



{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that relator filed this mandamus action 18 days (14 business days) after respondent received relator's public records request. The magistrate determined that this length of time was not sufficient to establish a cause of action against respondent under R.C. 149.43. Therefore, the magistrate has recommended that we deny relator's motion for summary judgment. The magistrate also determined that respondent's motion to dismiss was groundless. Therefore, the magistrate has also recommended that we deny respondent's motion to dismiss.

{¶3} Although recommending that we deny both relator's motion for summary judgment and respondent's motion to dismiss, the magistrate nevertheless recommends that we dismiss relator's action. Based upon her finding that relator's cause of action had not accrued when relator filed this action, the magistrate recommends that we dismiss relator's suit.

{¶4} Relator has filed four separate objections to the magistrate's decision. First, relator takes issue with the magistrate's calculation of the number of days between the date respondent received relator's public records request (November 30, 2009) and the date relator filed this action (December 18, 2009). According to relator, the magistrate should have found that there are 19 days between these dates. We disagree. The magistrate correctly calculated that there are 18 days between these days. The magistrate was correct in not including the day that respondent received the public records request in the calculation. Therefore, we overrule relator's first objection.

{¶5} In his second objection, relator argues that the magistrate erred by overruling his motion for summary judgment. We disagree, but for reasons different than those expressed by the magistrate.

{¶6} Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶7} Relator brought this action pursuant to R.C. 149.43, Ohio's Public Records Act, which requires government agencies to respond to requests for public records. More specifically, R.C. 149.43(D)(1) requires a public office to "make copies of the requested public record available at cost and within a reasonable period of time." The act contains its own mandamus remedy for an agency's noncompliance. R.C. 149.43(C)(1). After considering the facts and circumstances, the decision to issue a writ lies in the sound discretion of the appellate court. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 143, paragraph seven of the syllabus.

{¶8} Respondent received relator's public records request on November 30, 2009. Relator requested the following records:

(1) Collective Bargaining Agreement which exists recently between the ("State of Ohio") and/or Ohio Department of Rehabilitation and Correction and the respective Unions pursuant to R.C. §124.24, governing the standards of employee conduct.

(2) Westlaw Correctional Facilities contract and/or subscription, any documents relating to the negotiation of the correct[ion] with the Ohio Department of Rehabilitation and

Correction for providing computerize cases and legal documents for the institutional law library.

(3) State Personnel Board of Review policies and procedures for employees of the Ohio Department of Rehabilitation and Correction.

(4) Librarian I and Librarian II contracts with the Ohio Department of Rehabilitation and Correction to provide library services to the institutions.

{¶9} After receiving no response, relator filed this action on December 18, 2009.

Relator still had not received a response to his document request when he filed his motion for summary judgment on January 20, 2010. However, the record reflects that respondent produced some records and provided a written response to relator's public records request on January 28, 2010. In a letter dated February 3, 2010, relator disputed the adequacy of respondent's response and attempted to clarify the records he was requesting. On March 1, 2010, respondent sent relator a letter indicating that it would produce additional records pursuant to relator's request, but it requested that relator pay \$2.61 to cover the copying and postage charges before respondent would send the additional records.

{¶10} The record reflects that there are material issues of fact to be resolved and that reasonable minds could come to different conclusions regarding whether respondent's response was proper and timely under the circumstances. The disputed factual issues include the meaning and scope of relator's public records request, the efforts taken by respondent to respond to the request and the adequacy and timeliness of respondent's response under the circumstances. We also note that relator is an inmate. We recognize that security issues can arise from an inmate's request for public records and that additional time may be necessary for an adequate review of responsive records under these circumstances. *State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.*, 10th

Dist. No. 08AP-21, 2009-Ohio-442, ¶9. Therefore, we agree with the magistrate's recommendation that relator's motion for summary judgment should be denied. For these reasons, we overrule relator's second objection.

{¶11} In his third objection, relator contends that the magistrate erred when she dismissed his action based upon a determination that "relator filed this mandamus action prematurely, before a cause of action accrued." We agree.

{¶12} The magistrate found that as a matter of law, 18 days (14 business days) is not sufficient to establish a cause of action for respondent's failure to respond to relator's request promptly and in a reasonable manner. However, 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. Wadd v. Cleveland* (1998), 81 Ohio St.3d 50. Here, there is a material issue of fact regarding whether respondent ever properly responded to relator's request. Moreover, even if respondent did properly respond, there is a material issue of fact regarding whether respondent replied in a reasonable time frame under the circumstances. For these reasons, we sustain relator's third objection.

{¶13} In his fourth and final objection, relator contends the magistrate erred by failing to address his request for statutory damages under R.C. 149.43(C)(1). We disagree.

{¶14} Relator is not entitled to statutory damages in the absence of a violation. Because this court has yet to determine if respondent violated R.C. 149.43, we overrule relator's fourth objection.

{¶15} In summary, we sustain relator's third objection, but overrule his first, second, and fourth objections.

{¶16} Following an independent review of this matter, we decline to adopt the magistrate's decision. We return this matter to the magistrate to determine whether respondent violated R.C. 149.43 under these circumstances.

*Objections sustained in part and overruled in part;  
action remanded to magistrate for further proceedings.*

BROWN and CONNOR, JJ., concur.

---

**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Martin L. Holloman,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1184
	:	
Terry Collins, Director, Ohio Department of Rehabilitation and Corrections,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

---

MAGISTRATE'S DECISION

Rendered on February 17, 2010

---

*Martin L. Holloman, pro se.*

*Richard Cordray, Attorney General, and Melissa Montgomery,  
for respondent.*

---

IN MANDAMUS  
ON MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS

{¶17} Relator, Martin L. Holloman, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, 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.

Findings of Fact:

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

{¶19} 2. On November 25, 2009, relator made a public records request seeking the following public records:

(1) Collective Bargaining Agreement between the Ohio Department of Rehabilitation and Correction and the respective Unions pursuant to *R.C. § 124.24*, governing the standards of employee conduct; (2) Westlaw Correctional Facilities contract relating to negotiation of with [sic] the Ohio Department of Rehabilitation and Correction to provide computerize[d] cases and legal documents for the institutional law library; (3) State Personnel Board of Review policies and procedures for employees of the Ohio Department of Rehabilitation and Correction; (4) Librarian contracts with the Ohio Department of Rehabilitation and Corrections to provide library services to the various institutions.

{¶20} 3. ODRC received relator's request on November 30, 2009.

{¶21} 4. Fourteen business days later, on December 18, 2009, relator filed the instant mandamus action asking this court to order ODRC to provide him the records and asserting that he was entitled to statutory damages because ODRC had failed to respond to his request within a reasonable period of time.

{¶22} 5. On January 20, 2010, relator filed his motion for summary judgment asserting that he was entitled to judgment as a matter of law.

{¶23} 6. On January 31, 2010, ODRC filed a motion to dismiss arguing that relator failed to comply with the requirements of *R.C. 2969.25*, that *R.C. 149.43* does not require ODRC to mail the requested documents to relator, and relator failed to utilize the three-step grievance procedure prior to the filing of this action.

{¶24} 7. This matter is currently before the magistrate on motions.

Conclusions of Law:

{¶25} For the reasons that follow, it is this magistrate's decision that this court should deny relator's motion for summary judgment and deny ODRC's motion to dismiss; however, as more fully explained below, this court should dismiss relator's action.

{¶26} 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.

{¶27} As stated in the findings of fact, relator mailed his public records request to ODRC on November 25, 2009. It is undisputed that ODRC received relator's request on November 30, 2009. Fourteen business days later, on December 18, 2009, relator filed this mandamus action asserting that ODRC had already violated the statute. In support, relator cites this court's decision in *State ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 08AP-21, 2009-Ohio-442. In that case, Simonsen made a public records request in August 2007. ODRC admitted that it received his request; however, ODRC did not respond. Simonsen sent ODRC a second request on November 8, 2007, seeking the same records he sought in August 2007. ODRC received that request on November 13, 2007. Again, ODRC did not respond to Simonsen's request. Simonsen

filed a mandamus action in this court on January 9, 2008. On February 11, 2008, ODRC sent Simonsen 110 copied pages from documents in response to his public records request.

{¶28} In a decision rendered in December 2008, this court found that ODRC had not responded fully to Simonsen's request and granted a writ of mandamus ordering ODRC to submit evidence that it had responded fully to the request or, in the alternative, to provide all responsive records to Simonsen and inform this court accordingly.

{¶29} Thereafter, ODRC provided Simonsen with the documents. This court ultimately concluded that the three-month delay between Simonsen's November 2007 request for documents and ODRC's initial response to that request in February 2008 was unreasonable and that ODRC had failed to explain the reasons for the delay. This court granted Simonsen statutory damages in the amount of \$1,000.

{¶30} The instant case is significantly different from the facts in *Simonsen*. In this case, relator gave ODRC 14 business days to respond to his request before he filed this mandamus action. The magistrate finds that 14 business days is not sufficient to establish a cause of action against ODRC for its failure to respond to relator's records request promptly and in a reasonable manner. As such, contrary to relator's assertions, he is not entitled to summary judgment. This court should deny relator's motion for summary judgment.

{¶31} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable

inferences in favor of the nonmoving party. Id. For the following reasons, respondent's motion to dismiss should be denied.

{¶32} ODRC argues that this court should grant its motion to dismiss relator's complaint because relator failed to comply with the mandatory requirements of R.C. 2969.25, failed to exhaust his remedies through the prison grievance system, and that ODRC was not required to mail any documents to relator.

{¶33} First, ODRC is incorrect to argue that relator did not comply with R.C. 2969.25. Relator attached an affidavit of prior actions, a waiver of prepayment of fees, and the requisite cashier's statement from the correctional institution. As such, dismissal for this reason is unwarranted.

{¶34} ODRC also contends that relator failed to exhaust his administrative remedies because he failed to utilize the prison grievance system in an effort to obtain the public records he requested. However, R.C. 149.43 has nothing to do with a prison grievance system and such a system does not release ODRC from its duty to respond to relator's public records request. As such, dismissal for this reason is also unwarranted.

{¶35} ODRC also argues that it is not required to mail any documents to relator. ODRC cites several cases, which were decided before the 2001 amendment to R.C. 149.43. Specifically, R.C. 149.43(B)(3) currently provides:

*Upon a request made in accordance with division (B)(1) 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 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 and other supplies used in the mailing.*

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 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.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(Emphasis added.)

{¶36} Clearly, ODRC does have an obligation to mail the requested records to relator and may require relator to pay in advance the cost of postage and other supplies used in the mailing. Because ODRC is incorrect to assert that it has no obligation to mail these documents to relator, dismissal on these grounds is also unwarranted.

{¶37} In spite of the fact that the magistrate finds that summary judgment in favor of relator should be denied and that ODRC's motion to dismiss should be denied, the magistrate nevertheless finds that relator's cause of action should be dismissed.

{¶38} Relator prepared and signed his complaint on December 2, 2009. This was just seven days after relator mailed his request to ODRC and two days after ODRC received his request. Further, as noted in the findings of fact, this complaint was filed a mere 14 days after ODRC received relator's public records request.

{¶39} Relator filed this mandamus action prematurely, before a cause of action accrued. Relator did not give ODRC a reasonable period of time to respond to his public records request and should not be allowed to use the filing of this mandamus action as a means to potentially delay ODRC's response to his public records request and ask for

statutory damages for any further delay. It would not be proper for this court to permit relator's action to remain pending here so that a cause of action might eventually accrue. For that reason, this court should dismiss relator's mandamus action.

{¶40} Based on the foregoing, it is this magistrate's decision that this court should deny relator's request for summary judgment. Further, because relator complied with the filing requirements of R.C. 2969.25, was not required to pursue the grievance procedure, and because ODRC is obligated to mail the requested documents to relator, ODRC's motion to dismiss should be denied. However, because this action was filed prematurely, before a cause of action against ODRC accrued, this court should dismiss relator's complaint.

s/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).