COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO, EX REL. CHRISTOPHER HICKS	:	
	:	**CASE NO. 2018 CVH 00058**
Relator	:	**Judge McBride**
vs.	:	**DECISION/ENTRY**
CLERMONT COUNTY BOARD OF COMMISSIONERS	:	
Respondent	:	

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This cause is before the court for consideration of (1) the motion to compel filed by the relator State of Ohio ex rel. Christopher Hicks on September 18, 2018 and (2) the motion for protective order filed by the respondent Clermont County Board of Commissioners on October 2, 2018. The court scheduled and held a hearing on the motions on October 26th. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case stems from alleged violations of the Ohio Meetings Act ("OMA"), R.C. 121.22. Christopher Hicks is a Clermont County resident, and the respondent is the Clermont County Board of Commissioners.

In his complaint, the relator alleges that the respondent failed to comply with R.C. 121.22 by failing to maintain accurate meeting minutes for the board of commissioners meetings. The alleged failures include failing to include the relator's comments that he made at the respondent's board meetings, failing to include a summary of the relator's statements, failing to disclose a commissioner's admission to owning shares in a hotel, and failing to post some of the relator's written statements. The relator further alleges that the respondent violated the OMA by holding private quorums, privately discussing and reviewing public comments, and entering into executive sessions without informing the public of its reason for doing so. The relator states in his complaint that the respondent entered into executive session improperly in 2017 at least 15 times. He also identifies certain dates on which these alleged violations occurred, including January 1, 2017, February 22, 2017, February 27, 2017, March 1, 2017, March 22, 2017, March 27, 2017, April 19, 2017, June 7, 2017, June 28, 2017, July 12, 2017, July 26, 2017, August 2,

2017, August 9, 2017, August 16, 2017, September 13, 2017, October 4, 2017, November 8, 2017, and November 11, 2017.

During the course of discovery, the relator learned that Edwin Humphrey, a commissioner, maintains a notebook in which he writes notes at the respondent's meetings and executive sessions. The relator received a version of the notebook that included notes from the dates the relator listed in his complaint, and which was heavily redacted. After that, the relator served Document Request No. 11 on the respondent, which states: "Produce a clean and unredacted copy of the entirety of the notes and/or notebook of Humphrey, which were previously provided in redacted form."

In response, the respondent did not produce the notebook and wrote "OBJECTION" in response to the request. Counsel for the relator spoke with respondent's counsel about the request, and respondent's counsel stated that he would not produce any part of the notebook that did not specifically relate to the dates listed in the complaint.

Humphrey avers that the notes contain both notes about the commission meetings as well as personal notes relating to a variety of personal and professional matters unrelated to the meetings. He keeps the notebook as a reference tool for his own use, and he does not share the notes with anyone.

On September 18, 2018, the relator filed a motion to compel the respondent to produce the entirety of Humphrey's notebook without redactions. On October 2nd, the respondent filed a response in opposition with a motion for a protective order, requesting an order to protect it from producing any portions of Humphrey's notes it has not already produced. The relator filed a reply in support of its motion with a response in opposition

to the respondent's motion on October 8th. The court held a hearing on the motions on October 26th. At the conclusion of the hearing, the court took the motions under advisement.

LEGAL STANDARD

The Civil Rules of Procedure afford parties "* * * a right to liberal discovery of information * * *."[1] The scope of discovery is provided for in Civ.R. 26:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. * * * It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[2]

"The Civil Rules permit discovery of information so long as it is 'reasonably calculated to lead to the discovery of admissible evidence.'"[3] Therefore, "* * * documents are irrelevant when the information sought will not reasonably lead to the discovery of admissible evidence."[4]

Under Civ.R. 26, "[t]he concept of relevancy as it applies to discovery is not limited to the issues of the case, but to the subject matter of the action, which is a broader

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[1] *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, ¶ 9, citing *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 661-662, 635 N.E.2d 331 (1994).
[2] Civ.R. 26(B).
[3] *State ex. rel. Community Journal v. Reed*, 2014-Ohio-5745, 26 N.E.3d 286, ¶ 16 (12th Dist.), quoting Civ.R. 26(B)(1).
[4] *Fifth Third Bank v. Jones-Williams*, 10th Dist. Franklin No. 04AP-935, 2005-Ohio-4070, ¶ 13, citing *Tschantz v. Ferguson*, 97 Ohio App.3d 693, 715, 647 N.E.2d 507 (8th Dist. 1994).

concept."[5] "Generally, a party may obtain discovery regarding any matter concerning the pending litigation."[6] As such, the Twelfth District Court of Appeals has reflected that "[p]arties generally should be granted broad leeway in discovering material that may be useful to them in preparing for litigation."[7]

Although the discovery rules are liberal, the trial court "is vested with authority to limit pretrial discovery in order to prevent an abuse of the discovery process."[8] "The regulation of discovery is committed to the sound discretion of the trial court * * *."[9]

Civ.R. 26(C) permits the court to grant protective orders:

> "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into

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[5] *State ex. rel. Community Journal*, 2014-Ohio-5745 at ¶ 16, citing *Nilavar v. Osborn*, 137 Ohio App.3d 469, 499, 738 N.E.2d 1271 (2d Dist. 2000).

[6] *See Crosby v. Rose*, 4th Dist. Pike No. 97CA594, 1998 WL 51603, *5 (Feb. 11, 1998), citing Civ.R. 26(B)(1); *First Bank of Marietta v. Mitchell*, 4th Dist. Washington No. 82 X 5, 82 X 14, 1983 WL 3307, *12 (Nov. 29, 1983) (Citation omitted.) ("The Civil Rules and the commentators are in unanimous agreement that the scope of discovery under Civ.R. 26(B)(1) is not limited to matters which are admissible into evidence, but extend to all matters not privileged, which is relevant to the subject matter involved in the pending action.").

[7] *Grantz v. Discovery for Youth*, 12th Dist. Butler Nos. CA2004-09-216, CA2004-09-217, 2005-Ohio-680, ¶11, citing *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 85, 523 N.E.2d 902 (8th Dist. 1987).

[8] *Alpha Benefits Agency, Inc. v. King Ins. Agency, Inc.*, 134 Ohio App.3d 673, 680, 731 N.E.2d 1209 (8th Dist. 1999), citing *Arnold v. Am. Natl. Red Cross*, 93 Ohio App.3d 564. 575, 639 N.E.2d 484 (8th Dist. 1994).

[9] *Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. Clinton No. CA2008-01-001, 2008-Ohio-5669, ¶ 7, quoting *Henderson Elec. Co. of Ohio, Inc. v. Elan Constr. Mgt. Serv.* 92 Ohio App.3d 98, 101, 634 N.E.2d 267 (1st Dist. 1993). *See Grantz*, 2005-Ohio-680 at ¶ 12, citing *Dirkshing v. Blue Chip Architectural, Inc.*, 100 Ohio App.3d 213, 227, 653 N.E.2d 718 (12th Dist. 1994) ("It is well-established that the regulation of discovery is committed to the sound discretion of the trial court * * *.").

or that the scope of the discovery be limited to certain matters * * *."[10]

"The decision whether to grant or deny the protective order is within the trial court's discretion * * *."[11] A court may issue a protective order under Civ.R. 26(C) to prevent "fishing expeditions," where a discovery request is broad and the party making the discovery request fails to demonstrate a likelihood that relevant evidence will be obtained.[12]

Furthermore, Civ.R. 26(C) also requires that the movant "shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery."[13] In doing so, the motion for protective order must "be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph."[14]

If the court denies the motion for protective order in whole or in part, then the court may order that a party provide discovery on "terms and conditions as are just."[15] Moreover, Civ.R. 26(C) states that awards for expenses incurred from the motion for a protective order are governed by Civ.R. 37(A)(5), which is discussed below.

While Civ.R. 26 provides a mechanism to protect a responding party from answering interrogatories or producing documents, Civ.R. 37 provides a mechanism for the party seeking discovery to compel the responding party to answer interrogatories or

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[10] Civ.R. 26(C).
[11] *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 155 Ohio App.3d 653, 2003-Ohio-7257, 802 N.E.2d 732, ¶ 9 (6th Dist.), citing *Ruwe v. Springfield Twp. Bd. of Trustees*, 29 Ohio St.3d 59, 61, 505 N.E.2d 957 (1987).
[12] *Drawl v. Cleveland Orthopedic Ctr.*, 107 Ohio App.3d 272, 277-278, 668 N.E.2d 924 (11th Dist. 1995).
[13] Civ.R. 26(C).
[14] Id.
[15] Id.

produce documents.[16] A party may make a motion to move the court to compel an opposing party to respond to discovery requests when the opposing party fails to answer an interrogatory or fails to permit the inspection of documents.[17] For purposes of a motion to compel, "an evasive or incomplete answer or response shall be treated as a failure to answer or respond."[18]

The procedure for moving the court to compel discovery is provided for in Civ.R. 37:

> "On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action."[19]

Courts may deny a motion to compel when the movant fails to attempt to "resolve the matter prior to filing the motion to compel," as required in Civ.R. 37.[20] The purpose of this requirement is "to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort."[21] Moreover, the party opposing the discovery bears "the burden of demonstrating to the trial court that the

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[16] *See Papadelis v. Charter One Bank, F.S.B.*, 8th Dist. Cuyahoga No. 84581, 2005-Ohio-288, ¶ 16 ("Civ.R. 37(A) authorizes motions to compel discovery.").
[17] Civ.R. 37(A)(3).
[18] Civ.R. 37(A)(4).
[19] Civ.R. 37(A)(1).
[20] *See Image Sciences, Inc. v. Design Linc Corp.*, 12th Dist. Warren No. CA95-07-074, 1996 WL 56049, *3 (Feb. 12, 1996). *See Crosby*, 1998 WL 51603 at *6 (finding that in the absence of efforts by the movant to resolve the discovery dispute, a trial court may properly deny a motion to compel).
[21] *Studer v. Seneca County Humane Society*, 3d Dist. No. 13-99-59, 2000 WL 566738, *6 (May 4, 2000), citing 1994 Staff Note, Civ.R. 37.

required information would not reasonably lead to the discovery of admissible evidence."[22]

If the court grants a motion to compel, the court shall require the opposing party that necessitated the motion, and/or the party's counsel, to pay for the movant's "reasonable expenses incurred in making the motion, including attorney's fees."[23] However, the court shall not order payment if the movant filed the motion before attempting in good faith to obtain the discovery without judicial intervention, the opposing party's response or objection was substantially justified, or other circumstances would make the award unjust.[24] If the movant's motion to compel is denied, the court shall require the movant and/or the movant's counsel to pay the party "who opposed the motion its reasonable expenses incurred, including attorney's fees."[25] "If the motion is granted in part and denied in part, the court may * * * apportion reasonable expenses for the motion."[26]

LEGAL ANALYSIS

I. MOTION FOR PROTECTIVE ORDER

The respondent has moved for a protective order under Civ.R. 26(C) to protect it from producing any more of Humphrey's notebook than it has already produced. The

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[22] *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6194, 928 N.E.2d 763, ¶ 44 (10th Dist.), citing *Patterson v. Zdanski*, 7th Dist. No. 03 BE 1, 2003-Ohio-5464, ¶ 19.
[23] Civ.R. 37(A)(5).
[24] Civ. R. 37(A)(5)(a).
[25] Civ.R. 37(A)(5)(b).
[26] Civ.R. 37(A)(5)(c).

relator claims that the respondent did not satisfy Civ.R. 26(C) because it failed to engage in meaningful efforts to address the discovery problem through discussion or certify that it did so with a supporting affidavit. The respondent counters that a protective order is simply a remedy available to the court in addressing the relator's motion to compel.

As explained, Civ.R. 26(C) states that the movant "shall make a reasonable effort to resolve the matter through discussion with an attorney" before moving for a protective order. Further, Civ.R. 26(C) states that the motion "shall be accompanied by a written statement reciting the effort made to resolve the matter * * *." When the movant for a protective order does not comply with Civ.R. 26(C)'s mandates, it should be denied.[27]

In the present case, the respondent's motion for protective order did not contain a statement indicating that respondent's counsel made a reasonable effort to resolve the discovery dispute through discussion, contrary to Civ.R. 26(C). Thus, the court denies the respondent's motion for protective order. The issue of whether costs should be awarded is dealt with at the end of Section II.

II. MOTION TO COMPEL

[27] *See State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 19 (2007), citing *Dennis v. State Farm Ins. Co.*, 143 Ohio App.3d 196, 200, 757 N.E.2d 849 (7th Dist. 2001) ("Register's motion for a protective order failed to comply with Civ.R. 26(C) because she did not include a statement reciting her effort to resolve the matter through discussion with Citizens' counsel. Therefore, we deny Register's motion for a protective order."); *Hattie v. Sherman*, 9th Dist. Lorain No. 97CA006809, 1998 WL 318464, *6 (June 17, 1998) (remanding case to trial court after trial court improperly granted protective order after construing the response of a non-movant to a motion to compel discovery as a motion for protective order; the response did not comply with Civ.R. 26(C)); *Dennis*, 143 Ohio App.3d at 200 (failure to comply with Civ.R. 26(C) requirement by filing statement of efforts to resolve the matter constitutes a sufficient reason to vacate a protective order).

In his motion to compel, the relator argues that Humphrey's notebook may contain information that is reasonably calculated to lead to the discovery of admissible evidence. Further, he posits that he is not restricted to the dates that he listed in his complaint, because those were not an exhaustive list of dates, but merely examples of dates on which OMA violations occurred. The respondent argues that Humphrey's personal notes, aside from the ones already produced, are not relevant to the subject matter of the pending litigation. Instead, it maintains that the relator is using discovery as a fishing expedition to uncover information that would allow him to bring additional lawsuits.

In order for the court to determine whether the discovery request for the notebook is reasonably calculated to lead to the discovery of admissible evidence, it is helpful to briefly examine the OMA. R.C. 121.22(G), known as the OMA or "Ohio's Sunshine Law, * * * requires that public officials, when meeting to consider official business, conduct those meetings in public."[28] The statute "seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to the public."[29] Meetings by the public body are "public meetings open to the public at all times."[30] Moreover, R.C. 121.22 explicitly states that it is to be "liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[31]

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[28] *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, 928 N.E.2d 1082, ¶ 20, quoting *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 668 N.E.2d 903 (1996).
[29] *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. Clermont Nos. CA2011-05-045, CA2011-06-047, 2012-Ohio-2569, ¶ 14, citing *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032 (1st Dist.).
[30] *State ex rel. Ross*, 2010-Ohio-2167 at ¶ 20, citing R.C. 122.22(C).
[31] R.C. 121.22(A).

Notwithstanding the requirement of openness, "if specific procedures are followed, public officials may discuss certain sensitive information privately in an executive session."[32] Much of the underlying suit arises from the relator's contention that the respondent violated R.C. 121.22(G), governing executive sessions. R.C. 121.22(G) provides: "'* * * [M]embers of a public body may hold an executive session only after a majority of quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters * * *." R.C. 121.22(G) then lists several bases that permit public bodies to go into executive session, such as to consider the purchase of public property or to conference with an attorney, for instance.

Further, examining how the shifting burden of proof operates for OMA claims helps illuminate the interests the relator has in reviewing the additional meeting notes:

> "[I]n an action brought under R.C. 121.22, the plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions in of R.C. 121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid."[33]

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[32] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 16, citing *Tobacco Use Prevention & Control Found. Bd. Of Trustees v. Boyce*, 185 Ohio App.3d 717, 2009-Ohio-6993, 925 N.E.2d 641, ¶ 64 (10th Dist.).

[33] *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 900, ¶ 25. *See State ex rel. Cincinnati Enquirer v. Hamilton County Com'rs*, 1st Dist. Hamilton No. C-010605, 2002 WL 727923, *3 (Apr. 26, 2002), citing *State ex rel. National Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988), paragraph two of the syllabus ("The burden is on the public body to justify the resort of executive session under one or more of the exceptions to the Sunshine Law found in R.C. 121.22(G).").

In turning to the case at bar, the respondent has not argued that the notebook is privileged or too burdensome to produce. Additionally, in oral argument the respondent's counsel stated that the additional portions would not embarrass Humphrey. Instead, the respondent argues that the unproduced portions of the notebook are irrelevant and will only serve to annoy Humphrey.

Whether the documents will annoy Humphrey is relevant to a motion for protective order under Civ.R. 26(C), but as discussed, that has been denied. Under Civ.R. 26(B), the relevant inquiry in determining whether the notebook is discoverable is whether the notebook is reasonably calculated to lead to the discovery of admissible evidence. Although the respondent argues that the relator should be restricted to notes from the dates listed in his complaint, the court does not believe that the scope of discovery is so limited.

As mentioned, the scope of discovery is not limited to the issues in the case, but to the subject matter of the litigation, which is broader in scope. The subject matter in this case concerns the board's meetings and executive sessions. Notes from other meetings or executive sessions may contain information referencing prior meetings or executive sessions, or they may provide further context for past or future meetings or executive sessions listed in the complaint. Given that parties should generally be granted broad leeway in discovering material that may be useful to them in preparing for litigation, the court believes that Humphrey's notes taken at board of commissioners meetings and during executive sessions should be produced.

However, notes Humphrey took outside of board of commissioners meetings and executive sessions are not reasonably calculated to lead to the discovery of admissible

evidence. Unlike ancillary board of commissioner meetings and executive sessions, unrelated meetings or personal affairs are not relevant to the present case. Thus, the respondent need not produce notes from other meetings or notes concerning personal or work matters, so long as those notes were made outside of the board meetings and executive sessions.

Concerning an award of expenses, as set forth above, when a motion to compel or a protective order "is granted in part and denied in part, the court may * * * apportion reasonable expenses for the motion."[34] The court has allowed the relator to receive some of Humphrey's notes, although not all of the notes he requested. In other words, some of the respondent's objection to production was substantially justified. Given the balance of the discovery order, the court finds that neither party shall be required to pay the other party for the reasonable expenses associated with the motion. The court also declines to award expenses concerning the motion for protective order. The respondent's motion, and the relator's response in opposition, are very small portions of the parties' briefs, each consisting of only one paragraph.

CONCLUSION

For the foregoing reasons, the court grants the realtor's motion to compel in part and denies it in part. The respondent must produce Edwin Humphrey's notes that he recorded at (1) meetings of the Clermont County Board of Commissioners, and (2) executive sessions entered into by the Clermont County Board of Commissioners. The

[34] Civ.R. 37(A)(5)(c). As discussed, Civ.R. 37(A) also governs expenses associated with a protective order as well.

court orders the respondent to comply with this discovery order, as detailed above, within 14 days from the date of this entry.

Regarding the respondent's motion for a protective order, the court does not find it well-taken and hereby denies it.

IT IS SO ORDERED.

DATED: 11-9-18

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 9th day of November 2018 by e-mail to Jennifer M. Kinsley, at kinsleylawoffice@gmail.com, and Matt Miller-Novak, at Matt@godbeylaw.com, Attorneys for the Plaintiff, and G. Ernie Ramos, at eramos@clermontcountyohio.gov, and Jeannette Nichols, at jnichols@clermontcountyohio.gov, Attorneys for the Defendant.

Judicial Assistant to Judge McBride