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Court of Appeals

BRIEF IN OPPOSITION TO
November 16, 2017 16:29

By: JOHN T. MCLANDRICH 0021494

Confirmation Nbr. 1227820

STATE OF OHIO, EX. REL., BRIAN J. ESSI

CA 16 104659

vs.

CITY OF LAKEWOOD, OHIO

Judge:

Pages Filed: 37

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, ex rel, BRIAN J. ESSI,	)	CASE NO.: CA-16-104659
	)	
Relator,	)	
	)	
vs.	)	<u>RESPONDENT'S REPLY IN SUPPORT</u>
	)	<u>OF THEIR MOTION FOR SUMMARY</u>
CITY OF LAKEWOOD,	)	<u>JUDGMENT AND BRIEF IN</u>
	)	<u>OPPOSITION TO RELATOR'S</u>
Respondent.	)	<u>MOTION FOR SUMMARY JUDGMENT</u>

Now comes Respondent, City of Lakewood, by and through counsel, and hereby files its reply in support of Respondent's Motion for Summary Judgment and its Opposition to Relator's Motion for Summary Judgment. Respondent's Motion for Summary Judgment should be granted in total. Relator's Motion for Summary Judgment should be denied.

Relator's opposition to Respondent's motion for summary judgment does not take issue with any redaction or privilege asserted by Respondent in its Motion for Summary Judgment, and as a result Respondent's Motion for Summary Judgment is unopposed in that regard, and should be granted. Additionally, Relator's opposition to Respondent's Motion for Summary Judgment only argues in support of incomplete production with respect to Request Numbers 28, 36, 37, 219, 221, 223, 285, and 287. As a result, Respondent's Motion for Summary Judgment and the completeness of its record production with respect to all other record requests stand unchallenged, and as such summary judgment should be granted with respect to any request for mandamus as to every public records request other than those, as Respondent's Motion for Summary Judgment is unopposed with respect to every other request.

As will be more fully set forth, *infra*, Respondent's Motion for Summary Judgment should be granted as to Request Numbers 28, 36, 37, 219, 221, 223, 285, and 287. With respect to Request Numbers 28, 36, and 37, there is no evidence that Respondent has in its possession additional records which it has failed to produce. With respect to Request Numbers 219, 221, and 223, these requests would require Respondent to download software to create documents which do not exist, which it is not required to do under Ohio Public Records law. With respect to Request Numbers 285 and 287, there is no evidence that documents exist relative to these Requests that have not been produced.

Summary judgment should also be granted in total because Relator's requests comprise a request for the complete duplication of voluminous records, which is not required under Ohio Public Record law, and the cases construing the same, as will be more fully set in the brief attached hereto.

Further, many of Relator's requests are individually improper, even setting aside the fact that when combined, by Relator's own admission, the Requests are designed as a impenetrable dragnet intended to require the production of every single document relating to the Lakewood Hospital's condition prior to closure, its closure, the sale of property to Cleveland Clinic Foundation and the building of a new healthcare facility.

As more fully set forth in the attached brief, there is no genuine issue of material fact and Relator is not entitled to an order of mandamus and correspondingly Relator is not entitled to summary judgment.

Summary judgment should be granted to Respondent and summary judgment should be denied to Relator.

BRIEF IN SUPPORT

I. INTRODUCTION

Relator's opposition to Respondent's Motion for Summary Judgment begins with a recitation with respect to the reasons and purpose for Relator's public records request. As the Court is well aware, the purpose for which Relator seeks public records is irrelevant to Relator's claims or Respondent's opposition or response to the same. However, what is pertinent is Relator's acknowledgement that his 323 public record requests "were designed to obtain all public records and information that existed concerning the governmental process, due diligence and decisions that led to the agreement being approved by City Council as well as the subsequent execution and performance of the agreement by Lakewood and the other parties to it." (Exhibit B to Relator's Opposition to Respondent's Motion for Summary Judgment/Relator's Motion for Summary Judgment at p. 3, ¶9.) The agreement referenced in the previous quote is the Master Agreement and corresponding ordinance with respect to the closure of Lakewood Hospital. (See Exhibit B to Relator's Opposition to Respondent's Motion for Summary Judgment at ¶9.)

While Relator is critical of Respondent's response and search for records, Relator alleges that Law Director Butler "... was in control of and had personal knowledge of nearly all the records sought; (b) Mr. Butler had first-hand knowledge of how many of the records sought were created; (c) Mr. Butler had created many of those records he sought to withhold; (d) Mr. Butler was the one person at the center of nearly everything in the functioning of the City of Lakewood who cannot complain that he does not know how to find the records and/or that the requests are overly broad and ambiguous." (Exhibit B to Relator's Opposition to Respondent's Motion for Summary Judgment/Relator's Motion for Summary Judgment at p. 3 ¶8.) Given this statement Relator's

challenge to Mr. Butler's actions in searching for records is odd and presents an oxymoron. If Mr. Butler created many of the records, knows what the records are and where to find them and swears he has searched for and produced them, the speculation by Relator to the contrary is unavailing.

As evidenced by the affidavit of Mike Coletta, Lakewood's IT Manager, Respondent's suggestion that Lakewood has failed to produce documents based on a failure to search its network drive and servers is erroneous. First, the searches performed through the email archiver by Mr. Butler inherently searched the network servers for emails and their attachments. (Coletta Affidavit at ¶3, attached hereto as Exhibit 1.) Further, Relator already complains regarding the many duplicates produced in this matter. There is no evidence that a search of the servers, independent of the email archiver search performed by Mr. Butler, would produce additional original documents which have not been produced. Additionally, searching of the servers themselves would be an inherently time consuming and unproductive as servers are not designed with robust search tools. (Exhibit 1, Coletta Affidavit at ¶7.)

Realtor argues that this case is not about Mr. Essi's inability to draft a comprehensible public records request. To the contrary, this case is about whether through 300 requests, most of which are over broad and unclear and which fail to adequately identify the records being sought, Mr. Essi is not entitled to receive a complete duplication of the voluminous files of the City of Lakewood with respect to the Lakewood Hospital transaction, when he could not obtain a complete duplication of those voluminous records had he simply requested, as was his goal, a copy of each and every record created concerning the decision to close Lakewood Hospital and enter into a new agreement with the Cleveland Clinic Foundation for the development of a healthcare facility near the former hospital location. This Court should not create the dangerous precedent of allowing,

through layer upon layer of overlapping and often times redundant requests, the production of voluminous files and a complete duplication of records, when a more straight forward request for the same would clearly be prohibited by Ohio public records law. “In identifying records for purposes of presenting a viable request, the Public Records Act ‘does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies.’ (Citations omitted.)” *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 126 (2012).

On March 9, 2017 this Court issued an Order providing “Lakewood shall comply with Essi’s requests by preparing and releasing an Index of Records Supplied, Supplied with Redactions, or Withheld, along with appropriate records to Essi and filing a copy of the Index with the court. ... Lakewood shall also file a motion for summary judgment on the records released with redactions or withheld.” (Order of March 9, 2017 in pertinent part.) Subsequent to the March 9th Order, on March 29, 2017, Lakewood filed a Motion for Judgment on the Pleadings regarding requests that it felt were legally deficient. The Court ultimately denied this motion. While Relator seems to take issue with Lakewood trying to comply with the Court’s order of March 9, 2017 to respond to Essi’s requests, while still preserving its legal defenses to the deficiencies of Essi’s requests, Lakewood did its best to comply with what it understood as the spirit of the Court’s Order. In that regard, Lakewood undertook the task of reviewing tens of thousands of records in order to identify records which it believed were arguably within the scope of its construction of Mr. Essi’s requests and to produce them regardless of whether Lakewood, or even Mr. Essi, felt they may ultimately be responsive. Lakewood did this in an effort to comply the spirit of the March 9, 2017 Order, and in recognition of the admonition from the Ohio Supreme Court that the

public records law is to be construed in favor of openness. Such a production is certainly not an acknowledgment that Lakewood understood Mr. Essi's overbroad ambiguous requests, or that it understood the records Mr. Essi was requesting, but rather was an effort to resolve the dispute since mandamus can only lie for failure to produce, not for a construction of the requests leading to the production of records some of which may ultimately be deemed unresponsive by the requester, in response to requests that lack clarity. The "oxymoron" was not of Lakewood's making, but was rather Lakewood's effort to be compliant in the face of Mr. Essi's steadfast refusal, even to this day, to clarify any requests. Mr. Essi's self-serving descriptions of his efforts to explain his requests are simply not clarified requests. Not once has Mr. Essi committed to accept search terms proffered by Lakewood, not once has Mr. Essi tendered narrowed or clarified requests, and not until challenged by this Court to certify the manner in which he has narrowed his requests did Mr. Essi withdraw a single request. In fact, even on that occasion, Mr. Essi did not narrow or clarify any requests, but rather only withdrew a number of the redundant over lapping requests that were part of his records dragnet, while not ultimately reducing the sum of the records requested – namely, every single record in the possession of the City of Lakewood relating to the Lakewood Hospital transaction.

Mr. Essi's opposition to Respondent's Motion for Summary Judgment focuses on Lakewood's delay in responding to the public records requests, the alleged failure to retrieve internet site access history and an allegation that certain specific records were withheld (PRRs 28, 36, and 37) and an alleged failure to cooperate with Mr. Essi in clarifying his improper requests.

II. ALLEGATIONS OF DELAY

The Ohio Supreme Court has held “the determination whether a public office has complied with its duty to timely provide requested records depends on ‘all of the pertinent facts and circumstances.’” *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 614 (2016) citing *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105 at ¶10.

Lakewood was the recipient of 323 separate public records requests received in three separate batches. A few were straight forward and were responded to.

Relator’s own declaration indicates that Lakewood has produced over 40,000 pages of documents. This is not to mention the time spent trying to understand Mr. Essi’s ambiguous requests, the time spent redacting documents, the time spent evaluating documents for privilege, indexing records, and the time spent reviewing additional documents deemed not to be responsive. While Mr. Essi complains regarding duplicates contained in the documents, Lakewood did make an effort to remove duplicates within documents reviewed for each request, but did not have the time or ability to review for duplicates across various requests. To the extent the requests themselves are redundant and overlapping, the responses themselves are redundant and overlapping and inherently produce duplicates.

The amount of time involved in responding to Mr. Essi’s requests has been extremely substantial. Further, the time spent in responding to Mr. Essi’s requests must be viewed within the context of the legal defenses to the appropriateness of these public records requests. Lakewood continues to assert Mr. Essi’s requests as a group are improper and that many of Mr. Essi’s individual public records requests are improper, as set forth in its Motion for Summary Judgment and its Motion for Judgment on the Pleadings. Notwithstanding, in an effort to engage in a good

faith response, Lakewood has spent hundreds of man hours searching for, reviewing, and producing the documents about which Mr. Essi complains. Lakewood asserts in this context its response to Mr. Essi's public records requests are reasonable and timely.

III. FAILURE TO SEARCH FOR RECORDS RESPONSIVE TO PRRS 219, 221, AND 223

Relator's argument in opposition to summary judgment with respect to Requests 219, 221, and 223 is that Lakewood could have downloaded free software from the internet and performed computer searches which would have created records responsive to Essi's requests. (Relator's Opposition to Respondent's Motion for Summary Judgment at pp. 7-8.) However, Relator's argument seeks to impose a duty on Lakewood which is beyond that contained in the law of the State of Ohio. Public records law is clear that a public entity need not create records which do not exist in response to a public records request. *State ex rel. Lanham v. Smith*, 122 Ohio St.3d 527, 207-Ohio-609, 861 N.E.2d 530 at ¶15, providing that respondents have no duty to create or provide access to non-existent records. Also see *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33 (2006), 857 N.E.2d 1208, 2006-Ohio-6365 at p. 38, ¶8, where the court wrote, "requests for information and requests that require record custodian to create a new record by searching for selected information are improper requests under R.C. § 149.43."

Relator's argument that Lakewood has an obligation to obtain computer programs to allow it to search its computers to create a record of the internet website access for certain users seeks to impose a duty on Lakewood to create a record that does not currently exist. Such a request is improper under the Ohio Public Records law.

Pursuant to the foregoing, Lakewood is entitled to summary judgment with respect to Requests 219, 221, and 223.

IV. RECORDS PRODUCED RESPONSIVE TO PRR 28, 36, AND 37 AND THE CLAIM OF ADDITIONAL UNPRODUCED RECORDS

The Ohio Supreme Court has held that mandamus will not lie for records that no longer exist. *State ex rel. Cincinnati Enquirer, Division of Gannet Satellite Information Network, Inc. v. Cincinnati Board of Education*, 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629, ¶15 (Relator is “not entitled to a writ of mandamus to compel what would be tantamount to an impossible act.”). *State ex rel. Toledo Blade Co. v. Seneca County Board of Comm.*, 120 Ohio St. 372 (2008), 899 N.E.2d 961, 2008-Ohio-6253 at 379 ¶11, quoting *Cincinnati Enquirer*, supra.

With respect to the testimony of former councilwoman Madigan that when she received Board books she shredded them after hospital Board meetings, Board books which were formerly in the possession of Ms. Madigan that have been destroyed cannot be produced and are not properly the subject of a mandamus action. As such, mandamus does not lie with respect to any Board books previously in the possession of Ms. Madigan which have been destroyed.

With respect to Board books previously in the possession of Mike Summers and/or Tom Bullock, the only evidence of record is that Mayor Summers testified any Board books that he previously had, as a Trustee of LHA, he gave to Mr. Butler. Mayor Summers testified he did not keep copies of the Board Books and that those that he did keep were produced. (Summers Deposition at pp. 22-23, attached hereto as Exhibit 2.) Likewise Mr. Butler has indicated that any Board books in his possession have been provided to Mr. Essi. (Affidavit of Kevin Butler at ¶2, attached hereto as Exhibit 3.) Mr. Essi takes issue with this contending that he has only received two Board books and that there should be numerous other Board books. Mayor Summers also testified to “binders” which he previously had and provided to the clerk of counsel or Mr. Butler. (Exhibit 2, Summers Deposition at p. 37.) Mayor Summers testified that the

spreadsheets/calculations that he created regarding the value of the Master Agreement are the document that he produced at the deposition and which became Exhibit H at the deposition. (Exhibit 2, Summer Deposition at pp. 52-55.) Mr. Butler has inquired of the Clerk of Council and has done a diligent search for said binders and/or other Board books and has located no other Board books or binders. (Exhibit 3, Butler Affidavit at ¶3.) To the extent that these other Board books and/or “binders” of information the Mayor received from LHA existed, they no longer exist or Respondent would willingly provide them to Mr. Essi. As there is no evidence that the documents currently exist, but rather only evidence that they once upon a time “existed” mandamus will not lie and Respondent should be granted summary judgment as to Requests 28, 36, and 37.

Unlike *Toledo Blade*, supra, there is no evidence that Respondent can retrieve or restore the previously destroyed or missing documents. Absent such evidence, mandamus will not lie. Relator has produced no evidence that these records continue to exist and that they are in Lakewood’s possession, but Lakewood refuses to produce them. Absent such evidence, summary judgment is proper, as to Relator’s claim of mandamus with respect to Requests 28, 36, and 37.

V. RESPONDENT’S ALLEGED FAILURE TO SEARCH NETWORK DRIVES

Relator argues that Respondent failed to search its “network drives,” but as demonstrated by the affidavit of IT Manager Coletta, a search through the Barracuda, the City’s email archive system, inherently searches the Lakewood servers for email and the attachments pertinent to the searches conducted by Law Director Butler. Further, as sworn to by Mr. Essi, Law Director Butler is the person who “... was in control and had personal knowledge of nearly all the records sought; ... Mr. Butler had first-hand knowledge of how many records sought were created; Mr. Butler had created many of those records he sought to withhold. ... Mr. Butler was the one person at the

center of nearly everything in the functioning of the City of Lakewood” (Exhibit B to Realtor’s Opposition to Respondent’s Motion for Summary Judgment/Relator’s Motion for Summary Judgment at p. 3, ¶8.)

As the person with such knowledge, Mr. Butler knew where to find and how to search for the records arguably responsive to Mr. Essi’s public records request. Notwithstanding Mr. Essi’s belief in this regard, now Mr. Essi contends that Law Director Butler failed to conduct a proper search as he failed to search “network drives.” Mr. Essi engages in nothing more than speculation that additional responsive records reside on these drives that are somehow separate from the records produced. The fact that “records” may be created in a number of places in the City, in many different locations, on different drives, by different persons merely begs the question of whether records responsive to Mr. Essi’s Requests were created “all over the place” and reside in “many different locations.” Further, with respect to councilpersons, Mr. Coletta testified that there are no login scripts for councilpersons, as they do not work on computers at the City and, as such do not create documents on the network drive. (Deposition of Michael Coletta at pp. 10-11, attached hereto as Exhibit 4.) Further, it is undisputed that Lakewood produced records which are not email and are outside any Barracuda search, such as the records produced of financial records of the City of Lakewood, personnel files, the records relating to audits and in support of audits, including records responsive to Requests Numbers 1, 3, 4, 5, 6, 7, 8, 9, 11, 53, 56, 58, 60, 61, 62, 140, 141, 135, 190, 191, 192, 193, 194, 197, 199, 200, 201, 217, 218, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, and 321, as well as others. Mr. Butler’s affidavit documents these efforts. (Exhibit 3, Butler Affidavit of at ¶4.) Additionally,

the vast majority of the remaining Requests ask for emails and correspondence, and in today's era virtually all correspondence is electronic and, as such within the email archives and subject to the Barracuda email archive searches. As such there is no evidence that additional records reside on the "servers" of the City of Lakewood which are responsive to Relator's Public Records Requests and Respondent is entitled to summary judgment based on any alleged claim for mandamus as a result of failure to search the "network drives." Additionally, Relator takes the testimony of Mr. Coletta out of context. While Mr. Butler could not search Mayor Summers' personal drive without the assistance of Mr. Coletta, or the assistance of Mayor Summers, Mayor Summers could search such drives and testified he did so. (Exhibit 2, Summers Deposition at pp. 28-31.) Relator offers no evidence or testimony that the Clerk of Council Mary Madigan, Council Liaison Monique Smith, Janine Petrus, the secretary of the Records Commission, or Assistant Law Director Jennifer Swallows would have additional responsive records which were not produced. Speculation is not evidence and as such Relator is not entitled to mandamus predicated on an allegation that Respondent failed to search network drives.

VI. ALLEGED FAILURE TO ASSIST MR. ESSI IN CLARIFYING HIS REQUESTS

Acknowledging that a public entity has a duty to inform the requestor of the manner in which the records are maintained by the public office and accessed in the ordinary course of the public office or persons duties "the statute does not, ... require a public office to explain how a records request should be phrased." *State ex rel. Zidonis v. Columbus State Community College*, 2011-Ohio-6871 at ¶8, affirmed at *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 976 N.E.2d 861, 2012-Ohio-4428.

Mr. Butler informed Relator that the City retains, organizes and accesses their records based on content and function, as occurred in *Zidonis*. *Zidonis*, supra at 133 Ohio St.3d 122 p. 125 ¶11. As the court further noted in *Zidonis* it is the responsibility of the requestor to identify the records at issue with “reasonable clarity.” *Zidonis*, supra at 126, ¶21. As in *Zidonis*, Relator never narrowed his original requests to clarify the records sought. *Zidonis*, supra at 127-128, ¶25.

Contrary to Mr. Essi’s argument, the City need not sit down with him and explain to him how to draft a public records request. As in *Zidonis* the Law Director provided him a copy of the City’s public records retention schedule, advised him that the City retained its records, organizes them in and accesses them based on content and invited him to rephrase and clarify his public records requests. Mr. Essi steadfastly refused to modify a single request and to date has never done so.

Under such a circumstance, Respondent asserts it has satisfied its obligation to work with the requestor to form a proper public records request, notwithstanding Mr. Essi’s protestations to the contrary.

VII. CONCLUSION

Based on the foregoing, Respondent asserts that Mr. Essi’s efforts to layer request upon request in an effort to form a seamless web of requests which were impenetrable, preventing any record relating to the Lakewood Hospital transaction from escaping his dragnet, should be rejected as an impermissible public records request which seeks a complete duplication of voluminous records in violation of Public Records law. Respondent asserts this Honorable Court should not sanction such a subterfuge of the prohibition against the complete duplication of voluminous records by allowing it to be done through hundreds of layered requests, in lieu of one omnibus

request for every single record of any kind relating to the Lakewood Hospital transaction. To rule otherwise will completely eviscerate the prohibition against complete duplication of voluminous records.

Even assuming *arguendo* that Mr. Essi's requests were proper as not seeking a complete duplication of voluminous records, the majority of Mr. Essi's requests were improper for failure to identify the records requested with reasonable clarity and/or requiring research to identify specific information requested, and for a variety of additional reasons as set forth in Respondent's Motion for Summary Judgment.

Further assuming *arguendo* Mr. Essi's requests did not suffer from these various defects, Respondent's responses were timely and appropriate given the volume of scope of the requests, their ambiguity and Mr. Essi's failure to narrow or modify the same so as to make them clear.

Based on the foregoing, and as set forth in its original Motion for Summary Judgment, Lakewood asserts it is entitled to summary judgment on Relator's complaint for mandamus and that Relator's motion for summary judgment should be denied.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

/s/John T. McLandrich

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CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Reply in Support of their Motion for Summary Judgment and Brief in Opposition to Relator's Motion for Summary Judgment was filed electronically and served November 16, 2017 to all registered parties by operation of the Court's electronic filing system.

/s/John T. McLandrich

JOHN T. MCLANDRICH (0021494)

Counsel for Respondent City of Lakewood

TRID-160233/Rspndt RIS of Rspndt MSJ & BIO to Rltr's MSJ

Exhibit 1

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, ex rel, BRIAN J. ESSI,) CASE NO.: CA-16-104659
)
 Relator,)
)
vs.) **AFFIDAVIT OF MICHAEL COLETTA**
)
CITY OF LAKEWOOD,)
)
 Respondent.)

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Now comes, Michael Coletta, who being first duly sworn according to law, deposes and states the following:

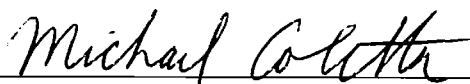
1. I am over 18 years of age and have personal knowledge of all facts contained herein.
2. When a search is performed with the Barracuda Email Archiver that search by its very nature performs a search of the city network drives where email is stored.
3. The Barracuda archiver is a complete and permanent repository of records. The Barracuda email archiver is configured so that every email is stored indefinitely, regardless of whether the recipient deleted the email or the sender attempted to withdraw the email. No one can delete emails from the archiver. It is a complete record of every City email ever sent or received by City employees, searchable by attachment, keyword, date, sender, recipient and more.
4. There are currently more than 7.8 million emails stored in the Barracuda archiver, and it is the City's most robust public records archive.

5. The file servers referenced by Mr. Essi in his brief are incomplete and impermanent records repositories. Unlike the Barracuda email archiver, the City's file servers, whose contents are any type of computer files rather than emails, allow users to modify and delete the contents. The storage is volatile.

6. The Barracuda archiver is designed to be searched and for records to be found quickly. The Barracuda email archiver was built for speedy searching. It is able to do this because the emails are "indexed." Indexing is a computer process that allows for very fast searches. One may type in a search term and seconds later, the results appear. This speed allows for searching across millions of emails very quickly, including the email attachments.

7. Conversely, performing the same searches on the file servers would cripple the City's IT infrastructure. Unlike the Barracuda email archiver, the City's file servers are not indexed and thus not searchable in such a speedy fashion. Even in response to just one of Essi's requests, searching for a keyword or keywords across every folder stored within the main file servers would take several hours or even days to complete while slowing down the server for normal daily tasks for employees. Turning on indexing for every folder that contains employee or departmental files would slow down the server considerably. Indexing requires processing time. And because the contents of the file servers are volatile, the index has to be adjusted for every change, further exacerbating the speed issue.

FURTHER AFFIANT SAYETH NAUGHT.


MICHAEL COLETTA

SWORN TO BEFORE ME, and subscribed in my presence this 16th day of
November, 2017.



NOTARY PUBLIC

KEVIN M. BUTLER, ATTORNEY
NOTARY PUBLIC • STATE OF OHIO
My commission has no expiration date
Section 147.03 O.R.C.

In The Matter of:
State of Ohio, EX REL, Brian J. Essi
VS
City of Lakewood

Michael Summers

October 25, 2017

Deposition

MEHLER HAGESTROM

Court Reporters

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original filename: 171025_-_summers_michael

1 very helpful to me.

2 Q. Oh, okay. So you're saying you subsequently --
3 and that's not what you're saying necessarily.

4 Before a meeting, you would get something in
5 the secure email electronically but you were
6 being given hard copies of it?

7 A. Subsequent, yeah, like a day later, two days
8 later.

9 Q. Okay. Where are those hard copies?

10 A. Actually, I think they're in the possession of
11 the law director currently if they were kept.

12 MR. McLANDRICH: Why don't we just
13 go off the record for a second?

14 MS. TAYLOR-KOLIS: Sure.

15 - - - -

16 (Thereupon, a discussion was had off the
17 record.)

18 - - - -

19 Q. So what we've established is this secure email
20 was in fact to receive board information for LHA,
21 just the --

22 A. That's correct.

23 Q. -- I didn't say LHA.

24 A. Correct.

25 Q. But so that the record would be clear, you did

1 not keep copies of these hard copies that you
2 got?

3 A. That's correct.

4 Q. So whatever we received is what you gave Kevin
5 Butler?

6 A. Correct.

7 Q. So that I have some semblance of context, you
8 went on the board of LHA in what year?

9 A. I, my first meeting was as a councilman in
10 roughly December 2010.

11 Q. And how frequently would that board meet?

12 A. I believe quarterly.

13 Q. So four times a year?

14 A. Correct.

15 Q. And in anticipation of each of those meetings,
16 you would receive some electronic information and
17 then hard books?

18 A. That's correct.

19 Q. I shouldn't call them books. Hard copies like
20 these, correct?

21 A. Right.

22 Q. And after you gave whichever ones are in
23 Mr. Butler's possession, what did you do? Did
24 you receive them back or not?

25 A. I might have left them. They weren't

1 ultimately was shared by Subsidium.

2 Q. Okay. So is your answer you did keep a hard copy
3 paper file?

4 A. I did keep many documents and I believe those
5 have all been shared and/or are on our website.

6 Q. And when you say you were interested in the
7 documents that you were going to -- I don't know
8 if you used the word "share" with Subsidium?

9 A. No. That ultimately were produced by Subsidium.
10 Subsidium was the firm that was retained by the
11 hospital trustees to understand the future of
12 healthcare in Lakewood in particular and the
13 future of healthcare services. I was very
14 interested in that work.

15 Q. Do you still have that paper file?

16 A. It's around but it's, most of it's on the city
17 website. I mean there were very significant
18 iterations of that as over two-and-a-half years
19 of analysis that emerged and I think all that's
20 been shared through litigation and otherwise.

21 Q. Where were those records maintained by you and
22 the city?

23 A. There were some hard copy in a binder.

24 Q. In your office?

25 A. Yep, and those have been, those have been

1 produced to the law director and ultimately
2 shared or a part of litigation. And ultimately
3 the reporting and all the data is on the city
4 website.

5 **Q. Are you testifying that you still have that**
6 **binder?**

7 A. I think it's in the hands of Law Director Butler
8 at this point.

9 **Q. And that's where you think it is now, would be?**

10 A. I believe so, yeah and much of that was tied up
11 in the litigation of the Graham lawsuit.

12 **Q. How many binders were there, best of your**
13 **recollection?**

14 A. Yeah. It was maybe one three-inch binder. You
15 know, the work had drafts and then versions that
16 got changed so I would the, you'd have, a lot of
17 them were workpapers that ultimately culminated
18 in final reports. That is what you would see.

19 **Q. You're talking about drafts from Subsidium?**

20 A. Right.

21 **Q. Is that what your binder would have been labeled,**
22 **"Subsidium documents"?**

23 A. Probably, yeah, or "Lakewood Hospital."

24 **Q. If you would go to the third page, I think you've**
25 **already answered but I just want to make sure**

1 because these are places where we had some
2 questions.

3 Again, this is an email from Deborah Sukey,
4 July 13th, 2015 and it's to the members of the
5 board of trustees.

6 "Today you received notice that Lakewood
7 Hospital Association's board portal was available
8 to review electronically all meeting materials
9 for Wednesday's meeting."

10 Is this the same portal that you referred to
11 in the first email?

12 A. It appears that way, yeah.

13 Q. Okay. And as you sit here today, you do not
14 believe that you have a hard copy?

15 A. Well, it says that we would have gotten a hard
16 copy when we showed up at the meeting.

17 - - - -

18 (Thereupon, Relator's Exhibit D, 12/14-15/14
19 Fry/Summers email string, was marked for
20 purposes of identification.)

21 - - - -

22 Q. Okay. Handing you what we're marking Exhibit D,
23 can you identify that document for me?

24 A. It is an email from Lisa Fry of Subsidium
25 Healthcare.

1 Q. To you, December 15th, 2014; is that correct?

2 A. Correct.

3 Q. Okay. Now, this particular email says, "Mike, I
4 just resent to both emails you provided below.
5 Let me know if you don't get them. I'll be in a
6 conference," et cetera, et cetera.

7 So the emails that she sent this to were
8 SummersM72@gmail.com and SummersMW@gmail.com.
9 Those are private emails. Is that true?

10 A. That's correct.

11 Q. During your tenure as mayor -- that's a pretty
12 long time -- did you receive city related
13 documents in your personal emails?

14 A. I think I might have received some as this would
15 indicate.

16 Q. When these records requests were made and you
17 were working with Law Director Butler to respond
18 to the requests of Mr. Essi, did you search your
19 personal emails?

20 A. I did.

21 Q. Tell me when you did that and how you did that.

22 A. Well, I would have done it by key names like
23 Subsidiary and looked at what was forthcoming.

24 Q. Did you record a log of all the city related
25 things that you found on your personal email?

1 picked and it was in response to that type of
2 question.

3 **Q. All right. So you, per the terms of this, you**
4 **gave those binders to Monique. Did you ever get**
5 **those binders back?**

6 A. You know, I probably did and my guess is they're
7 part of the litigation file for the Graham case.
8 I don't have them in my office now so they're,
9 they were available and I'm guessing they're
10 packed up somewhere.

11 **Q. And when you say the litigation file for the**
12 **Graham case, litigation file that Kevin Butler**
13 **would have?**

14 A. I would -- he, yes, I would guess he would have
15 or he would know, you know, our attorneys would
16 have it.

17 **Q. Are there any other binders related to the**
18 **hospital and the hospital's, I'm trying to think**
19 **of what I want to call it.**

20 Do you have any other binders relative to
21 **Lakewood Hospital that are in your possession?**

22 A. I do not have a binder that's in my possession.
23 I think the binder that I did have has been part
24 of that litigation file as well. I have various
25 other files relating to healthcare.

1 A. LHA, right.

2 Q. He was showing those in his capacity as a trustee
3 of LHA, correct?

4 A. We would have discussed, yeah, those.

5 Q. But you in fact believe that you still do have
6 your calculations?

7 A. I do.

8 Q. Okay.

9 A. But they're my internal calculations. They're
10 notes.

11 Q. They're notes that you took in furtherance of
12 doing the city's business, correct?

13 A. They're notes, yeah.

14 Q. Where do you have those stored?

15 A. I would have them probably in a document file.

16 Q. On your computer?

17 A. Correct.

18 Q. Okay. You don't have a hard copy of them? I
19 mean you could download them from your computer?

20 A. No.

21 Q. I'm just asking you didn't create another binder?

22 A. No.

23 Q. Is what I'm getting at, right?

24 A. That's correct.

25 Q. It's on your computer.

1 Let's take a look at, if you would for me,
2 PRR 287. I'm sorry I'm running a little over
3 time.

4 MR. McLANDRICH: You can do
5 whatever you want.

6 MS. TAYLOR-KOLIS: Okay. Thank
7 you.

8 Q. Do you want to read that one out loud too for the
9 record? Thank you.

10 A. "All records, emails, notes, and communications
11 electronic or otherwise including spreadsheets or
12 calculations used by any city employee or elected
13 official for any purpose that estimate or
14 establish the economic or financial value of the
15 letter of intent for the master agreement."

16 Q. We've already discussed in the prior PRR that I
17 am now aware that you do have a record of
18 calculations.

19 Are you aware of any records that exist that
20 are responsive to this particular PRR?

21 A. Aside from what I've discussed in the 285?

22 Q. Yes.

23 A. No.

24 Q. Okay. I need three to five minutes with Brian in
25 the hallway.

1 - - - - -

2 (Thereupon, a recess was had.)

3 - - - - -

4 Q. We're going to mark this H.

5 Can I put that H sticker on yours?

6 A. Sure.

7 - - - - -

8 (Thereupon, Relator's Exhibit H, "Set the
9 Record Straight", was marked for purposes of
10 identification.)

11 - - - - -

12 Q. And you gave your counsel a copy; is that true?

13 A. Yes.

14 Q. Prior to the break we were discussing
15 calculations of the value of the new master
16 agreement, I guess that's the best way to phrase
17 it. PRR 285. And you have now produced -- I'm
18 assuming this came out of your computer; is that
19 right?

20 A. That's correct.

21 Q. Is this the document that you were discussing?

22 A. That's correct.

23 Q. All right. Obviously I have not seen this
24 before. I assume you know that I haven't seen it
25 before?

1 A. Correct.

2 Q. The top of the document, the title is "Set the
3 Record Straight."

4 What does that mean? Who is this document
5 for?

6 A. Well, I think this was a, an internal review of a
7 conversation that was going on in the community
8 about what others were saying the deal value was
9 and this is what I understood it to be.

10 Q. Okay. Did you --

11 A. So the point is the left hand is other's view and
12 the right hand is my view or ultimately what I
13 think the agreement delivers.

14 Q. Okay. I'm so sorry, I misunderstood you.

15 Let's start at one place.

16 Did you create this document?

17 A. I would have created the content in this
18 document, yeah.

19 Q. That's what I meant.

20 A. Yeah.

21 Q. Did Jen Pae help you create this?

22 A. I doubt it. No. These numbers are generally
23 well understood and they come out of the master
24 agreement and other conversations and other
25 information that's been made public.

C E R T I F I C A T E

The State of Ohio,) SS:
County of Cuyahoga.)

I, Pamela S. Greenfield, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named witness was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action; that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 1st day of November, 2017.



Pamela S. Greenfield, CRR, RDR
Notary Public, State of Ohio
My commission expires July 2, 2018

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, ex rel, BRIAN J. ESSI,) CASE NO.: CA-16-104659
)
 Relator,)
)
vs.) **AFFIDAVIT OF KEVIN BUTLER**
)
CITY OF LAKEWOOD,(()
)
 Respondent.)

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Now comes, Kevin Butler, who being first duly sworn according to law, deposes and states the following:

1. I am over 18 years of age and have personal knowledge of all facts contained herein.

2. With respect to Mr. Essi's request for "Board Books", PRRs 28, 36 and 37, I have produced any Board Books that are in the City's possession after a diligent search for the same, which includes asking Mayor Summers about them and looking in his office, asking the Clerk of Council about them and having her search her files and archives.

3. With respect to Mr. Essi's request for any binders that were mentioned at the deposition of Mayor Summers, I personally looked in Mayor Summers' office, with the help of the Mayor, inquired of the Clerk of Council about whether she had such binders, had her search her files and archives for such binders and no such binders were found. To the best of my knowledge no such binder is in the possession of the City or its legal counsel in the *Graham* litigation.

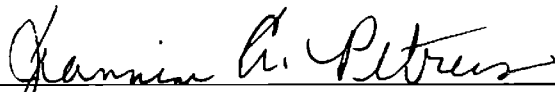
4. In responding to Mr. Essi's Public Record Requests at issue in this litigation, where appropriate I employed the City's Barracuda email archiver program to search for and retrieve emails and the attachments. Where the records would not likely already be found in email, I also had City personnel, including Jennifer Pae, Mayor Summers, Councilpersons Madigan and Bullock search for responsive records in among their files, personal computers and cellphones. I also had our outside counsel at Thompson Hine produce their file for review and extraction of public records arguably requested by Mr. Essi.

FURTHER AFFIANT SAYETH NAUGHT.



KEVIN BUTLER

SWORN TO BEFORE ME, and subscribed in my presence this 16th day of
November, 2017.



NOTARY PUBLIC

 JEANNINE A. PETRUS
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Cuyahoga County
My Comm. Exp. 1/30/2022

Exhibit 4

In The Matter of:
State of Ohio, EX REL, Brian J. Essi
VS
City of Lakewood

Michael Coletta

October 25, 2017

Deposition

M E H L I R H A G E S T R O M

Court Reporters

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Cleveland, Ohio 44113	Akron, Ohio 44308
216.241.9000	330.535.7300

216.621.0050 Fax

www.MandH.com

Schedule@MandH.com

original filename: 171025_-_coletta_michael

1 have that capability.

2 Q. Is the building department the only one that has
3 their information preserved on the cloud?

4 A. No.

5 Q. Who else?

6 A. Fire department. Parts of the police department.

7 Q. Do all the individual council people have log-in
8 scripts? I'm sorry?

9 A. I was waiting for you.

10 I don't know for sure. What's different
11 about council accounts is council members
12 typically aren't sitting at a computer in city
13 hall; so in cases where we have users like that,
14 oftentimes we create an account in what's called
15 active directory and do not add a log-in script
16 because if the user is not physically in the
17 building, there's no way to connect to the drives
18 that would otherwise be available to users that
19 are physically connected to the network so for
20 example, council staff that --

21 Q. Like Mary Hagan?

22 A. Correct.

23 Q. The clerk?

24 A. They have log-in scripts because they sit at a
25 computer here in city hall and would have the

1 capability to save data to the network; but a
2 member of council, I don't believe they have a
3 log-in script because they don't come here to
4 work on the computer; but they have an email
5 account so we needed to create an account on
6 active directory for --

7 Q. So that's what active directory is, your email
8 accounts?

9 A. It's the Windows account management tool. It's a
10 prerequisite to email accounts.

11 Q. Okay. I'm assuming Law Director butler, Mayor
12 Summers, Jeannine Pincus, and when she was here
13 Monique Smith, that they all have a log-in
14 script?

15 A. I believe that's correct.

16 Q. Okay. What I want to do is I want to look at
17 your affidavit.

18 So if you turn to Page 2 of Exhibit A, it
19 says that you "reviewed Brian J. Essi, (Relator's)
20 public records request 219 through 224, in which
21 he asked for records documenting various Lakewood
22 employees' use of Lakewood computers to access
23 certain websites."

24 So that's what, you were given those requests
25 and said please read these requests, right?

C E R T I F I C A T E

The State of Ohio,) SS:
County of Cuyahoga.)

I, Pamela S. Greenfield, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named witness was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulation of counsel; and that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney, or financially interested in this action; that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 1st day of November, 2017.



Pamela S. Greenfield, CRR, RDR
Notary Public, State of Ohio
My commission expires July 2, 2018