

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, ex rel. JOHN C. DEAL

Petitioner

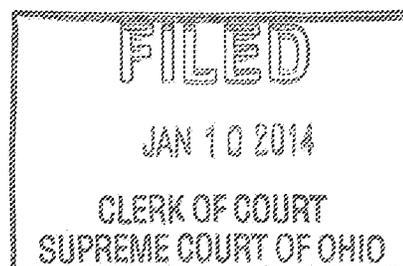
14-0041

vs.

THE OHIO STATE UNIVERSITY

Respondent.

MEMORANDUM IN SUPORT OF WRIT OF MANDAMUS



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Relator

IN THE SUPREME COURT OF OHIO

STATE, ex rel. JOHN C. DEAL

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Petitioner,

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No. _____

vs.

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THE OHIO STATE UNIVERSITY

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**MEMORANDUM IN SUPPORT
OF COMPLAINT FOR WRIT OF
MANDAMUS**

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I. INTRODUCTION

Recently, questions involving health care have risen to the top of the national agenda. Some of the issues involve what is sometimes called “alternative medicine,” but as one author has put it, “[T]he truth is, there's no such thing as conventional or alternative or complementary or integrative or holistic medicine. There's only medicine that works and medicine that doesn't.” Paul A. Offit, *Do You Believe in Magic: The Sense and Nonsense of Alternative Medicine* (2013), at 6. The controversy over alternative or integrative medicine extends to whether alternative or integrative medicine should be a part of medical school curricula. Steven Salzberg, *Why Medical Schools Should Not Teach Integrative Medicine* (2011), at <http://www.forbes.com/sites/sciencebiz/2011/04/21/bad-medicine-at-the-university-of-maryland/>. The Ohio State University (“Ohio State”) has resolved the issue in favor of integrative medicine. It has a Center for Integrative Medicine apparently staffed with faculty of its medical school.

This case concerns a public records request for documents regarding the recent hiring of a faculty member whose background and expertise includes integrative medicine. The records are

expected to identify the decisionmakers involved as well as the basis for their decision and to identify any persons who dissented from that decision and the basis for their dissent.

II. STATEMENT OF FACTS

Background. By memorandum dated September 20, 2011 to the new Dean of the medical school of Ohio State, the Relator 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 the Relator's memorandum, one of the providers was an *emeritus* pathologist. The Relator received no response to the memorandum. Affidavit of Relator in Support of Writ of Mandamus ("Aff."), ¶ 2.

In late September 2012, Ohio State hired Dr. Kathi Kemper and proposed to make her a full Professor, with tenure. Dr. Kemper's faculty appointment was dependent upon Dr. Kemper's receiving privileges at Nationwide Children's Hospital, The Ohio State University Hospitals, and/or The Arthur G. James Cancer Hospital and the Richard J. Solove Research Institute. Dr. Kemper is an expert in Reiki. According to biographical material from Wake Forest available on the world wide web,

Dr. Kemper began studying with Dora Kunz, the founder of Therapeutic Touch (TT), in 1990. Dr. Kemper was a regular participant in Dora's healing group in Seattle until she was invited to join the Harvard Medical School faculty in 1998. Later, Dr. Kemper was the only physician to help lead the mentorship program in TT at Pumpkin Hollow in upstate New York under the guidance of Dolores Krieger, PhD, RN. In 2000, Dr. Kemper received Third Degree Reiki Master and Master Teacher certificates.

at <http://www.wakehealth.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=35255>. The Relator has not been able to locate any mention of Dr. Kemper's background in Reiki on the Wexner Medical Center's website.

At about the time Dr. Kemper was furthering her education in therapeutic touch and

Reiki, the concepts involved in therapeutic touch and Reiki were discredited in a JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION article. Linda Rosa, BSN, RN; Emily Rosa; Larry Sarner; Stephen Barrett, MD, *A Close Look at Therapeutic Touch*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (1998), 279(13):1005-1010, doi:10.1001/jama.279.13.1005, available at <http://jama.jamanetwork.com/article.aspx?articleid=187390>. The Rosa article has been widely cited, e.g., Offit, *supra*, at 34-35; David C. Howell, *Fundamental Statistics for the Behavioral Sciences* (7th ed.) (2008), at 504-05.

Reiki therapy is inappropriate for Catholic institutions such as Catholic health care facilities on scientific as well as religious grounds. Committee on Doctrine, United States Conference of Catholic Bishops, *Guidelines for Evaluating Reiki as an Alternative Therapy* (2009), available at http://old.usccb.org/doctrine/evaluation_guidelines_finaltext_2009-03.pdf. As the bishops put it, *supra* at 5, “In terms of caring for one’s physical health or the physical health of others, to employ a technique that has no scientific support (or even plausibility) is generally not prudent.” Amen.

By letter dated December 17, 2012, the Relator 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, the Relator did not identify any record by date, nor did the Relator have any way to identify documents by particular dates. At the time of this first request, the Relator did not know that Ohio State had employed Dr. Kemper. Aff., ¶ 3.

By letter dated February 28, 2012, Ohio State’s Director of Public Records 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, the Relator provided both a document dated March 26, 2013 describing his goals and other documents relating to the Center for Integrative Medicine and its providers. By that time, the Relator was aware of the hiring of Dr. Kemper, so at the meeting, the Relator requested records concerning Dr. Kemper, including, *inter alia*, her faculty appointments. The Relator did not identify any record by date. Aff., ¶ 4.

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

On August 19, 2103, the Relator 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 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.

Aff., ¶ 6.

¹ For several years, the Relator has been a volunteer at the surgical intensive care unit waiting room.

By letter dated September 13, 2013, the Senior Assistant General Counsel responded, but the response was incomplete. As a result, on September 15, 2013, the Relator 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. Kemper² 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.”³

Aff., ¶ 7.

The Request. By letter dated December 5, 2013, the Relator made a second written public records request (the “Request”) to Ohio State pursuant to R.C. 149.43. Aff., Exh. 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].

The Relator did not identify any record by date. The Relator had no way to identify documents by particular dates and the Relator believed that as a result of the two meetings mentioned above

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. It was on one of the missing pages (p. 4) that Dr. Kemper's hospital privileges were discussed.

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=190527&resultClick=1>. A copy of the article was provided to Ohio State as part of the March 26, 2013 meeting.

and the September 25 letter, *supra*, n.2, Ohio State was aware of the specific records requested. Aff., ¶ 8.

Ohio State's Response to the Request. By letter dated December 12, 2013, Ohio State responded to the Request. Aff., Exh. B. With respect to the records sought concerning the faculty appointment 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. "*[I]n 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.]

Aff., ¶ 9.

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

III. ARGUMENT

The records at issue in this case have been whittled down through some production on the part of Ohio State, through meetings and discussions between the parties, and by the Relator's acceptance for purposes of this case of some of the arguments advanced by Ohio State in its Response. We are left with only the following records at issue:

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].

The legal issues have also been narrowed. In this case, unlike most cases arising under R.C. 149.43, the public office did not contend that the records at issue are exempt under the statute. Instead, Ohio State quibbled about the Request itself, advancing four arguments in support of its refusal to provide the records. Each of these arguments is factually incorrect or contrary to law, or both.

To begin with, the question is not whether the Relator jumped through the hoops provided by Ohio State, but whether Ohio State could discern what records were requested. The provisions of R.C. 149.43 must be construed liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *E.g.*, *State ex rel. Dann v. Taft* (2006), 848 N.E.2d 472, 109 Ohio St.3d 364, 2006-Ohio-1825.

In *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 589 N.E.2d 24, during a hearing, the Franklin County Sheriff's Department had made an oral request to SERB's counsel for an "investigatory file." Before this Court, SERB argued that the request was inadequate because it was not made to SERB itself. That argument was firmly rejected by this Court:

Contrary to this argument, the sheriff did make a proper request for the documents. The request was made to SERB's counsel, the Attorney General. R.C. 149.43(B) states that "[u]pon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. * * * " As SERB was represented by counsel, the sheriff's request for the public records from SERB's counsel was proper. *No specific form of request is required by R.C. 149.43.*

63 Ohio St.3d at 504, 589 N.E.2d at 29. [Emphasis added.]

A. The Request did not ask for research of a search of records containing selected information.

In denying the Request, Ohio State first argued, "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.” Not so. Here, the Request did not ask for a search of records involving Dr. Kemper's faculty appointments. Moreover, Ohio State's argument on this point is legally incorrect. Considered in the context of the circumstances surrounding it, the Request was adequate to identify the records and invoke Ohio State's duties under the statute. See *Morgan v. City of New Lexington* (2006), 112 Ohio St.3d 33, 39, 857 N.E.2d 1208, 1215, 2006-Ohio-6365, ¶ 33: “Morgan's request was not for information, but for the specific records that supported the city's discharge of her from employment. Morgan's request must be considered in the context of the circumstances surrounding it. Her request was structured to mirror the city's letter specifying 18 separate charges against her. The request merely sought the records verifying those charges.”

In the instant case, the Request must be considered in light of the Relator's September 20, 2011 memorandum, the December 27, 2012 request, the March 26, 2013 meeting, the March 26, 2013 document setting forth the Relator's goals) as well as the documents provided at the meeting), the July 26, 2013 meeting, and the Relator's August 19, 2013 e-mail. Nothing in the Response indicates that Ohio State failed to understand what was requested.

B. The Request Properly Identified Public Records.

Second, Ohio State argued, “Additionally, your request fails to identify the minutes you are looking for by date, which is how OSU generally keeps them.” [Emphasis in original; citations omitted.] In *Morgan*, this Court rejected the argument that a public records request must specify a date:

[N]otwithstanding the city's implication to the contrary, *we have never held that in order to constitute a viable request, the requester must specify the author and date of the*

records requested. Although this may be helpful in identifying the requested records, the failure to do so does not automatically result in an improper request for public records, particularly where, as here, *it is evident that the public office was aware of the specific records requested. We do not require perfection in public-records requests. State ex rel. Cater v. N. Olmsted (1994), 69 Ohio St.3d 315, 320, 631 N.E.2d 1048.*

Morgan, supra, 112 Ohio St.3d at 39, 857 N.E.2d at 1216, 2006-Ohio-6365 at ¶ 37 [Emphasis added]. Thus, Ohio State's argument on this point is legally incorrect. Moreover, nothing in the Response indicates that Ohio State failed to understand what was requested.

C. The Request Was Not Overbroad.

Ohio State's third argument was that, "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.*'" [Emphasis in original.] This argument is factually incorrect. The Request sought not "an entire category of records," but only those minutes specifically involving Dr. Kemper's faculty appointments. Thus, the Response was disingenuous and factually inaccurate.

D. The Request Did Not Seek Records Properly Disposed Of.

Finally, Ohio State argued, "... 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. '*[I]n 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.] This argument is factually incorrect, since Dr. Kemper's faculty appointments took place subsequent to September 25, 2012.

E. The Relator Is Entitled To An Award Of Costs In This Matter.

R.C. 149.43(C)(1) permits this Court to award costs associated with bringing this action. As an aggrieved party, the Relator is entitled to this relief.⁴ This Court may reduce an award of costs only if it determines

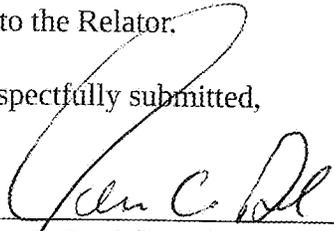
[t]hat, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

In light of the specific requirements that the section 149.43 imposes on public offices to respond to records requests and the clear failure of Ohio State to adhere to those requirements, a well informed custodian could have no reasonable belief that the responses provided complied with the law.

IV. CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus (1) ordering Ohio State to produce 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. Kathi Kemper and (2) awarding the costs of this action to the Relator.

Respectfully submitted,


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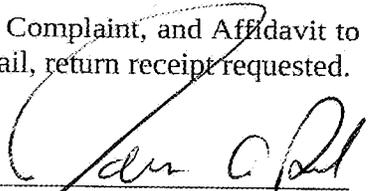
Relator

⁴ The Relator does not seek statutory damages or attorney fees.

PRAECIPE FOR SERVICE

TO THE CLERK:

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



John C. Deal (0020223)