[Cite as *State ex rel. Armatas v. Plain Twp. Bd. of Trustees*, 2020-Ohio-1225.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO EX REL., STEVEN A. ARMATAS,	:	JUDGES:
	:	Hon. John W. Wise, P.J.
	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
Relator	:	
	:	
-vs-	:	
	:	
PLAIN TOWNSHIP BOARD OF TRUSTEES,	:	Case No. 2019CA00141
	:	
Respondent	:	O P I N I O N

CHARACTER OF PROCEEDING: Writ of Mandamus

JUDGMENT: Denied

DATE OF JUDGMENT: March 23, 2020

APPEARANCES:

For Relator

STEVEN A. ARMATAS, pro se
7690 Bucknell Circles, N.W.
North Canton, Ohio 44720

For Respondent

JAMES F. MATHEWS
ANDREA K. ZIARKO
TONYA J. ROGERS
BAKER, DUBLIKAR, BECK
WILEY & MATHEWS
400 South Main Street
North Canton, Ohio 44720

Baldwin, J.

{¶1} On September 16, 2019, Relator, Steven A. Armatas, filed a Complaint for Writ of Mandamus against Respondent, Plain Township Board of Trustees ("Plain Township"). Mr. Armatas asks the Court to compel Plain Township to produce certain legal invoices it allegedly received, from the law firm of Baker, Dublikar, Beck, Wiley & Mathews ("Baker, Dublikar"), for three separate matters Mr. Armatas identified in his records request.

I. Factual background

{¶2} Mr. Armatas made the public records request that is the subject of this writ on December 10, 2018. Mr. Armatas emailed Plain Township and requested legal invoices for the following matters: (1) "Appeal No. 1272-18 before the BZA Re: Denise Armatas, 7690 Bucknell Cir. N.W., North Canton, Ohio 44720"; (2) "Appeal No. 1277-18 before the BZA Re: Steven A. Armatas, 7690 Bucknell Cir. N.W., North Canton, Ohio 44720"; (3) "Case No. 2018-CV-02112 in the Stark County Court of Common Pleas; Denise Armatas v. Plain Township Board of Zoning Appeals." [Relator's Evidence, Exhibit A]

{¶3} On December 11, 2018, Plain Township Administrator, Lisa Campbell, responded to Mr. Armatas: "I am in receipt of your public records request and will gather your requested materials." [*Id*., Exhibit B] Shortly after sending this email, in late 2018 or early 2019, Plain Township alleges Mr. Armatas called Ms. Campbell regarding the status of his public records request. [Respondent's Evidence, Affidavit Lisa Campbell, ¶3] According to Ms. Campbell, she informed Mr. Armatas Plain Township did not possess any invoice documents because the Public Entity Risk Services of Ohio ("PERSO")

retained Baker, Dublikar to represent the Plain Township Zoning Inspector in connection with the three matters set forth in Mr. Armatas's request. [*Id*., ¶¶ 3, 8]

{¶4} Mr. Armatas thereafter filed this original action requesting immediate production of the requested records, attorney fees, and statutory damages under R.C. 149.43(C)(1) for each of the three sets of documents requested.

{¶5} On November 8, 2019, Mr. Armatas moved for summary judgment. Plain Township filed a response on November 22, 2019. Mr. Armatas filed a reply in support of his motion on December 9, 2019. On December 18, 2019, the Court denied Mr. Armatas's motion. On January 7, 2020, the Court filed a scheduling order for the submission of stipulations, additional evidence, and merit briefs. This matter is now before the Court for a merit determination.

II. Mandamus elements/burden of proof

{¶6} For a writ of mandamus to issue, the relator must have a clear legal right to the relief prayed for, the respondent must be under a clear legal duty to perform the requested act, and relator must have no plain and adequate remedy in the ordinary course of law. (Citations omitted.) *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983). "Mandamus is an extraordinary remedy 'to be issued with great caution and discretion and only when the way is clear.' " *State ex rel. Taylor v. Glasser,* 50 Ohio St.2d 165, 166, 364 N.E.2d 1 (1977), citing *State ex rel. Kriss v. Richards,* 102 Ohio St. 455, 457 132 N.E. 23 (1921), and *State ex rel. Skinner Engine Co. v. Kouri,* 136 Ohio St. 343, 25 N.E.2d 940 (1940), paragraph one of the syllabus.

> 'It is the well-settled general rule in Ohio that the issuance of a writ of mandamus rests, to a considerable extent at least, within the sound

> discretion of the court to which application for the writ is made. The writ is not demandable as a matter of right, or at least is not wholly a matter of right; nor will it issue unless the relator has a clear right to the relief sought, and makes a clear case for the issuance of the writ. *The facts submitted and the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.*'

(Citation omitted, emphasis added.) *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967).

III. ANALYSIS

A. Construction of Ohio's Public Records Act

{¶7} R.C. 149.43, Ohio's Public Records Act, implements the state's policy that, " 'open government serves the public interest and our democratic system.' " *State ex rel. Dunlap v. Smith*, 5th Dist. Fairfield No. 11-CA-60, 2012-Ohio-4239, ¶ 6, citing *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. " '[W]e construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.' " (Citations omitted.) *Dunlap* at ¶ 6. Under the facts here, Mr. Armatas does not need to establish there exists no other adequate remedy in the ordinary course of the law because mandamus is the specific remedy as provided under R.C. 149.43. *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.*, 78 Ohio St.3d 518, 520, 678 N.E.2d 1388 (1997).

{¶8} Although R.C. 149.43 is to be liberally construed in favor of free access to public records, the relator must still establish entitlement to mandamus by clear and convincing evidence. Clear and convincing evidence is defined as "that measure or

degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' on criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Further, "where an office attests that requested records do not exist, the requester has the burden to establish the records exist by clear and convincing evidence." *Chillicothe Gazette v. Chillicothe City Schools*, Ct. of Cl. No. 2018-00950PQ, 2018-Ohio-5445, ¶ 10, citing *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶¶ 22-26.

B. Plain Township's admissions in its Answer and subsequent actions

{¶9} Mr. Armatas maintains Plain Township has essentially conceded the case by not denying the allegations in its Complaint. This argument references paragraph 16 of Mr. Armatas's complaint, which states:

> 16. On December 11, 2018, Relator received an electronic mail communication from Plain Township Administrator, Ms. Lisa Campbell, acknowledging receipt of Relator's records request. The message stated: "Good morning Steve. I am in receipt of your public records request and will gather all your requested materials." * * * This was the only communication received by Relator from Respondent with regards to the aforementioned records request.

[Complaint, ¶ 16]

{¶10} In its answer, Plain Township responded to this allegation of the Complaint as follows:

> 10. In response to paragraphs 14, 15, and 16 of the complaint, respondent admits that the relator sent an electronic mail request for documents to the Township Administrator dated December 10, 2018, which was acknowledged December 11, 2018. Both the request and acknowledgement speak for themselves. Further answering, respondent acknowledges that, following the acknowledgment of the request by the Administrator, inadvertently, the relator was not informed that there was no record kept by the township responsive to the request, until after the filing of the complaint.

[Answer, ¶ 10]

{¶11} Mr. Armatas is critical of the fact that Plain Township did not deny his allegation that, "this [email reply] was the only communication received by Relator from Respondent with regard to the aforementioned records request." Mr. Armatas is also critical of the fact that Plain Township admitted, "relator was not informed that there was no record kept by the township responsive to the request, until after the filing of the complaint." Mr. Armatas concludes he established he made a records request via email, the Township Administrator acknowledged his request by email, and he was never provided the requested documents or a written explanation why Plain Township could not provide the documents. Thus, Mr. Armatas asserts under Civ.R. 8(D) and case law, he has satisfied the burden under the Ohio Public Records Act and there is nothing Plain Township can do to revive any defense it may have had.

{¶12} We do not find Plain Township's admissions in its Answer means Mr. Armatas has clearly and convincingly proven his case under R.C. 149.43. The fact remains Plain Township does not have in its possession any records that are responsive to Mr. Armatas's public records request, and Mr. Armatas has not proven otherwise. Plain Township's evidence includes an affidavit from Ms. Lisa Campbell wherein she opines: (1) PERSO – not Plain Township - retained Baker, Dublikar to provide legal services for Plain Township; (2) the township did not receive any invoices or copies of invoices from Baker, Dublikar for any services related to the three matters that are the subject of Mr. Armatas's public records request that Baker, Dublikar may have sent to PERSO; and (3) Plain Township did not make any payments to Baker, Dublikar or PERSO with regard to the three matters that are the subject of Mr. Armatas's public records request. [Respondent's Evidence, Affidavit Lisa Campbell, ¶¶ 7-9].

{¶13} Further, Ms. Diana Hoppe, Baker, Dublikar's billing manager, indicated in her affidavit she generated an invoice for the first matter (Appeal No. 1272-18) on November 16, 2018. [Respondent's Evidence, Affidavit Diana Hoppe, ¶ 3] She addressed and sent the invoice directly to PERSO and did not send the invoice or a copy of it to Plain Township. [*Id*.; Respondent's Evidence, Affidavit of James Mathews, ¶ 5] On November 26, 2018, Baker, Dublikar received payment from PERSO under an existing, open claim number, Claim No. OTR 018386 A 1. [Respondent's Evidence, Affidavit Diana Hoppe, ¶¶ 4, 5] Further, Ms. Hoppe opined Baker, Dublikar generated no invoices for the second and third matters identified in Mr. Armatas's public records request. *Id*. at ¶ 6.

{¶14} Attorney Mathews clarified in his affidavit that with regard to the second and third matters, PERSO assigned a new claim number, "OTR019698A1[.]" [Respondent's

Evidence, Affidavit of James Mathews, ¶ 6]. The first invoice submitted to PERSO, under this new claim number, related to the second and third matters of Mr. Armatas's public records request, and was not generated until April 29, 2019, well after Mr. Armatas's records request dated December 10, 2018. [*Id*.]

{¶15} Finally, the letters from PERSO that Plain Township submitted as evidence, dated October 26, 2016 and November 5, 2018, specifically provide, "Interim statements are to be submitted to PERSO on a quarterly basis or when such statements reach the amount of $5,000, whichever occurs first. All bills should be submitted within ten (10) days of the close of the month for which the billing is being submitted." [Respondent's Evidence, PERSO letters, Oct. 26, 2016; Nov. 5, 2018] This evidence establishes Plain Township never received invoices from Baker, Dublikar pertaining to the first matter identified in Mr. Armatas's records request and never made any payments to Baker, Dublikar for such services. Because the requested records were never in Plain Township's possession and records for the second and third matters did not exist at the time of Mr. Armatas's public records request, Plain Township has no duty to produce the requested records.

{¶16} Case law supports this conclusion. In *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197, 580 N.E.2d 1085 (1991), the Ohio Supreme Court affirmed the court of appeals' decision granting respondent's summary judgment motion on the basis that the documents sought by relator did not exist. *Id*. The Court explained, "[t]he Public Records Act, R.C. 149.43, does not require that a public office create new documents to meet a requester's demand." *Id*. at 198. In *State v. Buehler*, 8th Dist. Cuyahoga No. 107462, 2018-Ohio-4028, the court of appeals found that affidavits established that respondent

did not have the requested jury forms and a "writ of mandamus will not issue to compel a custodian of public records to furnish records which are not in his possession or control." (Citations omitted.) *Id*. at ¶ 3.

{¶17} Likewise, here, Mr. Armatas produced no clear and convincing evidence the specific records he requests are in the possession or control of Plain Township. In fact, Mr. Armatas conceded at the summary judgment stage and merit review that he received a letter from Plain Township dated September 30, 2019, indicating Plain Township possessed no such records, which is further corroborated by the affidavits of Ms. Campbell, Ms. Hoppe, and Attorney James Mathews. The fact that Plain Township was able to produce similar records ten months prior to this present records request is not clear and convincing evidence that Plain Township possesses the current records requested by Mr. Armatas. This is particularly true where Plain Township submitted three affidavits explaining why it does not have these records in its possession.

C. Sufficiency of Plain Township's Response

{¶18} Next, Mr. Armatas alleges Plain Township's response that it does not have the requested records was inadequate. Because he made the request in writing under R.C. 149.43(B)(3) Mr. Armatas argues he was entitled to a written response from Plain Township explaining why the requested records were not available before he filed this writ. Finally, Mr. Armatas states the written response Plain Township subsequently provided was inadequate and not delivered within a reasonable period of time.

{¶19} The statute at issue, R.C. 149.43(B)(3), provides:

> 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. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. * * *

{¶20} This section of the statute addressing the denial of a public records request contains no time limits. However, R.C. 149.43(C)(3)(b)(i) allows for an award of attorney fees if the court determines, "[t]he public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section."

{¶21} We note the Ohio Supreme Court indicated in *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 565, 2015-Ohio-4914, 45 N.E.3d 981, ¶ 25 that, "[a] public-records requester has an obligation to cooperate with the public-records custodian fulfilling a request, including an obligation to inform the public agency when she feels that a request has been incomplete or slow." Admittedly, Plain Township never provided Mr. Armatas with a written response as to why it could not provide the requested records until after the writ was filed. Further, Mr. Armatas admits he never contacted Plain Township about the status of his records request after he received the email from Lisa Campbell on December 11, 2018 [Relator's Evidence, Affidavit of Steven A. Armatas, ¶6] Phone records submitted by Mr. Armatas also appear to prove this point. [Relator's Evidence, Exhibit J]

{¶22} Instead, Mr. Armatas waited almost nine months, with no further contact with Plain Township, and then filed this writ. Thereafter, Mr. Armatas received a written explanation from Plain Township in a letter dated September 30, 2019. Mr. Armatas acknowledged receipt of this letter and included it as evidence in support of his writ of mandamus even though a portion of the letter contained an Evid.R. 408 settlement offer.

Mr. Armatas argues that as an Evid.R. 408 letter he is foreclosed from challenging whether the letter suffices as a proper explanation for not producing the requested records. This concern is baseless since Mr. Armatas submitted the entire letter as evidence, with no redactions. [*See* Relator's Evidence, Exhibit H.] Therefore, he has not been harmed by Plain Township including its explanation in a letter that also contained settlement communications. [*See* Relator's Exhibit H.]

{¶23} Mr. Armatas also contends Plain Township's letter does not contain an adequate explanation as to why it cannot produce the requested records. We disagree. Two paragraphs of the letter explain why Plain Township is not in possession of any invoices for work performed by Baker, Dublikar. The letter indicates, in part:

> Plain Township is a party to a Legal Defense and Claim Payment Agreement with the Ohio Township Association Risk Management Authority ("OTARMA"). The representation in those three matters was arranged pursuant to that agreement through the administrator for OTARMA, namely, the Public Entity Risk Services of Ohio ("PERSO"). There was one Baker, Dublikar invoice for legal services generated in connection with the three matters you referenced, prior to December 10, 2018. That invoice, however, was submitted for payment only to OTARMA, and the invoice was not directly or indirectly (through OTARMA) ever in the custody of the township. * * * We should add that payment of the invoice was made directly by PERSO, and the township was not involved in either the process or payment of that invoice.

[Relator's Evidence, Exhibit H]

{¶24} Mr. Armatas has not provided clear and convincing evidence that this written explanation is insufficient. Rather, the explanation is consistent with the evidence produced by Plain Township throughout these proceedings and we do not find the timing of the letter somehow nullifies the effectiveness of the explanation.

{¶25} Further, Mr. Armatas acknowledges there is no set time period for responding to a public records request, but R.C. 149.43(B)(1) requires "all public records responsive to the request shall be promptly prepared * * *" Mr. Armatas asserts Plain Township's failure to provide a written response until after he commenced suit is not only "unreasonable" but viewed as acting in bad faith under R.C. 149.43(B)(3)(b)(iii).

{¶26} This section of the public records statute references a finding of bad faith where the office or person voluntarily makes the public records available to the relator for the first time after the relator commences the mandamus action. That is not what occurred here. Plain Township did not make the records available after Mr. Armatas filed this writ. Instead, Plain Township has maintained all along that it is not in possession of the requested records. Therefore, we do not find Plain Township acted in bad faith in responding to Mr. Armatas's public records request because legal invoices for one matter were never in its possession and no invoices were ever generated for the other two matters.

D. Mr. Armatas's prior public records request

{¶27} Mr. Armatas contends Plain Township previously produced invoices from Baker Dublikar in response to a public records request he made in February 2018 ("first public records request") and therefore, the township should once again be able to produce similarly requested records that are the subject of this writ.

{¶28} In support of this argument, Mr. Armatas submitted as part of his evidence Exhibits "C," "D," "E," "F," and "G," all of which pertain to his first public records request that is not, in any way, related to the present matter. These exhibits do not establish clearly and convincingly that Plain Township has the currently requested public records in its possession. Simply because Plain Township previously had similar records in its possession that were responsive to a prior public records request by Mr. Armatas does not mean it has records responsive to Mr. Armatas's current public records request. This argument serves as no basis to grant Mr. Armatas's writ of mandamus.

E. The requested records are not public records.

{¶29} Mr. Armatas next contends the requested records are public records as defined under R.C. 149.43(A)(1). This statute defines "public records" as:

> Records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code * * *

{¶30} In support of this argument, Mr. Armatas cites several decisions, including *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990); *Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001); and *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 678 N.E.2d 557 (1997). These decisions applied the "quasi-agency test" recognized by the Ohio Supreme Court in *Mazzaro* and this Court in *Hurt v. Liberty Twp.*, Delaware Cty., 5th Dist. Delaware No. 17 CAI 05 0031, 2017-Ohio-7820, ¶ 43.

{¶31} Under this test, "Ohio courts have * * * held that when a public office contracts with a private entity to perform government work, the private entity can be a 'person responsible for public records' sufficient to compel compliance with the Public Records Act, even if not a 'public office.' " *Id.* at ¶ 43. The "quasi-agency test" is a "quasi-agency" theory under which the private entity may be subject to R.C. 149.43 where: "(1) [T]he private entity prepares records in order to carry out a public office's responsibilities; (2) the public office is able to monitor the private entity's performance; and (3) the public office has access to the records for this purpose." *Id*.

{¶32} Applying this tripartite test to the facts here, we conclude Mr. Armatas is not entitled to the requested records. First, as indicated in the two letters from PERSO, the private entity, Baker, Dublikar, that generated the legal invoices was tasked by PERSO – not Plain Township – to defend the interests of Plain Township as a result of lawsuits filed against the township by Mr. Armatas and Ms. Denise Armatas. Plain Township did not directly contact Baker, Dublikar and retain legal representation for the proceedings referenced in the PERSO letters. In fact, PERSO's letters to Baker, Dublikar indicate: "We [PERSO] are assigning this matter to you to be conducted in accordance with the Litigation Management Guidelines." [Respondent's Evidence, PERSO letters, Oct. 26, 2016; Nov. 5, 2018]

{¶33} Even if an argument could be made that by representing Plain Township in the legal proceedings it was carrying out a public office's responsibilities, it was PERSO, and not Plain Township, that was tasked with monitoring Baker, Dublikar's performance with regard to the legal proceedings. The letters from PERSO to Baker, Dublikar specifically provide that, "[i]f there is anything you require in order to properly defend the

Member, please contact the undersigned." [Respondent's Evidence, Exhibits A, B] The letters also indicate PERSO, and not Plain Township, should receive statements for legal services performed on a quarterly basis or when the legal fees reach the amount of $5,000 for legal services performed on behalf of Plain Township. There is no evidence in the record indicating Plain Township was monitoring Baker, Dublikar's handling of these legal matters on its behalf. Rather, it was PERSO doing so on behalf of Plain Township.

{¶34} The third factor under the quasi-agency test is whether the public office has access to the records for monitoring purposes. Again, there is no evidence in the record that Plain Township had access to Baker, Dublikar's legal invoices for monitoring purposes. Instead, the two letters from PERSO indicate it was PERSO that was monitoring these legal matters, including payment of Baker, Dublikar's fee invoices.

{¶35} Even though Mr. Armatas cannot satisfy the "quasi-agency test," the Ohio Supreme Court has also held that "where a public official contracted with a private entity for a public purpose, the records are public records subject to disclosure under R.C. 149.43." *Hurt* at ¶ 60, citing *State ex rel. Gannett Satellite Info. Network*, 78 Ohio St.3d at 403, 678 N.E.2d 557. Again, there is no evidence Plain Township contracted with PERSO. Instead, PERSO's two letters to Baker, Dublikar indicate PERSO "provides claim services to the Ohio Township Association Risk Management Authority (OTARMA) of which, Plain Township is a member." [Respondent's Evidence, PERSO letters dated Oct. 26, 2016; Nov. 5, 2018] Thus, it is OTARMA that has the contractual relationship with PERSO, not Plain Township.

{¶36} For these reasons, we conclude the requested records in PERSO's possession are not public records under R.C. 149.43(A)(1).

F. Alleged phone call between Mr. Armatas and Ms. Campbell

{¶37} Next, Mr. Armatas challenges Ms. Campbell's statements made in her affidavit about a phone call she allegedly had with him. This portion of Ms. Campbell's affidavit provides:

> 3. Since the filing of the complaint in this case, I have recalled that, after my acknowledgement was sent, in late 2018 or early 2019, I received a telephone call from Mr. Armatas. At that time, he inquired about the status of his request. At that time, I informed Mr. Armatas that the Baker Dublikar law firm had been retained through the Public Entity Risk Services of Ohio ("PERSO") to represent the Township Zoning Inspector in connection with the three matters set forth in his request. Consequently, Plain Township did not possess any invoice documents to provide in response to the December 10, 2018, request.
>
> 4. During the telephone call, and after I informed Mr. Armatas that Plain Township did not possess any invoices to provide to him, Mr. Armatas stated something to the effect of "well, doesn't Plain Township pay for its coverage?" (Paraphrasing). I responded that the Township did pay for its liability and defense coverage; however, at no time have I received any request from Mr. Armatas for the particulars of that coverage or the costs associated with the coverage.
>
> 5. After the telephone conversation, I had no further communication with Mr. Armatas relating to his stated request.

[Respondent's Evidence, Affidavit Lisa Campbell, ¶¶ 3-5]

{¶38} Mr. Armatas denies ever receiving a phone call from Ms. Campbell and asserts he never called Ms. Campbell regarding his public records request made on December 10, 2018. [Relator's Evidence, Affidavit of Steven A. Armatas, ¶ 6]. Further, Mr. Armatas submitted his telephone records as evidence that the call never occurred with Ms. Campbell. *[Id., Exhibit J]* Although these records may address the issue of whether Mr. Armatas had a phone conversation with Ms. Campbell, the records do not address the material issue of whether Plain Township possesses the requested records.

{¶39} Further, even if we disregard Ms. Campbell's affidavit regarding the phone call with Mr. Armatas, the fact remains that shortly after Mr. Armatas filed the writ, Attorney James Mathews sent Mr. Armatas a letter explaining Plain Township did not have the requested documents in its possession.

{¶40} Thus, even if we disregard portions of Ms. Campbell's affidavit, the record still contains no clear and convincing evidence establishing Plain Township is in possession of the records requested by Mr. Armatas. The only other evidence Mr. Armatas submitted to refute Plain Township's explanation for the absence of the requested records is his assertion that he previously requested and received similar records from Plain Township. This does not satisfy the clear and convincing evidence standard. Further, Mr. Armatas's "good faith belief [that] Respondent Plain Township Board of Trustees has failed to comply with Ohio's Public Records Act" is also not clear and convincing evidence that it indeed failed to do so.

G. Statutory damages and attorney fees

{¶41} Finally, Mr. Armatas asserts he is entitled to statutory damages and attorney fees. In making this argument, Mr. Armatas relies on *State ex rel.* DiFranco, 2014-Ohio-539, 7 N.E.3d 1146. This case clarifies, under R.C. 149.43(C)(2),[1] when a court has discretion to award attorney fees and when an award of attorney fees is mandatory. *Id*. at ¶ 12. R.C. 149.43(C)(2) only awards attorney fees when a court orders the production of public records. Here, because there are no public records in Plain Township's possession that are responsive to Mr. Armatas's public records request, no records can be produced.

{¶42} Even if we found under R.C. 149.43(B)(3) Plain Township did not timely inform Mr. Armatas that it did not possess the requested records, the Ohio Supreme Court and this Court have both held that R.C. 149.43(C) does not allow for an award of reasonable attorney fees to pro se litigants. *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 251, 643 N.E.2d 126 (1994); *State ex rel. Striker v. Frary*, 5th Dist. Richland No. 10 CA 01; 2011-Ohio-1021, ¶ 35.

{¶43} Therefore, Mr. Armatas is not entitled to statutory damages or an award of attorney fees.

IV. Conclusion

{¶44} For these reasons, Mr. Armatas's writ is denied. The Court also denies Mr. Armatas's request for a hearing. The clerk of courts is hereby directed to serve upon all

[1] In the current version of R.C. 149.43, attorney fees are now addressed in sections (C)(3)(b)(i)-(iii) and (C)(3)(c)(i)-(ii).

parties not in default notice of this judgment and its date of entry upon the journal. *See* Civ.R. 58(B).

{¶45} WRIT DENIED.

{¶46} COSTS TO RELATOR.

{¶47} IT IS SO ORDERED.

By: Baldwin, J.

Wise, John, P.J. and

Delaney, J. concur.