under [KORA]." *See*, *e.g.*, 12-ORD-114; 06-ORD-197; 01-ORD-168; 99-ORD-148.

LFUCG handled the uncertainty which stemmed from Wain's February 2012 letter appropriately under KORA and other authorities. At several points, Wain styled his letter as a request for an investigation. On page five of the letter, he requests an investigation of LFUCG's Department of Social Services and its Commissioner. On page seven, Wain urged Mayor Gray to "act swiftly on this

[4] Kentucky Revised Statutes.

investigation request[.]" These requests fell squarely outside the scope of the Open Records Act, the express purpose of which is to permit the "free and open examination of public records[.]" KRS 61.871.

To the extent that Wain's letter also requested "information" – and it did at several points – these requests largely sought information not contained in then-existing public records. The letter repeatedly asked why LFUCG took certain action or made various decisions. For example, the letter states, "We are now asking Mayor Gray why our May 16, 2012, July 25, 2012 and our September 7, 2012 emails were ignored…." KORA did not require LFUCG to respond or otherwise provide this information as it was not contained in a document at the time of Wain's request. *See* 05-ORD-230; 00-ORD-07; 93-ORD-50. Such a request is also beyond the scope and purpose of KORA.

In light of the confusing terminology in Wain's September 24, 2012 letter, and despite the fact that the bulk of its requests did not warrant action under KORA, LFUCG acted properly in responding to Wain's letter. LFUCG asked Wain to clarify whether his letter was a request for information, an investigation, or for documents under KORA. Wain did not respond for nearly a year. Once Wain informed LFUCG that he indeed sought documents, to the extent such documents existed, LFUCG made all documents responsive to his requests available for Wain's inspection within a reasonable time and in a manner compliant with KORA. These facts are apparent from the face of the record, and

when combined with the law we have cited, they demonstrate that Wain's claim that LFUCG violated KORA warrants no further litigation.

In addition to arguing that LFUCG wrongfully withheld the records he sought, Wain contends that the trial court erred when it "relied" upon the Attorney General's opinion issued in this case. He asserts that the trial court did not apply the appropriate *de novo* review in granting summary judgment in favor of LFUCG. It is true that the trial court's order expressly stated that it was "based on" the Attorney General's opinion; however, the trial court's opinion merely referenced the law and the reasoning contained in the Attorney General's opinion which correctly concluded that the law did not entitle Wain to relief under KORA.

Finally, Wain argues that the trial court impermissibly denied his requests for discovery in the underlying appeal from the Attorney General's opinion. In interrogatories Wain tendered to the trial court, he sought, *inter alia*, the criteria for selection of participants for the Spotlight for Youth event and invoices for that event, as well. The trial court did not err in denying Wain's discovery request.

Wain's attempt at discovery before the trial court was improper given that the sole issue before the trial court was a question of law concerning the sufficiency of LFUCG's response to Wain's initial request. In discovery,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the

> existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

CR 26.02(1). Wain's discovery requests largely sought information concerning Partners for Youth and the Spotlight for Youth event which precipitated his September 2012 letter, which sought similar information. These subjects were irrelevant to the narrow legal question and subject matter before the trial court. Therefore, in addition to seeking information irrelevant to the legal question before the trial court, Wain's tendered interrogatories were a transparent attempt to circumvent KORA; and the trial court was correct to bar them.

Conclusion

Given the ambiguous and voluminous nature of his initial request, we conclude that LFUCG addressed Wain's requests appropriately under KORA. No genuine issues of material fact remain concerning this issue. Therefore, the Fayette Circuit Court's August 18, 2014 order granting summary judgment in favor of LFUCG is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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