[Cite as *State ex rel. Daugherty v. Mohr*, 2011-Ohio-6453.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Michael Daugherty,	:	
Relator,	:	
v.	:	No. 11AP-5
[Gary Mohr], Director Ohio Department of Rehabilitation and Correction et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 15, 2011

Michael Daugherty, pro se.

Michael DeWine, Attorney General, and *Peter L. Jamison*, for respondents.

IN MANDAMUS
ON MOTIONS FOR SUMMARY JUDGMENT

SADLER, J.

{¶1} Relator, Michael Daugherty, commenced this original action requesting this court to issue a writ of mandamus ordering respondent, Gary Mohr, as director of Ohio Department of Rehabilitation and Correction ("ODRC"), to respond to his public records request. Relator filed a motion for summary judgment asserting that ODRC failed to provide him with public records in a timely manner. ODRC filed a memorandum contra to relator's motion for summary judgment, as well as its own motion for summary judgment which asserted that relator's request for public records was overbroad, vague, and

burdensome. Relator did not file a memorandum contra to ODRC's motion for summary judgment.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who considered the action on its merits and issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that relator's motion for summary judgment was untimely and recommended that it be denied. Additionally, the magistrate determined that, because ODRC responded to relator's request for public records within 12 business days of receipt of the request, it acted timely and appropriately when it informed relator that his request was overly broad. Furthermore, the magistrate noted that ODRC informed relator that if he narrowed his request, ODRC would consider the new request. Accordingly, the magistrate recommended that the court grant ODRC's motion for summary judgment.

{¶3} No objections have been filed to the magistrate's decision.

{¶4} Having conducted an independent review of the record in this matter, and finding no error of law or other defect in the magistrate's decision, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein. In accordance with the magistrate's decision, relator's motion for summary judgment is denied, and ODRC's motion for summary judgment is granted.

Relator's motion for summary judgment denied;
ODRC's motion for summary judgment granted;
and request for writ of mandamus denied.

BROWN and CONNOR, JJ., concur.

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A P P E N D I X

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[Gary Mohr], Director Ohio Department of Rehabilitation and Correction et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on May 31, 2011

Michael Daugherty, pro se.

Michael DeWine, Attorney General, and *Peter L. Jamison*, for respondents.

IN MANDAMUS
ON MOTIONS FOR SUMMARY JUDGMENT

{¶5} Relator, Michael Daugherty, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Gary Mohr, as Director of the Ohio Department of Rehabilitation and Correction ("ODRC"), to respond to his public

records request. Relator also seeks an award of statutory damages and court costs pursuant to R.C. 149.43(C)(2) and (C)(2)(a).

Findings of Fact:

{¶6} 1. Relator is an inmate currently incarcerated at London Correctional Institution.

{¶7} 2. According to his complaint, "[o]n or about December 3, 2010, relator made a public records request for all the DRC and LoCI policies, e-mails, or memos, concerning whether prison officials are authorized to 'triple cell' inmate into segregation."

{¶8} 3. Relator acknowledges that he did receive a response from legal counsel for ODRC. Attached to his complaint is the December 21, 2010 letter from Steven A. Young, ODRC's legal counsel, informing him of the following:

> I am responding to your record request for **all DRC and LoCI policies, e-mails, or memos regarding whether prison officials are authorized to 'triple cell' inmates into segregation.**
>
> I have reviewed Revised Code Section 149.43 (Availability of Public Records), the Criminal Rules of Procedure and applicable case law. State agencies are obligated to make public records available for inspection and copying to members of the general public. Obviously, a public agency's obligations only relate to public records as they are defined in the statute. Not all records maintained by government agencies are deemed public. Ohio public record law only requires that records be made available by public agencies as they are kept in the normal course of business. Public agencies are not required to perform research or create new files in responding to requests for records. The information you seek is not maintained in one file or a group of files. Retrieving records that pertain to your request would require judgments and research not contemplated by the law. We

> decline to do so. If the request asks for a record that is not contained in existing files, there is no requirement to create a new record.
>
> I cannot fully respond to your request. I believe much of your request falls outside the scope of the Department's obligations under the statute. I do not know what you mean by 'regarding whether'. A public agency may refuse a request on the basis that it is too broad as to be vague and burdensome. Your request is simply too broad.
>
> Since you are an inmate, you cannot go to various locations and inspect records. Consequently, you must specifically identify the type of record you wish to receive. Presently, the Department is not obligated to furnish the records you request. If you can identify specific records, the Department will consider your request. Let me suggest that you direct your request for records maintained at London Correctional Institution to staff at that institution.

(Emphasis sic.)

{¶9} 4. According to his complaint, relator responded to Mr. Young stating:

> On Monday December 27th 2010, I was called to the office of [R]ussell Parrish Unit Manager Administrator at L.O.C.I. and given a letter from you dated December 21st 2010 regarding my Public Records request to your office.
>
> What is strange about the letter is its "Authenticity[.]" The letter does not have your normal ODRC letter head at the top of your office paper and the signature seems to have been "photo copied["] and placed on the bottom of the letter.
>
> What makes this letter suspicious is I have seen other letters that you have sent to other inmates who have made Public Records request.
>
> Can you please indicate whether or not this letter has been sent by you or if this letter is a forgery prepared by someone else at this Institution.

{¶10} 5. Because relator did not receive a reply, he filed this mandamus action on January 4, 2011.

{¶11} 6. In this mandamus action, relator seeks the following:

> [¶Nine] The relator is aggrieved by the respondent's and other department employees in the Ohio Department of Rehabilitation and Correction failure to promptly respond to his public records request within a reasonable amount of time under the **ODRC's Policy #07-ORD-02(F)(1)**.
>
> [¶Ten] The relator seek[s] an award of statutory damages pursuant to R.C. 149.43(C)(1) for respondent's failure to respond to his public records request for all DRC and LoCI policies, e-mails, or memos concerning whether prison officials are authorized to "triple cell" inmates into segregation. The existence of this injury shall be conclusively presumed.
>
> [¶Eleven] The relator incorporates the Tenth District Court of Appeals decision in ***State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.***, 10th Dist. No. 08AP-21, 2009-Ohio-442, at ¶9-¶12 in support of the pleadings inside this mandamus complaint.
>
> [¶Twelve] The relator contends that fifteen days is sufficient to establish a cause of action for respondent's failure to respond to his public records request promptly and in a reasonable manner. Also, in assessing whether there has been a violation of the public records act, the critical time frame is not the number of days between when respondent received the public records request and when relator filed his action. Rather, the relevant time frame is the number of days it took for respondent to properly respond to the relator's public records request. ***State ex rel. Holloman v. Ohio Dept. of Rehab. & Corr.***, 10th Dist. No. 09AP-1184, 2010-Ohio-3034, at ¶12, citing ***State ex rel. Wadd v. Cleveland*** (1998), 81 Ohio St.3d 50.

(Emphases sic.)

{¶12} 7. On January 25, 2011, relator filed a motion for summary judgment asserting that there was no genuine issue of material fact concerning ODRC's failure to provide him with public records in a timely manner. Relator attached thereto an affidavit essentially setting forth the evidence contained in the above findings of fact.

{¶13} 8. After being granted several extensions of time to file a memorandum contra, due to numerous changes in the attorney general's office, a memorandum in opposition to relator's motion for summary judgment was filed on behalf of ODRC. In its memorandum contra, ODRC asserts that relator's motion for summary judgment should be denied for the following reasons: (1) his motion was untimely and therefore not properly filed with this court because it was filed ten days before ODRC filed its answer, and violates R.C. 56(A), and (2) that ODRC's response to relator's public records request was timely within the definition found in R.C. 149.43.

{¶14} 9. Also on April 12, 2011, ODRC filed a motion for summary judgment asserting that its response to relator's request was timely and that his request was properly denied as being overbroad, vague and burdensome.

{¶15} 10. Relator has not filed a memorandum in opposition to ODRC's motion for summary judgment.

{¶16} 11. Summary judgment notices were sent to the parties originally scheduling relator's motion for summary judgment for a non-oral hearing in March 2011. After granting ODRC's extensions and because ODRC filed its own motion for summary judgment, the magistrate did not rule on relator's motion for summary judgment in March. Instead, both motions are submitted to the magistrate for consideration in May 2011.

{¶17} 12. The motions are currently before the magistrate for consideration.

Conclusions of Law:

{¶18} For the following reasons, it is this magistrate's decision that this court should deny relator's motion for summary judgment and grant ODRC's motion for summary judgment.

{¶19} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶20} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶21} As noted in the findings of fact, relator filed this mandamus action on January 4, 2011, and he filed his motion for summary judgment on January 25, 2011. Pursuant to Civ.R. 12(A), ODRC had 28 days after service of the summons and complaint in order to file its answer. Without considering what date ODRC was actually

served a copy of relator's complaint, the magistrate notes that it is undisputed that only 21 days passed from the date that relator filed his mandamus complaint to the date that relator filed his motion for summary judgment. The time for filing an answer had not yet run.

{¶22} Motions for summary judgment are governed by Civ.R. 56, which provides, in pertinent part:

> A party seeking to recover upon a claim, * * * may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim * * *. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. * * *

{¶23} Civ.R. 7(A) defines a pleading as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, or a third-party answer. Relator's motion for summary judgment was clearly filed before ODRC had the opportunity, by rule, to answer.

{¶24} Because relator filed his motion for summary judgment before ODRC had the opportunity to file its answer, relator's motion for summary judgment violates the requirements of Civ.R. 56(A) and was untimely. For that reason, it should be denied.

{¶25} Relator's motion for summary judgment should also be denied because he has not demonstrated that his request was not overly broad or vague or that ODRC was required to provide him with any documents in response to his request. Further, determination of whether or not ODRC's response thereto was prompt cannot be determined merely on the face of relator's complaint and after considering his affidavit. For this additional reason, relator's motion for summary judgment should be denied.

{¶26} Turning now to ODRC's motion for summary judgment, ODRC maintains that its response to relator's request was both prompt and proper. ODRC's response, as admitted by relator, was within 15 days of the receipt of his request. ODRC argues that its response meets the requirements of the Ohio Public Records Act and that relator's request for a writ of mandamus should be denied. For the reasons that follow, the magistrate agrees.

{¶27} The appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act, is mandamus. *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903. R.C. 149.43 must also be construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374.

{¶28} R.C. 149.43 pertains to the availability of public records and provides, in pertinent part, as follows:

> (B)(1) Upon request[,] * * * all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. * * * [U]pon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, 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. * * *
>
> (2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office

also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, 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. * * *

* * *

(7) Upon a request made in accordance with division (B) of this section[,] * * * 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. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time

after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

* * *

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section.
* * *

If a requestor transmits a written request by hand delivery 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, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars 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 one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. 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.
>
> * * *
>
> (2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.
>
> (b) If 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 court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section[.] * * *
>
> * * *
>
> (c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. * * *

{¶29} The purpose of the Ohio Public Records Act "is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264, quoting *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St.3d 350, 355. Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so government officials can be held accountable. See *White v. Clinton Cty. Bd. of Commrs*. (1996), 76 Ohio St.3d 416, 420.

{¶30} As above indicated, public offices are required to promptly prepare records and transmit them within a reasonable period of time after receiving the request for the copy. The term "promptly" is not defined in the statute. However, statutes in

other states give their agencies from between three and 12 days from the date the public records were requested to make the documents available. The word "prompt" is defined as "performed readily or immediately." Webster's Eleventh New Collegiate Dictionary (2005).

{¶31} Other courts have examined the number of days which may be considered reasonable or unreasonable. Ten business days has been held to be reasonable while 32, 37, and 79 business days have been held to be unreasonable. See *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 8th Dist. No. 93058, 2009-Ohio-5573, and *State ex rel. Striker v. Cline*, 5th Dist. No. 09CA 107, 2010-Ohio-3592. Here, relator's public records request was sent by relator on Friday, December 3, 2010. Considering for the moment that relator's request was actually received by ODRC on or about Monday, December 6, 2010, relator acknowledges in his complaint that ODRC responded to him by letter dated December 21, 2010. This constitutes 12 business days from receipt of the request to respond, and this magistrate finds that 12 business days meets the definition of prompt as contemplated by the Ohio Public Records Act. As such, the magistrate has determined that ODRC responded promptly to relator's request.

{¶32} The magistrate also finds that ODRC's response was appropriate. As noted previously, relator requested "**all DRC and LoCI policies, e-mails, or memos regarding whether prison officials are authorized to 'triple cell' inmates into segregation.**" (Emphasis sic.) ODRC determined that the request was overbroad.

{¶33} " '[I]t is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.' " *State ex rel. Morgan v.*

City of New Lexington, 112 Ohio St.3d 33, 2006-Ohio-6365, quoting *State ex rel. Fant v. Tober* (Apr. 28, 1993), Cuyahoga App. No. 63737, affirmed, 68 Ohio St.3d 117. Further, the Ohio Public Records Act never contemplated that any individual would have the right to receive a complete duplication of files kept by government agencies. *State ex rel. Zauderer v. Joseph* (1989), 62 Ohio App.3d 752. Instead, if a request for records is unreasonable in scope, and if it would interfere with the sanctity of the record-keeping process, courts have held that the request is overbroad. Id.

{¶34} For example, in *Zauderer*, this court held that a public records request for all traffic reports was overbroad in scope and noted that "[a] general request, which asks for everything, is not only vague and meaningless, but essentially asks for nothing. At the very least, such a request is unenforceable because of its overbreadth. At the very best, such a request is not sufficiently understandable so that its merit can be properly considered." Id. at 756. Furthermore, the Supreme Court of Ohio has determined that a public records request for any and all reports is too broad. *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312.

{¶35} In the present case, the magistrate finds that ODRC's response to relator informing him that his request was overly broad and informing relator that, if he could narrow his request, ODRC would consider it, was not a violation of the Ohio Public Records Act.

{¶36} On those grounds, the magistrate would grant summary judgment in favor of ODRC.

{¶37} Based on the foregoing, it is this magistrate's decision that this court should deny relator's motion for summary judgment and, instead, grant ODRC's motion for summary judgment.

/S/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).