

IN THE COURT OF APPEALS
FRANKLIN COUNTY, OHIO

| | | |
|-------------------------------|---|-----------------|
| The State of Ohio ex rel. |) | |
| BUCKEYE ENVIRONMENTAL |) | |
| NETWORK |) | |
| P.O. Box 824 |) | CASE NO. _____ |
| Athens, Ohio 45701 |) | |
| |) | |
| Relator, |) | |
| |) | |
| vs. |) | ORIGINAL ACTION |
| |) | IN MANDAMUS |
| THE OHIO DEPARTMENT OF |) | |
| NATURAL RESOURCES |) | |
| c/o James Zehringer, Director |) | COMPLAINT |
| ODNR Fountain Square Campus |) | |
| 2045 Morse Road, Bldg. D |) | |
| Columbus, Ohio 43229-6693 |) | |
| |) | |
| Respondent. |) | |
| |) | |

Now comes Relator, Buckeye Environmental Network (“BEN”),
by and through its undersigned counsel, and for its Complaint against
Respondent, the Ohio Department of Natural Resources (“ODNR”),
states as follows:

1. This is a mandamus action brought under the Ohio Public Records Act (“the Act”), R.C. 149.43, for a writ compelling the Respondent ODNR to provide Relator BEN with an opportunity to inspect public records in Respondent’s possession as requested by Relator on May 22, 2018, and for court costs and attorneys’ fees as provided by the Act.
2. As of the date of the filing of this Complaint, Respondent ODNR has violated the Act by flatly denying Relator’s request on the false assertion that the request was vague and overbroad despite Relator’s having specifically and adequately identified the public records requested for inspection.
3. In support of this Complaint, BEN has attached as Exhibit A the affidavit of Teresa Mills, a member of BEN, who has personal knowledge of the matters averred therein.
4. This Court has jurisdiction over this original action pursuant to R.C. 149.43(C)(1) and Section 3(B) of Article IV of the Ohio Constitution.
5. Relator BEN is a non-profit Ohio corporation with members across Ohio who are concerned about human health and environmental quality,

including harmful impacts on those values caused by pollutants under the regulatory authority of Respondent ODNR. The subject matter of BEN's illegally denied public records request is consistent with this purpose as it was to inspect records in Respondent's possession pertaining to a product distributed for commercial and residential use in Ohio called "AquaSalina" which is produced from liquids contaminated by radioactive isotopes and chemicals that are discharged from oil and gas production wells regulated by Respondent ODNR.

6. ODNR is a public office of the State of Ohio with possession and control of the records that BEN seeks. The records sought by BEN pertain to ODNR's statutory duties under R.C. Chapter 1509 to oversee the handling of waste fluids created by oil and gas production in the State of Ohio.

7. The Ohio Public Records Act requires public offices of the State of Ohio, upon request, to allow inspection and copying of information in their possession to the public unless one of thirty-two (32) specific statutory exemptions applies to the information. R.C. 149.43(A)(1)(a-ff); (B)(1). None of the statutory exemptions is applicable to the

Relator's records request and Respondent's failure to comply with Relator's request is in violation of this requirement.

8. Respondent ODNR's Public Records Policy, maintained on the Department's web-site at <http://ohiodnr.gov/offices-programs/human-resources/policies-procedures/policies/public-records-policy-and-procedure>, last accessed on June 12, 2018, requires, at ¶7(e), that:

“Public records must be made available for inspection promptly. Copies of public records must be made available within a reasonable period of time. “Prompt” and “reasonable” take into account the volume of records requested; the form of the requested records; the proximity of the location where the records are stored; and the necessity for any pre-release review of the records requested. If a requester wishes to review public records in person, public records will be made available for inspection during regular business hours with an appointment.”

This policy also creates a standard for the level of clarity needed in the making of a public records request, at ¶7(a)(i), that:

“Although the Public Records Act does not require that specific language be required to make a public records request, the requester must identify the records requested with sufficient clarity to allow the public office to identify, retrieve, and review those records.”

R.C. 149.43(B)(7)(b) provides that: “[a] public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.” Any failure of Respondent ODNR to comply with its own records policy is actionable under R.C. 149.43(C)(1). Respondent ODNR failed to comply with its Public Records Policy by failing to respond to Relator’s request promptly and by denying its request on the grounds of vagueness and overbreadth grossly in excess of the standard stated in its rules and which is impossible for Relator to comply.

FACTS GIVING RISE TO RELATOR’S CLAIMS FOR RELIEF

9. On May 22, 2018, Relator BEN, through its member Teresa Mills, served a public records request on Respondent ODNR through electronic mail directed to an employee responsible for public records requests in the Respondent’s oil and gas division that regulates wastes from oil and gas production operations. The electronic mail contained as an attachment a letter dated May 21, 2018, containing the public records request, Exhibit B, and the body of the e-mail repeated the contents of that letter. These communications were identified as a “Request to

inspect records” pursuant to R.C. 149.43, and identified two categories of documents for inspection as follows:

“1. Records held by your agency regarding Nature’s Own Sources/AquaSalina.

“2. Communication between your agency and Dave Mansbery, owner of Duck Creek Energy, Inc.”

The public records request concluded with a request to inspect those records at the Department’s offices on May 29, 2018, unless the Department specified a different time.

10. AquaSalina is a commercial product for ice control sold in Ohio for residential and commercial use and is produced by a company identified in the public records request, “Nature’s Own Sources.”

AquaSalina is regulated by Respondent ODNR as it is derived from highly saline liquids discharged from oil and gas wells, which liquids also contain chemicals and radioactive isotopes. ODNR had previously released laboratory results on AquaSalina documenting that it contained high levels of radioactivity in excess of the lawful limits for radiation in

drinking water. The request requested inspection of all documents held by Respondent regarding this company and its product.

11. The individual identified in the second paragraph of the request is the owner of “Nature’s Own Sources” and is also the owner of the oil and gas company identified in the second paragraph, Duck Creek Energy, Inc. The request was for all communications between this individual and Respondent.

12. By specifying the name of a specific company and its specific product and specifying the communications of a named individual with Relator who was further identified by the company that he owned, Relator satisfied the requirements of the Act that the Respondent could “reasonably identify what public records are being requested” for inspection, R.C. 149.43(B)(2), and the requirement in Respondent’s own public records policy that “the requester must identify the records requested with sufficient clarity to allow the public office to identify, retrieve, and review those records,” see ¶8 above.

13. On May 25, 2018, Respondent ODNR sent a letter, Exhibit C, to Ms. Mills stating that her request of May 22 “must be denied as

overbroad as it does not identify with reasonable clarity specific records.”

14. The words used in Exhibit C itself demonstrate it is insufficient to excuse refusing Relator access to the requested records. Regarding communications between the identified person and ODNR, the letter states on page 2 that “e-mails may be searched by a sender or recipient,” a condition which is satisfied by the request, but Respondent did not retrieve those records for Relator’s inspection as the Act requires. Also, on page 2, in a paragraph summarizing its own methods of maintaining records, Respondent states that “The Division’s Underground Injection Control Program maintains a physical file of documents on Duck Creek Energy, Inc./AquaSalina,” but does not make this file available to Relator for inspection despite its being responsive to the records request. Third, the letter states that “the Division’s Radiation Safety Section’s records are generally sorted by project.” This program is closely related to the public controversy over AquaSalina, but these important records also were not made available for inspection even though identifying the product and its manufacturer are reasonably sufficient to allow

Respondent's employees to retrieve responsive documents by determining which internally designated "project" related to those identified entities. As no person outside the Respondent could know the arbitrary "project" name assigned by Respondent, denying Relator's request on that basis would allow the denial of all records requests directed to that Section and thereby completely defeat the purposes of the Act. Similarly, the Engineering files are sorted by facility, which is also readily ascertainable by Respondent once it is provided the company name by Relator.

15. Respondent ODNR's position is that a request must be so highly particularized that Respondent must undertake no ministerial act of any kind to identify and retrieve the responsive records. This standard violates the Act's requirement that a request need only "reasonably identify what public records are being requested" for inspection, R.C. 149.43(B)(2). If, as Respondent claims, its retrieval system can only function when specific records with full and exacting detail is provided, Respondent violates the provision of R.C.149.43(B)(2) that:

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section.

16. In light of Respondent's failure to produce the requested records for inspection with no lawful excuse and its failure to comply with its duties under Ohio's Public Records Act, BEN is filing this Complaint for a writ of mandamus.

RELATOR'S CLAIM

17. Respondent ODNR has possession of the records requested by BEN in its public records request described above.

18. These records are public records under the Public Records Act.

19. BEN has a statutory right to the records it seeks under the Public Records Act and no legal basis exists for ODNR's refusal to provide the records.

WHEREFORE, Relator Buckeye Environmental Network respectfully requests that this Court:

- (1) Issue a Peremptory Writ in Mandamus ordering Respondent ODNR to immediately provide the requested records to Relator for inspection;
- (2) Award Relator its reasonable attorney's fees and court costs in this action; and
- (3) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Richard C. Sahli

Supreme Court ID 0007360

Richard Sahli Law Office LLC

981 Pinewood Lane

Columbus, OH 43230

Phone: 614-428-6068

e-mail:

rsahliattorney@columbus.rr.com

PRAECIPE FOR SERVICE

TO THE CLERK:

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

/s/Richard C. Sahli

Supreme Court ID 0007360

EXHIBIT A

STATE OF OHIO)
) SS: VERIFYING AFFIDAVIT FOR
COUNTY OF FRANKLIN) WRIT OF MANDAMUS

I, Teresa Mills, being duly sworn, state under penalty of law that the following is true:

1. I am a member of the Buckeye Environmental Network ("BEN"), a non-profit corporation organized under the laws of Ohio that is comprised of individuals concerned about human health impacts arising from the state's environmental quality, including impacts from the disposal of the wastes from oil and gas production operations, among other concerns. I am a resident of Franklin County.
2. I have reviewed each and every line in the foregoing Complaint for a writ of mandamus and the exhibits attached thereto.
3. I am personally familiar with all of the matters alleged in the Complaint as I personally prepared and served on Respondent ODNR the public records request described therein.
4. The facts and allegations contained in the foregoing Complaint are true.
5. The exhibits attached to the Complaint are true and exact copies of the originals and are what they purport to be.
6. I have a good faith belief that Respondent ODNR has failed to comply with Ohio's Public Records Act for the reasons stated in the Complaint.


Signature of Affiant


Printed

SWORN TO before me and subscribed in my presence this 13th day of June, 2018.



Shirley A. Spellman
Notary Public, State of Ohio
My Commission Expires 08-19-2019


Notary Public

EXHIBIT B



**BUCKEYE
ENVIRONMENTAL
NETWORK**

May 21, 2018

Adam Schroeder
Ohio Department of Natural Resources
Division of Oil & Gas Resources Management

Re: Request to inspect records

Dear Mr. Schroeder:

On behalf of the Buckeye Environmental Network, please allow me to inspect the following records as allowed by the Public Record Act, R.C. 149.43 They are:

1. Records held by your agency regarding Nature's Own Sources/AquaSalina.
2. Communication between your agency and Dave Mansbery, owner of Duck Creek Energy, Inc

Please make those records available by Tuesday May 29, 2018.

Unless you advise me to come at a different time or different day, I will be at your office to inspect the records at 10 a.m. on Tuesday, May 29, 2018.

If you decide to deny any part of this request, please provide your reason in writing, along with legal authority that supports your decision.

You can reach me at (614) 539-1471 or by email at tmills@benohio.org or tmills@chej.org or

Thank you

Sincerely,

Teresa Mills



Ohio Department of Natural Resources

EXHIBIT C

JOHN R. KASICH, GOVERNOR

JAMES ZEHRINGER, DIRECTOR

Ohio Department of Natural Resources
Division of Oil & Gas Resources Management
2045 Morse Road, Building F-2
Columbus, OH 43229
Voice: (614) 265-6922 Fax: (614) 265-6910

May 25, 2018

Teresa Mills
2319 Parkridge Court
Grove City, Ohio 43213
tmills@chej.org

Re: Public Record Request #3251

Dear Ms. Mills:

On May 22, 2018, the Ohio Department of Natural Resources (“ODNR”) received an email from you in which you requested to inspect public records, pursuant to R.C. 149.43. A copy of your request is attached for your convenience. Specifically, you asked to inspect:

1. “Records held by [ODNR] regarding Nature’s Own Sources/AquaSalina.” and
2. “Communications between [ODNR] and Dave Mansbery, owner of Duck Creek Energy, Inc.”

Unfortunately, request must be denied as overbroad as it does not identify with reasonable clarity specific records. “[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, 2006-Ohio-6365, ¶ 29, quoting *State ex rel. Fant v. Tobert*, 68 Ohio St.3d 117, 1993-Ohio-154, 623 N.E.2d 1202 (1993). A governmental office has no duty to “seek out and retrieve those records which would contain the information of interest to the requester.” *State ex rel. Fant v. Tober*, No. 63737, 1993 Ohio App. LEXIS 2591 at *4 (8th Dist. Apr. 28, 1993); *aff’d* 68 Ohio St.3d 117 (1993); *see also State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 315 (2001) (finding a public records request for all records containing a particular name was overbroad); *Hicks v. Newtown, Ct. of Cl.* No. 2017-Ohio-00612-PQ, 2017-Ohio-8952, ¶ 8 (“A request to search for information ‘regarding,’ or ‘relating’ to, a topic is generally improper”); *State ex rel. Bristow v. Baxter*, 2018-Ohio-1973, ¶12 (“[R]equests for every email sent and received by respondents and their employees are overly broad.”)

Furthermore, your request does not specify a time frame and while some communications, such as emails for example, may be searched by a sender or recipient, not all communications or correspondence throughout ODNR are organized by sender and recipient. *See State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989) (finding relator's request did not comport with the method of retrieval used by the government entities).

Pursuant to R.C. 149.43(B)(2), ODNR must provide you with an opportunity to revise your request by informing you of the manner in which records are maintained by ODNR in the ordinary course of its duties. Specifically, as to the Division of Oil & Gas Resources Management ("Division"), the Division maintains and accesses its records in the ordinary course of its duties based on function and use. For example, as mentioned above, ODNR's emails may be sorted by sender or recipient. The Division's Underground Injection Control Program maintains a physical file of documents on Duck Creek Energy, Inc./AquaSalina. The Division's Engineering files are sorted by County and then by Facility. The Division's Legal files are sorted by legal issue or litigation case. Additionally, the Division's Radiation Safety Section's records are generally sorted by project.

If you wish to revise your request, you may also benefit from reviewing the ODNR's records retention schedules, which you can access and search electronically at <http://apps.das.ohio.gov/rims/SelectMenu/Selection.asp>. Click on the "Make Selections" page and then follow the "agency/Division/Section List" page to choose the various divisions in which you are interested.

If you require further assistance in clarifying your request, please feel free to contact our office. Thank you.

Sincerely,

Jennifer A. Barrett

Jennifer A. Barrett
Attorney
Division of Oil & Gas Resources Management

Enclosures