

As everyone present tonight knows, Councilwoman Kowalski was censured by this Council on December 6, 2022 for her unlawful pursuit of prosecution of campaign finance violations causing the city to spend money without council authorization. It began on July 19th, 2022 when Ms Kowalski forwarded an e-mail from Don Reed, identified as “a citizen,” to the Hudson Solicitor and Special Counsel, in an effort to express a duty on behalf of the city to pursue action against individuals who may have committed campaign finance violations under Hudson Ordinance 226.01. The discussions surrounding this issue caused the expenditure of public funds without council authorization, which, in part, resulted in the censure of Ms. Kowalski on December 6, 2022. Unfortunately for the City of Hudson, the story did not end there.

Tonight, I have with me an order from the Summit County Court of Common Pleas in the lawsuit filed against the City by Councilwoman Nicole Kowalski. I will pass it out now.

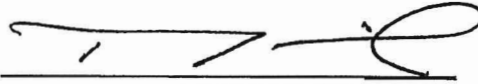
As you can see from the order, in the aftermath of Ms. Kowalski’s December 2022 censure, she purposefully emailed privileged records to resident Don Reed. Her actions were both improper and illegal. Her conduct was improper because she contrived with Mr. Reed on how to create a false narrative about her censure and to defame me. It was illegal because she emailed Mr. Reed privileged records in violation of Ohio law and her oath.

I move that, in the exercise of its legislative authority, that this Council express its opinion and again censure Councilwoman Nicole Kowalski, verbally rebuking her for acting unlawfully based upon the following:

1. On December 10th, 2022, four days after her initial censure, Ms. Kowalski e-mailed two PDF documents in their entirety to Hudson resident Don Reed, the same individual identified as “a citizen” in Ms. Kowalski’s initial campaign finance effort. Those PDF documents included attorney-client privileged materials.
2. On December 19th, 2022, Don Reed, who is not formally affiliated with City Council in any way, emailed his email conversation with Ms Kowalski to all of Council and the mayor’s office, evidencing that Ms. Kowalski had sent Mr. Reed privileged documents. These emails were subsequently downloaded by some members of this Council and submitted into evidence later with the court.
3. On December 21st, 2 days after Don Reed sent his email to the City, Ms. Kowalski’s lawyer, at that time Hillary Desaussure, filed a lawsuit against the City. That lawsuit sought to remove the privilege from the documents Ms. Kowalski e-mailed to Mr. Reed. The lawsuit was an attempt to avoid presumptive guilt under Ohio Revised Code 102.03(B), which makes it clear that public officials are prohibited from disclosing privileged information learned in the course of their public duties. Such a Disclosure is a violation of the Ohio Revised Code under Section 102.99 subject to up to a \$1,000 fine and/or 180 days incarceration according to R.C. 102.99(B), which lists the penalty as a misdemeanor in the first degree.
4. Ms. Kowalski’s lawsuit was dismissed, and the court held that the city documents Ms. Kowalski emailed to resident Don Reed were privileged.

5. The email correspondence between Ms. Kowalski and Mr. Reed also shows that Ms. Kowalski instructed Mr. Reed in how to request documents from the City and assisted in contriving and delivering a narrative to maliciously defame a member of Council.
6. Ms. Kowalski has undermined the privilege of this body in an attempt to attack the body of Council broadly and Council President Foster specifically.
7. It is also the duty of this Council to remind Ms. Kowalski that under Hudson Charter Section 3.13 that an act of gross misconduct, malfeasance, or that a violation of her oath of office is cause for expulsion from office.

Respectfully submitted,



THEODORE J. LESIAK (0041998)
KRISTOPHER IMMEL (#0088659)
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kimmel@rlblp.com

CERTIFICATE OF SERVICE

A copy of the foregoing was served on the following via email and U.S. Mail this 22nd day of August 2023:

Hamilton DeSaussure, Jr. (0023516)
Stark & Knoll Co. LPA
3475 Ridgewood Road
Akron, Ohio 44333
Telephone: (330) 376-3300
Fax: 330-572-1278
hdesaussure@stark-knoll.com

Thomas W. Bevan
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6555 Dean Memorial Parkway
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(Fax) 330-467-4493
bosborn@bevanlaw.com
Attorneys for Relator



THEODORE J. LESIAK (0041998)
KRISTOPHER IMMEL (#0088659)
Attorneys for Respondent City of Hudson

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

NICOLE KOWALSKI, et al.

CASE NO. CV-2022-12-4298

JUDGE TAMMY O'BRIEN

Appellants and Relators

**AFFIDAVIT OF
THEODORE J. LESIAK**

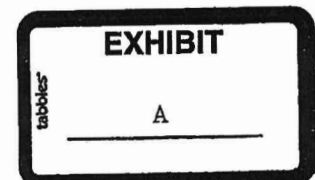
V.

CITY OF HUDSON et al

Appellees and Respondents

THEODORE J. LESIAK, being first duly sworn according to law, deposes and states:

1. This affidavit is made upon my personal knowledge and information.
2. I am attorney licensed to practice law in the State of Ohio, and represent the City of Hudson in the above captioned matter.
3. On August 22, 2023, I received an email from Don Reed in response to a subpoena Hudson served upon Don Reed. This email is attached hereto and marked Exhibit 1.
4. On December 10, 2022, Nicole Kowalski shared attachments labeled NK Censure-Documents 1 and NK Censure-Documents 2 with Don Reed by email.
5. NK Censure-Documents 1 and NK Censure-Documents 2 provided by Don Reed to me in response to Hudson's subpoena are identical to unredacted versions of redacted documents sought by Nicole Kowalski in her December 12, 2022 public records request to the City of Hudson.



6. The unredacted versions of redacted documents sought by Nicole Kowalski in her December 12, 2022 public records request to the City of Hudson have been filed with the Court in the above captioned matter under seal.

FURTHER AFFIANT SAYETH NAUGHT.



THEODORE J. LESIAK

SWORN TO BEFORE ME and subscribed in my presence this 22nd day of August 2023.



MICHELLE L. FERGUSON, NOTARY PUBLIC
Residence - Medina County
State Wide Jurisdiction, Ohio
Expiration Date 10/13/2023



NOTARY PUBLIC

Theodore Lesiak

From: Don Reed <doncollinsreed@icloud.com>
Sent: Tuesday, August 22, 2023 9:22 AM
To: Theodore Lesiak
Subject: In reference to CV-2022-12-4298

Attachments available until Sep 21, 2023

NOTE: After the trouble sending yesterday, I tried just now to send the email with attachments to myself, and it also disappeared. I have now saved the documents to a different folder and will try again.

=====

Mr. Lesiak:

The email chain below was sent by me to Nicole Kowalski and Council@hudson.oh.us. It contains all the records I have of communications between Nicole Kowalski and myself relating to Council's vote to censure her. It also contains communication about a statement I planned to present at the meeting of Council following the censure vote. The statement did not relate directly to the censure or the attached documents.

Please find two documents attached. You will see from the email chain that I believed the contents of these documents would be provided to me in response to my public records request (on 12Dec22), since Council had waived attorney-client privilege in order to consider them in a public meeting. That at least was my understanding.

Sincerely,

Don Reed

Click to Download

NK Censure-Document 1.pdf
7 MB

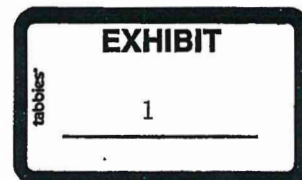
Click to Download

NK Censure-Document 2.pdf
114.6 MB

Begin forwarded message:

From: Don Reed <doncollinsreed@icloud.com>
Subject: Re: Documents
Date: December 19, 2022 at 3:34:39 PM EST
To: Nicole Kowalski <nicoletomak@gmail.com>

1



From: Don Reed <doncollinsreed@icloud.com>

Sent: Monday, December 19, 2022 3:34 PM

To: Nicole Kowalski <nicoletomak@gmail.com>

Cc: Mayor & Council <Council@hudson.oh.us>

Subject: Re: Documents

CAUTION: This email originated from outside the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Just checking whether the Council@hudson.oh.us address worked.

Did you receive the two emails I sent to Jody Roberts this morning (one was slightly after noon)?

On Dec 19, 2022, at 9:23 AM, Don Reed <doncollinsreed@icloud.com> wrote:

Ah. Thanks. The City website is out of date.

Sent from my iPhone

On Dec 19, 2022, at 08:48, Nicole Kowalski <nicoletomak@gmail.com> wrote:

We are now using a guy named Marshal Pitchford as our solicitor.

mpitchford@dpylaw.com

Pitchford is, coincidentally, I am supposed to believe, a supporter of Beth when she has run for the state house and is the Chair for the organization Ohio Right to Life. He was a Foster hire.

Nikki

On Dec 19, 2022, at 7:11 AM, Don Reed <doncollinsreed@icloud.com> wrote:

Nikki,

If you see this before 9:30am, am I correct in believing that we still do not have a regular City Solicitor but are using Todd Hunt as an interim Solicitor?

Thank you,

Don

On Dec 18, 2022, at 9:19 AM, Don Reed <doncollinsreed@icloud.com> wrote:

Thanks

Sent from my iPhone

On Dec 18, 2022, at 09:13, Nicole Kowalski <nicoletomak@gmail.com> wrote:

7:30

Nikki

On Dec 18, 2022, at 4:46 AM, Don Reed <doncollinsreed@icloud.com> wrote:

Thank you. 7pm or 7:30pm?

Don

On Dec 18, 2022, at 12:45 AM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

FYI they changed the meeting back to Tuesday.

Nikki

On Dec 16, 2022, at 1:23 PM, Don Reed <doncollinsreed@icloud.com> wrote:

Thank you. I'll keep both those points in mind.

On Dec 16, 2022, at 11:17 AM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

If you do, you can send to Council@hudson.oh.us and it will go to the full Council and the Mayor.

Also, if you are unable to make it, you can ask Councilwoman Schlademan to read it to be entered into the record

On Fri, Dec 16, 2022 at 11:03 AM Don Reed <doncollinsreed@icloud.com> wrote:

I will. Thanks.

I may send an email anyway, so that there is an "electronic copy" in the record that can easily be retrieved.

On Dec 16, 2022, at 10:46 AM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

Thank you, Don. It is so important people attend so I am hopeful you can still come. LMK if you can't and I will suggest alternative ideas for you to communicate what you need to if that is the case.

On Fri, Dec 16, 2022 at 10:44 AM Don Collins Reed <doncollinsreed@gmail.com> wrote:

Just FYI, I made the public records request on Monday at about 9:30am. Jody Roberts acknowledged my request right away.

When I followed up just now, expressing my hope that my public records request could be met in time for me to review the documents this weekend, I was told that the legal department is reviewing the documents and she will send them as soon as she can.

Have a good weekend,

Don

PS: I am aware the meeting has been moved to Wednesday at 7pm. That is less good for me, but I will do my best to attend.

On Dec 12, 2022, at 9:49 AM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

Interesting.

I like the angle you are taking, it is very different from what most others are focusing on. I think that having printouts and asking the clerk to enter your supplemental materials into the record so that they can be recorded with your statement will also be important. I would create a cover page that states it corresponds with your statement so that she can keep it all together.

On Mon, Dec 12, 2022 at 9:23 AM Don Collins Reed <doncollinsreed@gmail.com> wrote:

Thank you. I'm pulling together a bit more information.

I'll put in that public records request to Jody Roberts today.

None of what I'm likely to find will help you much, but it reflects poorly on Foster so far as I can tell. The question, from the angle I'm taking, is whether Foster or others (esp. Foster) had a motive to go easy on Norman for her blatant violation of the Hudson campaign finance ordinance, which all the elected officials who contributed to Norman's campaign followed to the letter.

BTW, I hadn't known until I looked that while Norman was inviting and receiving contributions in excess of the legal limit, she gave not one cent to her own campaign.

Don

On Dec 12, 2022, at 9:16 AM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

Hey Don -

I think it looks like your timeline (1-4) is correct, however I didn't sit down and verify the dates and I can't verify whether or not they knew the status of the prosecutor's decision to speak to #4. Because I do not know what they knew or when they knew it, most of the last part of your statement, following the timeline, is conjecture, even if I tend to also believe it.

All I know is that I typically do not know what the rest of Council knows, often having to do records requests or send very direct questions to staff to get answers. So if they knew the status of Sarah's infraction before I did, I can't attest to that but there may be a paper (email) trail somewhere. When I inquired about the law's enforcement, it was because I did not know the status of it.

The only reason the list of emails may be relevant is if you see a subject line that may indicate other relevant information you believe would fill in holes in your timeline.

On Mon, Dec 12, 2022 at 5:27 AM Don Collins Reed <doncollinsreed@gmail.com> wrote:

I threw this together quickly, Nikki, and I'm working on refining it. I'll be back in touch with a better version soon.

Thank you!

Don

On Dec 11, 2022, at 7:06 PM, Don Collins Reed <doncollinsreed@gmail.com> wrote:

Thank you, Nikki.

It looks like these are the two documents / sets of documents that you suggested I request via a public records request. Is that correct? Thank you for the advance look at them.

First, I see the list of billing invoices, but I don't think it's actually relevant to my inquiry as stated below. If you think I'm wrong, please help me understand.

Second, this is probably oversimplified, but it looks to me like the consistent and not contradicted legal advice Council received is that the campaign finance ordinance is constitutional and enforceable, as within the reasoning in the Buckley decision on the constitutionality of campaign finance limits, for the very reason cited in our ordinance, that is, to prevent corruption and the appearance of corruption through the influence of campaign donations. The main sticking point identified is how low our limit is, \$100 per individual — but you tried to address that with legislation in March, and Council defeated your attempt.

One of the reasons Fagnilli gave for seeking an opinion from outside Hudson is that, by her writing on Jan. 12, 2022, the individual [Sarah Norman] had already been appointed to Planning Commission.

So it looks to me like the following would be an accurate account:

Oct. 23, 2021 — Hudson citizen (me) raised the question of SGN's campaign finance violations and asked for a judgment about whether her claim that our limit is unconstitutional and unenforceable is correct.

DATE? — SGN, having failed to be elected to Council, is appointed by the new Council majority to Planning Commission.

Jan. 12, 2022 — Legal opinion is given that SGN's violations could be prosecuted as a minor misdemeanor, since the Hudson ordinance is constitutional and enforceable, but because SGN lost, and therefore did not receive an unfair advantage from them, Angela Lohan (external consulting prosecutor) would not recommend prosecution.

The new Council majority considers this the end of the matter and [perhaps] reports that the advice was not to prosecute (omitting to note that a prosecutable offense was committed).

It seems then that we have at least the appearance of partisan political favoritism given to someone affiliated with the new Council majority through local partisan organizations and elections. Having the evidence of misconduct in hand (the Oct. 2021 memo), they went ahead and appointed her to Planning Commission and directed the City Prosecutor to drop any consideration of the violation.

If you have a chance to consider this, where are the holes in this presentation of the facts to which Foster and/or others would point.

I know you are very busy, so thank you for your help.

Don

On Dec 10, 2022, at 11:14 PM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

Censure-Document 1.pdf

Censure-Document 2.pdf

Did this work?

On Sat, Dec 10, 2022 at 6:46 PM Don Collins Reed <doncollinsreed@gmail.com> wrote:

It appears that you cannot simply forward an invitation sent to another email address, because that address is still attached to the invitation.

On Dec 10, 2022, at 5:21 PM, Nicole Kowalski <nicoletomak@gmail.com> wrote:

Here you go!

Censure-Document 1.pdf

Censure-Document 2.pdf
attached

From: Don Reed <doncollinsreed@icloud.com>
Sent: Monday, December 19, 2022 12:08 PM
To: Jody Roberts <JRoberts@hudson.oh.us>
Cc: Mayor & Council <Council@hudson.oh.us>; Sara Fagnilli <sfagnilli@hudson.oh.us>
Subject: Re: Public Records Request for documents released at the Dec. 6 Hudson Council Mtg

CAUTION: This email originated from outside the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thank you, Ms. Roberts.

I am honestly at a loss to understand how Attorney-Client privilege could have been waived in a public vote in the meeting of the Hudson City Council on December 6, so that documents could be viewed in support of a motion made in that meeting after the documents were made public, and yet that Attorney-Client privilege could still be invoked as protecting documents from release as public records.

Sincerely,

Don Reed

On Dec 19, 2022, at 11:24 AM, Jody Roberts <JRoberts@hudson.oh.us> wrote:

Dear Mr. Reed,

Please see the attached documents which are responsive to your request for public records. The documents have been redacted because they either are not responsive to the request or redacted based on Attorney-Client privilege.

R.C. §149.43 (A)(1)(v) excludes City records from the definition of a "public record" if the requested record's release is protected by state or federal law. This request specifically seeks communications with legal counsel for the City. These communications are not public record. "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of those records." State ex rel. Dawson v. Bloom-Carroll Local School Dist., 131 Ohio St.3d 10, 2011-Ohio-6009 at ¶ 27, quoting State ex. rel. Besser v. Ohio State Univ. (2000), 87 Ohio St.3d 535, 542, 721 N.E.2d 1044. The attorney-client privilege is governed both by statute, which provides a testimonial privilege, and by common law, which "broadly protects against any dissemination of information obtained in the confidential attorney-client relationship." Dawson, citing State ex. rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth., 121 Ohio St.3d 537, 2009-Ohio-1767, ¶ 24.

Jody Roberts

Communications Manager

<image001.jpg>
1140 Terex Road
Hudson, OH 44236

p: 330-342-9539
w: www.hudson.oh.us

From: Don Reed <doncollinsreed@icloud.com>

Sent: Monday, December 12, 2022 9:36 AM

To: Jody Roberts <JRoberts@hudson.oh.us>

Subject: Public Records Request for documents released at the Dec. 6 Hudson Council Mtg

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Dear Ms. Jody Roberts,

Please send me copies of the two documents or sets of documents made available for use by Council at its December 6 meeting through motions by President Chris Foster. The first motion was to release the documents from Attorney-Client Privilege, and the second motion was to censure Council Member Kowalski. If electronic copies of these are available, that would be ideal.

Also please send the exact wording of the two motions Foster made, both of which passed.

Thank you,

Don Reed
1542 Groton Dr.
Hudson

<Nicole Kowalski Censure-Support Docs_Redacted.pdf>

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

NICOLE KOWALSKI)	CASE NO.: CV-2022-12-4298
)	
Plaintiff)	JUDGE TAMMY O'BRIEN
-vs-)	
)	
HUDSON CITY COUNCIL, et al.)	<u>ORDER</u>
)	
Defendant)	

- - -

This matter comes before the Court upon the Motion for Summary Judgment filed by Respondent, City of Hudson, on August 7, 2023. Respondent filed Supplemental Evidence in Support of the Motion for Summary Judgment on August 22, 2023. Relator, Nicole Kowalski, filed a Response in Opposition on September 19, 2023. Respondent filed a reply in support on September 26, 2023. Relator, Nicole Kowalski, filed a Motion to Strike the Additional Evidentiary Materials and Arguments Presented for the First Time in Respondent's Reply Brief, or in the alternative, To Obtain Leave of Court for Good Cause Shown to File a Sur-reply to Address Respondent's New Evidence and Arguments on October 6, 2023.

Upon review, the Court finds the Motion to Strike to be not well-taken. The Court further finds that the Motion for Summary Judgment is well-taken. However, the Court finds that the Motion for Summary Judgment does not fully resolve the issues in this matter.

The Court therefore ORDERS the Motion to Strike filed by Relator, Nichole Kowalski, shall be DENIED.

The Court also ORDERS the Motion for Summary Judgment shall be GRANTED insofar as Plaintiff has requested production of the records used during the Hudson City Council Meeting held on December 6, 2022. The uncontroverted evidence establishes that Plaintiff already provided redacted copies of these records and that the unredacted records are protected by attorney-client privilege and not subject to the Ohio Public Records Act, R.C. 149.43.

The Court further ORDERS that Hudson shall have twenty-one (21) days from the date of this Order to review and provide any remaining public records to Kowalski and file a notice of compliance with the Court. If no additional records exist, Hudson must communicate that to Kowalski and file a notice of compliance with the Court. Kowalski shall have fourteen (14) days after the notice of compliance has been filed to decide whether issues remain to be litigated or whether the issues have been resolved. If the issues are not resolved, Kowalski shall file a Notice

of Intent to Proceed which specifically sets forth any and all records which she believes remain undisclosed from the City of Hudson which are subject to disclosure under Ohio Public Records Act, R.C. 149.43. If a Notice of Intent to Proceed is not filed within fourteen (14) days of the Notice of Compliance, the Court will docket this matter as final and closed pursuant to the ruling on the Motion for Summary Judgment.

ANALYSIS

A. Procedural History and Arguments Presented.

On December 21, 2022, Appellant/Relator, Councilwoman Nicole Kowalski ("Kowalski"), filed a Notice of Appeal from City Council Censure and Complaint for Writ of Mandamus. On December 28, 2022, Kowalski filed her Amended Notice of Appeal and Action for Writ of Mandamus ("Complaint"). As Count I of her Complaint, Kowalski appealed the decision of Hudson City Council ("Council") to censure her on or about December 6, 2022 during the Council meeting ("Meeting"). She filed her action as an administrative appeal pursuant to R.C. 2506.01. In Count II, Kowalski filed a Writ of Mandamus requesting that the Appellee/Relator, City of Hudson ("Hudson"), comply with Ohio Public Records Act, R.C. 149.43 ("Public Records Act") and provide requested public records. Count I was dismissed by Court Order dated February 21, 2024 for lack of jurisdiction. Count II remained pending.

On August 7, 2023, Hudson filed a Motion for Summary Judgment in the Mandamus action. Hudson submitted the following exhibits in support of its Motion for Summary Judgment: (1) the affidavit of Aparna Wheeler; (2) the affidavit of Jody Roberts; (3) the affidavit of Skyler Sutton; (4) the minutes from the Meeting; (5) the public records request from Kowalski to Hudson dated December 12, 2022 ("Public Record Request"); (6) Hudson's e-mail (without attachments) in response to the Public Record Request ("E-mail Response"); (7) e-mails between Don Reed ("Reed") and Kowalski; (8) Hudson Ordinance 3.05 and 220.03; and (8) excerpt from Robert's Rules of Order. On August 22, 2023, Hudson filed supplemental evidence in support of the Motion for Summary Judgment ("Supplement"). The Supplement included Exhibit A, the affidavit of Don Reed ("Reed").

In the Motion for Summary Judgment, Hudson summarized the Writ of Mandamus action as follows:

On December 12, 2022, Kowalski issued a public records request to Hudson pursuant to R.C. 149.43. Roberts Affidavit ¶ 3; *Kowalski Public Records Request December 12, 2022*; *Exhibit B*. Kowalski requested that Hudson produce the following documents:

1. All Documents between Hudson City Council and its members and Walter Haverfield that relate to campaign finance legislation activity related to Ord. 22-26 and Ord. 22-48.
2. All documents between Hudson City Council and its members and Walter Haverfield that relate to Walter Haverfield's constitutional investigation and analysis of Ord. 22-26 and Ord. 22-48.
3. All documents between Chris Foster, Chris Banweg, Beth Bigham, Karen Heater, and Skylar Sutton that reference Nicole Kowalski made between January 1, 2022 to the present.

Id.

On December 19, 2022, Hudson responded to Kowalski's public records request by providing Kowalski with 46 partially redacted documents that were provided to Hudson City Council at the December 6, 2022 Hudson City Council meeting (the "Redacted Documents"). *Roberts Affidavit* ¶ 4; *Hudson Email December 19, 2022*; *Exhibit C*. Hudson contends that the Redacted Documents were properly redacted pursuant to *R.C. 149.43(A)(1)(v)*, due to attorney-client privilege. *Id.*

On December 21, 2022, Kowalski filed the instant action requesting that this Court issue a Writ of Mandamus requiring Hudson to produce the Redacted Documents in unredacted form...

Motion for Summary Judgment at Pg. 4.

Hudson contends that the Motion for Summary Judgment must be granted because Kowalski's request for unredacted versions of the Redacted Documents (hereinafter referred to as "Unredacted Documents") from Hudson is moot. In support of its position, Hudson included an affidavit of Don Reed ("Reed"), who contends that Kowalski sent Unredacted Documents via e-mail to him. It is undisputed that Kowalski received the Unredacted Documents during the Council meeting on December 6, 2022. Hudson contends that, because Kowalski already possesses the Unredacted Documents, her mandamus action must be moot. Next, Hudson contends that the Mandamus action must be denied because Hudson provided the Redacted Documents and the Unredacted Documents are protected by attorney-client privilege.

On September 19, 2023, Kowalski filed her response in opposition to Hudson's Motion for Summary Judgment. In support of her response, Kowalski submitted her own affidavit, her Public Records Request, and the E-mail Response. Kowalski argued that summary judgment should not be granted on her mandamus claim because she requested three different categories of documents and Hudson inadequately responded to her requests. Kowalski emphasized in her brief that Hudson failed in its obligation to provide *all* responsive documents and that it also failed by improperly redacting the Redacted Documents. Kowalski argued that additional correspondence

exists between Hudson and Walter Haverfield because additional correspondence was referenced during the Meeting but that correspondence was not included in the documents provided to Council members at the Meeting. Kowalski further argues that the fact that she obtained the documents during the Meeting does not render her mandamus action moot. Finally, Kowalski argued that Council waived attorney-client privilege as to the Unredacted Documents during the meeting and that, thereby, privilege has also been waived as to any other responsive documents over the same subject matter.

On September 26, 2023, Hudson filed a reply brief in support of its Motion for Summary Judgment. Hudson reiterated its mootness argument and its attorney-client privilege argument. In addition, Hudson submitted an updated affidavit of Jody Roberts which averred that the additional correspondence specifically referenced by Kowalski in her response brief did not exist or the documents were already in the possession of Kowalski because she initiated the requested correspondence. Hudson also submitted a draft version of the Meeting minutes.

On October 6, 2023, Kowalski filed a Motion to Strike additional evidentiary materials and arguments presented for the first time in Hudson's reply brief and, in the alternative, to obtain leave of Court to file a sur-reply to address Hudson's new evidence and arguments.

On October 16, 2023, Hudson responded to Kowalski's Motion to Strike. Hudson argued that it did not present any new arguments in the reply and that it only submitted new evidence in response to Kowalski's self-serving affidavit. Accordingly, Hudson asks the Court to deny Kowalski's Motion to Strike.

On October 23, 2023, Kowalski filed a reply in support of her Motion to Strike or Motion to File a Sur-Reply. She claims that Hudson improperly used its response to advocate for its Motion for Summary Judgment.

B. Applicable Standards.

1. Motion to Strike.

"The determination of a motion to strike is within the court's broad discretion." *State ex. rel Dawson v. Bloom-Carroll Local Sch. Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding a motion to strike. *Cooper v. BASF, Inc.*, 9th Dist. No. 23624, ¶22, 2013-Ohio-2790. "An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling." *Id.*

2. Motion for Summary Judgment.

Summary judgment shall be granted where (1) no issues of material fact remain to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) when viewing the evidence in the light most favorable to the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. Civ. R. 56. The party seeking summary judgment bears the burden of showing no genuine issue of material fact exists for trial. Civ. R. 56(C). Doubts must be resolved in favor of the non-moving party. *Id.* Once the moving party has satisfied its burden, the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt* 75 Ohio St.3d 280, 291 (1996).

C. Law and Analysis.

1. Motion to Strike.

It is well-established that a party moving for summary judgment must expressly delineate each basis on which it seeks summary judgment in its motion so as to provide the opposing party a meaningful opportunity to respond. The danger in allowing a new argument to be asserted in a reply or a supplemental motion is that the opposing party does not have an opportunity to respond and may be subjected to summary judgment by ambush. Therefore, when a new argument is raised in a reply or supplemental motion for summary judgment, the proper procedure is to strike the reply or supplemental motion or, alternatively, to allow the opposing party to file a surreply.

Baker v. Coast to Coast Manpower, LLC, 3d Dist. Hancock No. 5–11–36, 2012-Ohio-2840, 2012 WL 2371470, ¶ 35 (internal citations omitted), *Hicks v. Cadle Co.*, 2016-Ohio-4728, ¶ 18.

When considering Hudson's reply brief, the Court finds that it presents the same arguments as the original Motion for Summary Judgment. However, the brief includes an affidavit that addresses the limited issue of additional documents outside the Redacted Documents referenced in Kowalski's response. The Court finds that the evidence submitted did not raise any new issues and the Motion to Strike must be denied.

2. Motion for Summary Judgment.

"Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Comm't. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). "[T]he requirement of the lack of an adequate legal remedy does not apply to public-records cases." *State ex rel. Gaydosh v. Twinsburg* (2001), 93 Ohio St.3d 576, 580, 757 N.E.2d 357.

The Public Records Act reflects the state's policy that “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records. *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 29.

Before considering the merits of Glasgow's mandamus claim, it is important to recall certain definitions. “ ‘Public record[s]’ means records kept by any public office * * *.” R.C. 149.43(A)(1). “ ‘Public office’ includes any state agency” and “ ‘[s]tate agency’ includes * * * the general assembly.” R.C. 149.011(A) and (B). “ ‘Public official’ includes all officers, employees, or duly authorized representatives or agents of a public office.” R.C. 149.011(D).

State ex rel. Glasgow v. Jones, 2008-Ohio-4788, ¶¶ 12-14, 119 Ohio St. 3d 391, 393–94, 894 N.E.2d 686, 689.

In order to succeed in a request for public records, Kowalski must show by clear and convincing evidence that she requested a public record pursuant to R.C. 149.43(B)(1) and the records custodian did not make the records available. *State ex. rel. McQueen v. Welbling-Holiday*, 150 Ohio St. 3d 17, 2017-Ohio-5107.

As an initial matter, the Court disagrees with Hudson's argument that Kowalski's request is moot because she actually has the Unredacted Documents. Under Ohio law, it is possible for a mandamus action to become moot “when the records custodian provides the requested documents.” *See State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22. 2024-Ohio-104. The Ohio Supreme Court has recognized that a public office may establish a mandamus action is moot by providing an affidavit that avers all existing public records have been provided.” *Id.*

Here, Hudson asserts that Kowalski's action is moot because she received a copy of the Unredacted Documents as part of the Meeting and she retained the documents and distributed the documents to Reed. However, the Court finds the disclosure to Kowalski during the Meeting would not render her public records request moot. The disclosure at the Meeting occurred **before** the public records request was even made by Kowalski. Accordingly, the disclosure during the Meeting would not be sufficient to render the mandamus action moot. Any disclosure made during the City Council meeting was not made as a response to provide public records under 149.43. It was made as part of the press of business during the Meeting. It would be antithetical for the Court to find that a public records request can be rendered moot by actions that occurred

before the public records was even made. Hudson has an obligation under R.C. 149.43 to provide public records when requested to the requesting party. Hudson cannot subvert this obligation by claiming that the person already has the records from another source or by claiming that the records were previously provided. Hudson can only subvert this action by providing the records requested and averring that “all existing public records have been provided.” *Id.*

Under the circumstances, the Court rejects Hudson’s argument that the mandamus is moot because Kowalski has the requested records. The Court notes that the fact that Kowalski has the records request may be relevant for purposes of determining whether statutory damages or attorney’s fees should be awarded, but it is not a basis to render the mandamus action moot. *State ex rel. Ware v. Galonski*, 2024-Ohio-613.

With that in mind, the Court next considers whether attorney-client privilege applies to the documents at issue in this matter. Documents protected by attorney-client privilege are excluded as public records under the Public Records Act. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority*, 2009-Ohio-1767, paragraph two of the syllabus. The custodian has the burden to establish that records are excluded. *Id.* The custodian’s burden is met when the custodian provides evidence to establish that the requested records fall squarely within the exception. *Id.* citing *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 2008-Ohio-1770.

Attorney-client privilege in Ohio is governed by R.C. 2317.02(A) and, where R.C. 2317.02 does not specifically address an issue, by common law. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508. Attorney-client privilege applies as follows:

(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived [or an exception applies].

Id. citing *Reed v. Baxter*, 134 F.3d 351, 355–356 (C.A.6, 1998) and *Perfection Corp. v. Travelers Cas. & Sur. Co.*, 2003-Ohio-2750, ¶ 12. *See also, squire*

In her response, Kowalski appears to concede, and the Court agrees (upon *in camera* review), that the Unredacted Documents meet the first seven elements of attorney-client privilege. The only question that remains is whether a waiver of the attorney-client privilege occurred or whether an exception applies.

Upon consideration, the Court finds that a waiver did not occur as to the Unredacted Documents. The Ohio Supreme Court has held “R.C. 2317.02(A) provides the exclusive means

by which privileged communications directly between an attorney and a client can be waived.” *Jackson v. Greger*, 2006-Ohio-4968, ¶11 citing *State v. McDermott*, 1995-Ohio-80. R.C. 2317.02(A) states that a client may waive attorney-client privilege: “by express consent or by voluntarily testifying on the same subject.” *Id.* ¶12. “Because a client’s voluntary disclosure of confidential communications is inconsistent with an assertion of privilege, voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to the communications on the same subject matter.” *MA Equip. Leasing, L.L.C. v. Tilton*, 2012-Ohio-4668, ¶20. However, the Second District has succinctly explained:

Only the client can waive the attorney-client privilege. The mere fact that a memorandum subject to the attorney-client privilege comes into the hands of an opposing party does not necessitate a finding that the client has waived the privilege. Rather, any disclosure by the client must be voluntary, or at least under circumstances in which the disclosure to third persons is reasonably foreseeable by the client. If disclosure was by some person who was not entitled to have the memorandum or who did not have authority to waive the privilege, the document is still privileged. See *Powers v. Chicago Transit Auth.* (C.A.7, 1989), 890 F.2d 1355, 1357–1359. When the client is a corporation, the privilege can be waived only by a decision of management.

State v. Today’s Bookstore, Inc., 83 Ohio App. 3d 810 (2nd Dist. 1993).

In this case, the Unredacted Documents were distributed to Council members during a public meeting. The Court finds the disclosure of the documents to the Council members did not waive attorney-client privilege as the Council members would be considered part of the government client and they are not a third-party. The Court further finds that the discussion related to Kowalski’s censure during the public meeting did not voluntarily waive attorney-client privilege as to the records sought by Kowalski in her request. Council took a break from public session for the Council members to review the Unredacted Documents. The Unredacted Documents were never shared with any third-party during the meeting. Further, the Court finds that the general discussion related to censure and the content of the documents did not waive attorney-client privilege as to the Unredacted Documents. During the Meeting, Council expressly waived attorney-client privilege to the narrowest extent possible to proceed with the press of business, i.e. to discuss the censure of Kowalski. Council then proceeded in a manner that was appropriate to preserve the issue and maintain their obligation to hold meetings in an open and public forum. To hold otherwise would permit any general conversation regarding attorney-client privileged documents in an open meeting to waive attorney-client privilege as to the specific

detailed documents. The Court finds that the express and voluntarily waiver contemplated by the Ohio Supreme Court requires more than a general discussion predicated on the attorney-client privileged materials.

Further, while Kowalski has not styled her argument in terms of an exception of the attorney-client privilege act, the tenor of her arguments appears to incorporate an exception to attorney-client privilege. Kowalski repeatedly asserts that she should be entitled to the documents in the mandamus action so that she can defend herself as to the censure.

The Ohio Supreme Court has explained the difference between an exception to the attorney-client privilege doctrine and waiver as follows:

Unlike *waiver*, which involves the client's relinquishment of the protections of R.C. 2713.02(A) once they have attached, an *exception* to the attorney-client privilege falls into the category of situations in which the privilege does not attach to the communications in the first instance and is therefore excluded from the operation of the statute. See *Ross v. Abercrombie & Fitch Co.* (Apr. 22, 2008), S.D. Ohio Nos. 2:05-cv-0819 et seq., 2008 WL 1844357, *1 (“Logically, the first issue to be addressed in any case where one party claims that any applicable privileges have been waived is whether the privileges attach to the requested documents in the first instance”); *Moskovitz*, 69 Ohio St.3d at 661, 635 N.E.2d 331 (“the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction”); Restatement (Third) of the Law Governing Lawyers, Chapter 5, Topic 2, Title C, Introductory Note (distinguishing between waivers of the privilege and exceptions to it); Black's Law Dictionary (9th Ed.2009) 644 (defining “exception”); id. at 1717 (defining “waiver”).

Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 2010-Ohio-4469, ¶ 47.

When considering an exception to attorney-client privilege, the Court finds that exceptions do not apply to a Public Record Request such as the Request at issue in this matter. Exceptions apply under limited circumstances and must be evaluated on a case-by-case basis. If exceptions applied to Public Record Requests, then the custodian would be required to undertake an individualized assessment as to whether or not the person requesting the records was entitled to disclosure. The Court finds that this process would undermine the purpose and nature of the Public Records Act. Further problematic, even when an exception applies, the privilege would only be waived to the extent necessary. Protective orders and/or other safeguards are put into place to maintain the confidentiality of the records outside of the exception. Kowalski's attempt to apply her specific individualized situation to her mandamus action based on 149.43 is improper. If the

record is not subject to 149.43 then no one, including Kowalski, is permitted to obtain the record under 149.43. Stated another way, the mandamus action must be considered irrespective of whether Kowalski may have another basis to request the record in another setting under her own individualized circumstances, i.e. as part of discovery in a civil case (which may require protections such as a protective order to maintain the confidential nature of the documents).

Accordingly, the Court finds no basis to treat Kowalski any differently than any other member of the community for purposes of the mandamus action. The plain purpose of the Public Records Act is to provide documents to those who request them. *Id.* To hold otherwise would require the records holder to undertake an individualized assessment of whether any exception to attorney-client privilege applies, based on the standing of the requester of the documents. Such is not the nature of a public records request.

Based thereupon, the Court finds that attorney-client privilege applies to the Unredacted Documents, that waiver has not occurred as to the Unredacted Documents, and that no exception applies in this mandamus action. Further, the Court has undertaken an *in camera* review of the Unredacted Documents and finds that Hudson properly redacted the documents pursuant to Kowalski's public records request. The Court therefore finds that summary judgment must be granted as filed by Hudson.

Finally, the Court notes that it is unclear from the record whether this ruling disposes of all of the claims of Kowalski's requests under Ohio's Public Records Act. The Motion for Summary Judgment relates to "Redacted Documents" which is defined as "46 partially redacted documents that were provided to Hudson City Council at the December 6, 2022 Hudson City Council meeting..." However, the scope of the request for public records as listed in Kowalski's letter dated December 12, 2022, the Complaint, and the Motion for Summary Judgment was as follows:

1. All Documents between Hudson City Council and its members and Walter Haverfield that relate to campaign finance legislation activity related to Ord. 22-26 and Ord. 22-48.
2. All documents between Hudson City Council and its members and Walter Haverfield that relate to Walter Haverfield's constitutional investigation and analysis of Ord. 22-26 and Ord. 22-48.
3. All documents between Chris Foster, Chris Banweg, Beth Biggam, Karen Heater, and Skylar Sutton that reference Nicole Kowalski made between January 1, 2022 to the present.

Request at Pg. 2.

Stated another way, the scope of the Motion for Summary Judgment is narrower than the scope of the public records request. Kowalski requests three categories of documents in her December 12, 2024 letter. The first category of documents is addressed in this opinion. The second category of documents are likely subject to attorney-client privilege as explained above. However, the third category of documents, requesting communications between "Chris Foster, Chris Benweg, Beth Bigham, Karen Heater, and Skylar Sutton" are not likely subject to attorney-client privilege. Whether the third category of documents constitutes a public record request or whether Hudson has any of this information is not an issue briefed in the Motion for Summary Judgment, and the Court has no opinion at this point whether any of these documents, other than the 46 pages reviewed by the Court, should be produced pursuant to R.C. 149.43.

It is unclear from the record whether the Redacted Documents, as defined in the Motion for Summary Judgment, are the only documents responsive to Kowalski's request. Three alternatives are possible: (1) no other responsive documents exist; (2) other responsive documents exist but they are all excluded from the public records act by attorney-client privilege; or (3) other responsive documents exist and some of the documents or parts of the documents are not covered by attorney-client privilege. Under scenario (1) and (2), Kowalski's mandamus action would fail. However, if scenario (3) applies, Kowalski might succeed in her mandamus action against Hudson. At this juncture, the Court does not have argument or evidence to reach the issue presented as to any other responsive documents that may or may not exist. Accordingly, the Court will grant the Motion for Summary Judgment as filed by Hudson. However, this decision does not finally resolve this matter.

In an effort to move this matter to conclusion, the Court finds good cause to require the City of Hudson to review its records and determine if any additional documents exist that are responsive to Kowalski's request and must be disclosed under R.C. 149.43. The Court finds that attorney-client privilege would apply as it applied to the Unredacted Documents, but that Hudson has an obligation to provide responsive documents not covered by attorney-client privilege, to inform Kowalski and/or redact responsive documents if additional records exist that are subject attorney-client privilege, or if no further documents exist, inform Kowalski that no further documents exist.

The Court finds good cause to give Hudson twenty-one (21) days from the date of this Order to provide this information to Kowalski and file a Notice of Compliance with the Court. Kowalski shall have fourteen (14) days after Hudson files the Notice of Compliance to determine

whether issues remain to be litigated or whether the issues have been resolved. Kowalski shall file a Notice of Intent to Proceed which specifically sets forth any and all issues that she plans to proceed with in this litigation.

COURT ORDERS

The Court therefore ORDERS the Motion to Strike filed by Relator, Nichole Kowalski, shall be DENIED.

The Court also ORDERS the Motion for Summary Judgment shall be GRANTED insofar as Plaintiff has requested production of the records used during the Hudson City Council Meeting held on December 6, 2022. The uncontroverted evidence establishes that Plaintiff already provided redacted copies of these records and that the unredacted records are protected by attorney-client privilege and not subject to the Ohio Public Records Act, R.C. 149.43.

The Court further ORDERS that Hudson shall have twenty-one (21) days from the date of this Order to review and provide any remaining public records to Kowalski and file a notice of compliance with the Court. If no additional records exist, Hudson must communicate that to Kowalski and file a notice of compliance with the Court. Kowalski shall have fourteen (14) days after the notice of compliance has been filed to decide whether issues remain to be litigated or whether the issues have been resolved. If the issues are not resolved, Kowalski shall file a Notice of Intent to Proceed which specifically sets forth any and all records which she believes remain undisclosed from the City of Hudson which are subject to disclosure under Ohio Public Records Act, R.C. 149.43. If a Notice of Intent to Proceed is not filed within fourteen (14) days of the Notice of Compliance, the Court will docket this matter as final and closed pursuant to the ruling on the Motion for Summary Judgment.

IT IS SO ORDERED.



JUDGE TAMMY O'BRIEN

CC: ATTORNEY HAMILTON DESAUSSURE, JR.
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ORC 102.03(B)

(B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.