[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Kesterson v. Kent State Univ.*, Slip Opinion No. 2018-Ohio-5108.]

SLIP OPINION NO. 2018-OHIO-5108

THE STATE EX REL. KESTERSON *v.* KENT STATE UNIVERSITY.

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Mandamus—Public-records law—Public office's production of all responsive public records was untimely—Writ denied—Statutory damages and attorney fees awarded—Costs denied.

(No. 2016-0615—Submitted May 8, 2018—Decided December 20, 2018.)

IN MANDAMUS.

KENNEDY, J.,

{¶ 1} Relator, Lauren Kesterson, seeks a writ of mandamus to compel respondent, Kent State University, to provide her with certain records regarding student-athletes under the Public Records Act, R.C. 149.43. Because Kesterson has not shown that she is entitled to additional records beyond those that she has already

received pursuant to her request, we deny the writ. We award Kesterson statutory damages in the amount of $1,000 and attorney fees, but deny court costs.

Background

{¶ 2} On February 2, 2016, by e-mail and certified mail, Kesterson sent a public-records request to Kent State, seeking three categories of records:

> 1. All personnel records, including records of training and discipline, for the following individuals: Karen Linder, Eric Oakley, Jessica Toocheck, Erin Barton, and Joel Nielsen;
>
> 2. All records regarding training or information provided to the Kent State varsity softball team regarding Title IX [20 U.S.C. 1681 et seq.], gender equity, sexual harassment, sexual assault, Sexual and Relationship Violence Support Services, or the University's policies or procedures for reporting instances of gender-based harassment or sexual assault (from the 2012-13 academic year to the present); and
>
> 3. All records regarding student-athlete reviews of Coach Karen Linder from the 2010-11 academic year until her resignation in August 2015.

{¶ 3} On February 3, 2016, Kent State acknowledged the request and stated that records were being identified and gathered. Kesterson sent multiple follow-up requests that month, and on February 24, Kent State provided her with redacted personnel files for each of the five identified individuals and a student-athlete handbook. The following day, Kent State sent redacted summaries of student-athlete reviews of softball coach Karen Linder, bringing the total amount of documents provided to Kesterson to more than 750 pages of records.

{¶ 4} After receiving the documents, Kesterson contacted Kent State to question its response and to request legal authority for the redactions. On March 2, she wrote to Kent State raising additional concerns, including its failure to provide the originals of the student-athlete reviews and records of sexual-assault training.

{¶ 5} Kent State responded with a letter on March 14 and provided additional records, including Linder's 2008 and 2011 employment contracts. At that time, Kent State also gave Kesterson an undated memorandum from Loretta Shields, Executive Director of Benefits and Compliance, to the Equal Employment/Affirmative Action Coordinator, Erin Barton, regarding Barton's "excessive use of accrued sick/vacation leave." Kent State explained to Kesterson that the originals of the student-athlete reviews had been destroyed, pursuant to the university's records-retention policy, after the summaries were created. With respect to Kesterson's request for training regarding Title IX, sexual assault, sexual harassment, and other related matters Kent State responded, "You were provided with the student [athlete] handbook, which is responsive to this request." Further, the March 14 letter explained that the school did not "centrally maintain" records involving Title IX/sexual-assault "[t]raining provided to the softball team, specifically and separately from training provided to student-athletes, or even the general student body * * *. Training materials on these issues are kept by the sponsoring departments and organizations, not the softball team." It also stated that Kent State did "not view R.C. 149.43 as requiring an item-by-item list of the grounds for each redaction absent a specific question."

{¶ 6} Kesterson filed her mandamus complaint with this court on April 21, 2016, alleging that Kent State had failed to fully respond to her February 2 request and "littered the records that were provided with improper redactions" and that her request "has been outstanding for 78 days." The complaint asks for a "peremptory writ of mandamus directing Kent State * * * to make responsive public records available promptly and without improper redactions." Additionally, it seeks an

award of attorney fees, court costs, and "any other relief available to the firm under R.C. 149.43 * * * and any other relief as is appropriate." We referred this case to mediation on August 5, 2016, and Kent State subsequently produced more than 200 additional pages of records through November of 2016, including presentations provided to "all incoming Kent State students" that addressed sexual harassment and sexual misconduct.

{¶ 7} On October 11, 2017, we denied Kent State's motion to dismiss and granted Kesterson an alternative writ setting forth a schedule for the parties to present evidence and file briefs. 150 Ohio St.3d 1449, 2017-Ohio-8136, 83 N.E.3d 936. Kent State submitted evidence, and both parties submitted briefs.

Kesterson's federal litigation

{¶ 8} On February 9, 2016, one week after sending her public-records request, Kesterson filed a complaint against Kent State and Karen Linder in federal district court alleging, among other claims, civil-rights violations under Title IX of the Education Amendments of 1972, as amended. In March 2017, Kesterson served discovery requests on the defendants, including requests for production of documents ("RPD"). Based on a November 20, 2017 affidavit from Kent State Associate Counsel, Nichole DeCaprio, the university asserts that it has provided over 7,000 pages of records to Kesterson in connection with her RPD. Kesterson's federal litigation is ongoing.

Ohio's Public Records Act

{¶ 9} It has long been the " 'rule in Ohio * * * that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people.' " *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960), quoting 35 Ohio Jurisprudence, Inspection of Records: Generally, Section 41, at 45 (1934). "The Public Records Act reflects [Ohio's] policy that 'open government serves the public interest and our democratic system.' " *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788,

894 N.E.2d 686, ¶ 13, quoting *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. It states that "[u]pon a request made in accordance with division (B) of this section * * * a public office * * * shall transmit a copy of a public record to any person * * * within a reasonable period of time after receiving the request for the copy." R.C. 149.43(B)(7).

{¶ 10} The act defines "public record" as "records kept by any public office, including, but not limited to, state * * * units." R.C. 149.43(A)(1); *see also* R.C. 149.011(A) (defining "public office"). R.C. 149.011(G) provides that " '[r]ecords' includes any document, device, or item, regardless of physical form or characteristic * * * created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Moreover, "a state university is considered a 'public office' for purposes of the Public Records Act." *State ex rel. Rea v. Ohio Dept. of Edn.*, 81 Ohio St.3d 527, 530, 692 N.E.2d 596 (1998).

Mandamus

{¶ 11} At the time Kesterson filed her complaint, "[m]andamus [was] *the* appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." (Emphasis added.) *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1).[1]

{¶ 12} Despite the liberal construction of the Public Records Act "in favor of disclosure," *State ex rel. Zidonis v. Columbus State Community College*, 133

[1] Relator's complaint is governed by former R.C. 149.43 (2015 Am.Sub.H.B. No. 64), which was effective on the dates she made her public-records request and commenced her original action before this court. *See State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 24 ("Because this case was filed and pertains to a records request made after the effective date of the amendment [to R.C. 149.43], the amended version * * * applies here"). All references to R.C. 149.43, the Public Records Act, refer to that version unless otherwise noted.

Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 19, Kesterson "must still establish entitlement to the requested extraordinary relief by clear and convincing evidence," *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16. Unlike in other mandamus cases, "[r]elators in public-records mandamus cases need not establish the lack of an adequate remedy in the ordinary course of law." *State ex rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24.

{¶ 13} Under R.C. 149.43(B), a public office may produce the requested records prior to the court's decision, which renders the mandamus claim for production of records moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. Nonetheless, a relator may still be entitled to other forms of relief if the production of records was not completed "within a reasonable period of time." R.C. 149.43(B) and (C).

Analysis

{¶ 14} Kent State contends that it fully responded to Kesterson's February 2, 2016 request by February 25, 2016. In contrast, Kesterson's brief asserts that Kent State did not complete its response.

Timeliness of Kent State's production of responsive records

{¶ 15} Kesterson argues that because Kent State provided additional responsive documents in October and November 2016, up to nine months after her request, it violated its statutory duty under R.C. 149.43(B) to promptly prepare and provide *all* responsive records "within a reasonable period of time." Indeed, "[s]tatutory damages may be awarded if the public record has not been provided promptly." *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595, 2016-Ohio-8195, 71 N.E.3d 1076, ¶ 22; *see also* R.C. 149.43(C)(1).

{¶ 16} "Reasonable period of time" is not defined in the Public Records Act, but "the determination of what is 'reasonable' depends upon all the pertinent

facts and circumstances." *Deters* at ¶ 23. Moreover, "R.C. 149.43(A) envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials." *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994).

{¶ 17} Kent State's production, by February 25, 2016, of over 700 pages of responsive records was not untimely under the circumstances. Kesterson requested full personnel files for five Kent State employees, in addition to all Title IX/sexual-assault training materials provided to the softball team and all student-athlete reviews of Linder from the 2010-2011 academic year until her resignation in August 2015. Kent State promptly acknowledged Kesterson's request the next day, immediately began to compile the responsive records, and provided those records to Kesterson approximately three weeks later. These actions contradict any claim that the university's response was untimely. *See State ex rel. Shaughnessy v. City of Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 11, 17 (noting 24-day delay in producing responsive records not unreasonable in light of steps city took to respond, including a comprehensive database search and submission of records to the law department for review and redaction).

{¶ 18} Kent State's own evidence demonstrates that it did not complete its response on February 25, 2016, as it contends; the response was not complete until November 9, 2016. The additional materials that Kent State produced in October and November 2016 also amounted to "public records" and were responsive to the second category of records in Kesterson's request. The records produced on October 28 included PowerPoint slideshow presentations provided annually to incoming students addressing issues such as consent to sexual activity, "sexual misconduct," "acts of violence," and the processes for responding to inappropriate student conduct. The slides also provide the contact information for campus police, psychological services, and the Sexual Assault Response Team. These records were provided to all incoming students, *including* those on the varsity softball team.

And the production on November 9 included a PowerPoint slideshow presentation created by the Office of Sexual and Relationship Violence Support Services addressing consent, power-based personal violence, sexual assault, rape and related crimes, statistics of sexual assault on campuses, and what rights and resources are afforded to students (including the contact information for the university's Title IX Coordinator).

{¶ 19} Kent State does not dispute that it "created" these items, all of which appear to "document the organization, functions, policies, decisions, procedures, operations, or other activities" of the university. *See* R.C. 149.011(G). Moreover, Kent State has not alleged that the records produced in October and November 2016 were not available in February of that year, nor has it contended that it was required to create these records. *See State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 15 ("Respondents have no duty to create or provide access to nonexistent records"). Kent State also concedes that it made no redactions to the documents produced in October and November 2016. *See Warren Newspapers*, 70 Ohio St.3d at 623, 640 N.E.2d 174. Those facts, together with its assertion that upon receiving the public-records request in February, DeCaprio contacted "relevant departments and individuals" such as Kent State's Human Resources Records, Human Resources Training and Development, and Athletics departments, belie Kent State's argument that it *timely* provided all responsive records.

{¶ 20} Although Kent State contends that the records it provided in October and November were not responsive to Kesterson's request, and that this production was done merely as a "courtesy," we are not persuaded. These materials were public records, and despite DeCaprio's assertion that Kesterson's February 2, 2016 request was limited to Title IX and sexual-assault/harassment training offered exclusively to the softball team, this request was broader and encompassed *all training and information* provided to the softball team, which by definition includes

training and information provided to all incoming students—precisely what the university ultimately produced. However, despite its failure to comply with Kesterson's request within a reasonable period of time, Kent State's eventual production of all the requested records has rendered her mandamus claim moot.

Statutory Damages

{¶ 21} R.C. 149.43(C)(1) imposes damages at the rate of $100 "for each business day during which the public office * * * 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."[2] The act provides that an award of statutory damages can be reduced if two conditions are satisfied. *State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 41, citing R.C. 149.43(C)(1). A court may reduce or not award statutory damages if it determines that "based on the ordinary application of statutory law and case law as it existed at the time," the public office "reasonably would believe that the conduct or threatened conduct of the public office * * * did not constitute a failure to comply with an obligation" under R.C. 149.43(B) *and* that the public office "reasonably would believe that the conduct or threatened conduct * * * would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct." R.C. 149.43(C)(1)(a) and (b).[3]

{¶ 22} Kent State violated R.C. 149.43(B) when it did not produce *all* responsive records until November 9, 2016, more than six months after Kesterson filed her mandamus complaint on April 21, 2016, and therefore statutory damages are warranted. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 46. Also, neither condition of R.C. 149.43(C)(1)(a) or (b) is satisfied in this case. Accordingly, because Kesterson has met the

[2] This provision is now found in R.C. 149.43(C)(2) of the current Public Records Act.
[3] These provisions are found in R.C. 149.43(C)(2)(a) and (b) of the current Public Records Act.

requirements for statutory damages, to include a written request that "fairly describe[d]" the records she sought transmitted to Kent State by certified mail, R.C. 149.43(C)(1), we award her statutory damages in the amount of $1,000.

Court Costs

{¶ 23} Kesterson is not, however, entitled to an award of court costs. On the dates she made her public-records request and filed her mandamus complaint, the applicable version of the Public Records Act allowed for an award of court costs only "[i]f the court issues a writ of mandamus that orders the public office * * * to comply with division (B) of this section." R.C. 149.43(C)(2)(a). Accordingly, because we hold that Kesterson's mandamus claim is moot, we deny her request for court costs.

Attorney Fees

{¶ 24} The plain and unambiguous language of the applicable version of R.C. 149.43(C)(2)(b)(i) requires an award of reasonable attorney fees when the public office or person responsible for the public records failed to timely respond, pursuant to R.C. 149.43(B), to the public records request ("The court *shall* award reasonable attorney's fees * * * when * * * [t]he public office or 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)" [emphasis added]). An award of attorney fees pursuant to R.C. 149.43(C)(2)(b)(i) is *not* dependent upon the court having issued a judgment that orders compliance with the public-records law. *See also* R.C. 149.43(C)(3)(b)(i)[4] (court may award attorney fees if the court renders a judgment that orders the public office to comply with R.C. 149.43(B) or if the court determines the public office failed to timely respond to the request). The award of reasonable attorney fees is subject to reduction pursuant to R.C. 149.43(C)(2)(c).

[4] This reference is to the current Public Records Act, effective November 2, 2018. This statutory amendment was originally adopted in 2016 Am.Sub.S.B. No. 321.

{¶ 25} An award of reasonable attorney fees is appropriate under R.C. 149.43(C)(2)(b)(i) because Kent State violated R.C. 149.43(B) when it failed to produce *all* responsive records until November 9, 2016, more than six months after Kesterson filed this action. The court will make a final determination of the amount of attorney fees upon review of Kesterson's filing of an itemized application with independent evidence supporting the reasonableness of the hourly rates charged and the hours billed. The statutory guidelines in R.C. 149.43(C)(2)(c) will aid the court in determining the amount of fees to be awarded. Kesterson must demonstrate that she is entitled to an award of fees that is "reasonable" and "remedial." *Id*. Specifically, the itemized billing statements should only reflect time spent on the public-records request, mandamus action, and the proof of entitlement to and reasonableness of the requested fees. *Id.* Kent State is entitled to respond to Kesterson's application, and this court, applying R.C. 149.43(C)(2)(c), could reduce the attorney fees if it found that a "well-informed public office or person responsible for the requested public records reasonably" would believe the conduct "did not constitute a failure to comply" with a statutory obligation and that such conduct would "serve the public policy [underlying] the authority that [was] asserted as permitting that conduct." R.C. 149.43(c)(2)(C)(i) and (ii); *see Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, at ¶ 37.

{¶ 26} Any person submitting an application for attorney fees should note that "fee applications submitted to this court should contain separate time entries for each task, with the time expended on each task denoted in tenths of an hour" and that "this court will no longer grant attorney-fee applications that include block-billed time entries." *State ex rel. Harris v. Rubino*, ___ Ohio St.3d ___, 2018-Ohio-5109, ___N.E.3d ___, ¶ 7, 14.

Conclusion

{¶ 27} Kesterson has not shown by clear and convincing evidence that Kent State has failed to fully respond to her February 2016 records request. Therefore,

she has not established her entitlement to the requested extraordinary relief in mandamus, and we deny the writ. We also deny her request for costs. However, because Kent State failed to timely produce some of the responsive records, we award statutory damages to Kesterson under R.C. 149.43(C)(1) in the amount of $1,000, and grant her request for reasonable attorney fees.

Judgment accordingly.

FRENCH, DEWINE, and DEGENARO, JJ., concur.

O'CONNOR, C.J., concurs in part and dissents in part, and would deny the writ and award statutory damages, but would deny relator's request for fees and costs.

FISCHER, J., concurs in part and dissents in part, and would deny the writ but would not award statutory damages, and would deny relator's request for fees and costs.

O'DONNELL, J., dissents and would grant the writ and would grant relator's request for fees and costs.

The Chandra Law Firm L.L.C., Subodh Chandra, Ashlie Case Sletvold, and Marvin C. Brown IV, for relator.

Michael DeWine, Attorney General, and Jeffrey Knight and Sarah E. Pierce, Assistant Attorneys General, for respondent.
