IN THE SUPREME COURT OF OHIO

STATE, ex rel. JOHN C. DEAL

Petitioner

vs.

THE OHIO STATE UNIVERSITY

Respondent.

AFFIDAVIT OF RELATOR IN SUPPORT OF WRIT OF MANDAMUS

John C. Deal (0020223)
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Relator
IN THE SUPREME COURT OF OHIO

STATE, ex rel. JOHN C. DEAL

Petitioner,

vs.

THE OHIO STATE UNIVERSITY

Respondent.

STATE OF OHIO

COUNTY OF FRANKLIN

1. I am John C. Deal, the Relator herein. I make this affidavit on the basis of my personal knowledge.

2. Background. By memorandum dated September 20, 2011 to the new Dean of the medical school of The Ohio State University ("Ohio State"), I raised questions regarding Ohio State's Center for Integrative Medicine, including its staffing and advertising. At that time, the Center's website indicated, "All practitioners ... have been through the OSU Family Medicine credentialing process and hold faculty appointments." At the time of my memorandum, one of the providers was an emeritus pathologist. I received no response to the memorandum.

3. By letter dated December 17, 2012, I made a public records request to Ohio State for certain records, among those "[r]ecords relating to the ... appointment to faculty positions in the [Center for Integrative Medicine] of Dr. Hari Sharma, Dr. David Dehui Wang, and Dr. Glen Aukerman, including employment agreements." Having reviewed the public records requests in State ex rel. ESPN, Inc. v. Ohio State Univ. (2012), 970 N.E.2d 939, 132 Ohio St.3d 212, 2012-Ohio-2690, I did not
identify any record by date, nor did I have any way to identify documents by particular dates. At
the time of my first request, I did not know that Ohio State had employed Dr. Kemper.

responded, agreeing to produce some of the requested records and suggesting a face-to-face
meeting with the Medical Director of University Hospitals “to discuss the intent of your request
and how we can best assist you.” That meeting, which included a Senior Assistant General
Counsel for Wexner Medical Center, took place on March 26, 2013. As a part of the meeting, I
provided both a document dated March 26, 2013 describing my goals for the meeting and other
documents relating to the Center for Integrative Medicine and its providers. By that time, I was
aware of the hiring of Dr. Kemper, so at the meeting, I requested records concerning Dr. Kemper,
including, *inter alia*, her faculty appointments. I did not identify any record by date.

5. There was no formal written response to the March 26, 2013 meeting. As a result,
I met with the Senior Assistant General Counsel on July 26, 2013. No formal written response
was forthcoming from this meeting.

6. On August 19, 2103, I sent an e-mail to the Senior Assistant General Counsel,
which read, in part,

As we parted on July 26th, it was my expectation that you would send me a letter
formally responding to the remaining document requests in my earlier meeting with you
and Dr. Thomas, specifically, records reflecting (1) privileges to treat patients and (2)
faculty appointments for the following individuals: Professor Emeritus Hari Sharma,
Clinical Assistant Professor David Dehui Wang, Professor Glen Aukerman, and Kathi J.
Kemper, M.D. My recollection is that you said that the Wexner Medical Center has no
unprivileged records responsive to these requests and that I asked that you put that in a
letter. I can understand how the patient treatment privilege materials might be privileged
as peer review documents, but it is a little harder to understand how faculty appointments
would be unavailable because I typically see anesthesiology department appointments
and promotions posted on the bulletin board outside the Doan Hall SICU.1 In any event, I
am trying to understand the process by which these individuals are on the faculty, if

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1 For several years, I have been a volunteer at the surgical intensive care unit waiting room.
indeed they are all on the faculty, of the medical school. If I need to make a request to some other part of OSU, please let me know.

7. By letter dated September 13, 2013, the Senior Assistant General Counsel responded, but the response was incomplete. As a result, on September 15, 2013, I sent an e-mail to the Senior Assistant General Counsel, which read, in part,

I just opened your September 13 letter. One of the enclosures seems to be a partial copy. It looks like someone ran a two-sided copy of the September 25, 2012 letter to Dr. Kemper through a copier, generating a copy that has pages 1, 3, and 5, but is missing pages 2, 4, and 6. Would you please check on this? Also, if Dr. Kemper has not yet been granted tenure, is there a tenure committee that would listen to my concerns about her? In particular, I would like to make sure that such a committee is aware of her involvement with reiki and with what she has written concerning “diagnostic modalities such as astrology, iridology, [and] psychic diagnosis.”

8. The Request. By letter dated December 5, 2013, I made a second written public records request (the “Request”) to Ohio State pursuant to R.C. 149.43. The Request is attached as Exhibit A. The Request again sought access to records relating to the Center for Integrative Medicine. In order to know how and by whom faculty appointments were recommended and approved with regard to certain individuals, including Dr. Kemper, the Request included

minutes of boards, committee, task forces, and other university units and organizations ... to show who is responsible for recommending and approving faculty appointments of [Dr. Kemper].

I did not identify any record by date. I had no way to identify documents by particular dates and believed that as a result of the two meetings mentioned above and the September 25 letter,

2 The missing pages were later supplied. The letter, which had offered Dr. Kemper a faculty appointment with an office at the Wexner Medical Center’s Kenny Road facility (the OSU Center for Integrative Medicine), apparently had been signed by Dr. Kemper and faxed back on September 26, 2012.

3 The quoted language is from the article cited at p. 2 of the Request, Kathi J. Kemper, MD, MPH; Wendy L. Wornham, MD, “Consultations for Holistic Pediatric Services for Inpatients and Outpatient Oncology Patients at a Children’s Hospital,” ARCH PEDIATR ADOLESC MED. 2001;155(4):449-454, available at http://archpedi.jamanetwork.com/article.aspx?articleid=1905278&resultClick=1. A copy of the article was provided to Ohio State as part of the March 26, 2013 meeting.
supra, n.2, Ohio State was aware of the specific records requested.

9. Ohio State's Response to the Request. By letter dated December 12, 2013, Ohio State responded to the Request. The Response is attached as Exhibit B. With respect to the records sought concerning the faculty appointments of Dr. Kemper, Ohio State responded that

Your request for minutes showing who is responsible for recommending and approving faculty appointments of ... Dr. Kemper asks for research of a search of records containing selected information. ... [T]he Public records Act does not obligate OSU to conduct this kind of research or search.

Additionally, your request fails to identify the minutes you are looking for by date, which is how OSU generally keeps them. A request for an entire category of records (“Minutes”) is overly broad. 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.” Finally, the established retention period of minutes is three years. The information that you seek, if it existed, would have appeared in minutes far more than three years ago. “In case in which public records ... are properly disposed of in accordance with a duly adopted records retention policy, there is no entitlement to those records under the Public Records Act. [Emphasis in original; citations omitted.]

10. As I indicated to Ohio State in the March 26, 2013 meeting, among my goals are to understand the organization and governance of the Center for Integrative Medicine and to understand the credentialing process as regards Dr. Kemper.

FURTHER AFFIANT SAYETH NAUGHT.

John V. Deal

Sworn to and subscribed before me this 10 day of Jan., 2014.

Notary Public

John C. Deal  
2575 Wexford Road  
Columbus, Ohio 43221-3215  
jdeal@columbuscounsel.com  

December 5, 2013  

Julie E. Chicoine, Esq.  
Senior Assistant General Counsel  
Wexner Medical Center at The Ohio State University  
650 Ackerman RD, Suite 200  
Columbus, OH 43202

VIA EMAIL

Subject: Records request

Dear Julie:

In my September 16, 2013 email, I indicated that I would get back to you after I had a chance to review the enclosures and compare them with the OSU General Records Retention Schedule.

I am also interested to know how and by whom faculty appointments were recommended and approved with regard to Dr. Aukerman and the individuals mentioned below. As I understand it, “minutes of boards, committee, task forces, and other university units and organizations” are maintained. Specifically, the minutes, etc., should be available and producible to show who is responsible for recommending and approving faculty appointments of Dr. Aukerman and the individuals mentioned below even if the personnel files themselves are not producible.

Finally, I am trying to understand whether certain documents were present when certain faculty appointments or renewals were recommended and made. To that end I request that the documents mentioned below be produced if they (1) exist from some source other than me and (2) are contained in the Medical Center’s files connected with the appointment or retention of the individuals mentioned below. If not, please indicate.

Dr. Hari Sharma.

* An article by Andrew A. Skolnick that raised questions about Dr. Sharma: Maharishi Ayur-Veda: guru’s marketing scheme promises the world eternal perfect health, http://www.aaskolnick.com/new/articles/JAMA_MAV.htm.

Dr. Kathi Kemper


Thank you very much.

Sincerely,

John C. Deal
December 12, 2013

John Deal, Esq.
2575 Wexford Rd.
Columbus, OH 43221-3215

VIA U.S. MAIL

RE: Response to December 5, 2013 Public Records Request

Dear Mr. Deal,

This letter responds to your above referenced Public Records Request seeking certain documents as follows:

2. Your letter also states that you are "interested to know how and by whom faculty appointments were recommended and approved with regard to Dr. Aukerman and the individuals mentioned below" which includes Dr. Hari Sharma and Dr. Kathi Kemper, and that "minutes, etc., should be available and producible to show who is responsible for recommending and approving faculty appointments" of these individuals.

Your request for minutes showing who is responsible for recommending and approving faculty appointments of Dr. Aukerman, Dr. Sharma and Dr. Kemper asks for research or a search for records containing selected information. As above, the Public Records Act does not obligate OSU to conduct this kind of research or search.3

Additionally, your request fails to identify the minutes you are looking for by date, which is how OSU generally keeps them. A request for an entire category of records ("Minutes") is overly broad. 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

3 "[i]t is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue." State ex rel. Morgan v. New Lexington, 112 Ohio St.3d 33, quoting State ex rel. Fant v. Tober, 8th Dist. No. 63737, 1993 Ohio App. LEXIS 2591, 1993 WL 178743, *1 (Apr. 26, 1993), affirmed, 68 Ohio St.3d 117.
4 See, Fant v. Tober.
5 See, Fant v. Tober.

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of voluminous files kept by government agencies. Finally, the established retention period for minutes is three years. The information that you seek, if it existed, would have appeared in minutes far more than three years ago. "[I]n cases in which public records...are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to those records under the Public Records Act."

3. In order to understand whether select published articles referenced in your letter were present in the Medical Center’s files connected with the appointment or retention of the above referenced physicians, you asked us to produce them if they exist. As above, this final request asking that OSU conduct a search for documents wherever they may exist within records kept by OSU is one that OSU has no duty to fulfill. Further, the articles that you referenced—journal publications—are also not records of OSU as that term is defined by Ohio law as said publications were not created or received by, or fall under the jurisdiction of OSU. These journal publications are also available in the public domain via the internet.

Sincerely,

[Signature]

Julie E. Chicoine, Esq.
Senior Assistant General Counsel

cc: Lauren Lubow, JD
    Andy Thomas, MD

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1 State ex rel. Zidonis v. Columbus State Community College, 133 Ohio St.3d 122.
2 Toledo Blade Co. v. Seneca County Bd. Of Comm’rs, 120 Ohio St.3d 372.
3 See, Fant v. Taber.
4 Ohio Revised Code Section 149.011(G).

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PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this Memorandum along with the Summons, Complaint, and Memorandum to the Respondent identified in the caption on page one via Certified Mail, return receipt requested.

John C. Deal (0020223)