

MEMORANDUM

I. STATEMENT OF THE FACTS

On September 12, 2008, Relator Charles David Fooce, filed a Complaint for a writ of mandamus regarding a public records matter with The Ohio State University (“OSU”). Relator Fooce is seeking the Ohio Supreme Court to order OSU to comply with the Ohio Public Records Act.

Relator’s filing fails to state a claim. The Complaint provides that attorney Christopher Ore is representing Mr. Fooce in an employment matter with OSU. Paragraph 6 of the Complaint alleges that, Mr. Fooce, through counsel, made a public records request on OSU on August 25, 2008. The public records request is attached to the Complaint as Exhibit A. Paragraph 7 of the Complaint alleges that OSU “refuses to produce any records.” Relator does not attach any documents that support that allegation and since this is a motion to dismiss the accuracy of that allegation will not be addressed at this time.

Exhibit A to the Complaint, the August 25, 2008 public records request, is made by attorney Christopher Ore. The August 25, 2008 request at no place provides that Attorney Ore is making the public records request on behalf of Charles David Fooce, or a client of Attorney Ore. It is simply a public records request from Attorney Ore for personnel files of Dr. John McNaugher Stang, Dr. Linda Stone, and Ms. Mary G. Menkedick Ionno. Further the request provides that all documents should be sent to Attorney Ore at his offices. At no point is a request made by or for Charles David Fooce.

Relator's filing fails to state a claim and should be dismissed.

II. LAW AND ARGUMENT

A. Standard of Review

A motion to dismiss pursuant to Civ. R. 12(B)(6) tests the sufficiency of the Petition. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St. 3d 94, 95, 647 N.E.2d 788, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St. 3d 545, 548, 605 N.E.2d 378. In order for a court to dismiss a Petition for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the Petition that the Relator can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242, 327 N.E.2d 753, syllabus. For purposes of the motion, the court must presume that all factual allegations of the Petition are true and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3d 190, 532 N.E.2d 753. The movant may not rely on allegations or evidence outside the Petition. *State ex rel. Boggs* (1995), 72 Ohio St.3d 94, 96, 647 N.E.2d 788. Matters outside the pleading are permissible only if the court treats the motion to dismiss as a motion for summary judgment. Civ. R. 12(B); *State ex rel. Scanlon v. Deters* (1989), 45 Ohio St. 3d 376, 377, 544 N.E.2d 680.

B. The Complaint does not comply with RC 2731.04 and Civil Rule 10(A)

RC 2731.04 provides in part: "Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit." The petition presented to this Court is not in the name of the state on the relation of Foose. This deficiency alone is an adequate reason to deny the petition. R.C. 2731.04; *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004 Ohio 5596, 817 N.E.2d 382; *Gannon v. Gallagher* (1945) 145 Ohio St. 170, 60 N.E.2d 666; *Dunning v. Cleary* (Jan. 11, 2001), Cuyahoga App. No. 78763,

2001 Ohio App. LEXIS 79." *State v. McMonagle*, Cuyahoga App. No. 91477, 2008 Ohio 3798, at P2.

Relator "also failed to include the address of the parties in the caption of the complaint as required by Civil Rule 10 (A). This may also be grounds for dismissing the action." *State ex rel. Sherrills v. State* (2001), 91 Ohio St. 3d 133, 2001 Ohio 299, 742 N.E.2d 651; *State ex rel. Hall v. Calabrese* (Aug. 16, 2001), Cuyahoga App. No. 79810, at 2, 2001 Ohio App. LEXIS 3769 .

C. Relator Fooce does not have standing to bring this action.

Pursuant to Ohio's Public Records Act, any person may request public records. R.C. 149.43(B)(1). In the event that the public office or person responsible for public records fails to prepare a requested public record and to make it available for inspection, the person allegedly aggrieved may commence a mandamus action. R.C. 149.43(C)(1).

Here, Relator's attorney, Christopher Ore, submitted a public records request to the Office of Legal Affairs for various personnel files. Attorney Ore requested these documents in his own name and not as the attorney for Mr. Fooce. Complaint, Exhibit A. The requester of public records, Attorney Ore, not Relator Fooce, is the person allegedly aggrieved by OSU's alleged failure to promptly respond to his request. It is counterintuitive for Relator to bring this action when did not submit the public records request in question and, therefore, cannot be deemed a person allegedly aggrieved for the purposes of Ohio's Public Records Act. Pursuant to R.C. 149.43, Attorney Ore, and not Relator, is the proper party to bring this action. While this may seem like a fine distinction, it is an important one under the Public Records Act and general standing requirements. Mr. Fooce simply does not have standing to bring this action.

Although there is an apparent dearth of Ohio case law discussing who constitutes an aggrieved person for the purposes of filing a mandamus action under the Public Records Act,

other state court decisions offer guidance. Louisiana appellate courts have held that where the named plaintiff in an action to compel compliance with the state's public records law makes no request to inspect or copy records, that individual has no right of action to bring a suit for enforcement of the Public Records Law. *Vourvoulis v. Movassaghi*, 906 So. 2d 461 (La. Ct. App. 2005)(citing *Plaquemines Parish Council v. Petrovich*, 629 So. 2d 1322 (La. Ct. App. 1993)).

Louisiana's Public Records Law is markedly similar to Ohio's Public Records Act. Compare Louisiana Revised Statutes § 44:35, which provides "Any person who has been denied the right to inspect or copy a record. . . may institute proceedings for the issuance of a writ of mandamus . . . together with attorney's fees, costs and damages as provided for by this Section," with R.C. 149.43(C)(1):

"If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection . . . the person allegedly aggrieved may commence a mandamus action to obtain a judgment . . . that awards court costs and reasonable attorney's fees and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section."

A writ of mandamus is an order, to perform an act, which the law specifically enjoins as a duty. In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. *State ex rel. Carter v. Wilkinson* (1994), 70 Ohio St.3d 65; *State ex rel. Evans v. Indus. Comm.* (1992), 64 Ohio St.3d 236, 238, 594 N.E.2d 609, 611; *State ex rel. Fant v. East Cleveland Mun. Court Clerk* (1992), 62 Ohio St.3d 530, 531, 584 N.E.2d 721, 722; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225, 226. A failure to show any one of these prerequisites requires the court to deny the petition or Petition. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199,

614 N.E.2d 827.

A court in mandamus proceedings cannot create the legal duty the relator would enforce through it; creation of the duty is the distinct function of the legislative branch of government. *State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348, 66 N.E.2d 207. Moreover, mandamus cannot be used to compel the performance of a permissive act. *State ex rel. Niles v. Bernard* (1978), 53 Ohio St.3d 31, 372 N.E.2d 229. A writ cannot issue to control an exercise of discretion, but it can be issued to compel a person to exercise it when there is a clear legal duty to do so. *See State ex rel. Martin v. Corrigan* (1986), 25 Ohio St.3d 29, 494 N.E.2d 1128.

Relator Fooce does not have a clear legal right to the relief prayed for since he does not have standing to bring this claim and the complaint must be dismissed.

III. CONCLUSION

Wherefore, Respondent respectfully request that this Court issue an Order dismissing Relator's Complaint with prejudice, assess costs to Relator, and order any other relief deemed necessary and just by this Court.

Respectfully submitted,

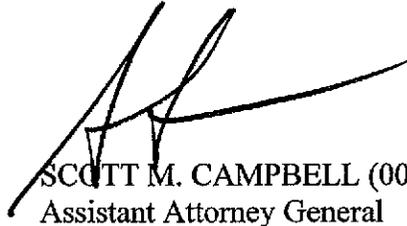
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following, via regular U.S. mail, postage prepaid, this 3rd day of October 2008:

Christopher P. Ore, Esq.
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