

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. : CASE NO. 09-2140
 BRIAN BARDWELL, :
 :
 RELATOR-APPELLANT, : On Appeal from the
 : Cuyahoga County Court of Appeals,
 : Eighth Appellate District
 vs. :
 : Court of Appeals Case No. 09 CA 93058
 CUYAHOGA COUNTY BOARD :
 OF COMMISSIONERS, :
 :
 RESPONDENT-APPELLEE. :
 :

MERIT BRIEF OF RELATOR-APPELLANT BRIAN BARDWELL

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I. INTRODUCTION

Relator-Appellant Brian Bardwell sought public records of a billion dollar deal for an economic development project in downtown Cleveland that has been shrouded from public view by Respondent-Appellee Cuyahoga County Board of Commissioners (the “Commissioners”). The purpose of the Ohio Public Records Act, R.C. 149.43, “is to expose government activity to public scrutiny.” *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 165, 2005-Ohio-4384; *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 5; *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St.3d 350, 355. That purpose would be manifestly frustrated if this Court were to allow the appellate court’s sanctions order to stand. As this Court has reaffirmed, “[i]nherent in Ohio’s Public Records Law is the public’s right to monitor the conduct of government.” *Dispatch Printing Co.*, 106 Ohio St.3d at 165-166 (quoting *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 369). Given the current controversy concerning the project itself, and recent allegations of public corruption, sweet-heart deals and self-dealing, it is unsurprising that the Commissioners would avoid producing public records before the contracts were signed and the deal closed.

Bardwell therefore did exactly what good government watchdogs are supposed to do: he sought public records under the Ohio Public Records Act and attempted to enforce his rights under that law through a mandamus action. The appellate court vilified and punished Bardwell for exercising his rights when it sanctioned him. The lower court misapplied Rule 11, when sanctions were not warranted. Moreover, if the sanctions are allowed to stand, it creates a chilling effect for all who would utilize the Public Records Act and writes a new limitation into the Act not contemplated by the General Assembly. The sanctions order must be vacated.

II. STATEMENT OF THE CASE AND FACTS

Bardwell filed an original mandamus action in the Court of Appeals for Cuyahoga County on March 27, 2009. (Appx. at A07.) He sought enforcement of the Ohio Public Records Act after being denied access to drafts of a development agreement between the county and private parties on March 26 and 27, 2009, respectively. (Id. at A51.) Bardwell subsequently received those drafts on April 9, 2009. (Id. at A52.)

Bardwell's claim became moot when he received the records he requested. The Cuyahoga County Prosecutor even explained that Bardwell had received all of the drafts on April 29, 2009, but did not ask for a dismissal based upon mootness. (Appx. at A56-A59.) Nevertheless, the prosecutor, on behalf of the Commissioners, filed a seventeen page summary judgment motion. (Id. at A31.) A simple suggestion of mootness would have sufficed. The appellate court dismissed Bardwell's mandamus action on July 2, 2009, and denied his statutory damages claim. (Id. at A69-A79.)

On August 13, 2009, the appellate court *sua sponte* ordered Bardwell to show cause why sanctions should not be imposed against him for acting in bad faith and engaging in frivolous conduct. (Appx. at A80.) Bardwell timely answered the show cause order. (Id. at A81-A87.) At the court's request, he supplemented his initial filing with a list of all mandamus actions he had ever filed to enforce the Ohio Public Records Act. (Id. at A88-A89.) Of nineteen mandamus actions Bardwell filed, he settled five; had the writ granted in one; had it denied in four; had one dismissed; and the remainder are open. (Id. at A89.) Bardwell had a better than .500 average in obtaining the relief he requested either by settlement or by having the writ granted. (Id.) The Commissioners, of course, vigorously contended that Bardwell had violated Ohio Civil Rule 11

and Revised Code Section 2323.51 in filing the underlying mandamus action. (Id. at A91-A104.)

The appellate court held a show cause hearing on September 22, 2009. (Appx. at A80.) The appellate court subsequently entered sanctions against Bardwell on October 19, 2009 in its Journal Entry and Opinion. (Id. at A105.) It awarded \$1,050.42 in attorneys' fees to the Commissioners. (Id. at A124.) Furthermore, in its opinion, the court warned Bardwell to think twice before filing any additional mandamus actions to enforce the Public Records Act under threat of even greater sanctions. (Id. at A124.)

Bardwell timely filed his appeal on November 24, 2009. (Appx. at A01.) He filed an Amended Notice of Appeal on December 4, 2009, to correct a citation in the original Notice of Appeal. The appellate court filed the record on December 17, 2009. (Id. at A04.)

III. STANDARD OF REVIEW

The appellate court abused its discretion in imposing sanctions on Bardwell absent any conduct that runs afoul of Ohio Civil Rule 11. An appellate court "will not reverse a court's decision on a Civ. R. 11 motion for sanctions absent an abuse of discretion." *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65. An abuse of discretion occurs when a court enters a decision that is "unreasonable, arbitrary or unconscionable." *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, ¶18 (citing *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513, ¶10). The appellate court's sanction is unreasonable and arbitrary under the circumstances presented here, Bardwell's conduct did not run afoul of Rule 11, and imposing sanctions in such a situation violates not only the spirit of the rule but also of Ohio's public records law.

IV. LAW AND ARGUMENT

Proposition of Law No. 1: Ohio Civil Rule 11 must be stringently and sparingly applied in litigation filed to compel compliance with the Ohio Public Records Act.

A. Ohio Civil Rule 11 Sanctions Must Not Be Imposed Absent Substantial Evidence of Bad Faith When Applied in the Context of a Mandamus Action to Enforce the Ohio Public Records Act.

Bardwell, a pro se litigant, availed himself of the statutory process set out in the Public Records Act, R.C. 149.43(C), to enforce a records request via filing a mandamus action. He was sanctioned even though his conduct in filing the mandamus did not meet the threshold for imposing sanctions under Civil Rule 11]

1. The standard to impose sanctions for violations of Civil Rule 11 or frivolous conduct under Revised Code Section 2323.51 requires a finding that the litigant acted in bad faith.

Civil Rule 11 provides that an attorney's signature on pleadings, motions and other documents, when representing parties in a case, "constitutes a certificate by the attorney *** that the attorney *** has read the document; that to the best of the attorney's knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay." The rule likewise applies to litigants representing themselves. It further states that "[f]or willful violation of this rule, an attorney *** upon motion of a party or upon the court's own motion, may be subjected to appropriate action" See *Dreamer*, 115 Ohio St.3d 190, 2007-Ohio-4789, ¶17. "Civil Rule 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation be willful." *Id.* at ¶19 (citing *Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, ¶9; *Ransom v. Ransom*, Warren App. No. 2006-03-031, 2007-Ohio-457, ¶25). A court must make this determination only if one of the Rule 11 requirements has not been satisfied. *Gallagher v. Amvets Post 17*, Erie App. No. E-09-008, 2009-Ohio-6348, ¶32 (citing *Callahan v.*

Akron General Med. Ctr., 9th Dist. Nos. 24434, 24436, 2009-Ohio-5148, ¶24; *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290).

In analyzing the propriety of imposing Rule 11 sanctions, “the relevant inquiry is whether the attorney’s [or unrepresented party’s] actual intent or belief was of willful negligence.” *Stafford v. Columbus Bonding Center*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶8 (citing *Ceol*, 81 Ohio App.3d at 290). “The attorney’s actual intent or belief is consequently relevant to the determination of whether he or she acted willfully.” *Id.* (citing *Ceol*, 81 Ohio App.3d at 290). “Willful” has been defined as “voluntarily, knowingly, deliberate *** intentional, purposeful, not accidental or involuntary.” *Gallagher*, 2009-Ohio-6348, ¶33 (citing Black’s Law Dictionary (6 ed., 1991) at 1103). Accordingly, “negligence is insufficient to invoke Civ. R. 11 sanctions.” *Capital One Bank v. Day*, 176 Ohio App.3d 516, 2008-Ohio-2789, ¶10 (citing *Oakley v. Nolan*, Athens App. No 06CA36, 2007-Ohio-4794, ¶13).

Furthermore, the appellate court, in describing the bad faith standard it applied in evaluating Bardwell’s litigation conduct, relied upon *Slater v. Motorists Mutual Ins. Co.* (1962), 174 Ohio St. 148. It stated:

A lack of good faith is the equivalent of bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports *a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.* It also embraces *actual intent to mislead or deceive another.*

Id. (emphasis added). Bardwell’s conduct in no way comes close to meeting this standard for the imposition of sanctions under Rule 11.

In contrast, Revised Code Section 2323.51 applies an objective bad faith standard, and is broader in scope than Civil Rule 11. *Stafford*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶6 (citing *State Farm Ins. Cos. v. Peda*, Lake App. No. 2004-L-082, 2005-Ohio-3405, ¶25. “R.C. 2323.51

provides that a party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action.” *Id.* (citing *Wauseon v. Plassman* (1996), Fulton App. No. F-96-003, 1996 WL 673521). Furthermore, “[a] frivolous claim is a claim that is not supported by facts in which the complainant has a good faith belief, and which is not grounded in any legitimate theory of law or argument for future modification of the law.” *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 12.

Specifically, as used in 2323.51, “frivolous conduct” is defined as any of the following:

- (a) Conduct of an inmate or other party to a civil action *** that satisfies any of the following:
 - (i) It obviously serves merely to harass or maliciously injure another party to the civil action *** including, but not limited to, *** a needless increase in the cost of litigation.
 - (ii) It is not warranted under existing law ***.
 - (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, of specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.”

“[A] finding of frivolous conduct under R.C. 2323.51 is determined without reference to what the individual knew or believed.” *Stafford*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶8.

2. Bardwell acted in good faith when he filed the mandamus action to compel the County to turn over non-privileged records responsive to his request that he reasonably believed were being wrongly withheld.

Bardwell filed his mandamus action against the commissioners in good faith, and did not engage in frivolous conduct by filing it initially or in failing to dismiss it voluntarily once it became moot. Notably, while the appellate court *sua sponte* scrutinized Bardwell’s intent in filing the suit and implied that it may be frivolous, it did not go so far as to make a finding that

his conduct was frivolous and violated the broader prohibitions in Revised Code 2323.51. (Appx. at A116-A119.) While Bardwell asserts that his mandamus action in the instant case was filed in good faith, it is notable that the lower court despite its hostility toward Bardwell did not reach such a finding and instead imposed sanctions under Rule 11.

Using the broader analysis required by Revised Code 2323.51 to assess Bardwell's conduct, it becomes clear that Rule 11 sanctions were unreasonably and arbitrarily imposed here. If a court determines that a litigant engaged in frivolous conduct, it then must determine whether the conduct "adversely affected" the moving party. *Stone v. House of Day Funeral Service, Inc.* (2000), 140 Ohio App.3d 713, 722 (citing *Ceol*, 81 Ohio App.3d at 290; *Yousef v. Jones* (1991), 77 Ohio App.3d 500, 510). And, "if an adverse affect can be shown, the court must determine the amount of the award." *Id.* (citing *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 53-54). An award of attorney fees is discretionary. *Id.* (citing *Shaffer v. Mease* (1991), 66 Ohio App.3d 400, 407).

Sanctions were unreasonable based on Bardwell's conduct. First, Bardwell did nothing to harass or maliciously injure the Commissioners in filing his mandamus action. Furthermore, as will be discussed infra, Bardwell did not needlessly increase the cost of litigation by initially filing his mandamus action or by abandoning it once it became moot. Second, mandamus is the legal tool open government activists like Bardwell use to enforce the Ohio Public Records Act. Third, Bardwell reasonably believed that the Commissioners and their counsel would refuse to produce or unreasonably delay the production of the public records he requested.

Bardwell had good ground to support his mandamus complaint. The county Commissioners did not provide Bardwell with all the records he requested. (Appx. at A65.) They failed to produce "[d]rafts of contracts or development agreements related to Medical Mart

projects.” (Id.) Instead, they claimed the records were protected by privilege and relied on an inapplicable case, *State ex rel. Benesch, Friedlander, Coplan & Aronoff LLP v. Rosford* (2000), 140 Ohio App.3d 149, to justify their refusal to produce them. (Id.) Drafts exchanged between parties to a negotiation are not protected by the attorney-client privilege, and therefore are not exempt from disclosure under Revised Code Section 149.43(A)(1)(v). The attorney-client privilege only protects “confidences shared in the attorney-client relationship.” *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 660.

Assuming that a category of drafts existed that had been exchanged between adverse parties in the negotiations concerning the Medical Mart development, they would have been subject to disclosure under Revised Code Section 149.43 at the time Bardwell made his initial public records request in March 2009. “Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it is not proven that the requested records fall squarely within the exception.” *State ex rel. Cincinnati Enquirer v. Jones-Kelly*, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph 2 of the syllabus. All the prosecutor did here was state that the records were exempt as attorney-client privileged communications, without specifically identifying whether a category of drafts existed that should be subject to disclosure because they had been exchanged with third parties not within the attorney-client relationship between the county and its counsel. (Appx. at A65.) The appellate court did not go far enough in its analysis of the privilege issue the prosecutor raised. It therefore erred when it concluded that the commissioners properly withheld *all* of the requested drafts, some of which likely were not exempt from disclosure under the Public Records Act.

The fact that Bardwell filed his mandamus action the same day he received a *partial* response to his public records request does not constitute bad faith under the circumstances. (Appx. at A65.) Bardwell received records in two of the three categories he identified in his request. (Id.) He received a copy of the records retention schedule. (Id.) And, he received a copy of correspondence between Fred Nance, counsel for Cuyahoga County in the Medical Mart transaction, and David Marburger, counsel for *The Plain Dealer*. (Id.) The content of that correspondence is crucial to understanding Bardwell's motivation for immediately filing a mandamus action.

Marburger's interaction with Nance clearly demonstrated that the county commissioners were not producing to *The Plain Dealer* the same drafts of contracts and development agreements Bardwell had requested on March 27, 2009. *The Plain Dealer* requested the records on March 18, 2009. (Id. at A27.) Marburger telephoned Nance on March 19, 2009, and followed up with a voice mail. (Id. at A26.) Marburger's communication with Nance, via e-mail, was as follows:

Fred: I just left a voice mail for you -- pls [sic] give the county the green lite [sic] to inspect & receive a copy of the drafts of the development contracts that the county possesses *that also have been shared with representatives of the organization that would enter into the contract with the county.*

(Id.) (Emphasis added.) Marburger, on March 20, 2009, followed up with Nance via e-mail, asking again that Nance return his call about the contracts. (Id. at A28.) *The Plain Dealer* therefore understood that non-privileged drafts, subject to disclosure under the Public Records Act, likely existed.

In light of the fact that the county's counsel was not responding to *The Plain Dealer's* counsel or the underlying public records request, Bardwell reasonably believed that he had no

choice but to file a mandamus action when he did not receive the non-privileged drafts that had been shared among adverse negotiating parties. Bardwell was under no obligation to accept the prosecutor's representation that the documents would be produced at some unspecified time in the future, particularly since the drafts that had been exchanged among the negotiating parties did not enjoy privileged status. The Public Records Act does not prescribe a specific waiting period before a mandamus action can be filed.

... The prosecutor did not afford Bardwell an opportunity to revise his request, which violates Revised Code Section 149.43. (Appx. at A65.) Bardwell certainly could have revised his public records request to seek all non-privileged drafts of contracts or development agreements, in response to the prosecutor's broad contention that *all* drafts were exempt from disclosure. This is especially true in the context of Marburger's March 19, 2009, e-mail to Nance in which Marburger requests drafts that had been shared with the parties to the Medical Mart development, implying that *The Plain Dealer* only wanted non-privileged drafts. (Id. at A26.) Given the opportunity, Bardwell could have clarified his position. The prosecutor did not give him that opportunity. He simply deferred the request until such time as the contracts were signed and the Medical Mart transactions closed. (Id. at A65.) This effectively would prevent any public scrutiny of the Medical Mart development deals before the Commissioners executed them. The end result: circumvention of the Ohio Public Records Act, thereby allowing the Commissioners to do business without the inconvenience of public scrutiny.

The Public Records Act, R.C. 149.43, has only limited and narrow exceptions. It must be interpreted to avoid exceptions in order to affect its purpose -- giving a liberal construction in favor of release and a narrow construction for exceptions. *State ex rel. Plain Dealer Publishing*

Co. v. Cleveland, 106 Ohio St.3d 70, 2005-Ohio-3807, ¶ 20; *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629, ¶ 10.

The appellate court read the attorney-client privilege asserted by the prosecutor, on behalf of the Commissioners, too broadly in holding that *all* of the drafts Bardwell requested were records exempt from disclosure. The only exceptions to the Ohio Public Records Act are those created by the General Assembly, and “judicially created exceptions” are not permitted. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497. The General Assembly serves as “the ultimate arbiter of public policy” to decide what exceptions to include and which to omit. *Id.* at 413. If the legislature doesn't create an exception, it doesn't exist. There are *no implied exceptions*. The appellate court effectively expanded the attorney-client privilege exemption to all drafts created and exchanged among counsel to adverse parties in transactions like those involved in the Medical Mart deal. Those drafts, prepared by the Commissioner’s counsel, became non-privileged public records once they were circulated outside of the confidential attorney-client relationship to adverse or third parties with whom the county intended to contract.

Finally, Bardwell pursued his mandamus action in good faith and any minor technical failure to satisfy the procedural requirements of Eighth District Local Appellate Rule 45(B)(1)(a) does not constitute bad faith. The appellate court could have instructed Bardwell, a pro se litigant, to cure any procedural defect by ordering him to verify the complaint within a time certain or face dismissal and sanctions. Likewise, the prosecutor could have filed a motion to dismiss based upon Bardwell’s failure to comply with the local rule without answering the complaint or proceeding to summary judgment three months later. The appellate court had ample opportunity to rid itself of Bardwell’s mandamus action by exercising its inherent power to control the proceedings before it, to require Bardwell to comply with the local rule or dismiss

his case and to dismiss the case once it became clear that it was moot. It did neither. Instead, it allowed the case to remain pending long after it should have been dismissed. The appellate court could have dismissed the mandamus action as easily, if not more easily, than Bardwell, but failed to do so. Bardwell's acts constituted good faith.

B. Rule 11 Sanctions Are Not Warranted When a Moot Claim Proceeds to Summary Judgment Unnecessarily.

1. Rule 11 sanctions should not be imposed for mere abandonment of a moot claim.

Bardwell did not prosecute his mandamus complaint after he received all of the requested records ten business days after he filed the action. A mandamus action brought to enforce the Ohio Public Records Act is moot once the responding public office produces the requested records. See *State ex rel. Cincinnati Enquirer, a Div. of Gannett Satellite Information Network, Inc. v. Ronan*, 2009-Ohio-5947, ¶4 (holding that court of appeals properly dismissed mandamus complaint because public records had been produced); *Toledo Blade Co. v. Seneca Cty. Bd. of Commissioners*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶43 (holding that newspaper's claim for records became moot after the county commissioners produced the requested records). A moot case may be dismissed *sua sponte*. *Id.*, ¶4 (quoting *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, ¶14). See also *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, ¶7. Bardwell's mandamus claim became moot approximately ten business days after he filed it, and it should have been dismissed as such either at the prosecutor's suggestion or *sua sponte* by the appellate court once it became aware that the records request had been fulfilled. Instead, the prosecutor and the court allowed the case to proceed to summary judgment at taxpayer expense approximately three months *after* the claim had become moot.

Bardwell had no obligation to dismiss his mandamus action once it became moot. As this Court recently held, a party whose mandamus action becomes moot after it receives requested public records, may still pursue a claim for attorney's fees. "[A] claim for attorney fees in a public-records mandamus action is not rendered moot by the provision of the requested records after the case has been filed." *Ronan*, 2009-Ohio-5947, ¶10 (quoting *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, ¶18). Bardwell, of course, did not pursue attorney's fees because the appellate court dismissed his mandamus action on the merits of the commissioners' summary judgment motion.

It is curious that both the prosecutor and the appellate court failed to recognize that Bardwell's mandamus action was moot at the time the prosecutor sought an extension of time to move or plead on April 28, 2009, and subsequently filed a summary judgment motion on June 8, 2009. (Appx. at A30.) Again, a simple, one page, suggestion of mootness filed by the prosecutor would necessarily have resulted in an immediate dismissal of Bardwell's mandamus action. The prosecutor never would have had to brief summary judgment to resolve the case. Likewise, the appellate court would not have had to reach the underlying merits of the mandamus action in deciding the Commissioner's summary judgment motion. Nevertheless, the prosecutor in its summary judgment motion, and the appellate court in its decision on that motion, attacked Bardwell and set the stage for the sanctions proceedings that were yet to come.

2. Awarding attorneys' fees to the Commissioners was an abuse of discretion because the fees incurred could have been avoided.

The Commissioners unnecessarily incurred more than one-thousand dollars in attorneys' fees in responding to Bardwell's mandamus action long after it became moot. Bardwell's mandamus action became moot as soon as the Commissioners produced the remaining public records in April 2009. See *Ronan*, 2009-Ohio-5947, ¶4 (holding that court of appeals properly

dismissed mandamus complaint because public records had been produced); *Toledo Blade Co. v. Seneca Cty. Bd. of Commissioners*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶43 (holding that newspaper's claim for records became moot after the county commissioners produced the requested records). The county commissioners therefore could have avoided answering the complaint and preparing a summary judgment motion by filing a suggestion of mootness or a very short dispositive motion indicating that Bardwell's claim was moot. The commissioners incurred additional legal fees not because Bardwell pressed his claim after it was moot, but rather because the prosecutor chose to file a lengthy and entirely unnecessary summary judgment motion. Even assuming *arguendo* that Bardwell's conduct in initially filing the mandamus was marginal, there is no basis for finding that he caused the Commissioners to incur the legal fees associated with responding to the complaint and moving for summary judgment after it became moot. Consequently, the Court should vacate the monetary sanction imposed upon Bardwell.

Proposition of Law No. 2: Ohio public policy strongly favors citizen activists using the Ohio Public Records Act, and mandamus, to ensure openness in government. The use of judicial sanctions to deter enforcement of the Public Records Act runs afoul of this public policy.

A. Ohio Public Policy Favors Open Government and Open Records.

The public policy of this State is openness, recognizing and respecting the public right to know. In Ohio, it is public policy that all government business is presumptively open to the public, unless explicitly made otherwise. Both the Ohio Constitution and the Ohio Revised Code ensure this important principle. The Public Records Act embodies that policy and could not exist were it at odds with the stated policy or the state constitution.

From nearly the beginning, the Ohio Constitution, embraced a policy of open government, proclaiming, "all political power is inherent in the people. Government is instituted for their equal protection and benefit... and no special privileges or immunities shall ever be

granted, that may not be altered, revoked, or repealed by the general assembly.” Ohio Constitution, Article I, Section 2. The purpose of having a governmental structure, in general, is to preserve the will of the people.

“The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people.” *Dayton Newspapers, Inc. v. Dayton* (1976), 45 Ohio St.2d 107, 109 (quoting *State ex rel. Patterson v. Ayers* (1960), 171 Ohio St. 369, 371). The Ohio Revised Code also generally maintains a general policy of open records and reports. For example, the Public Records Act states that “records kept by any public office, including, but not limited to, state, county, city, village, township...” are required to be public. R.C. 149.43(A). The Open Meetings Act “shall 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.” R.C. 121.22(A).

The Public Records Act is a broad statute; it covers all government officials. “The Public Records Act allows public access to public records with certain exceptions and is based on the ‘fundamental policy of promoting open government, not restricting it.’” *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St.3d 168, 171; *see also, State ex rel. Gannett Satellite Info. Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264. The appellate court undermined Ohio public policy, embodied in the Public Records Act, by sanctioning Bardwell for demanding the very government openness on which this state was founded.

B. Enforcement of the Ohio Public Records Act Should Not Be Chilled, and Ultimately Deterred, by the Unreasonable and Arbitrary Use of Sanctions.

The appellate court's sanctions order irreparably undermines and weakens the public's ability to ensure that government officials abide by the Ohio Public Records Act. It cannot be permitted to stand. In the context of enforcing the Ohio Public Records Act, the use of Ohio Civil Rule 11 and Revised Code Section 2323.51 must be stringently and sparingly applied in only the worst cases of intentional abuse of process. Such an approach would recognize the strong public policy underlying Ohio's Public Records Act: 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. The Act also must be liberally construed in favor of broad access to public records, with any doubt resolved in favor of disclosure. *Cf. State ex rel. Natl. Broadcasting Co. v. Cleveland (1992)*, 82 Ohio App.3d 202. See also, *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. Of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903; *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 1996-Ohio-214. Sanctioning government watchdogs like Bardwell, absent any evidence of bad faith, limits enforcement of the Act by private citizens and reduces access to public records. In Cuyahoga County, in the wake of the public corruption scandal developing there, the ability of government watchdogs to act swiftly to enforce the Ohio Public Records Act has never been more important.

Furthermore, this case demonstrates that the abuse of judicial authority is a potent deterrent to private citizen watchdogs and open government advocates who regularly enforce the Ohio Public Records Act. The appellate court erroneously applied Rule 11 and Revised Code Section 2323.51 to sanction Bardwell. It then went on to warn Bardwell against filing additional mandamus actions. (Appx. at A119-A123.) It bent the law to suit a purpose for which it was not

enacted -- *i.e.*, to deter Bardwell from using mandamus to enforce the Ohio Public Records Act. The appellate court has created a slippery slope down which private citizens, government watchdogs, and newspaper reporters alike will skid.

The sanctions entered against Bardwell, if permitted to stand, will have a chilling effect in Cuyahoga County and throughout the State of Ohio. It sent a clear message that Bardwell would be subject to more severe sanctions if he continued to litigate mandamus actions in Cuyahoga County. It is worth noting that in the wake of the appellate court's decision in this matter, another municipality with which Bardwell is engaged in mandamus litigation to compel disclosure of public records has filed a counterclaim against Bardwell, asserting in essence that Bardwell is somehow not privileged to avail himself of the Public Records Act for the simple reason that he has utilized it "too often." See *State of Ohio, ex rel, Bardwell v. City of Lyndhurst*, Eighth District Court of Appeals Case No. 093636. There can be no doubt that the appellate court's intent was to deter Bardwell from seeking public records from county offices -- especially in Cuyahoga County.

The sanctions order also indirectly will deter others, like Bardwell, who want to ensure transparency in their county government, but who will not risk monetary penalties to do so. An appellate court should not be permitted to stifle government watchdogs and other activists in Cuyahoga County, or any Ohio county, by sanctioning citizens who seek enforcement of the Ohio Public Records Act through routine litigation.

The threat of a pending mandamus action and the specter of statutory attorneys' fees often is sufficient to prompt production of public records that otherwise would occur at a glacial pace. Regardless whether those actions become moot by the subsequent production of documents, the ability to file a mandamus action -- to properly motivate often recalcitrant public

officials to disclose public records -- is essential. Penalizing a *pro se* litigant for using mandamus to enforce the spirit and the letter of the Ohio Public Records Act only diminishes the law's significance as a tool of open and transparent government.

The appellate court's clear intent in sanctioning Bardwell is to deter him, and others like him, from filing future actions to enforce the Ohio Public Records Act. It explicitly warned him that future litigation he filed would be subject to higher scrutiny and that additional sanctions could be imposed. Bardwell has been successful in enforcing the Ohio Public Records Act in Cuyahoga County and elsewhere. Now he must labor under a sanctions order that erroneously brands him as litigating in bad faith solely for the purpose of obtaining statutory damages.

If in place of a private citizen such as Bardwell, *The Plain Dealer* or other large institutional litigator had filed the underlying mandamus action, sanctions likely would not be an issue. The prosecutor likely would not have briefed summary judgment so extensively, but instead merely would have filed a suggestion of mootness. Sanctions also would not be an issue because the appellate court likely would not have *sua sponte* ordered a newspaper to show cause after its mandamus action had been mooted. And, they would not be an issue because a newspaper likely would not be deterred by monetary sanctions. Unlike the news media, private citizens seeking to enforce the Ohio Public Records Act will likely be deterred by the specter of court ordered sanctions. The appellate court abused and exceeded its judicial authority, in contravention of Ohio law and public policy, by imposing sanctions against a private citizen availing himself of the Public Records Act under the circumstances here.

V. CONCLUSION

For the foregoing reasons, this Court should vacate the sanctions entered against Bardwell. Bardwell did nothing more than press his rights under the Ohio Public Records Act

through a mandamus action he filed in good faith to shine a light on a billion dollar development deal that had been shrouded in secrecy. This is precisely the type of action the Public Records Act authorizes citizen watchdogs to take when government attempts to prohibit public scrutiny of its business.

Respectfully submitted,



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*Counsel for Relator-Appellant,
Brian Bardwell*

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served this 26th day of January 2010, by regular U.S. Mail, postage prepaid, upon Charles E. Hannan, Assistant Prosecuting Attorney, The Justice Center, Courts Tower, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.

A handwritten signature in black ink that reads "Brian J. Laliberte". The signature is written in a cursive style with a horizontal line underneath the name.

Brian J. Laliberte
Counsel for the Relator

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. :
BRIAN BARDWELL, :
 :
RELATOR-APPELLANT, :
 :
vs. :
 :
CUYAHOGA COUNTY BOARD :
OF COMMISSIONERS, :
 :
RESPONDENT-APPELLEE. :
 :

CASE NO. 09-2140
On Appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District
Court of Appeals Case No. 09 CA 93058

NOTICE OF APPEAL OF RELATOR-APPELLANT BRIAN BARDWELL

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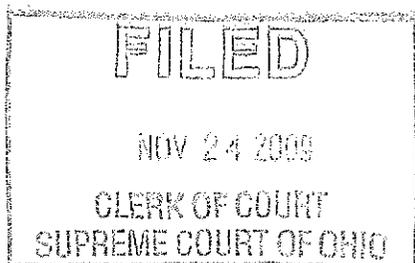
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NOTICE OF APPEAL OF RELATOR-APPELLANT BRIAN BARDWELL

Relator-Appellant, Brian Bardwell, gives notice of his claimed appeal of right and discretionary appeal pursuant to Ohio Supreme Court Rule II, Sections 1(A)(2) and (3), from a decision of the Cuyahoga County Court of Appeals, Eighth District, in an original mandamus action filed in that court and journalized in Case No. 09 CA 93058 on October 19, 2009. A date-stamped copy of the Eighth District's Judgment Entry and Opinion, respectively, is attached to the Relator-Appellant's Motion for Stay Pending Appeal as Exhibit 1.

The Motion for Stay is being filed pursuant to Ohio Supreme Court Rule II, Section 2(A)(3)(a). Relator-Appellant's forthcoming Memorandum in Support of Jurisdiction, will explain why this case raises substantial legal questions and is of public and great general interest.

Respectfully submitted,



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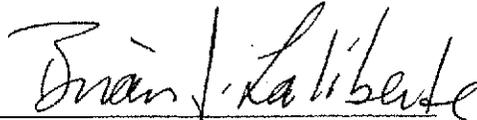
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*Counsel for Relator-Appellant,
Brian Bardwell*

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Stay Judgment Pending Appeal to the Ohio Supreme Court was served this 24th day of November 2009, by regular U.S. Mail, postage prepaid, upon Charles E. Hannan, Assistant Prosecuting Attorney, The Justice Center, Courts Tower, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



Brian J. Laliberte
Counsel for the Relator

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. : CASE NO. 09-2140
BRIAN BARDWELL, :
RELATOR-APPELLANT, : On Appeal from the
vs. : Cuyahoga County Court of Appeals,
Eighth Appellate District
Court of Appeals Case No. 09 CA 93058
CUYAHOGA COUNTY BOARD :
OF COMMISSIONERS, :
RESPONDENT-APPELLEE. :
:

AMENDED NOTICE OF APPEAL OF RELATOR-APPELLANT BRIAN BARDWELL

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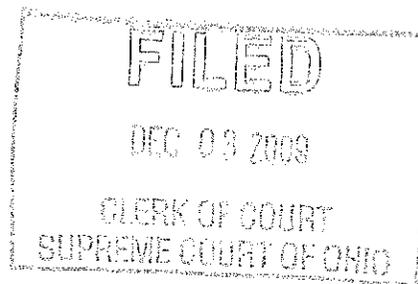
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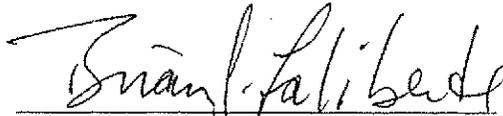
AMENDED NOTICE OF APPEAL OF RELATOR-APPELLANT BRIAN BARDWELL

Relator-Appellant, Brian Bardwell, gives this amended notice of his appeal of right and discretionary appeal pursuant to Ohio Supreme Court Rule II, Sections 1(A)(1) and (3), from a decision of the Cuyahoga County Court of Appeals, Eighth District, in an original mandamus action filed in that court and journalized in Case No. 09 CA 93058 on October 19, 2009. The original Notice of Appeal incorrectly characterized this appeal as a “claimed appeal of right” under Supreme Court Rule II, Sec. 1(A)(2). It is in fact an appeal of right under Rule II, Sec. 1(A)(1).

This Amended Notice of Appeal is timely filed, within 45 days of the appellate court’s Judgment Entry and Opinion. A date-stamped copy of the Eighth District’s Judgment Entry and Opinion, respectively, is attached both to the Relator-Appellant’s Motion for Stay Pending Appeal and to his Memorandum in Support of Jurisdiction as Exhibit I.

The Motion for Stay was filed on November 24, 2009, pursuant to Ohio Supreme Court Rule II, Section 2(A)(3)(a). Relator-Appellant’s Memorandum in Support of Jurisdiction, filed simultaneously with this Amended Notice of Appeal, will more fully explain the basis for this Court’s jurisdiction and demonstrate that this case is of public and great general interest.

Respectfully submitted,



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*Counsel for Relator-Appellant,
Brian Bardwell*

CERTIFICATE OF SERVICE

A copy of the foregoing Amended Notice of Appeal was served this 3d day of December 2009, by regular U.S. Mail, postage prepaid, upon Charles E. Hannan, Assistant Prosecuting Attorney, The Justice Center, Courts Tower, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



Brian J. Laliberte
Counsel for the Relator

**IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO, EX REL.
BRIAN BARDWELL
Relator

Case Number: _____

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
1219 Ontario St.
Cleveland, OH
Respondent

**VERIFIED PETITION FOR
WRIT OF MANDAMUS**

Now comes the Relator, Brian Bardwell, and for his complaint against the Respondent, alleges and states as follows:

FACTS

1. On or about March 26, 2009, the Relator hand-delivered a request pursuant to the Ohio Public Records Act, RC 149.43, to be given access to inspect records in the possession of the Cuyahoga County Board of Commissioners.
2. The request was delivered to the office of Prosecutor Bill Mason, who serves as counsel for the Commissioners.
3. The request sought access to inspect records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts; drafts of contracts or development agreements related to Medical Mart projects; and the county's records retention schedule.
4. The Relator delivered the request to a woman named Rhonda at the office's front desk.
5. Rhonda told the Relator to provide his name and phone number in addition to the request.

6. Rhonda did not first tell the Relator that he was not required to provide his identity.
7. After the Relator declined to provide his name, Rhonda again asked him for his identity.
8. Rhonda did not first tell the Relator that he was not required to provide his identity.
9. Rhonda then directed the request to another person, believed to be named "Saul."
10. Saul asked what records were being requested.
11. The Relator explained that he was looking for drafts of development agreements for the Medical Mart; communications between the county and The Plain Dealer about releasing or not releasing those agreements; and the records retention schedule.
12. Saul then directed the request to the prosecutor's public information officer, Ryan Miday.
13. Maria, an assistant to Mr. Miday, came out to take the Relator's request.
14. Maria again asked for the Relator's identity and contact information.
15. Maria did not first tell the Relator that he was not required to provide his identity.
16. The Relator offered to return later in the day instead of providing contact information.
17. The Relator asked if any of the requested records were available at that time.
18. Maria said that none of the requested records were available.
19. When the Relator returned, Maria provided the Law Department's record retention schedule, and no other records.
20. She stated that the Department was not able to provide copies of communications between the county and The Plain Dealer because they were still being compiled and would need to be redacted.
21. She further stated that those records would be available the next morning.

22. Maria stated that no contract drafts would be released until the contract was finalized.

23. The Relator then clarified for Maria that in addition to communication *from* the Plain Dealer regarding the Medical Mart project, he was also looking for communication *to* the Plain Dealer as well.

24. Shortly thereafter, the Relator was approached by Mr. Miday, who said that the office was working to identify, gather and provide that correspondence.

25. The Relator then asked about the contract drafts.

26. Mr. Miday said that there were no drafts available at that time.

27. The Relator asked whether any drafts existed.

28. Mr. Miday said that if any drafts existed, they would be protected by attorney-client privilege.

29. The Relator then requested copies of whatever drafts did exist.

30. Mr. Miday said that he would provide whatever was public record.

31. The Relator returned the next day to retrieve his requested records.

32. The records provided to the Relator included a request from a Plain Dealer reporter to view copies of development agreement drafts and two e-mails from David Marburger, an attorney for the Plain Dealer, to Fred Nance, an attorney for the county.

33. Those e-mails indicate that Mr. Marburger left at least one voicemail for Mr. Nance about the release of drafts.

34. No voicemails were provided to the Relator.

35. No explanation was given for the failure to provide voicemail records.

36. No records were provided reflecting communication from the county to the Plain Dealer.

37. No explanation was given for the failure to provide such records.

38. A letter from Prosecutor Mason was provided with the records.

39. That letter stated that no drafts of contracts would be provided because they were protected by attorney-client privilege.

40. No drafts were provided.

41. No nonexempt portions of any draft were provided.

JURISDICTION

42. This court is given original jurisdiction over this matter by Ohio Revised Code sections 2731.02 and 149.43.

AVAILABILITY OF PUBLIC RECORDS

43. The Ohio Public Records Act, codified at R.C. section 149.43, requires that “all public records [. . .] shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.”

44. The Act defines public records as “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.”

45. The Act further provides that “upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time.”

46. Respondent Cuyahoga County Board of Commissioners is a public office as contemplated by the Act.

47. The records requested by the Relator are public records as contemplated by the Act.

48. The records requested by the Relator are not exempt from disclosure under the Act.

49. The Respondent has not provided all the records requested by the Relator that are subject to disclosure.

50. The Respondent has failed to comply with the Act by failing to fulfill the Relator's request.

DUTY TO RELEASE NONEXEMPT PORTIONS OF RECORDS

51. The Act requires that if a request is made for a record that contains information that is exempt for the Act, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.

52. The Act further requires that "a redaction shall be deemed a denial of a request to inspect or copy the redacted information."

53. The Respondent has failed to release nonexempt portions of records that contain exempt information.

54. The Respondent has failed to comply with the Act by failing to release nonexempt portions of records that contain exempt information.

ORGANIZATION OF PUBLIC RECORDS

55. The Act requires the Respondent to "organize and maintain public records in a manner that they can be made available for inspection or copying."

56. The Respondent has failed to organize and maintain their records in such a manner.

57. The Respondent has failed to comply with the Act by failing to organize and maintain their records in a manner that would make them readily available for inspection or copying.

RECORDS RETENTION SCHEDULE

58. The Act requires the Respondent to make available "a copy of its current records retention schedule at a location readily available to the public."

59. The Respondent did not have a copy of their records retention schedule available when the Relator made his request.

60. The Respondent has failed to comply with the Act by failing to keep a copy of their records retention schedule readily available.

OPPORTUNITY TO REVISE REQUEST

61. The Act requires that in the case of an overly broad request, the Respondent “shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person’s duties.”

62. The Respondent’s denials did not adequately provide the Relator an opportunity to revise his request so that it could be fulfilled.

63. The Relator asserts that the Respondent has failed to comply with the Act by failing to adequately provide the Relator an opportunity to revise his request so that it could be fulfilled.

64. The Respondent’s denials did not adequately inform the Relator how the requested records were maintained so his request could be revised.

65. The Respondent has failed to comply with the Act by failing to adequately inform him how the requested records were maintained so his request could be revised.

FAILURE TO EXPLAIN DENIAL

66. The Act further requires that in the case of a request being denied, the Respondent “shall provide the requester with an explanation, including legal authority, setting forth why the request was denied.”

67. The Respondent’s denials did not include an explanation, including legal authority, setting forth why his request was denied.

68. The Respondent has failed to comply with the Act by failing to include with their denials an explanation or legal authority setting forth why the request was denied.

DEMAND FOR REQUESTER'S IDENTITY

69. The Act does not permit the Respondent to limit or condition the availability of public records by requiring disclosure of the requester's identity.

70. The Act permits the Respondent to ask for the requester's identity only after disclosing that it does not need to be provided, and when providing it would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

71. The Respondent did not disclose that the Relator was not required to reveal his identity.

72. The Respondent has failed to comply with the Act by failing to disclose that he was not required to reveal his identity.

73. The Respondent has made no assertion that providing the requester's identity would benefit the Relator.

74. The Respondent has failed to comply with the Act by requiring disclosure of his identity.

75. The Respondent's demand for the disclosure of the Relator's identity constitutes a denial of the Relator's request.

CONDITIONS FOR DAMAGES

76. The presumption of openness attached to the Act requires the Respondent to bear the burden of proving that its interests in keeping the requested records secret outweigh those of the Relator and the public.

77. A well-informed public official could not believe that the Respondent's conduct in denying the Relator's request was not a failure to comply with the Act's provisions based on the ordinary application of statutory law and case law.

78. A well-informed public official could not believe that the Respondent's conduct in denying the Relator's request would serve the public policy that underlies the authority that is asserted as permitting their conduct.

79. The records provided do not sufficiently fulfill the Relator's request.

80. The Respondent has failed to fulfill the Relator's request and have thereby violated the Act.

THEREFORE, the Relator prays that this Court issue a Writ of Mandamus and promulgate an immediate order directing the Respondent to make available all records requested and further directing the Respondent to comply with their remaining obligations under division (B) of the Ohio Public Records Act.

The Relator requests that this petition be heard on an expedited basis and that he be awarded his costs, attorney's fees and such other relief as is just and equitable, including damages as laid out in R.C. sections 149.43(C)(1) and 149.351.

Respectfully submitted,

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, EX REL.
BRIAN BARDWELL,
Relator

Case Number: _____

—v.—

VERIFICATION

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
Respondent

Comes now Relator Brian Bardwell and verifies that the allegations and statements as set forth in this Complaint and Affidavit are truthful and based on his personal knowledge.

BRIAN D. BARDWELL

STATE OF OHIO,
COUNTY OF CUYAHOGA

Sworn to before me and subscribed in my presence this ____ Day of _____, 2009.

NOTARY PUBLIC

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, EX REL.
BRIAN BARDWELL,
Relator

Case Number: _____

--v.--

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
Respondent

**AFFIDAVIT OF RELATOR,
BRIAN BARDWELL**

Now comes the Relator, Brian Bardwell, and for his Complaint against the Respondent, alleges and states as follows:

Unless otherwise indicated, I have personal knowledge of the matters set forth herein.

FACTS

1. On or about March 26, 2009, I hand-delivered a request pursuant to the Ohio Public Records Act, R.C. 149.43, to be given access to inspect records in the possession of the Cuyahoga County Board of Commissioners.
2. The request was delivered to the office of Prosecutor Bill Mason, who serves as counsel for the Commissioners.
3. The request sought access to inspect records of communications between the county and The Plain Dealer regarding negotiations for the release of records relating to the Medical Mart development project; records of development agreements or drafts of such agreements relating to the Medical Mart development project; and the county's records retention schedule.
4. I delivered the request to a woman named Rhonda at the office's front desk.
5. Rhonda told me to provide my name and phone number in addition to the request.
6. Rhonda did not first tell me that I was not required to provide my identity.
7. After I declined to provide my name, Rhonda again asked me for my identity.

8. Rhonda did not first tell me that I was not required to provide my identity.

9. Rhonda then directed my request to another person, believed to be named "Saul."

10. Saul asked what records were being requested.

11. I explained that I was looking for drafts of development agreements for the Medical Mart; communications between the county and The Plain Dealer about releasing or not releasing those agreements; and the records retention schedule.

12. Saul then directed my request to another employee, Ryan Miday.

13. Maria, an assistant to Mr. Miday, then came out to take my request.

14. Maria again asked for my identity and contact information.

15. Maria did not first tell me that I was not required to provide my identity.

16. I offered to return later in the day instead of providing contact information.

17. I asked if any of the requested records were available at that time.

18. Maria said that none of the requested records were available.

19. When I returned, Maria provided me the Law Department's record retention schedule, and no other records.

20. She stated that the Department was not able to provide copies of communications between the county and The Plain Dealer because they were still being compiled and would need to be redacted.

21. She further stated that those records would be available the next morning.

22. Maria stated that no contract drafts would be released until the contract was finalized.

23. I then clarified for Maria that in addition to communication from the Plain Dealer regarding the Medical Mart project, I was also looking for communication to the Plain Dealer as well.

24. Shortly thereafter, I was approached by Mr. Miday, who said that the office was working to identify, gather and provide that correspondence.

25. I then asked about the contract drafts.

26. Mr. Miday said that there were no drafts available at that time.

27. I asked whether any drafts existed.

28. Mr. Miday said that if any drafts existed, they would be protected by attorney-client privilege.

29. I then requested copies of whatever drafts did exist.

30. Mr. Miday said that he would provide whatever was public record.

31. I returned the next day to retrieve my records.

32. The records provided included a request from a Plain Dealer reporter to view copies of development agreement drafts and two e-mails from David Marburger to Fred Nance.

33. Those e-mails indicate that Mr. Marburger left at least one voicemail for Mr. Nance about the release of drafts.

34. No voicemails were provided.

35. No explanation was given for the failure to provide voicemail.

36. No records were provided reflecting communication from the county to the Plain Dealer.

37. No explanation was given for the failure to provide those records.

38. A letter from Prosecutor Mason was provided with the records.

39. That letter stated that no drafts of contracts would be provided because they were protected by attorney-client privilege.

40. No drafts were provided.

41. No nonexempt portions of any draft were provided.

JURISDICTION

42. Upon information and belief, this court is given original jurisdiction over this matter by Ohio Revised Code sections 2731.02 and 149.43.

AVAILABILITY OF PUBLIC RECORDS

43. Upon information and belief, the Ohio Public Records Act, codified at R.C. section 149.43, requires that “all public records [. . .] shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.”

44. Upon information and belief, the Act defines public records as “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.”

45. Upon information and belief, the Act further provides that “upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time.”

46. Upon information and belief, Respondent Cuyahoga County Board of Commissioners is a public office as contemplated by the Act.

47. Upon information and belief, the records I have requested are public records as contemplated by the Act.

48. Upon information and belief, the records I have requested are not exempt from disclosure under the Act.

49. The Respondent has not provided all the records requested that are subject to disclosure.

50. Upon information and belief, the Respondent has failed to comply with the Act by refusing to fulfill my request.

DUTY TO RELEASE NONEXEMPT PORTIONS OF RECORDS

51. Upon information and belief, the Act requires that if a request is made for a record that contains information that is exempt for the Act, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.

52. Upon information and belief, the Act further requires that “a redaction shall be deemed a denial of a request to inspect or copy the redacted information.”

53. Upon information and belief, the Respondent has failed to release nonexempt portions of records that contain exempt information.

54. Upon information and belief, the Respondent has failed to comply with the Act by failing to release nonexempt portions of records that contain exempt information.

ORGANIZATION OF PUBLIC RECORDS

55. Upon information and belief, the Act requires the Respondent to “organize and maintain public records in a manner that they can be made available for inspection or copying.”

56. Upon information and belief, the Respondent has failed to organize and maintain their records in such a manner.

57. Upon information and belief, the Respondent has failed to comply with the Act by failing to organize and maintain their records in a manner that would make them readily available for inspection or copying.

RECORDS RETENTION SCHEDULE

58. Upon information and belief, the Act requires the Respondent to make available “a copy of its current records retention schedule at a location readily available to the public.”

59. The Respondent did not have a copy of their records retention schedule available when I made my request.

60. Upon information and belief, the Respondent has failed to comply with the Act by failing to keep a copy of their records retention schedule readily available.

OPPORTUNITY TO REVISE REQUEST

61. Upon information and belief, the Act requires that in the case of an overly broad request, the Respondent “shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person’s duties.”

62. Upon information and belief, the Respondent’s denials did not adequately provide me an opportunity to revise my request so that it could be fulfilled.

63. Upon information and belief, the Respondent has failed to comply with the Act by failing to adequately provide me an opportunity to revise my request so that it could be fulfilled.

64. Upon information and belief, the Respondent’s denials did not adequately inform me how the requested records were maintained so my request could be revised.

65. Upon information and belief, the Respondent has failed to comply with the Act by failing to adequately inform me how the requested records were maintained so my request could be revised.

FAILURE TO EXPLAIN DENIAL

66. Upon information and belief, the Act requires that in the case of a request being denied, the Respondent "shall provide the requester with an explanation, including legal authority, setting forth why the request was denied."

67. The Respondent's denials did not include a written explanation, including legal authority, setting forth why my request was denied.

68. Upon information and belief, the Respondent has failed to comply with the Act by failing to include with their denials an explanation or legal authority setting forth why my request was denied.

DEMAND FOR REQUESTER'S IDENTITY

69. Upon information and belief, the Act does not permit the Respondent to limit or condition the availability of public records by requiring disclosure of the requester's identity.

70. Upon information and belief, the Act permits the Respondent to ask for the requester's identity only after disclosing that it does not need to be provided, and when providing it would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

71. The Respondent did not disclose that I was not required to reveal my identity.

72. Upon information and belief, the Respondent has failed to comply with the Act by failing to disclose that I was not required to reveal my identity.

73. Upon information and belief, the Respondent has made no assertion that providing the requester's identity would benefit me.

74. Upon information and belief, the Respondent has failed to comply with the Act by requiring disclosure of my identity.

75. The Respondent's demand for the disclosure of my identity constituted a denial of my request.

CONDITIONS FOR DAMAGES

76. Upon information and belief, the presumption of openness attached to the Act requires the Respondent to bear the burden of proving that their interests in keeping the requested records secret outweigh mine and those of the public in having access to them.

77. Upon information and belief, a well-informed public official could not believe that the Respondent's conduct in denying my request was not a failure to comply with the Act's provisions based on the ordinary application of statutory law and case law.

78. Upon information and belief, a well-informed public official could not believe that the Respondent's conduct in denying my request would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

79. The records provided do not sufficiently fulfill my request.

80. Upon information and belief, the Respondent has failed to fulfill my request and have thereby violated the Act.

Respectfully submitted,

Brian Bardwell, *pro se*
9854 Pebble Brook Lane
Strongsville, OH 44149
(216) 256-2346

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O EX REL., BRIAN BARDWELL

Relator

COA No.
93058

ORIGINAL ACTION

-vs-

CUYAHOGA COUNTY BD. OF COMMISSIONERS

Respondent

MOTION NO. 426798

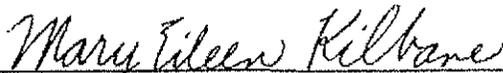
Date 10/19/2009

Journal

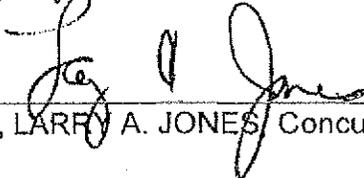
SANCTION ISSUED. RELATOR, BRIAN BARDWELL, SHALL PAY TO THE PROSECUTOR ATTORNEY FEES IN THE TOTAL AMOUNT OF \$1,050.42. THE ATTORNEY FEES SHALL BE PAID WITHIN FOURTEEN (14) DAYS OF THE DATE OF THIS ENTRY. NO OTHER COSTS SHALL BE ASSESSED AGAINST ANY PARTY.



Presiding Judge, KENNETH A. ROCCO, Concurs



Judge, MARY EILEEN KILBANE, Concurs



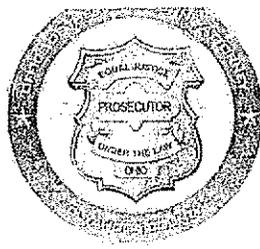
Judge, LARRY A. JONES, Concurs

RECEIVED FOR FILING

OCT 1 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY:  DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXES



Bill Mason
Cuyahoga County Prosecutor

March 27, 2009

To Whom It May Concern:

Re: Public Record Request made Thursday, March 26, 2009

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts
- Drafts of contracts or development agreements related to Medical Mart projects
- Your records retention schedule

In response to your requests:

1. We have attached all communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts;
2. Regarding your second request, drafts of the Development Agreement are not records at this time, since terms of Development Agreement are still being negotiated, so there presently is no agreement that has been submitted to the Board of County Commissioners for their approval. Moreover, the rough drafts of the agreement that is being negotiated are exempt from disclosure because they include confidential communications between the public client and its attorneys including but not limited to the attorneys' thoughts and opinions in rendering legal advice. State ex. rel. Benesch, Friedlander, Coplan & Amoff LLP v. Rossford (2000), 140 Ohio App. 3d 149, 746 N.E.2d 1139. When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available.
3. A copy of our retention schedule was provided to you on Thursday, March 26, 2009.

From: Marburger, David [<mailto:DMarburger@bakerlaw.com>]
Sent: Thursday, March 19, 2009 2:21 PM
To: Nance, Frederick R.
Cc: Marburger, David
Subject: Plain Dealer request

Fred: I just left a voice mail for you -- pls give the county the green light to allow the Plain Dealer to inspect & receive a copy of the drafts of the development contracts that the county possesses that also have been shared with representatives of the organization that would enter into the contract with the county. Thank you.

My Bio <http://www.bakerlaw.com/FindLawyers.aspx?LookupByEmail=dmarburger> | Web site
<http://www.bakerlaw.com/> | V-card <http://www.bakerlaw.com/vcards/dmarburger.vcf>

T 216.861.7956
F 216.696.0740
M
www.bakerlaw.com <http://www.bakerlaw.com/>

Dave Marburger
dmarburger@bakerlaw.com [mailto: dmarburger@bakerlaw.com](mailto:dmarburger@bakerlaw.com)

Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

<http://www.bakerlaw.com/>

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The Plain Dealer
1801 Superior Ave.
Cleveland, OR 44114

March 18, 2009

To: Cuyahoga County Commissioner Peter Lawson Jones

From: Plain Dealer reporter Joe Guillen

Re: Public records request

Greetings,

I am a reporter for the Plain Dealer writing to request copies of records, pursuant to Ohio Revised Code 149.43, in order to report on issues of public interest.

I request copies of all development agreement drafts exchanged between Commissioner Jones and Merchandise Mart Properties, Inc. related to the medical mart/convention center project.

Should you decide not to release any or all of the following records, please cite the section of Ohio law you are invoking.

Thank you,

Joe Guillen
The Plain Dealer
216-999-4675
jguillen@plaind.com



From: Marburger, David [<mailto:DMarburger@bakerlaw.com>]
Sent: Friday, March 20, 2009 1:48 PM
To: Nance, Frederick R.
Cc: Marburger, David
Subject: Pis phone

C'mon, Fred. Pis ring me about the Plain Dealer's request.

My Bio <<http://www.bakerlaw.com/FindLawyers.aspx?LookupByEmail=dmarburger>> | Web site
<<http://www.bakerlaw.com/>> | V-card <<http://www.bakerlaw.com/vcards/dmarburger.vcf>>

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M
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Dave Marburger
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<<http://www.bakerlaw.com/>>

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I WOULD LIKE TO INSPECT THE
FOLLOWING RECORDS:

- RECORDS OF COMMUNICATION FROM THE
PLAIN DEAR OR HIS ATTORNEYS REGARDING
THE RELEASE OF MEDICAL FILE
CONCERNING DEATHS AT THIS
CORPUS
- DRAFTS OF CONTRACTS OR DEVELOPMENT
AGREEMENTS RELATED TO MEDICAL
FILE PROJECTS
- YOUR RECORD RETENTION SCHEDULE

THANK YOU



IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL.
BRIAN BARDWELL.

Relator.

vs.

CUYAHOGA COUNTY BOARD
OF COMMISSIONERS,

Respondent.

) CASE NO. 09 CA 93058

) Original Action in Mandamus

) **RESPONDENT'S MOTION FOR**
) **SUMMARY JUDGMENT**

)
) Respondent Cuyahoga County Board of Commissioners ("respondent") respectfully
) moves this Court for an order pursuant to Rule 56 of the Ohio Rules of Civil Procedure that
) grants it a summary judgment on the Verified Petition for Writ of Mandamus and this cause.
) The grounds in support of this motion are that there are no genuine issues of material fact and
) respondent is entitled to judgment as a matter of law.

) A brief in support of this motion is attached hereto and incorporated herein.

) Respectfully submitted,

) WILLIAM D. MASON, Prosecuting Attorney
) of Cuyahoga County

) By:

) 

) CHARLES E. HANNAN (0037153)

) Assistant Prosecuting Attorney

) The Justice Center, Courts Tower, 8th Floor

) 1200 Ontario Street

) Cleveland, Ohio 44113

) Tel: (216) 443-7758/Fax: (216) 443-7602

) E-mail: channan@cuyahogacounty.us

) *Counsel for Respondent*

) *Cuyahoga County Board of Commissioners*

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL. BRIAN BARDWELL,	)	CASE NO. 09 CA 93058
)	
Relator,	)	Original Action in Mandamus
)	
vs.	)	<u>BRIEF IN SUPPORT OF</u>
	)	<u>RESPONDENT'S MOTION FOR</u>
	)	<u>SUMMARY JUDGMENT</u>
CUYAHOGA COUNTY BOARD OF COMMISSIONERS,)	
)	
Respondent.)	

STATEMENT OF FACTS AND PROCEEDINGS

Relator Brian Bardwell ("relator") filed this original action in mandamus against respondent Cuyahoga County Board of Commissioners ("respondent"). Brought under Ohio's public records law, R.C. 149.43, relator's "Verified Petition for Writ of Mandamus" ("Petition") principally sought drafts of a development agreement that was being negotiated at the time. The Petition additionally alleged, with utterly no substantiation, various violations of Ohio's public records act. For the reasons discussed hereafter, however, relator's action in mandamus fails as a matter of law. Accordingly, respondent respectfully requests that this Court issue an order that grants respondent a summary judgment, denies relator's request for relief in mandamus, and dismisses this cause.

The relevant facts are as follows:

On March 26, 2009, an individual presented himself in the office of the Cuyahoga County Prosecuting Attorney and delivered a hand-written request that said the following:

I would like to inspect the following records:

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts

- Drafts of contracts of development agreements related to Medical Mart projects
- Your record retention schedule.

Thank you.

A true and accurate photocopy of the hand-written request is submitted herewith as Exhibit A to the Affidavit of Charles E. Hannan.¹

The requester would not give the office receptionist any identifying information, but the Petition says it was relator. See Petition at paras. 1-9. His written request did not state that it was a request for "public records" and did not even refer to R.C. 149.43. After the requester explained what records he was seeking, he was promptly referred to the Public Information Office, to whom relator again declined to give any identifying information. See Petition at paras. 9-15.

Agreeing to return later that same day, relator acknowledges that he was given a copy of the Prosecuting Attorney's record retention schedule that he had requested earlier. See Petition at paras. 16-19. The public information officer told relator that copies of communications between the county and The Plain Dealer would be made available the next morning. See Petition at paras. 20-21.² The public information officer told relator that no copies of development agreement drafts would be available until the agreement was finalized. See Petition at para. 22-30.

Relator returned to the Prosecutor's Office on March 27, 2009. See Petition at paras. 31. Upon his return, the Prosecutor's Office gave the still unidentified requester a written response to

¹ Copies of the attached exhibits were previously submitted here in support of respondent's April 29, 2009 motion for an extension of time to move or plead.

² Relator says he verbally requested communications *to* the Plain Dealer. See Petition at para. 23. His written request, however, only sought communications "from the Plain Dealer or its attorneys."

his March 26, 2009 request, a true and accurate copy of which (excluding attachments) is submitted herewith as Exhibit B to the Affidavit of Charles E. Hannan. The March 27, 2009 response memorialized the following:

- All communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts were attached to the March 27, 2009 response, thus fulfilling a response to the first category of records requested on March 26, 2009.
- Drafts of the Development Agreement were not public record at that time because the terms of the Development Agreement were still being negotiated, so there was no agreement that had been submitted to the Board of Commissioners for their approval and the rough drafts were exempt from disclosure because they included confidential communications between a public client and its attorneys including attorney work product (citing *State ex rel. Benesch, Friedlander, Coplan & Arnoff LLP v. Rossford* (2000), 140 Ohio App.3d 149,746 N.E.2d 1139), thus responding to the second category of records requested on March 26, 2009.
- A copy of the Prosecuting Attorney's record retention schedule had been given to the requester on March 26, 2009, thus fulfilling a response to the third category of records requested on March 26, 2009.

With regard to the request for drafts of the Development Agreement, the Prosecutor's March 27, 2009 response also said the following: "When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available." See Exhibit B.

Later that day, relator filed this original action in mandamus against respondent Cuyahoga County Board of Commissioners. Alleging various infractions of Ohio's public records law that will be addressed hereafter, the Petition principally requests a writ of mandamus "directing the Respondent to make available all records requested ***." See Petition at p. 8.

Following the April 8, 2009 public release of the proposed Development Agreement between the County of Cuyahoga, Ohio; Merchandise Mart Properties, Inc.; MMPI Development LLC; and Cleveland MMCC LCC ("Development Agreement"), copies of nineteen (19) rough drafts that preceded the version of the proposed Development Agreement were also released

publicly. On April 9, 2009, respondent's undersigned counsel mailed a correspondence to relator, a true and accurate copy of which is submitted herewith as Exhibit C. Consistent with what had been indicated in the Prosecutor's March 27, 2009 response to relator's request, relator was sent a CD-R that contained, in PDF format, copies of the final version of the proposed Development Agreement as well as preceding drafts. The April 9, 2009 correspondence noted that the production of those prior drafts completed the response to the relator's March 26, 2009 request.

On April 16, 2009, the Cuyahoga County Board of Commissioners approved and executed the Development Agreement.³

For the reasons that follow, relator's action in mandamus fails as a matter of law.

ARGUMENT AND LAW

Relator's action in mandamus fails for several reasons. First, relator's Petition is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a). Second, relator's case is moot because the records he requested have already been provided to him. Third, relator cannot show that respondent violated Ohio's public records law. For any or all of these reasons, respondent should be granted a summary judgment that denies the requested writ of mandamus and dismisses this cause.

I. Relator's Petition is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Loc.App.R. 45(B)(1)(a) requires the verified complaint in an original action to contain "the specific statements of fact upon which the claim of illegality is based and must be supported by an affidavit from the plaintiff or relator specifying the details of the claim. Absent such detail

³ An executed copy of the Development Agreement executed by Cuyahoga County on April 16, 2009 may be viewed online at [http://bocc.cuyahogacounty.us/pdf/bocc/en-US/CLEVELAND-1048597-v12-Development Agreement 3 16 2009A.pdf](http://bocc.cuyahogacounty.us/pdf/bocc/en-US/CLEVELAND-1048597-v12-Development%20Agreement%203%2016%202009A.pdf).

and attachments, the complaint is subject to dismissal." Failure to comply with Loc.App.R. 45(B)(1)(a) provides grounds for dismissal.

Thus in *State ex rel. Bardwell v. Cleveland State University*, Cuyahoga App. No. 91077, 2008-Ohio-2819, the verification attached to the relator's complaint was defective because it failed to expressly state that the facts set forth in the complaint were based on the relator's personal knowledge. *Id.* at ¶ 7. The verification simply stated that the allegations and statements in the petition were true "to the best of his knowledge, information, and belief." *Id.* The Cuyahoga County Court of Appeals said: "Bardwell's verification is defective and requires dismissal of the complaint for a writ of mandamus."

Similarly in *Ghaster v. Fitzsimmons*, Cuyahoga App. No. 90652, 2007-Ohio-6187, the court held that the relator failed to comply with Loc.App.R. 45(B)(1)(a) because his petition lacks a sworn affidavit that specified the details of the claim based on the affiant's personal knowledge. *Id.* at ¶ 2.

In this case, and putting aside for the moment the claim alleging that public records were not made available, the other claims asserted in relator's Petition are not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

More specifically, and again without addressing for the moment the alleged failure to make public records available, relator asserts that the respondent failed to release nonexempt portions of records that contain exempt information. See Petition at paras. 51-54. This assertion is utterly without factual support. Relator does not allege or substantiate that any redaction was made to the records that were produced. Relator's supporting affidavit says only that it is based [u]pon information and belief." See Relator's Affidavit at paras. 51-54. Yet there are no facts to

support that supposed "information and belief." Accordingly, that claim is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Similarly, relator asserts that respondent has failed to organize and maintain its records in a manner that they can be made available for inspection or copying. See Petition at paras. 55-57. This assertion is likewise without any factual support. Relator does not substantiate that respondent has failed to organize or maintain its records. Relator's supporting affidavit again says only that it is based [u]pon information and belief." See Relator's Affidavit at paras. 55-57. Yet there once again are no facts to support that supposed "information and belief." Accordingly, that claim is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Relator next alleges that respondent did not have a copy of its record retention schedule available. See Petition at paras. 58-60. Of course, relator did not request a copy of respondent Board of County Commissioners record retention schedule - he requested a copy of respondent's lawyer's record retention schedule. And relator concedes that he received a copy of the Prosecutor's record retention schedule on March 26, 2009, the same day relator requested it. See Petition at para. 19. In any case, relator's assertions are again based on relator's supposed "information and belief." See Relator's Affidavit at paras. 58-60. He still provides no facts to support that alleged "information and belief." Accordingly, this claim is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Relator then says the respondent failed to comply with the public records law because it did not provide relator with an opportunity to revise his request. See Petition at paras. 61-65. Putting aside the fact that relator made no request at all to the respondent Board of County Commissioners, there are no facts to suggest that relator could have revised his request to obtain

records – indeed, relator has received all of the records he requested. Relator again attempts to support this claim by averring only that it is based on "information and belief." See Relator's Affidavit at paras. 61-65. He provides no facts to support his information and belief. This claim thus is not supported by an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Continuing, relator alleges that the respondent failed to explain its denial of relator's request. See Petition at paras. 66-68. Relator concedes that when he returned to the Prosecutor's Office on March 27, 2009 to obtain records, "[a] letter from Prosecutor Mason was provided with the records." See Petition at para. 38. Relator did not bother to attach a copy of that letter to the mandamus Petition he filed later that day. A copy of that correspondence is attached hereto as Exhibit B. It plainly spelled out that all records responsive to two (2) categories of requested records had been provided to relator and explained why the remaining records were not being provided, citing legal authority in support. Relator's Petition and Affidavit, at paras. 67, now say that "[t]he Respondent's denials did not include an explanation, including legal authority, setting forth why [relator's] request was denied." Relator's assertions are not just unsupported by his "information and belief" – they are refuted by the undisputed facts of record. In any case, relator's claim once again lacks an affidavit that complies with Loc.App.R. 45(B)(1)(a).

Relator then alleges that respondent violated the public records act by requesting relator's identity without telling relator that he did not have to disclose his identity. See Petition at paras. 69-75. Relator cannot seriously maintain that the public records act is violated whenever a front-office receptionist, preparing to page the office's public information officer, courteously asks, "Who should I say is calling?" In any event, relator's own Petition belies that any such innocuous inquiry violated the act. The availability of public records was not limited or

conditioned on the disclosure of the requester's identity. See R.C. 149.43(B)(4). Relator concedes that records were freely provided to him on March 26, 2009 and March 27, 2009 even while his identity was unknown. See Petition at paras. 19, 32-33 and 38. Thus whatever "information and belief" relator supposedly has to substantiate alleged public records law violations is refuted by his own Petition.

Relator's Petition tries to plead numerous violations of the public records law, but he has utterly failed to substantiate his allegations with facts based on personal knowledge. Because his Petition fails to comply with Loc.App.R. 45(B)(1)(a), the Petition and this cause should be dismissed.

II. Relator's request for public records is moot.

Relator's Petition asserts that the respondent failed to make alleged public records available. See Petition at paras. 43-50⁴ While this appears to be the only claim that is at least plausibly based on relator's "information and belief," the claim is nevertheless moot because the rough drafts of the Development Agreement requested by relator were made available to him on April 9, 2009. Accordingly, this case is now moot as a matter of law.

"[I]n determining actions involving extraordinary writs, a court is not limited to considering the facts and circumstances at the time that the writ was requested but can consider the facts and conditions at the time that entitlement to the writ is considered." *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, at ¶ 17 (quoting *State ex rel. Howard v. Skow*, 102 Ohio St.3d 423, 2004-Ohio-3652, 811 N.E.2d 1128, at ¶ 9).

⁴ Relator's Petition does not even allege that he made a public records request to respondent Board of County Commissioners - he delivered the request to the respondent's lawyer. See Petition at para. 2.

In *State ex rei. Toledo Blade Co. v. Toledo-Lucas Cty. Port Alth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, the Supreme Court of Ohio declared:

In general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot. *State ex rei. Toledo Blade Co. v. Ohio Bur. of Workers' Camp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711, ¶ 16.

rd. at ¶ 14. In that case, the court held that a newspaper's request for documentation associated with an investigative report was moot because the uncontroverted evidence showed that the requested documentation had already been made available to the newspaper. rd. ¶¶ 14-16.

Similarly in *State ex rei. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, the court held that a mandamus claim seeking certain e-mail messages was moot because the evidence showed that the requested e-mails had already been made available to the requester. rd. at ¶ 27.

In this case, the evidence is likewise uncontroverted that the records requested by relator have already been made available to him. In particular, relator concedes that he received a copy of the Prosecuting Attorney's record retention schedule on March 26, 2009, the same day that he requested it. See Petition at paras. 3, 19. See also Exhibit B.

Relator additionally concedes that he received copies of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts on March 27, 2009, one day after he requested them. See Petition at paras. 3, 32. See also Exhibit B.

Finally, copies of drafts of the Development Agreement were made available to relator on April 9, 2009, just as had been represented to relator when he picked up records on March 27, 2009 (shortly before he filed this mandamus case). See Exhibit C. The provision of those

records renders relator's mandamus claim moot as a matter of law. See *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, supra; *State ex rei. Glasgow v. Jones*, supra.

In *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21, the Supreme Court of Ohio declared:

It is not the duty of the court to answer moot questions, and when, pending proceedings in error in this court, an event occurs without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition in error.

Id. at syllabus.

In this case, there is no need for this Court to consider relator's request for a writ of mandamus to compel production of alleged public records because the records that the relator requested have already been made available to him. Accordingly, relator's request for a writ of mandamus should be denied as moot.

III. Relator cannot show that respondent violated Ohio's public records law.

For purposes of this motion, respondent will first address the contention that respondent failed to make public records available, see Petition at paras. 43-50, and then will separately address the relator's remaining contentions, see Petition at paras. 51-80. For the reasons that follow, relator's action in mandamus fails as a matter of law.

A. Respondent did not fail to make public records available.

While the provision of the requested records renders relator's action in mandamus moot as a matter of law, relator would not have been entitled to the writ in any event. Accordingly, relator's action in mandamus would fail as a matter of law.

To begin, relator's mandamus claim for public records fails because he never asked the respondent Cuyahoga County Board of Commissioners for public records. Ohio law establishes that "R.C. 149.43(C) requires a prior request as a prerequisite to a mandamus action." *State ex*

rel. Taxpayers Coalition v. Lakewood, 86 Ohio St.3d 385, 390, 1999-Ohio-114, 715 N.E.2d 179. In this case, relator contends that respondent Cuyahoga County Board of Commissioners failed to make its public records available. But relator's Petition concedes that he never made a request to the respondent Cuyahoga County Board of Commissioners for its public records - he made his request to the respondent's lawyer. See Petition at para. 2. To the extent that relator never made a request to the party whose alleged public records he sought, he cannot say that he was aggrieved by that party's failure to make public records available so as to justify an extraordinary writ of mandamus.

Beyond that, relator was not denied access to any public record. As noted previously, he requested the Prosecuting Attorney's record retention schedule on March 26, 2009 and he received a copy of it that same day. Relator requested copies of records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts on March 26, 2009 and he received copies of those on March 27, 2009.

The only remaining question here is whether the public records act was violated when preliminary drafts of the proposed Development Agreement were not provided to relator until April 9, 2009, after the proposed Agreement was submitted to the Board of Commissioners for its approval. For the reasons that follow, the public records law was not violated.

In particular, the documents requested by relator were preliminary and evolving drafts of the Development Agreement that were prepared by respondent's counsel and were the subject of ongoing negotiations. Until an agreement was in a form that was ready for submission to the Board of Commissioners to act upon it, preliminary drafts of the agreement would not qualify as a "record" under R.C. 149.011(G), which states:

"Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the

Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.01 I(G) (emphasis added).

It is respectfully submitted that preliminary drafts of an agreement cannot qualify as a "record" under R.C. 149.011(G) at least until such time as they are submitted to the public office for decision. Before such an instrument is ready for any formal action, it cannot document the public office's organization, functions, policies, decisions, procedure, operations, or other activities because it has not crystallized to the point where some action is warranted. Indeed, it would be absurd to require a public office to release working drafts - that may evolve on a daily basis - while negotiations of an economic development agreement are in progress. Until such time as the public office is ready to take formal action, tentative proposals do not document public office action.

To be sure, "records" under R.C. 149.011(G) can include a document that is in draft, compiled, raw, or refined form. See *Kish v. City of Akron*, 109 Ohio S.U.d. 162, 2006-Ohio-1244, 846 N.E.2d 811, syllabus at paragraph one. In that case, the "records" in question consisted of employee compensatory time sheets. But those comp-time records were in a form that the employer used and could be relied upon. *Id.* at ¶¶ 20-25. They accordingly documented the city's procedures or operations. Those comp-time sheets plainly were not works in progress.

Respondent is also mindful of decisions in which drafts were declared to be subject to release as public record. See *State ex rel. Cincinnati Enquirer, Div. of Gannet Satellite Information Network, Inc. v. Dupuis*, 98 Ohio S.U.d. 126, 2002-Ohio-7041, 781 N.E.2d 163; *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio S.U.d. 229, 2000-Ohio-142, 729 N.E.2d 1182. But even in those cases, the "drafts" in question were documents that were submitted to public

office for formal action, not preliminary working drafts that were not yet ready for action. Thus in *State ex rei. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis*, supra, the court held that the Department of Justice's proposed settlement agreement that was received by the City of Cincinnati on March 7, 2002 and used by the City in attempting to reach a settlement in the DOJ investigation of the city's police department was a public record. *Id.* at ¶¶ 2, 12-14. Similarly in *State ex rel. Calvary v. City of Upper Arlington*, supra, the court held that the December 10, 1999 draft of the city's tentative verbal agreement with the union was delivered to the respondent Upper Arlington City Council was public record because it documented the city's version of the agreement that the city relied upon in submitted it to city council for formal approval. See 89 Ohio SUD at 229, 2000-Ohio-142, 729 N.E.2d 1182; *id.* at 232-233, 2000-Ohio-142, 729 N.E.2d 1182. Those cases are fundamentally distinguishable from the circumstances of this case where a proposed agreement had not yet been submitted for formal action by the public office.

But even if preliminary drafts of an agreement could be considered a "record" under R.C. 149.011(G) before the agreement was submitted to the public office for action, the rough drafts of the agreement requested here were prepared by attorneys for the respondent in the course of rendering legal services on behalf of the respondent. Ohio law firmly establishes that the attorney-client privilege protects confidential communications between government agencies and their lawyers. See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio SUD 261, 2005-Ohio-1508, 824 N.E.2d 990. That privilege extends not only to the testimonial privilege codified under R.C. 2317.02(A) but also to the common-law attorney-client privilege that "reaches far beyond a proscription against testimonial speech [and] protects against any dissemination of

information obtained in the confidential relationship." *State ex rei. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio SUD 537, 2009-Ohio-1767, 905 N.E.2d 1221, at ¶ 24.

In its recent pronouncement in *State ex rei. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, the Supreme Court of Ohio held that an investigative report prepared by a public office's outside counsel was related to the rendition of legal services and was therefore exempt from disclosure under the attorney-client privilege. *Id.* at ¶¶ 20-33. "[I]f a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." *Id.* at ¶ 27 (quoting *Dunn v. State Farm Fire & Cas. Co.* (C.A.5 1991, 927 F.2d 869, 875). Like the investigative report at issue in that case, the drafts of the Development Agreement in this case plainly concern communications between a public office and its counsel who were attempting to draft the terms for a proposed development agreement on behalf of the government client. And considering that the relator's request here was made not to the government client – respondent Cuyahoga County Board of Commissioners – but rather was made to the government client's lawyers, counsel could not waive the attorney-client privilege because that is a privilege that belongs to the client. See *State v. Doe*, 101 Ohio SUD 170, 2004-Ohio-708, 803 N.E.2d 777, ¶ 15 ("The attorney-client privilege belongs solely to the client – not the attorney.")

And in a case that is analogous to the facts of this case, the court in *State ex rei. Benesch, Friedlander, Coplan & Arno J. L.L.P. v. City of Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139, held that preliminary drafts of bond documents prepared by a public office's attorneys were exempt from release as public records because they consisted of "confidential information supplied to the attorneys by their [government] clients supplied with legal advice and opinions, that is, legal proposals as to the substance of the bond instruments, based on that

confidential information." rd. at 155.746 N.E.2d 1139. The court accordingly held that the preliminary drafts of bond documents reflecting information provided by the city and the legal advice flowing from that information were protected by the attorney-client privilege and thus were not subject to public release. rd. at 156.746 N.E.2d 1139.

Likewise here, preliminary drafts of a development agreement drafted by the public office's counsel reflect information provided by the public office and legal advice rendered in the course of the legal representation of the public office. The attorney-client privilege attached to those drafts and rendered them exempt from disclosure as public records pursuant to R.C. 149.43(A)(1)(v). And even though the public office chose to release the preliminary drafts of the proposed agreement after the Development Agreement was submitted to the Board of Commissioners for approval, that does not mean that the public office had to release privileged communications with its counsel before that time.

And even if such preliminary drafts were public record, "R.C. 149.43(A) envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials." *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623, 640 N.E.2d 174. When a public office is faced with a broad public records request, a public office's decision to review the records before producing them, to determine whether to redact exempt material, is not unreasonable. See *State ex rei. Morgau v. Strickland*, __ Ohio St.3d __ * 2009-Ohio-1901, __N.E.2d__, at ¶ 17.

In this case, relator made his public records request on March 26, 2009. Copies of the preliminary drafts of the proposed Development Agreement were furnished to relator on April 9, 2009. The records sought were accordingly made available to relator within a reasonable period of time.

In short, the respondent did not fail to make public records available to relator in violation of Ohio's public records law. Relator's request for a writ of mandamus should accordingly be denied.

B. Mandamus will not lie to compel observance of law generally.

Relator's Petition additionally alleges numerous other supposed violations of Ohio's public records law. See Petition at pars. 51-80. As was previously noted in Section I, relator's assertions are utterly without any factual substantiation. Relator repeatedly asserts, supposedly on "information and belief," that respondent Cuyahoga County Board of Commissioners is in violation of Ohio's public records law. But relator did not even make a public records request to the Cuyahoga County Board of Commissioners, let alone offer any factual substantiation for his assertions. Respondent respectfully incorporates the discussion contained in Section I as relator's lack of factual support alone provides grounds to deny relator extraordinary relief in mandamus.

CONCLUSION

Respondent Cuyahoga County Board of Commissioners respectfully requests that this Court grant a summary judgment that denies the requested writ of mandamus and that dismisses this cause.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County

By:


CHARLES E. HANNAN (0037153)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Tel: (216) 443-7758 Fax: (216) 443-7602
E-mail: channan@cuyahogacounty.us

*Counselor Respondent
Cuyahoga County Board of Commissioners*

PROOF OF SERVICE

A true copy of the foregoing Respondent's Motion for Summary Judgment was served this 9th day of June 2009 by regular U.S. Mail, postage prepaid, upon:

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Relator Pro Se


CHARLES E. HANNAN
Assistant Prosecuting Attorney

STATE OF OHIO)
) SS. AFFIDAVIT
COUNTY OF CUYAHOGA)

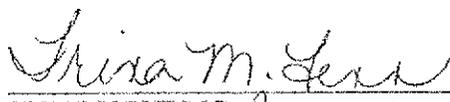
I, CHARLES E. HANNAN, being first duly sworn, depose and state the following:

1. I am counsel of record for respondent Cuyahoga County Board of Commissioners in the matter styled State of Ohio ex rel. Brian Bardwell vs. Cuyahoga County Board of Commissioners, Cuyahoga Court of Appeals Case No. 09 CA 93058, and I have personal knowledge of the facts and circumstances stated herein.
2. Exhibit A attached hereto is a true and accurate copy of a hand-written request for records that was delivered to the office of the Cuyahoga County Prosecuting Attorney on March 26, 2009.
3. Exhibit B attached hereto is a true and accurate copy (excluding attachments) of the March 27, 2009 written response by the office of the Cuyahoga County Prosecuting Attorney to the request referred to in paragraph 2 of this Affidavit.
4. Exhibit C attached hereto is a true and accurate copy (excluding enclosure) of my April 9, 2009 correspondence to relator Brian Bardwell that completed the response referred to in paragraph 3 of this Affidavit.

FURTHER AFFIANT SAYETH NAUGHT.


CHARLES E. HANNAN

SWORN TO AND SUBSCRIBED before me and in my presence this 8th day of June 2009.


NOTARY PUBLIC
NOTARY PUBLIC exp. 1/29/2012

I WOULD LIKE TO INSPECT THE FOLLOWING RECORDS:

- RECORDS OF COMMUNICATIONS FROM THE PLAIN DEALER OR ITS ATTORNEYS REGARDING THE RELEASE OF MEDICAL MARKET CONTRACTS OR DRAFTS OF THOSE CONTRACTS
- DRAFTS OF CONTRACTS OR DEVELOPMENT AGREEMENTS RELATED TO MEDICAL MARKET PROJECTS
- YOUR RECORD RETENTION SCHEDULE

THANK YOU.





Bill Mason
Cuyahoga County Prosecutor

March 27, 2009

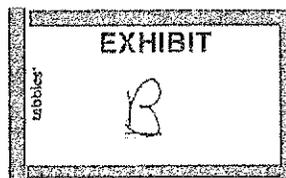
To Whom It May Concern:

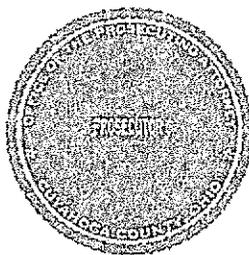
Re: Public Record Request made Thursday, March 26, 2009

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts
- Drafts of contracts or development agreements related to Medical Mart projects
- Your records retention schedule

In response to your requests:

1. We have attached all communication records from the Plain Dealer to county regarding release of Medical Mart contracts or drafts;
2. Regarding your second request, drafts of the Development Agreement are not records at this time, since terms of Development Agreement are still being negotiated, so there presently is no agreement that has been submitted to the Board of County Commissioners for their approval. Moreover, the rough drafts of the agreement that is being negotiated are exempt from disclosure because they include confidential communications between the public client and its attorneys including but not limited to the attorneys' thoughts and opinions in rendering legal advice. State ex. rei Benesch, Friedlander, Coplan & Arnoff LLP v. Rossford (2000), 140 Ohio App. 3d 149, 746 N.E.2d 1139. When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available.
3. A copy of our retention schedule was provided to you on Thursday, March 26, 2009.





WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

April 9, 2009

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Re: Public Records Request

- and -

State ex rel. Brian Bardwell vs. Cuyahoga County Board of Commissioners
Cuyahoga County Court of Appeals Case No. 09 CA 93058

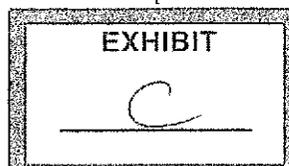
Dear Mr. Bardwell,

On March 26, 2009, a person came to our office to request, among other things, "drafts of contracts or development agreements related to Medical Mart projects." On March 26 and March 27, 2009 we gave that person copies of records that were responsive to two (2) other categories of requested records. We further indicated on March 27, 2009 that copies of the final agreement and preceding drafts of the agreement would be made available once the agreement was ready for submission to the Board of County Commissioners for approval.

On March 27, 2009, you commenced the above-referenced lawsuit by filing a Verified Petition for Writ of Mandamus. Your Petition identified yourself as the person who came to our office on March 26, 2009. Your Petition demanded "drafts of development agreements for the Medical Mart" Your Petition used the above address as your mailing address.

Because the proposed development agreement is now ready for submission to the Board of County Commissioners for approval, and consistent with what we indicated on March 27, 2009, enclosed please find a CD-R that contains, in PDF format, copies of the proposed agreement as well as preceding drafts of the proposed agreement.

OFFICE OF THE PROSECUTING ATTORNEY
Justice Center' Courts Tower' 1200 Ontario Street' Cleveland, Ohio 44113
(216) 443-7800' FAX: (216) 443-7602' email: masonccpo@aol.com' www.prosecutormason.com
Ohio Relay Service 711



This completes our response to your March 26, 2009 public records request.

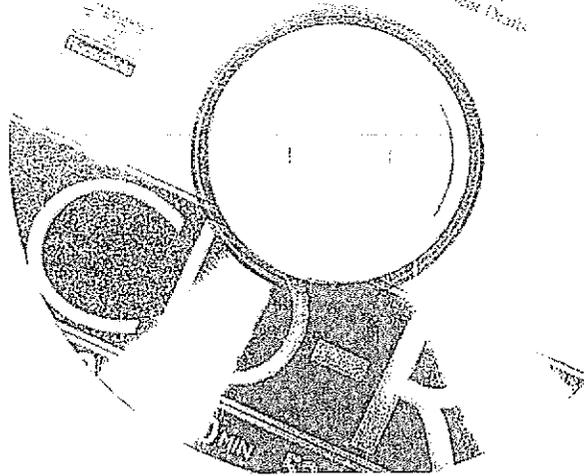
Very truly yours,

A handwritten signature in cursive script that reads "Charles E. Haman".

Charles E. Haman
Assistant Prosecuting Attorney

PHIL

AMPI & Cosahoga County
Development Agreement Details



IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL.	)	CASE NO. 09 CA 93058
BRIAN BARDWELL,)	
	)	Original Action in Mandamus
Relator,)	
)	
vs.)	
)	
CUYAHOGA COUNTY BOARD)	
OF COMMISSIONERS,)	
)	
Respondent.)	

**RESPONDENT'S MOTION FOR AN EXTENSION OF TIME
TO MOVE OR PLEAD**

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County

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Tel: (216) 443-7758/Fax: (216) 443-7602
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*Counsel for Respondent
Cuyahoga County Board of Commissioners*

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL.	)	CASE NO. 09 CA 93058
BRIAN BARDWELL,)	
	)	Original Action in Mandamus
Relator,)	
)	
vs.	)	<u>RESPONDENT'S MOTION FOR</u>
	)	<u>AN EXTENSION OF TIME TO</u>
CUYAHOGA COUNTY BOARD	)	<u>MOVE OR PLEAD</u>
OF COMMISSIONERS,)	
)	
Respondent.)	

Respondent Cuyahoga County Board of Commissioners ("respondent") respectfully moves this Court pursuant to Loc.R. 45(B)(2) and Civil Rule 6(B) for a twenty-eight (28) day extension of time, up to and including May 27, 2009, to move or plead in response to the Verified Petition for Writ of Mandamus ("Petition"). The grounds in support of this motion are that although all of the records responsive to relator's request for public records have already been provided to him, the respondent requires additional time to submit its dispositive motion in this matter.

The following discussion will briefly review (1) the relator's public records request and this action in mandamus and (2) the circumstances necessitating the respondent's request for an extension of time to move or plead in response to the Petition.

THE PUBLIC RECORDS REQUEST AND ORIGINAL ACTION IN MANDAMUS

On March 26, 2009, an individual presented himself in the office of the Cuyahoga County Prosecuting Attorney and delivered a hand-written request that said the following:

I would like to inspect the following records:

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts
- Drafts of contracts of development agreements related to Medical Mart projects
- Your record retention schedule.

Thank you.

A true and accurate photocopy of the hand-written request is submitted herewith as Exhibit A to the Affidavit of Charles E. Hannan.

On March 27, 2009, the office of the Cuyahoga County Prosecuting Attorney gave the requester a written response to his request, a true and accurate copy of which (excluding attachments) is submitted herewith as Exhibit B to the Affidavit of Charles E. Hannan. The Prosecutor's March 27, 2009 response memorialized the following:

- All communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts were attached to the March 27, 2009 response, thus fulfilling a response to the first category of records requested on March 26, 2009.
- Drafts of the Development Agreement were not public record at that time because the terms of the Development Agreement were still being negotiated, so there was no agreement that had been submitted to the Board of Commissioners for their approval and the rough drafts were exempt from disclosure because they included confidential communications between a public client and its attorneys including attorney work product (citing *State ex rei. Benesch, Friedlander, Coplan & Aronoff LLP v. Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139), thus responding to the second category of records requested on March 26, 2009.
- A copy of the Prosecuting Attorney's record retention schedule had been given to the requester on March 26, 2009, thus fulfilling a response to the third category of records requested on March 26, 2009.

With regard to the request for drafts of the Development Agreement, the Prosecutor's March 27, 2009 response also said the following: "When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available." See Exhibit B.

After receiving the Prosecuting Attorney's March 27, 2009 response, relator Brian Bardwell commenced this original action in mandamus against respondent Cuyahoga County Board of Commissioners. Alleging various infractions of Ohio's public records law that the respondent will fully address in due course, the Petition principally requests a writ of mandamus "directing the Respondent to make available all records requested ***." See Petition at p. 8. Respondent was served with the Petition on April 1, 2009.

On April 8, 2009, the terms of the proposed Development Agreement between the County of Cuyahoga, Ohio; Merchandise Mart Properties, Inc.; MMPI Development LLC; and Cleveland MMCC LCC ("Development Agreement") were publicly released. On that same day, copies of nineteen (19) rough drafts that preceded the version of the proposed Development Agreement were also released publicly.

On April 9, 2009, respondent's undersigned counsel mailed a correspondence to relator, a true and accurate copy of which is submitted herewith as Exhibit C. Consistent with what had been indicated in the Prosecutor's March 27, 2009 response, relator was sent a CD-R that contained, in PDF format, copies of the proposed Development Agreement as well as preceding drafts of the proposed agreement. The April 9, 2009 correspondence noted that the production of those prior drafts completed the response to the relator's March 26, 2009 request.

On April 16, 2009, the Cuyahoga County Board of Commissioners approved and executed the Development Agreement.¹

Because respondent was served with the Petition on April 1, 2009, an answer or dispositive motion responding to the Petition is currently due on April 29, 2009 pursuant to Loc.R. 45(B)(2) and Ohio Civil Rule 12.

For the reasons that follow, respondent respectfully requests a twenty-eight (28) day extension of time, up to and including May 27, 2009, to move or plead in response to the Petition.

THE CIRCUMSTANCES NECESSITATING RESPONDENT'S REQUEST FOR AN
EXTENSION OF TIME TO MOVE OR PLEAD IN RESPONSE TO THE PETITION

Although the undersigned counsel's April 9, 2009 transmission to relator of the final and preceding drafts of the Development Agreement would appear to have completed the response to relator's March 26, 2009 request for records (as well as those he sought to compel here by mandamus), the respondent is nevertheless obliged by rule to answer the allegations contained in relator's Petition. Due to the press of other professional obligations, however, the undersigned counsel requires additional time to prepare an appropriate response to the Petition. And because the relator has now received all of the responsive records that he has requested, granting this request for an extension of time to allow for an appropriate dispositive response to the Petition should not cause any prejudice in this case.

The undersigned counsel respectfully requests additional time because of prior professional obligations and impending professional obligations.

¹ An executed copy of the Development Agreement executed by Cuyahoga County on April 16, 2009 may be viewed online at http://boccc.cuyahogacounty.us/pdf/boccc/en-US_CLEVELA_D-1048597-v12-Development_Agreement_3_16_2009A.pdf.

Counsel's prior professional obligations include but are not limited to the following:

- Filing in the Supreme Court of Ohio on April 16, 2009 "Respondent's Motion to Dismiss" and "Respondents' Motion to Declare Relator A 'Vexatious Litigator' Under S. Ct. Prac. R. XIV, Section 5(B)" in the matter of Robert Grundstein vs. Eighth District Court of Appeals, Ohio Supreme Court Case No. 2009-0565; and
- Filing in the Cuyahoga County Court of Appeals on April 28, 2009 a "Respondent's Motion for Summary Judgment" in the matter of State of Ohio ex rel, Victoria Nagy Smith vs. Leslie Ann Celebrezze, Judge, Cuyahoga County Court of Common Pleas Domestic Relations Division, Cuyahoga Court of Appeals Case No. 09 CA 93072.

Counsel's impending professional obligations include but are not limited to the following:

- Filing in the Supreme Court of Ohio by May 4, 2009 a Memorandum in Opposition to Jurisdiction in the matter of David W. Roberts v. Christopher W. Roberson, Ohio Supreme Court Case No. 2009-0602;
- Filing in the Cuyahoga County Court of Appeals by May 11, 2009 a response to the application for alternative writ in the matter of Morgan Stanley Dean Witter Commercial vs. Judge John Sutula, Cuyahoga County Court of Appeals Case No. 09 CA 93156; and
- Filing in the Supreme Court of Ohio by May 14, 2009 a response to the "Emergency Petition of Writ of Prohibition" in the matter of William M. Sowell vs. Martin V. Sowell, et al., Ohio Supreme Court Case No. 2009-0708.

Because of these and other professional obligations, the undersigned counsel requires additional time to prepare an appropriate response to the instant Petition for Writ of Mandamus.

This is the first request for an extension of time in this matter. This motion is not made for purposes of delay.

And as has been noted previously, granting this request should not prejudice any party inasmuch as relator has already been given all of the records that he requested.

Accordingly, respondent respectfully requests a twenty-eight (28) day extension of time, up to and including May 27, 2009, to move or plead in response to the Petition.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County

By:


CHARLES E. HANNAN (0037153)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Tel: (216) 443-7758/Fax: (216) 443-7602
E-mail: channan@cuyahogacounty.us

*Counsellor Respondent
Cuyahoga County Board of Commissioners*

PROOF OF SERVICE

A true copy of the foregoing Respondent's Motion for Extension of Time to Move or Plead was served this 2nd day of April 2009 by regular U.S. Mail, postage prepaid, upon:

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Relator Pro Se


CHARLES E. HANNAN
Assistant Prosecuting Attorney

STATE OF OHIO)
) SS. AFFIDAVIT
COUNTY OF CUYAHOGA)

I, CHARLES E. HANNAN, being first duly sworn, depose and state the following:

1. I am counsel of record for respondent Cuyahoga County Board of Commissioners in the matter styled State of Ohio ex rel. Brian Bardwell vs. Cuyahoga County Board of Commissioners, Cuyahoga Court of Appeals Case No. 09 CA 93058, and I have personal knowledge of the facts and circumstances stated herein.

2. Exhibit A attached hereto is a true and accurate copy of a hand-written request for records that was delivered to the office of the Cuyahoga County Prosecuting Attorney on March 26, 2009.

3. Exhibit B attached hereto is a true and accurate copy (excluding attachments) of the March 27, 2009 written response by the office of the Cuyahoga County Prosecuting Attorney to the request referred to in paragraph 2 of this Affidavit.

4. Exhibit C attached hereto is a true and accurate copy (excluding enclosure) of my April 9, 2009 correspondence to relator Brian Bardwell that completed the response referred to in paragraph 3 of this Affidavit.

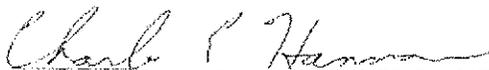
4. Because of other prior and impending professional obligations, I respectfully request additional time to prepare an appropriate dispositive response to the Petition for Writ of Mandamus in Court of Appeals Case No. 09 CA 93058.

5. My prior professional obligations include but are not limited to the following:

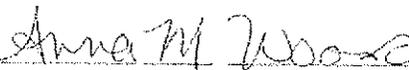
- Filing in the Supreme Court of Ohio on April 16, 2009 "Respondent's Motion to Dismiss" and "Respondents' Motion to Declare Relator A 'Vexatious Litigator' Under S. Ct. Prac. R. XIV, Section 5(B)" in the matter of Robert Grundstein vs. Eighth District Court of Appeals, Ohio Supreme Court Case No. 2009-0565; and

- Filing in the Cuyahoga County Court of Appeals on April 28, 2009 a "Respondent's Motion for Summary Judgment" in the matter of State of Ohio ex rel. Victoria Nagy Smith vs. Leslie Ann Celebrezze, Judge, Cuyahoga County Court of Common Pleas Domestic Relations Division, Cuyahoga Court of Appeals Case No. 09 CA 93072.
6. My impending professional obligations include but are not limited to the following:
- Filing in the Supreme Court of Ohio by May 4, 2009 a Memorandum in Opposition to Jurisdiction in the matter of David W. Roberts v. Christopher W. Roberson, Ohio Supreme Court Case No. 2009-0602;
 - Filing in the Cuyahoga County Court of Appeals by May 11, 2009 a response to the application for alternative writ in the matter of Morgan Stanley Dean Witter Commercial vs. Judge John Sutula, Cuyahoga County Court of Appeals Case No. 09 CA 93156; and
 - Filing in the Supreme Court of Ohio by May 14, 2009 a response to the "Emergency Petition of Writ of Prohibition" in the matter of William M. Sowell vs. Martin V. Sowell, et al., Ohio Supreme Court Case No. 2009-0708.
7. I respectfully request a twenty-eight (28) day extension of time, up to and including May 27, 2009, to move or plead in response to the Petition.

FURTHER AFFIANT SAYETH NAUGHT.


CHARLES E. HANNAN

SWORN TO AND SUBSCRIBED before me and in my presence this 29th day of April 2009.

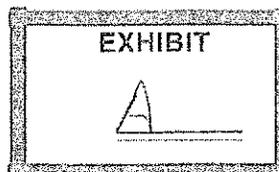

NOTARY PUBLIC

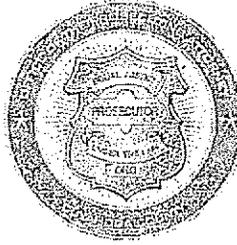
ANNA M. WOODS
NOTARY PUBLIC - STATE OF OHIO
Recorded in Cuyahoga County
My commission expires Feb 15, 2012

I WOULD LIKE TO INSPECT THE FOLLOWING RECORDS:

- RECORDS OF COMMUNICATIONS FROM THE PLAIN DEALER OR ITS ATTORNEYS REGARDING THE RELEASE OF MEDICAL MARKET CONTRACTS OR DRAFTS OF THOSE CONTRACTS
- DRAFTS OF CONTRACTS OR DEVELOPMENT AGREEMENTS RELATED TO MEDICAL MARKET PROJECTS
- YOUR RECORD RETENTION SCHEDULE

THANK YOU.





Bill Mason
Cuyahoga County Prosecutor

March 27, 2009

To Whom It May Concern:

Re: Public Record Request made Thursday, March 26, 2009

- Records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts
- Drafts of contracts or development agreements related to Medical Mart projects
- Your records retention schedule

In response to your requests:

1. We have attached all communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts:
2. Regarding your second request, drafts of the Development Agreement are not records at this time, since terms of Development Agreement are still being negotiated, so there presently is no agreement that has been submitted to the Board of County Commissioners for their approval. Moreover, the rough drafts of the agreement that is being negotiated are exempt from disclosure because they include confidential communications between the public client and its attorneys including but not limited to the attorneys' thoughts and opinions in rendering legal advice. State ex. rel. Benesch, Friedlander, Coplan & Amoff LLP v. Rossford (2000), 140 Ohio App. 3d 149, 746 N.E.2d 1139. When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available.
3. A copy of our retention schedule was provided to you on Thursday, March 26, 2009.





WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

April 9, 2009

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Re: Public Records Request

- and -

State ex rel. Brian Bardwell vs. Cuyahoga County Board of Commissioners
Cuyahoga County Court of Appeals Case No. 09 CA 93058

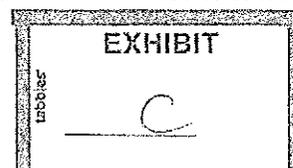
Dear Mr. Bardwell,

On March 26, 2009, a person came to our office to request, among other things, "drafts of contracts or development agreements related to Medical Mart projects." On March 26 and March 27, 2009 we gave that person copies of records that were responsive to two (2) other categories of requested records. We further indicated on March 27, 2009 that copies of the final agreement and preceding drafts of the agreement would be made available once the agreement was ready for submission to the Board of County Commissioners for approval.

On March 27, 2009, you commenced the above-referenced lawsuit by filing a Verified Petition for Writ of Mandamus. Your Petition identified yourself as the person who came to our office on March 26, 2009. Your Petition demanded "drafts of development agreements for the Medical Mall." Your Petition used the above address as your mailing address.

Because the proposed development agreement is now ready for submission to the Board of County Commissioners for approval, and consistent with what we indicated on March 27, 2009, enclosed please find a CD-R that contains, in PDF format, copies of the proposed agreement as well as preceding drafts of the proposed agreement.

OFFICE OF THE PROSECUTING ATTORNEY
Justice Center' Courts Tower' 1200 Ontario Street' Cleveland, Ohio 44113
(216) 443-7800 • FAX: (216) 443-7602 • email: masoncepo@aol.com • www. rosccutomason.com
Ohio Relay Service 711



This completes our response to your March 26, 2009 public records request.

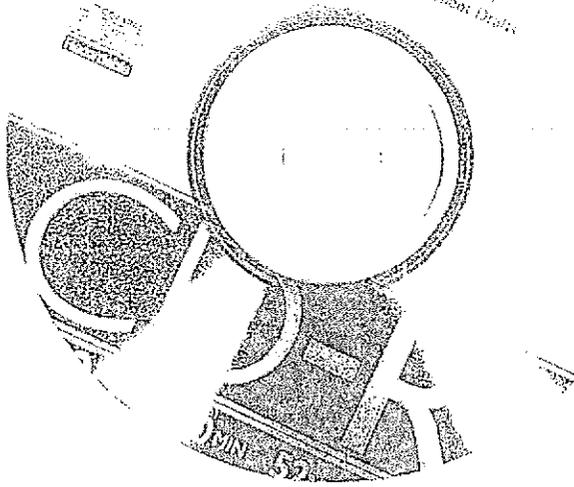
Very truly yours,



Charles E. HaMan
Assistant Prosecuting Attorney

PHIL

MINN & CAROLINA COUNTY
Development Agreement Draft



[Cite as *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93058

**STATE OF OHIO, EX REL.,
BRIAN BARDWELL**

RELATOR

vs.

**CUYAHOGA COUNTY BD. OF
COMMISSIONERS**

RESPONDENT

**JUDGMENT:
WRIT DENIED**

WRIT OF MANDAMUS
MOTION NO. 422893
ORDER NO. 423684

RELEASE DATE: July 2, 2009

FOR RELATOR

Brian Bardwell, pro se
9854 Pebble Brook Lane
Strongsville, Ohio 44149

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

BY: Charles E. Hannan, Jr.
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} This is an original action for a writ of mandamus to compel the Cuyahoga County Board of Commissioners ("Board"), the respondent, to provide Brian Bardwell, the relator, with access to the following documents: (1) communications from the Plain Dealer or its attorneys regarding the release of Medical Mart project contracts or drafts of contracts; (2) drafts of contracts or development agreements that relate to the Medical Mart project; and (3) a record retention schedule. Bardwell also seeks statutory damages for violation of R.C. 149.43(B)(5), which provides that employees of a public office "may ask for the requester's identity, * * * but may do so only after disclosing to the requester * * * that the requester may decline to reveal the requester's identity * * *." Because

Bardwell's complaint for a writ of mandamus is procedurally defective and the requested documents were excepted from disclosure under the Public Records Act by the attorney-client privilege or have been already timely provided, we deny the writ. We further find that Bardwell is not entitled to statutory damages.

{¶ 2} The facts, which are pertinent to this judgment, are gleaned from Bardwell's complaint for a writ of mandamus and the Board's motion for summary judgment with attached affidavit and supporting exhibits. On March 26, 2009, Bardwell presented himself at the office of the Cuyahoga County Prosecutor and hand-delivered a written request to the receptionist that provided:

{¶ 3} "I would like to inspect the following records:"

{¶ 4} "- records of communications from the Plain Dealer or its

{¶ 5} attorneys regarding the release of Medical Mart contracts or drafts of those contracts"

{¶ 6} "- drafts of development agreements related to Medical Mart projects"

{¶ 7} " - your record retention schedule"

{¶ 8} "Thank you."

{¶ 9} Bardwell, when asked to provide his identity and contact information, refused to do so and was than promptly referred to the Public Information Office. Bardwell was informed that none of the requested documents were immediately available, whereupon Bardwell offered to return later in the afternoon. Bardwell returned to the Prosecutor's Office later in the day of March 26, 2009, and was

provided with a copy of the requested record retention schedule. In addition, Bardwell was informed that copies of communications between the Board and the Plain Dealer would be available the next morning. Bardwell was also informed that no copies of development agreement drafts would be available until the agreement was actually finalized.

{¶ 10} Bardwell returned to the Prosecutor's Office the next day, on March 27, 2009, and was provided with a written response to his request for records and copies of all communication records from the Plain Dealer to the Board regarding release of Medical Mart contracts or drafts. The letter of March 27, 2009, from the Prosecutor's Office, further provided that drafts of the development agreement were not records and fell within the attorney-client privilege exception. However, Bardwell was further informed that "when an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available."

{¶ 11} On March 27, 2009, Bardwell filed his complaint for a writ of mandamus. On April 9, 2009, Bardwell was provided with a Compact Disc, in PDF format, with copies of the proposed development agreement as well as preceding drafts of the proposed agreement. On June 8, 2009, the Board filed a motion for summary judgment with attached affidavit and exhibits. Bardwell has not filed a brief in opposition to the Board's motion for summary judgment.

{¶ 12} Initially, we find that Bardwell's complaint for a writ of mandamus is procedurally defective. Loc.App.R. 45(B)(1)(a) provides that a complaint for an extraordinary writ must be supported by a *sworn affidavit* that specifies the details of the claim. (Emphasis added.) Bardwell has failed to attach a sworn affidavit to the complaint for a writ of mandamus. Thus, the complaint for a writ of mandamus is procedurally defective and subject to immediate dismissal. *State ex rel. Davis v. Fuerst*, Cuyahoga App. No. 90553, 2008-Ohio-584; *State ex rel. Edinger v. Cuyahoga Cty. Dept. of Children & Family Serv.*, Cuyahoga App. No. 86341, 2005-Ohio-5453.

{¶ 13} Notwithstanding the aforesaid procedural defect, a substantive review of the complaint for a writ of mandamus and the Board's motion for summary judgment, fails to establish that Bardwell is entitled to a writ of mandamus.

{¶ 14} The appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act, is mandamus. *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174. R.C. 149.43 must also be construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 1996-Ohio-214, 662 N.E.2d 334.

{¶ 15} In the case sub judice, Bardwell's request for public records encompassed three distinct demands: (1) communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts; (2) drafts of contracts of development agreements that related to the Medical Mart Project; and (3) the prosecutor's record retention schedule. In essence, the main issue before this court is whether Bardwell has shown that the Board has failed to promptly prepare and make available for inspection the requested records. Contrary to Bardwell's claims, we find that all requested records were provided in a reasonable and timely manner.

{¶ 16} R.C. 149.43(B)(1) provides that "upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost within a reasonable period of time." Herein, Bardwell made his request for public records and the record retention schedule on March 26, 2009. The record retention schedule was provided to Bardwell in the afternoon of March 26, 2009, the same day of his request, and clearly provided within a reasonable period of time. In addition, records of communications from the Plain Dealer or its attorneys, regarding the release of Medical Mart contracts or drafts of contracts, were provided to Bardwell on March, 27, 2009, just one day after the request was made. A lapse of one day cannot, under any circumstances, be considered a failure to provide a requested record within a

reasonable period of time. *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105. In general, promptly providing Bardwell with the retention schedule and the record of communication requests from the Plain Dealer rendered the mandamus claim moot. *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711; *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163.

{¶ 17} On March 27, 2009, Bardwell was also provided with a letter that specifically delineated that the request for drafts of the development agreement were not public records, because they constituted confidential communications between the Board and its attorneys and thus were exempt from disclosure pursuant to the attorney-client exception as contained within R.C. 149.43. We agree. The preliminary drafts of the development agreement do not qualify as a record under R.C. 149.011(G), since the preliminary drafts do not document the public office's organization, functions, policies, decisions, procedure, operations or other activities. To the contrary, the preliminary drafts of the development agreement, as prepared by the Board's attorneys, were confidential communications between a government agency and its attorneys, which fall within the attorney-client privilege exception contained within R.C. 149.43. See *State ex rel. Leslie v. Ohio House. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-

1508, 824 N.E.2d 990. See, also, *State ex rel. Toledo Blade Co. v. Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221; *State ex rel. Benesch, Friedlander, Coplan & Arnoff, L.L.P. v. Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139. It must also be noted that copies of all drafts of the development agreement, as related to the Medical Mart project, were provided to Bardwell on April 9, 2009, once the development agreement was ready for submission to the Board for approval. Once again, the requested records were provided within ten business days of the request, clearly rendering Bardwell's complaint for a writ of mandamus moot. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686; *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21.

{¶ 18} Finally, we decline to award Bardwell statutory damages for the alleged violation of R.C. 149.43(B)(5), the failure of the employees of the Prosecutor's Office to inform Bardwell that he need not disclose his identity upon requesting copies of public records. This court, in *State v. Bardwell, et al., v. Rocky River Police Dept, et al.*, Cuyahoga App. No. 91002, 2009-Ohio-727, held that:

{¶ 19} "As noted above, when [relator] delivered the requests, at each office reception staff asked him his name. Respondents do not refute these averments. These inquiries violate R.C. 149.43(B)(5) which requires that employees of a public

office 'may ask for the requester's identity, *** but may do so only after disclosing to the requester *** that the requester may decline to reveal the requester's identity ***.' Although respondents argue that these inquiries were made as a 'courtesy,' the failure of the respective employees to inform [relator] that he need not disclose his identity was clearly a violation of R.C. 149.43(B)(5)."

{¶ 20} "Yet, R.C. 149.43(C)(1) authorizes the recovery of statutory damages as 'compensation for injury arising from *lost use* of the requested information.' (Emphasis added.) Relators have not demonstrated that the requests for [relator's] identity resulted in 'lost use' of the records requested. We hold, therefore, that the fact that reception staff asked [relator] his name does not provide a basis for statutory damages." *State v. Bardwell, et al. v. Rocky River Police Dept., et al.*, supra, at ¶ 62.

{¶ 21} Herein, Bardwell has not even attempted to demonstrate that the request for his identity resulted in the "lost use" of any requested record. Thus, we find that the request as directed toward Bardwell, with regard to his name and other personal information, does not provide a basis for the imposition of any statutory damages per R.C. 149.43(C)(1).

{¶ 22} Having found that Bardwell was provided with the requested records within a reasonable period of time and that he is not entitled to any statutory damages, we must inquire into whether Bardwell's conduct, through the act of filing a complaint for a writ of mandamus, requires the imposition of sanctions pursuant to

Civ.R. 11 and/or R.C. 2323.51. Within fourteen days of the date of this judgment, Bardwell is ordered to show cause in writing, why this court should not impose sanctions based upon the possible determination that the complaint for a writ of mandamus was: (1) frivolous and filed in bad faith; (2) filed to simply harass or maliciously injure the Board; (3) not warranted under existing law; (4) caused a needless increase in the cost of litigation; (5) cannot be supported by a good faith argument; or (6) contained allegations or other factual contentions that had no evidentiary support or, if so specifically identified, were not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. See *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, 561 N.E.2d 1001. See, also, *Burrell v. Kassicieh* (1998), 128 Ohio App.3d 226, 714 N.E.2d 442. The Board is granted leave to file a responsive brief and argument within fourteen days of the filing of Bardwell's response to our order to show cause. No extension of time shall be granted to any party.

{¶ 23} Accordingly, we granted the Board's motion for summary judgment. Costs to Bardwell. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and

LARRY A. JONES, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O. EX REL., BRIAN BARDWELL

Relator COANO.
93058

ORIGINAL ACTION

-vs-

CUYAHOGA COUNTY BD. OF COMMISSIONERS

Respondent MOTION NO. 425189

Date 08/13/2009

Journal Entry

SUA SPONTE, A HEARING IS SCHEDULED ON SEPTEMBER 22, 2009, AT 1:00 PM, IN THE MAIN COURTROOM OF THE EIGHTH DISTRICT COURT OF APPEALS, WITH REGARD TO THE PENDING ORDER TO SHOW CAUSE. THE PURPOSE OF THIS HEARING IS TO DETERMINE WHETHER THIS COURT SHOULD IMPOSE SANCTIONS, PER CIV.R. 11 AND R.C. 2323.51, BASED UPON THE POSSIBLE FINDING THAT BARDWELL'S COMPLAINT FOR A WRIT OF MANDAMUS WAS: (1) FRIVOLOUS AND FILED IN BAD FAITH; (2) FILED TO SIMPLY HARASS OR MALICIOUSLY INJURE THE COMMISSIONERS; (3) NOT WARRANTED UNDER EXISTING LAW; (4) CAUSED A NEEDLESS INCREASE IN THE COST OF LITIGATION; (5) CANNOT BE SUPPORTED BY A GOOD FAITH ARGUMENT; OR (6) CONTAINED ALLEGATIONS OR OTHER FACTUAL CONTENTIONS THAT HAD NO EVIDENTIARY SUPPORT OR, IF SO SPECIFICALLY IDENTIFIED, WERE NOT LIKELY TO HAVE EVIDENTIARY SUPPORT AFTER A REASONABLE OPPORTUNITY FOR FURTHER INVESTIGATION OR DISCOVERY.

THE PARTIES ARE INSTRUCTED THAT UPON PRIOR WRITEN NOTICE TO THE COURT, ANY PARTY MAY MAKE ARRANGEMENTS FOR THE RECORDING OF THE SHOW CUASE HEARING BY ANY AUTHORIZED MEANS. SEE LOC.APP.R. 45(B)(8).

RECEIVED FOR FILING

AUG 13 2009

GERALD E. FURST
CLERK OF THE COURT APPEALS
BY *G.E.F.* OIP,

Presiding Judge KENNETH A. ROCCO,
Concurs

Judge LARRY A. JONES, Concurs

Mary Eileen Kilbane
Judge MARY EILEEN KILBANE

**IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO, EX REL.
BRIAN BARDWELL,
Relator

Case Number: CA-93058

—v.—

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
et al.,
Respondents

ANSWER TO SHOW CAUSE ORDER

Now comes the Relator and answers the Court's order to show cause why sanctions are not warranted in this case.

The Complaint arises from the County's work on a business deal worth nearly \$1 billion for the Medical Mart project in downtown Cleveland. The negotiations have been clouded in controversy for several reasons, including its massive price tag, the ongoing corruption investigation centered on Commissioner Jimmy DiMora, and the potential for conflicts of interest arising from the relationship between another board member and the developer.

In spite of the various grounds for public concern, the Commissioners explicitly rejected the notion of public input or accountability and spent more than a year working behind closed doors to spend millions of dollars in disregard for the spirit of the state's Sunshine Laws.

As the Commissioners neared final approval of the agreement, it became clear that the proposed contracts had been shared with the project's proposed developer and that the contract would likely be approved without any chance for the people of the county to see whether the secret deal was a better deal for them or for the corrupt politicians who are running the county.

After the county's only daily newspaper abdicated its responsibility to pursue the issue, the Relator requested the drafts and other related records for himself. In doing so, he discovered

that the county was in violation of R.C. 149.43(B)(2), which requires the county keep a copy of its record retention schedule in “a location readily available to the public.” Although this court claims in its judgment entry that the schedule was provided “within a reasonable period of time,” it is ignoring the plain text of the statute, which requires that the schedule be posted somewhere that the public can easily access on their own, not in an office behind locked doors where an employee can find it with a few hours’ notice.

This violation alone is enough to warrant a writ of mandamus, but several other oversights in the Court’s judgment entry undermine any argument in favor of sanctions.

First, it should be noted that it is not clear that the County has made available all communications from the Plain Dealer. In the communications that were provided, an e-mail from attorney David Marburger references a voice mail message he left for the County’s attorney (See Exhibit C). That record was never provided, nor did the County provide a written explanation justifying its failure to provide it.

Next, the Court has accepted the County’s assertion that the draft contracts were not “records” as defined by R.C. 149.011(G), adopting their argument that they do not document any activity of the public office. It is hard to say whether the County is arguing that the drafts do not document its negotiations with the developers or that those negotiations are not an “activity” or set of decisions. However, the drafts clearly document the negotiations between the County and the developers. Indeed, it’s hard to imagine what other purpose they serve.

This conclusion is the same one reached by the Supreme Court found in a similar case, *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126; 781 N.E.2d 163. There, the City of Cincinnati refused access to a draft settlement agreement from the U.S. Department of Justice, arguing that it was not a “record” because it was in draft form. The Court rejected their

arguments, noting that “The city and its solicitor note [. . .] that the proposal was merely a step in the negotiation process [. . .]. By so arguing, appellees in effect concede that they considered the proposal in the negotiation process [. . .]. Consequently, the requested DOJ proposal kept by appellees and used by them in attempting to reach a settlement [. . .] constituted a public record for purposes of R.C. 149.43(A)(1) and 149.011(G).”

Finally, it was likely an error – at least at this point – for the court to find that the drafts were exempted from disclosure by attorney-client privilege. As negotiations have been ongoing for more than a year, it is most likely that the drafts have been exchanged back and forth between the two parties, waiving any privilege that the County might have claimed. A ruling on this question should be withheld until it can be determined whether that privilege was waived.

The Relator also wishes to stress that the accusation that this case may have been filed in bad faith was perhaps an inadvertent lapse from this Court’s usual tradition of judicial restraint. It is unquestioned that the public policy underlying the Public Records Act was not being served by the County’s actions in the underlying matter, and absent any evidence – or even an accusation – of frivolous conduct in the record, the Relator submits that sanctions would be a disservice to the policy of openness and transparency in government.

Therefore, the Relator respectfully requests that this Court vacate its findings that the requested records were not subject to disclosure and decline to impose any sanctions.

Respectfully submitted,

Brian Bardwell, *pro se*
9854 Pebble Brook Lane
Strongsville, OH 44149
(216) 256-2346

Certificate of Service

A copy of the foregoing answer was mailed to counsel for the Respondents via U.S. Postal Service regular mail on Wednesday, July 15, 2009.

Brian Bardwell

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, EX REL.
BRIAN BARDWELL,
Relator

Case Number: CA-93058

-v.-

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
et al.,
Respondents

**AFFIDAVIT OF RELATOR,
BRIAN BARDWELL**

Now comes the Relator, Brian Bardwell, and for his Complaint against the Respondents, alleges and states as follows:

I have personal knowledge of the matters set forth herein.

1. The Complaint filed in this case was filed to ensure that millions of taxpayer dollars were not wasted.

2. I have no interest in harassing the County, injuring the County or increasing the cost of litigation, and did not file the Complaint in this case to any of those ends.

3. The Complaint was filed because the County had refused to release various records, including drafts of development agreements and a voice mail message referred to in an e-mail to their outside counsel.

4. A true and accurate copy of that e-mail is attached as Exhibit B.

5. The requested voice mail messages have not been provided to this day.

Respectfully submitted,

Brian Bardwell, *pro se*
9854 Pebble Brook Lane
Strongsville, OH 44149

Relator's Exhibit B
Page 1

(216) 256-2346

STATE OF OHIO,

Sworn to before me and subscribed in my presence this ____ Day of _____, 2009.

NOTARY PUBLIC

From: Marburger, David [<mailto:DMarburger@bakerlaw.com>]
Sent: Thursday, March 19, 2009 2:21 PM
To: Nance, Frederick R.
Cc: Marburger, David
Subject: Plain Dealer request

Fred: I just left a voice mail for you -- pls give the county the green lite to allow the Plain Dealer to inspect & receive a copy of the drafts of the development contracts that the county possesses that also have been shared with representatives of the organization that would enter into the contract with the county. Thank you.

My Bio <<http://www.bakerlaw.com/FindLawyers.aspx?LookupByEmail=dmarburger>> | Web site
<<http://www.bakerlaw.com/>> | V-card <<http://www.bakerlaw.com/vcards/dmarburger.vcf>>

T 216.861.7956

F 216.696.0740

M

www.bakerlaw.com <<http://www.bakerlaw.com/>>

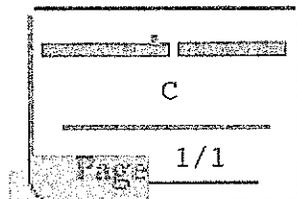
Dave Marburger
dmarburger@bakerlaw.com <<mailto:dmarburger@bakerlaw.com>>

Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

<<http://www.bakerlaw.com/>>

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CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, EX REL.
BRIAN BARDWELL,
Relator

Case Number: CA-93058

-v.-

CUYAHOGA COUNTY BOARD OF
COMMISSIONERS
et al.,
Respondents

SUPPLEMENT TO
ANSWER TO SHOW CAUSE ORDER

Now comes the Relator and submits this supplement to his answer to the Court's order to show cause why sanctions are not warranted in this case.

Respectfully submitted,

Brian Bardwell, *pro se*
9854 Pebble Brook Lane
Strongsville, OH 44149
(216) 256-2346

Certificate of Service

A copy of the foregoing answer was mailed to counsel for the Respondents via U.S. Postal Service regular mail on Monday, September 21, 2009.

Brian Bardwell

Case No.	Caption	Date	Status
CA-90762	State ex rel. Bardwell v. Parma Police Department	12/10/07	Settled
CA-91022	State ex rel. Bardwell v. Rocky River Police Department	02/12/08	Writ granted
08-CA-9342	State ex rel. Bardwell v. Amherst Police Department	02/29/08	Open
08-CA-9349	State ex rel. Bardwell v. Avon Lake Police Department	02/29/08	Dismissed
08-CA-9348	State ex rel. Bardwell v. Elyria Police Department	02/29/08	Writ denied
08-CA-9341	State ex rel. Bardwell v. Starnmitti	02/29/08	Writ denied
08-CA-9345	State ex rel. Bardwell v. North Ridgeville Police Department	02/29/08	Settled
08-CA-9340	State ex rel. Bardwell v. Southern Lorain County Ambulance District	02/29/08	Settled
08-CA-9347	State ex rel. Bardwell v. South Amherst Police Department	02/29/08	Open
08-CA-9346	State ex rel. Bardwell v. Vermilion Police Department	02/29/08	Open
08-CA-9343	State ex rel. Bardwell v. Wellington Community Fire District	02/29/08	Settled
08-CA-9344	State ex rel. Bardwell v. Wellington Police Department	02/29/08	Settled
08-AP-305	State ex rel. Bardwell v. Ohio Department of Public Safety	04/15/08	Writ denied
08-AP-358	State ex rel. Bardwell v. Dann	04/29/08	Writ denied
CA-91831	State ex rel. Bardwell v. Cleveland Police Department	07/22/08	Open
09-CA-14	State ex rel. Bardwell v. Apple Creek Police Department	03/02/09	Open
CA-93058	State ex rel. Bardwell v. Cuyahoga County Commissioners	03/27/09	Open
CA-93058	State ex rel. Bardwell v. Bratenahl Police Department	07/20/09	Open
CA-93636	State ex rel. Bardwell v. Lyndhurst Police Department	07/20/09	Open

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL.	)	CASE NO. 09 CA 93058
BRIAN BARDWELL,)	
	)	Original Action in Mandamus
Relator,)	
)	
vs.)	
)	
CUYAHOGA COUNTY BOARD)	
OF COMMISSIONERS,)	
)	
Respondent.)	

**RESPONDENT'S BRIEF IN RESPONSE TO
RELATOR'S ANSWER TO SHOW CAUSE ORDER**

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County

CHARLES E. HANNAN (0037153)
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Cleveland, Ohio 44113
Tel: (216) 443-7758/Fax: (216) 443-7602
E-mail: channan@cuyahogacounty.us

*Counsel for Respondent
Cuyahoga County Board of Commissioners*

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO EX REL.	)	CASE NO. 09 CA 93058
BRIAN BARDWELL,)	
	)	Original Action in Mandamus
Relator,)	
)	
vs.	)	<u>RESPONDENT'S BRIEF IN</u>
	)	<u>RESPONSE TO RELATOR'S</u>
CUYAHOGA COUNTY BOARD	)	<u>ANSWER TO SHOW CAUSE</u>
OF COMMISSIONERS,	)	<u>ORDER</u>
)	
Respondent.)	

In its July 2, 2009 journal entry and opinion, the Court of Appeals directed relator Brian Bardwell ("relator") to show cause why the Court should not impose sanctions against him pursuant to Civ.R. II and/or R.C. 2323.51. *State ex rei. Bardwell v. Cuyahoga ety. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-3273, 22. The Court stated:

Within fourteen days of the date of this judgment, Bardwell is ordered to show cause in writing, why this court should not impose sanctions based upon the possible determination that the complaint for a writ of mandamus was: (1) frivolous and filed in bad faith; (2) filed to simply harass or maliciously injure the Board; (3) not warranted under existing law; (4) caused a needless increase in the cost of litigation; (5) cannot be supported by a good faith argument; or (6) contained allegations or other factual contentions that had no evidentiary support or, if so specifically identified, were not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Id. at ¶ 22.

On July 15, 2009, relator filed his Answer to Show Cause Order ("Answer"). For the reasons that follow, respondent Cuyahoga County Board of Commissioners ("respondent") respectfully submits that relator has not shown good cause why sanctions shOULD not be imposed.

For purposes of this discussion, it should be recalled that relator's March 27, 2009 Verified Petition for Writ of Mandamus ("Petition") asserted the following seven (7) separate and distinct instances in which the respondent supposedly violated R.C. 149.43:

1. Respondent allegedly failed to make its public records available (see Petition at ¶¶ 43-50);
2. Respondent allegedly failed to release nonexempt portions of records (see Petition at ¶¶ 51-54);
3. Respondent allegedly failed to organize its public records properly (see Petition at ¶¶ 55-57);
4. Respondent allegedly failed to make its records retention schedule available (see Petition at ¶¶ 58-60);
5. Respondent allegedly failed to give relator an opportunity to revise his request (see Petition at ¶¶ 61-65);
6. Respondent allegedly failed to explain its denial of relator's public records request (see Petition at ¶¶ 66-68); and
7. Respondent allegedly violated the public records law by demanding relator's identity (see Petition at ¶¶ 69-75).

Three (3) of those claims had no basis in fact whatsoever.

In particular, there was no factual basis for the claim No.2 that the respondent failed to release nonexempt portions of records. To the contrary, the requested records were provided to relator in their entirety without redaction. Relator's claim had no basis in fact.

There likewise was no factual basis for claim No.3 that the respondent failed to organize its public records properly. Again to the contrary, the requested records relator requested were made available to him. Relator's claim had no basis in fact.

Nor was there any factual basis for claim No.5 that the respondent failed to give relator an opportunity to revise his request. No "revised" request was necessary or appropriate. Relator's claim again had no basis in fact.

Beyond that, two (2) of relator's claims were factually untrue.

More specifically, claim No.4 alleged that the respondent failed to make its records retention schedule available. That allegation was false. Relator did not ask for the respondent Board of Commissioners' record retention schedule. Relator asked the Prosecutor's Office on March 26, 2009 for its record retention schedule. Relator conceded that he received a copy of the Prosecutor's record retention schedule on March 26, 2009, the same day relator requested it. See Petition at para. 19. Thus relator's claim that the respondent failed to make its record retention schedule available was false.

Claim No.6 alleged that the respondent failed to explain its denial of relator's public records request. That allegation was false. Respondent Board of Commissioners did not deny relator's public records request - relator directed request to the Prosecutor's Office. Relator admitted that when he returned to the Prosecutor's Office on March 27, 2009 to obtain records, "[a] letter from Prosecutor Mason was provided with the records." See Petition at para. 38. Relator chose not to attach a copy of that letter to the mandamus Petition he filed in this Court later that day. That letter - which respondent had to file here in support of its motion for summary judgment - expressly noted that all records responsive to two (2) categories of requested records had been provided to relator and explained why the remaining records were not being provided, citing legal authority in support. Relator nevertheless alleged to this Court that "[t]he Respondent's denials did not include an explanation, including legal authority, setting forth why [relator's] request was denied." See Petition and Affidavit, at paras. 67. Relator's assertions were false.

Tellingly, relator's Answer to the show cause order says little or nothing about these five (5) claims. The best that relator can say is that "plain text of [R.C. 149.43(B)(2)] requires that

the [record retention] schedule be posted somewhere that the public can easily access on their own ***." Contrary to relator's assertion, R.C. 149.43(B)(2) says the following, in relevant part: "A public office also shall have available a copy of its current record retention schedule at a location readily available to the public." It is undisputed that relator asked to inspect the Prosecutor's Office's record retention schedule on March 26, 2009 and the Prosecutor's Office gave relator a copy of its record retention schedule that very same day. A public office is not required to allow an unidentified member of the public to roam its offices to see where records are kept.

As to claim No. 7 that the respondent violated the public records law by demanding relator's identity, the respondent Board of Commissioners did not ask for the relator's identity – a receptionist in the Prosecutor's Office allegedly did as she was preparing to page the office's Public Information Officer to respond to the relator's request. Be that as it may, it is undisputed that no records were withheld on the condition that the relator identify himself and, as the Court noted in its journal entry and opinion, the relator did not even attempt to demonstrate that the innocuous request for his identity resulted in the "lost use" of any requested record. See *State ex ref. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, supra, at ¶ 21. Relator was at least on constructive notice of such a showing, since he lost a similar claim in a decision this Court released one (1) month before he filed the instant action in mandamus. See *State ex rei. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727, 63. Relator's Answer does not even address this claim.

As to claim No.1 that the respondent failed to make its public records available, relator's Answer fails to address several undisputed facts.

First, relator did not make a request to the respondent Board of Commissioners for its public records - relator asked for records from the Prosecutor's Office.

Second, and more importantly, relator does not address the fact that the only category of records that he did not receive before this case was filed on March 27, 2009 - the "[d]rafts of contracts of development agreements related to Medical Mart projects" - were in fact provided to relator on April 9, 2009. Nor does relator dispute that "providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot." *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio SUd 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 14. See, also, *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers , Comp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711, ¶ 16.

Thus by April 9, 2009, relator's action in mandamus was moot as a matter of law. Nevertheless, relator maintained this case even after the provision of those remaining records, which necessitated not only the filing of the respondent's motion for summary judgment on June 8, 2009 to address that and the relator's six (6) other claims for relief but also this Court's decision adjudicating the merits of relator's claims.

This record by itself established that relator maintained this action without good cause. His claims had no basis in fact and/or in law. Apparently seeking to avoid responsibility for his litigation conduct, relator's Answer to the show cause order says that the Medical Mart project has supposedly "been clouded in controversy" and that there is an ongoing corruption investigation of county officials and/or employees. But neither one of those circumstances gives any litigant - pro se or represented - license to engage in frivolous conduct or to continue to pursue claims after their deficiencies become sufficiently obvious.

Relator says that a voice mail message that a Plain Dealer lawyer left for the County's - lawyer was not provided. This contention lacks merit for several reasons. First, relator's March 26, 2009 request did not ask for "voice-mail messages." He requested "records of communications from the Plain Dealer or its attorneys," which was reasonably construed to seek written requests. Those written requests were provided to relator on March 27, 2009. Second, there is no evidence to suggest that the voice-mail message referred to in relator's Exhibit C was ever transcribed, nor has relator identified any authority suggesting that a public office must transcribe every voice-mail message a public office or employee receives. Thus there was no failure to provide responsive public records.

Relator disputes this Court's determination that the requested drafts of the Development Agreement were not subject to release pursuant to R.C. 149.01 1(G) and the attorney-client privilege. See *State ex ret. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, supra, at ¶ 17. As this Court found, an attorney's evolving draft of a written instrument reflects confidential communications between attorney and client that does not document public office action.

Relator nevertheless suggests that because negotiations have been ongoing for more than a year, any exchange of working drafts would have to waive any attorney-client privilege. Contrary to relator's contention, however, attorneys representing clients negotiate with counsel representing opposing parties every day in civil and criminal cases, yet it cannot be said that an attorney's very advocacy on behalf of the client - be it public or private - operates to waive the confidential relation that exists between the attorney and the client. Surely a client can authorize its attorney to represent the client's interest by limited discussions with an opposing party without fear that the very act of client advocacy will breach the confidentiality that is central to

the attorney-client relationship. In this case, the attorneys' preliminary drafts constituted privileged attorney-client communications that were not public record under Ohio law.

In its show cause order, the Court directed relator to show cause why the Court should not impose sanctions pursuant to Ohio Civil Rule 11 and/or R.C. 2323.51.

Civil Rule 11 states the following, in relevant part:

A party who is not represented by an attorney shall sign the pleading^{***} and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule.^{***}

"Civ.R. 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation must be willful." *State ex rel. Dreamer v. Mason*, 115 Ohio SUd 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 19.

R.C. 2323.51 authorizes sanctions for frivolous conduct. "Conduct" means filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, [or] the filing of a pleading, motion, or other paper in a civil action^{***}." R.C.

2323.51(A)(I). "Frivolous conduct" includes the following:

Conduct of an inmate or other party to a civil action^{***} that satisfies any of the following:

- (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

- (ii) It is warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
- (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

RC. 2323.51(A)(2)(a).

In this case, there appear to be circumstances that would warrant sanctions under Civil Rule 11 and/or RC. 2323.51.

As to Civil Rule 11, the question is whether relator willfully violated Civil Rule II's requirement that to the best of his knowledge, information, and belief there was good ground to support the Petition. In this case, relator signed a Petition asserting claims that had no basis whatsoever in fact and/or were untrue. That would at least support the inference that relator willfully signed the Petition in violation of Civil Rule II.

As to RC. 2323.51, relator asserted factual contentions that had no evidentiary support. R.C. 2323.5 I(A)(2)(a)(iii), (iv). Those claims were not warranted under existing law, could not be supported by a good faith argument for an extension, modification, or reversal of existing law, and could not be supported by a good faith argument for the establishment of new law. RC. 2323.5 I(A)(2)(a)(ii). And to the extent that relator's Answer here seeks to deflect responsibility for litigation conduct by attempting to invoke other matters of public interest, that strongly suggests that this action was maintained merely to harass or maliciously injure the adverse party. RC. 2323.51(A)(1)(a)(i).

Respondent acknowledges that the imposition of sanctions is a matter within the sound discretion of the court. To the extent that relator's conduct here was inconsistent with Civil Rule II and/or R.C. 2323.51 that apply to all litigants, then he should be sanctioned for that conduct.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County

By:



CHARLES E. HANNAN (0037153)

Assistant Prosecuting Attorney

The Justice Center, Courts Tower, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Tel: (216) 443-7758/Fax: (216) 443-7602

E-mail: channan@cuyahogacounty.us

Counsel for Respondent

Cuyahoga County Board of Commissioners

PROOF OF SERVICE

A true copy of the foregoing Respondent's Brief in Response to Relator's Answer to Show Cause Order was served this 29th day of July 2009 by regular U.S. Mail, postage prepaid, upon:

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Relator Pro Se



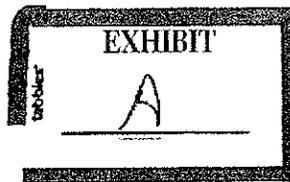
CHARLES E. HANNAN

Assistant Prosecuting Attorney

I WOULD LIKE TO INSPECT THE FOLLOWING RECORDS:

- RECORDS OF COMMUNICATIONS FROM THE PLAIN DEALER OR ITS ATTORNEYS REGARDING THE RELEASE OF MEDICAL MARKET CONTRACTS OR DRAFTS OF THOSE CONTRACTS
- DRAFTS OF CONTRACTS OR DEVELOPMENT REASONINGS RELATED TO MEDICAL MARKET PROJECTS
- YOUR RECORD RETENTION SCHEDULE

THANK YOU.





Bill Mason
Cuyahoga County Prosecutor

March 27, 2009

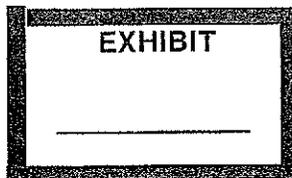
To Whom It May Concern:

Re: Public Record Request made Thursday, March 26, 2009

- Records of communications from the Plain Dealer or its attorneys regarding release of Medical Mart contracts or drafts of contracts
- Drafts of contracts or development agreements related to Medical Mart projects
- Your records retention schedule

In response to your requests:

1. We have attached all communication records from the Plain Dealer to the county regarding release of Medical Mart contracts or drafts;
2. Regarding your second request, drafts of Development Agreement are not records at this time, since terms of Development Agreement are still being negotiated, so there presently is no agreement that has been submitted to the Board of County Commissioners for their approval. Moreover, the rough drafts agreement that is being negotiated are exempt from disclosure because they include confidential communications between public client and attorneys including but not limited to the attorneys' thoughts and opinions in rendering legal advice. State ex. rei Benesch, Friedlander, Coplan & Arnoff LLP v. Rossford (2000), 140 Ohio App. 3d 149,746 N.E.2d 1139. When an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available.
3. A copy of our retention schedule was provided to you on Thursday, March 26, 2009.





WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

April 9, 2009

Brian Bardwell
9854 Pebble Brook Lane
Strongsville, Ohio 44149

Re: Public Records Request

- and -

State ex rel. Brian Bardwell vs. Cuyahoga County Board of Commissioners
Cuyahoga County Court of Appeals Case No. 09 CA 93058

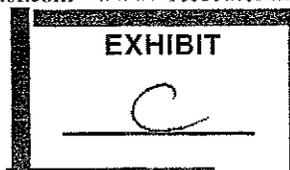
Dear Mr. Bardwell,

On March 26, 2009, a person came to our office to request, among other things, "drafts of contracts or development agreements related to Medical Mart projects." On March 26 and March 27, 2009 we gave that person copies of records that were responsive to two (2) other categories of requested records. We further indicated on March 27, 2009 that copies of the final agreement and preceding drafts of the agreement would be made available once the agreement was ready for submission to the Board of County Commissioners for approval.

On March 27, 2009, you commenced the above-referenced lawsuit by filing a Verified Petition for Writ of Mandamus. Your identified yourself as the person who came to our office on March 26, 2009. Your Petition demanded "drafts of development agreements for the Medical Mart." Your Petition used the above address as your mailing address.

Because the proposed development agreement is now ready for submission to the Board of County Commissioners for approval, and consistent with what we indicated on March 27, 2009, enclosed please find a CD-R that contains, in PDF format, copies of the proposed agreement as well as preceding drafts of the proposed agreement.

OFFICE OF THE PROSECUTING ATTORNEY
Justice Center' Courts Tower' 1200 Ontario Street' Cleveland, Ohio 44113
(216) 443-7800 • FAX: (216) 443-7602 • email: masonccpo@aol.com • www. rosecutormason.com
Ohio Relay Service 711



This completes our response to your March 26, 2009 public records request.

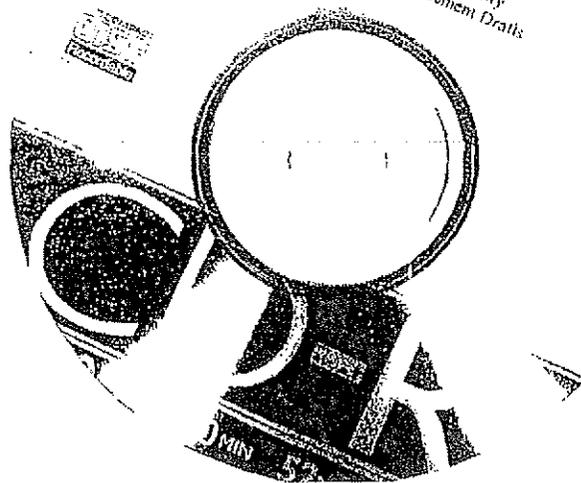
Very truly yours,

A handwritten signature in cursive script that reads "Charles E. Hannan".

Charles E. Hannan
Assistant Prosecuting Attorney

PHIL

*MMPJ & Cuyahoga County
Development Agreement Drafts*



Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93058

**STATE OF OHIO, EX REL.,
BRIAN BARDWELL**

RELATOR

vs.

**CUYAHOGA COUNTY BOARD OF
COMMISSIONERS**

RESPONDENT

**JUDGMENT:
SANCTION ISSUED**

SANCTIONS HEARING
ORDER NO. 426798

RELEASE DATE: October 19, 2009

FOR RELATOR

Brian Bardwell, pro se
9854 Pebble Brook Lane
Strongsville, Ohio 44149

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

BY: Charles E. Hannan, Jr.
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PER CURIAM

On September 22, 2009, this court held a hearing in order to determine whether sanctions should be imposed upon Brian Bardwell, a pro se litigant and the relator in the original action for a writ of mandamus as filed in *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, Cuyahoga App. No. 93058, 2009-Ohio-3273. During the course of the sanctions hearing, Bardwell and Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. presented testimony and exhibits. Finding Bardwell filed his complaint for a writ of mandamus in bad faith, we find that sanctions are appropriate pursuant to Civ.R. II.

Facts

Bardwell's Request for Public Records

On March 26, 2009, Bardwell appeared at the office of the Cuyahoga County Prosecutor ("Prosecutor") and hand delivered a written request that provided:

"I would like to inspect the following records:

"- records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts

"- drafts of development agreements related to Medical Mart projects

" - your record[s] [sic] retention schedule

"Thank you."

Bardwell was informed that the requested documents were not immediately available, but would be provided in a timely fashion. Bardwell offered to return on the same day to the Prosecutor's office on the afternoon of March 26, 2009. Upon his return, Bardwell was provided with a copy of the requested records retention schedule. Bardwell was also informed that copies of the requested communications would be available the next morning, March 27, 2009, but that no drafts of any development agreements would be available until the agreement was actually finalized.

Bardwell returned to the Prosecutor's Office on March 27, 2009, and was provided with all copies of communication records from the Plain Dealer to Cuyahoga County, regarding the release of Medical Mart contracts and drafts. Bardwell was also provided with a written response to his request for records. The written response of March 27, 2009, further provided that the development agreement drafts were exempted records and fell within the attorney-client privilege exception. However, Bardwell was informed that "when an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available."

Complaint for a Writ of Mandamus

On March 27, 2009, the same day that Bardwell received the requested records and the written response from the Prosecutor, Bardwell filed his complaint for a writ of mandamus. Bardwell's complaint was premised upon the alleged failure to provide all requested records and other alleged violations of RC. 149.43, et seq., the Ohio Public Records Act. On June 8, 2009, the Prosecutor filed a motion for summary judgment, which was not opposed by Bardwell. On July 2, 2009, this court granted the motion for summary judgment and declined to issue a writ of mandamus on the basis that: (1) Bardwell's complaint for a writ of mandamus failed to comply with Loc.App.R 45(B)(1)(a), which mandates that a complaint for an extraordinary writ must be supported by a sworn affidavit that specifies the details of the claim; (2) the lapse of just one day, from the making of the request for public records to the filing of the complaint for a writ of mandamus, could not be considered, under any circumstances, a failure to provide the requested records within a reasonable period of time; (3) Bardwell was promptly provided with a copy of the Prosecutor's records retention schedule, thus rendering the request moot; (4) Bardwell was promptly provided with all requested records that were not exempt from disclosure; (5) Bardwell was promptly provided with a written response which provided that the requested development agreement drafts were

exempt from disclosure under the attorney-client privilege as contained within RC. 149.43; (6) all requested drafts were provided to Bardwell by April 9, 2009, within ten business days of Bardwell's initial request for public records; and (7) Bardwell failed to establish that a casual request for his identity resulted in the "lost use" of any requested records.

Order to Show Cause

The journal entry and opinion of July 2, 2009, which declined to issue a writ of mandamus, further provided that Bardwell was ordered to show cause as to why sanctions should not be imposed pursuant to Civ.R 11 and RC. 2323.51. On July 15, 2009, Bardwell filed his answer to the show cause order. On July 29, 2009, the Prosecutor filed its response to Bardwell's answer to the show cause order. On August 13, 2009, this court issued an order, which provided that a hearing would be held in order to determine whether sanctions would be imposed against Bardwell under Civ.R 11 and RC. 2323.51. The show cause order was premised upon the possible that Bardwell's complaint for a writ of mandamus was: (1) in bad faith; (2) simply to harass or injure a public (3) not warranted under existing law; (4) caused a needless increase in the cost of litigation; (5) could not be supported by a good faith argument; and (6) contained allegations or other factual contention that had no evidentiary support. On September 3, 2009, this court issued an order that

required Bardwell to supplement his answer to the show cause order with a complete list of every original action filed by Bardwell, either pro se or through counsel, in any court located within the state of Ohio. Bardwell supplemented his answer on September 21, 2009. See Exhibit 1 as attached to this judgment.

Show Cause Hearing

On September 22, 2009, this court conducted a show cause hearing. Bardwell appeared in his pro se capacity, while the Prosecutor was represented by Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. and Assistant Cuyahoga Prosecutor Frederick W. Whatley. Oral testimony was received from Bardwell and Assistant Cuyahoga County Prosecutor Charles E. Hannan, Jr. Exhibits were also introduced and received on behalf of the Prosecutor.

Legal Analysis

Introduction

Initially, it must be emphasized that the show cause hearing was not concerned with the right of Bardwell to seek redress with regard to an unfulfilled request for public records. This court has consistently followed established case law, which provides that Ohio's Public Records Act reflects the

The parties were provided with an opportunity to allow for the presence of an official court reporter in order to preserve the record. No party arranged for the presence of an official court reporter at the show cause hearing as held on September 22, 2009.

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. R.C. 149.43 must also be liberally construed in favor of broad access to public records, with any doubt resolved in favor of disclosure. Cf. *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1992), 82 Ohio App.3d 202, 611 N.E.2d 838. See, also, *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. Of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174; *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 1996-Ohio-214, 662 N.E.2d 334.

The show cause hearing was premised upon two questions: (1) did Bardwell file his complaint for a writ of mandamus in bad faith; and (2) was Bardwell's conduct frivolous, as a result of filing the complaint for a writ of mandamus. Specifically, did Bardwell file his complaint for a writ of mandamus knowing that all requested public records had been promptly provided by the Prosecutor. Also, did Bardwell file his complaint for a writ of mandamus with the intent to harass or maliciously injure any party? Finally, did Bardwell file his complaint for a writ of mandamus for an improper purpose, which was to simply reap the maximum statutory damages of \$1000 as provided by R.C. 149.43(C)(1)?

Civ.R.11 and Bad Faith Standard

Civ.R. 11 provides in pertinent part:

"The signature of an attorney or *pro se* party constitutes a certificate by the attorney or *party that* the attorney party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is *good ground to support it*; * * * For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the *court's own motion*, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule * * *"
(Emphasis added.)

The imposition of a sanction, pursuant to Civ.R. 11, mandates the application of a subjective bad-faith standard by requiring that any violation must be willful. *State ex ret. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789,874 N.E.2d 510. The United States Supreme Court has opined that the purpose of Fed.R.Civ.P. 11, which is similar to Civ.R. 11, is to curb the abuse of the judicial system which results from baseless filings that burden the courts and individuals with needless expense and delay. *Cooter & Gell v. Hartmarx Corp.* (1990),496 U.S. 384, 110 S.Ct. 2247, 110 L.Ed.2d 359. The United States Supreme Court has also held that the specter of Rule 11 sanctions encourages a civil litigant to "stop, think and investigate more carefully before serving and

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that were not exempt from disclosure, thus rendering his request moot; (5) Bardwell was promptly provided with a detailed explanation, with supporting legal precedent, with regard to the exempted records; (6) Bardwell's request for records was not overly broad, but very specific, which did not necessitate that the Prosecutor provide an opportunity to revise the request; (7) all requested non-exempt records were promptly provided, thus negating any claim that the Prosecutor did not properly organize and maintain its records; (8) Bardwell failed to establish any "lost use" that resulted from a casual request for his identity; (9) Bardwell was provided with copies of all exempted records, within ten business days of the request; (10) Bardwell failed to amend his complaint for a writ of mandamus to take into consideration the records provided by the Prosecutor; and (11) Bardwell failed to file a brief in opposition to the Prosecutor's motion for summary judgment, which contained a properly executed sworn affidavit and other exhibits. Bardwell's filing of a complaint for mandamus, which was groundless in fact and legal argument, can only be the result of a willful action and constitutes bad faith. Thus, we find that Bardwell consciously violated Civ.R. 11 and that sanctions must be imposed. *State ex rel. Nix v. Curran* (Sept. 23, 1998), Cuyahoga App. No. 75261; *State ex rel. Harlamert v. City of Huber Hts.* (Oct. 26, 1994), Montgomery App. No. 1435.

See, also, *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105.

R.C. 2323.51 and Frivolous Conduct Standard

RC. 2323.51 permits this court to sua sponte award sanctions in a civil action, when a party engages in frivolous conduct. Original actions are civil in nature and thus are subject to RC. 2323.51. Cf. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982.

Frivolous conduct is defined as behavior that serves "merely to harass or maliciously injure another party to the civil action or appeal or is for another *improper purpose*, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation." (Emphasis added.) RC. 2323.51(A)(2)(a)(i). Frivolous conduct is also defined as the filing of a claim that "is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law." R.C. 2323.51(A)(2)(a)(ii). A court must also hold a hearing in order to determine whether the conduct was frivolous, whether any party was adversely affected by the frivolous conduct, and to determine the amount of any sanction. R.C. 2323.51(B)(2)(a)-(c). *State ex rei. Ohio Dept. Of Health v. Sowald*, 65 Ohio St.3d 338, 1992-Ohio-1, 603 N.E.2d 1017; *State ex rel. Naples v. Vance*, Mahoning App.

No. 02-CA-181, 2003-Ohio-4738; *State ex rel. Ward v. The Lion's Den* (Nov. 25, 1992), Ross App. No. 1867.

Based upon the hearing conducted before this court on September 22, 2009, we cannot find with certainty that the behavior of Bardwell, in prosecuting the complaint for a writ of mandamus, involved frivolous conduct. However, the conduct of Bardwell does appear to be frivolous by the apparent employment of the Ohio Public Records Act "for another improper purpose." The Supreme Court of Ohio has defined "improper purpose" as conduct that "* * * usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 662 N.E.2d 9, quoting *Prosser and Keeton on Torts* (5th ED. 1984), 898, Section 121.

On September 21, 2009, Bardwell filed a complete list of all original actions, as filed pro se or through counsel, within any court of original jurisdiction located within the state of Ohio. (See Exhibit 1.) Bardwell's list demonstrates that he has filed nineteen original actions against numerous municipalities and local governmental agencies. In fact, Bardwell filed ten original actions, on the same day, within the Ninth Appellate District. Bardwell has also filed five original actions within this court, each against a governmental

entity and each action seeking "statutory damages" for alleged violations of the Ohio Public Records Act. Many of these original actions have "settled" or resulted in the payment of substantial "statutory damages" to Bardwell. See *State v. Bardwell v. Parma Police Dept.*, Cuyahoga App. No. CA-90762; *State ex rel. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727; *State ex rel. Bardwell v. North Ridgeville Police Dept.*, Ninth App. No. 08-CA-9345; *State ex rel. Bardwell v. Southern Lorain Cty. Ambulance Dist.*, Ninth App. No. 08-CA-9340; *State ex rel. Bardwell v. Wellington Community Fire Dist.*, Ninth App. No. 08-CA-9343; and *State ex rel. Bardwell v. Wellington Police Dept.*, Ninth App. No. 08-CA-9344.

It must also be noted that the respondents, in *State ex rel. Bardwell v. Rocky River Police Dept.*, supra, argued in their motion for summary judgment that:

"It must be questioned whether Relators are presenting a matter requiring judicial declaration, or whether this is merely a 'gotcha' exercise for monetary gain. (Footnote omitted.) It is therefore submitted that statutory damages cannot be contemplated in the instant matter, as Relators appear to subterfuge the intended purpose the Public Records Act of promoting openness and public review of government activity. The form of this action contains none of the intended

purposes of the Act, but only promotes the impractical or unyielding application of the Act."

As stated previously, we cannot find with certainty that Bardwell, through his numerous actions for mandamus, is attempting to employ the Ohio Public Records Act for his own personal gain. Such a conclusion could be inferred, but at this juncture, we decline to make such a finding. Bardwell, however, is cautioned that the continued filing of original actions, under the guise of the Ohio Public Records Act, shall result in additional show cause hearings with the sole purpose of inquiry as to whether his conduct is frivolous under the "improper purpose" provision of R.C. 2323.51.

Inherent Authority of this Court to Control its Docket

In *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs.* (1995), 100 Ohio App.3d 592, 654 N.E.2d 443, we examined the inherent authority of this court to control its docket and held that the right of access to the courts does not include the right to abuse the legal process and that we possess the inherent authority to prevent abuses and guarantee that justice is administered to all on an equal basis.

"Frivolous conduct has no place in our judicial system, and relator's history of activity portrays a repetitious and perverse course of such conduct. * * *

"Nevertheless, the inherent authority of this court exists to provide some meaningful relief against an onslaught of frivolous filings. The Supreme Court of Ohio, in explaining the difference between the jurisdiction of a court and the inherent authority of a court, stated as follows:

" 'The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised.' *Hale v. State* (1896), 55 Ohio St. 210, 213, 45 N.E. 199, 200; see *Slabinski v. Servisteel Holding Co.*, supra, 33 Ohio App.3d 345, 515 N.E.2d 1021. Thus, as a necessary function of existence, courts retain the power inherently to control their efficient and prudent operation.

"Several courts in recent years, whether by statute, rule, or through their inherent authority, have levied sanctions or fashioned remedies to preclude the filing of frivolous and repetitious proceedings. (Footnote omitted.) In *Kondrat v. Byron* (1989), 63 Ohio App.3d 495, 579 N.E.2d 287, the court affirmed the issuance of a permanent injunction that enjoined Kondrat from filing future cases pro se absent certain stringent conditions. Over an eleven-year period, Kondrat filed over eighty-five actions in various courts, all of which were unsuccessful. The appellate court stated:

"Further, in *Bd. of Cty. Comms. v. Barday* (1979), 197 Colo. 519, at 522, 594 P.2d 1057, at 1059, it was stated:

", "We recognize that the Colorado Constitution guarantees to every person the right of access to courts of justice in this state. Colo. Const. Art. II, Sec. 6. However, the right of access to courts does not include the right to impede the normal functioning of judicial processes. Nor does it include the right to abuse judicial processes in order to harass others. Where we find, as here, that a 'pro se' litigant's efforts to obtain relief in our courts not only hamper his own cause, but deprive other persons of precious judicial resources, we must deny his right of self-representation as a plaintiff. We note that only his right of self-representation is being denied, not his right of access to the courts; Mr. Barday is still free to proceed through an attorney of his choice, and he is still

free to appear 'pro se' in his own 'defense.' Thus, this injunction works no infringement on respondent's constitutional rights.'" *Kondrat*, supra, 63 Ohio App.3d at 498, 579 N.E.2d at 288-289.

"Section 16, Article I of the Ohio Constitution provides that '[a]ll courts shall be open, and every person, for any injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' This right of access to the courts does not include the right to abuse the judicial processes and we believe it is within the inherent authority of this court to prevent such abuses and guarantee that justice is administered to all equally." *State ex rel. Richard v. Cuyahoga Cty. Ed. of Commrs.*, supra at 597.

Based upon the inherent authority of this court to control its docket and to provide meaningful relief against frivolous filings, Bardwell is forewarned that the continued filing of numerous original actions, based upon alleged violations of the Ohio Public Records Act, may result in the imposition of more drastic remedies. These remedies may include a permanent injunction that prohibits Bardwell from filing future cases pro se absent specific restrictive conditions. Any exercise of the inherent authority of the court to control its docket would not encompass an attempt to prevent Bardwell from accessing the remedies of the

Ohio Public Records Act, but to prevent the diminution of the court's precious judicial resources and the limited resources of the various public offices located within our jurisdiction.

Sanctions for Violation of Civ.R. 11

Having previously found that Bardwell filed his complaint for a writ of mandamus in bad faith, we must determine the type and amount of sanction to be imposed for violation of Civ.R. 11. Based upon the show cause hearing held on September 22, 2009, we find that an award of attorney fees shall adequately compensate the Prosecutor for any damages that resulted from Bardwell's willful violation of Civ.R. 11. During the course of the show cause hearing, testimony and exhibits were provided to the court with regard to: (1) the amount of time expended by the Assistant Cuyahoga County Prosecutor in defending against Bardwell's complaint for a writ of mandamus; (2) the hourly wage earned by the Assistant Cuyahoga County Prosecutor that defended against Bardwell's complaint for a writ of mandamus; and (3) the hourly fringe benefits earned by the Assistant Cuyahoga County Prosecutor that defended against Bardwell's complaint for a writ of mandamus. See Exhibit 2 and Exhibit 3 as attached to this judgment.

Based upon 20.5 hours of legal services, as expended in defending against the complaint for a writ of mandamus, and the total hourly compensation benefit

rate of \$51.24 per hour, we find that Bardwell shall pay, to the Prosecutor, attorney fees in the total amount of \$1050.42. The attorney fees shall be paid within fourteen days of the date of this entry. No other costs shall be assessed against any party.

Sanction issued.

Eth A. Rocco

ETH A. ROCCO, PRESIDING JUDGE

Mary Eileen Kilbane
MARY EILEEN KILBANE, JUDGE

Larry A. Jones
LARRY A. JONES, JUDGE

FILED AND JOURNALIZED
PER APP. R. 22(C)

OCT 19 2009

Erin K...
ERIN K...
CLERK OF THE COURT OF APPEALS
BY

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED