

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF RELATOR BRIAN BARDWELL

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FILED
 APR 26 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

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I. INTRODUCTION

The unreasonable and arbitrary imposition of sanctions, absent a willful violation of Ohio Civil Rule 11 in a mandamus action to compel production of public records, will chill the efforts of government watchdogs and media reporters alike to ensure the open operation of government in the State of Ohio. The Cuyahoga County Court of Appeals predicated its decision to sanction Relator Brian Bardwell on an erroneous interpretation and application of Ohio's public records law and jurisprudence and the law concerning privileged attorney-client communications. It clearly abused its discretion in sanctioning Bardwell.

The Respondent-Appellee, Cuyahoga County Board of Commissioners (the "Commissioners"), had no valid basis under Ohio law for withholding the records Bardwell requested and for otherwise violating the Ohio Public Records Act. The requested documents were (and are) "records" under R.C. 149.011(G) not subject to any exemption, contrary to the Commissioner's baseless contention. And, they were not subject to protection as attorney-client privileged communications, as the Commissioners also erroneously suggest. Although Bardwell cannot contest the appellate court's underlying ruling concerning these issues, he can and does contest them as predicates upon which that court relied to sanction him under Rule 11. Consequently, the question whether the documents Bardwell requested were records, and they are, is squarely before the Court. Likewise, the question whether those records fell within some exemption or under the attorney-client privilege, and they do not, also is squarely before the Court.

Bardwell did not engage in any bad faith conduct that can remotely be considered sanctionable under Ohio Civil Rule 11. The appellate court's sanctions order must be vacated.

II. ARGUMENT

- A. **In reviewing the issues presented by this appeal, this Court “must look at the purpose and meaning behind keeping records.”** *White v. Clinton Cty. Bd. Of Comms*, 76 Ohio St.3d 416, 419 (1996).

This Court has recognized that “In a democratic nation *** it is not difficult to understand the societal interest in keeping government records open.” *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland*, 38 Ohio St.3d 79, 81 (1988). “A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government’s work and decisions.” *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶15 (citing *Barr v. Matteo*, 360 U.S. 564, 577 (1959); Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective* (2003), 59 N.Y.U. Ann.Surv.Am.L. 247, n.1); see also 9 *The Writings of James Madison* 103 (Hunt Ed. 1910) 103.

This Court, in *Kish*, also noted the following view of Thomas Jefferson on open government:

The way to prevent [errors of] the people to give them full information of their affairs [through] the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right.

Kish, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶15 (quoting 11 *The Papers of Thomas Jefferson* (Boyd Ed.1955) 49).

This Court has recognized the significance of public records in Ohio in numerous cases. It has explained “Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance.” *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶16 (citing *State ex rel.*

Gannett Satellite Information Network, Inc. v. Petro, 80 Ohio St.3d 261, 264 (1997)); *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 157 (1997). Furthermore,

Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions, *White*, 76 Ohio St.3d at 420, promote cherished rights such as freedom of speech and press, *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 467 (1976), and ‘foster openness and *** encourage the free flow of information where it is not prohibited by law.’ *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 172 (1997).

Kish, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶16.

Given these fundamental principles, this Court explained that “our founders rejected the English common law and property theories that curtailed citizens’ access to governmental information.” *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶17 (citing *Natl. Broadcasting Co.*, 38 Ohio St.3d at 81; Moyer, 59 N.Y.U. Ann.Surv.Am.L. at 247-248)). “Instead, our legislators, executives, and judges mandated and monitored the careful creation and preservation of public records, *White*, 76 Ohio St.3d at 419, and codified the people’s right to access those records.” *Id.* Consequently, “[s]uch statutes, including those comprising R.C. Chapter 149, reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor.” *Id.* (citing *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623 (1994); *Wertheim*, 80 Ohio St.3d at 157; *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107, 109 (1976)).

The appellate court, despite modest lip service to the public policy underlying the Ohio Public Records Act, failed in every respect to appreciate the significance of the sanctions entered against Bardwell. Sanctioning a citizen seeking to enforce the Ohio Public Records Act under the circumstances presented here erodes the principles of democracy embodied in the Act and

chills precisely the type of openness required for the proper and transparent operation of our democracy. These principles apply in Cuyahoga County.

B. Bardwell, in filing a mandamus action to enforce the Ohio Public Records Act, did not act in bad faith.

1. The facts alleged in the mandamus complaint reflect Bardwell's belief that the Commissioners intended to withhold public records.

Bardwell's decision to file a mandamus action against the Commissioners, and the allegations he plead in his complaint, must be reviewed – in the context of the Rule 11 sanctions imposed upon him – using a subjective bad faith standard. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, ¶17. This subjective bad faith standard requires a *willful* violation of Rule 11, and not mere negligence. *Capitol 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). Bardwell's complaint may be technically deficient in certain respects, and some of the claims may not squarely fit the facts alleged, but the appellate court's interpretation of his *intent* in pleading those facts and claims was unreasonable and arbitrary under the circumstances.

Bardwell alleged, *inter alia*, the following operative facts in his mandamus complaint:

- Bardwell made a written request for public records relating to the Medical Mart project, including “contracts or drafts of those contracts; drafts of contracts or development agreements related to Medical Mart projects; and the county's records retention schedule.” Record at A07, A29.
- The prosecutor's office twice asked him to identify himself at the time he made his request. Record at A07, A08.

- Bardwell received the records retention policy and correspondence between the Commissioner’s outside counsel, Fred Nance, and *The Plain Dealer’s* counsel, David Marburger. Record at A09, A25-A29.
- The prosecutor’s office unequivocally asserted that the draft contracts were privileged, and refused to produce them until there was a “final agreement.” Record at A09-A10.
- The prosecutor’s office did not attempt to assist Bardwell in revising his request to facilitate the production of non-privileged records. Record at A12.

These allegations, which the Commissioners do not contest, other than to say that Bardwell failed to sign the verification and attached affidavit, formed the basis for nearly all of Bardwell’s claims. Bardwell did not make them in bad faith.

2. Communications and draft documents exchanged between counsel for adverse parties are not subject to any protection as a privileged attorney-client communication.

This Court has held that it has a “duty in public records cases to strictly construe exemptions from disclosure under R.C. 149.43 and to resolve any doubts in favor of disclosure of public records.” *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 233, 2000-Ohio-142. See also *State ex rel. Cleveland Police Patrolmen’s Assn. v. Cleveland*, 84 Ohio St.3d 310, 312 (1999).

Although Bardwell’s initial public records request certainly could be read to include a request for privileged communications and documents, the Commissioners had an obligation to provide records that clearly are not privileged – *i.e.*, any documents and communications that had been exchanged between and among the parties to the Medical Mart deal and their counsel.

Rather than suggest to Bardwell that his request was overly broad, and might therefore be read to request privileged documents, the Commissioners cloaked *all* draft contracts – regardless whether that had been communicated or exchanged with third-parties outside of the attorney-client relationship – under the attorney-client privilege. The privilege simply does not apply to communications and draft documents between counsel for the Commissioners and counsel for adverse, private third parties involved in the Medical Mart negotiations.

The appellate court erred in finding that *all* of the draft contracts Bardwell requested were privileged. Although he cannot challenge that ruling directly, it clearly informed the appellate court's decision to sanction him. The sanctions cannot, however, stand based upon the appellate court's erroneous conclusion that *all* of the draft contracts deserved privileged status. Certainly, any communications between the Commissioners and their counsel would be privileged. Communications, including draft contracts exchanged between counsel for adverse parties, would not, in contrast, fall within the attorney-client privilege. Consequently, the Commissioners would not have had to waive privilege to produce the drafts exchanged by counsel for those parties because the drafts never enjoyed privileged status. Those drafts were, at all times, public records subject to disclosure under the Ohio Public Records Act. Bardwell therefore reasonably believed that the Commissioners, through their counsel, were withholding public records subject to disclosure under R.C. 149.011(G).

Bardwell also reasonably believed that the Commissioners, and their counsel, were intentionally withholding public records after reviewing correspondence between the Commissioners' counsel and counsel for *The Plain Dealer*. Bardwell knew that *The Plain Dealer* had not had any success in obtaining non-privileged documents that had been circulated among adverse parties at the time he filed his mandamus action. Indeed, Bardwell's request is

strikingly similar to and requests precisely the same documents that *The Plain Dealer* requested. The difference is that Bardwell is an individual government watchdog and *pro se* litigant, and *The Plain Dealer* is represented by a prominent media lawyer, David Marburger, who is a partner in a national law firm of more than 600 lawyers. See www.bakerlaw.com. It therefore was reasonable for Bardwell to infer that he would receive the same treatment from the Commissioner's counsel at the prosecutor's office, especially in light of their blanket assertion of the attorney-client privilege to deny his request for *all* draft contracts regardless whether they had been communicated outside of the attorney-client relationship.

The record provides absolutely no indication that Bardwell acted in bad faith by asserting violations of the Ohio Public Records Act predicated upon the Commissioners' refusal to provide non-privileged draft contracts.

3. Bardwell did not consider the request for his identity "innocuous" in the context in which it was made.

Bardwell is a citizen watchdog. He also has been active in filing mandamus actions to enforce the Ohio Public Records Act. He went to the prosecutor's office to ask for records of a billion-dollar deal that had been shielded from public scrutiny. Given the stakes involved for Cuyahoga County and the Commissioners, not to mention the developers participating in the project, Bardwell did not wish to share his identity with the prosecutor's office at the time he made his request. Nothing in the Public Records Act requires him to share his identity. And, the production of public records cannot be conditioned upon a citizen providing his identity with his request. R.C. 149.43. Bardwell, in this context, clearly did not appreciate the request for his identity as "innocuous."

Rather, Bardwell believed that the request was an effort to thwart his pursuit of public records relating to the Medical Mart project. These were records that the Commissioners clearly

did not want disclosed before they finalized their agreement with its developers. Consequently, Bardwell asserted a claim based upon a request for his identity that he believed violated the Ohio Public Records Act. Simply asserting such a claim, under these circumstances, does not demonstrate bad faith as defined under Rule 11.

4. **Bardwell reasonably believed that the Commissioners intended to approve a billion dollar project, without any public scrutiny of ongoing negotiations between and among the parties involved, by disclosing a “finalized agreement” at the eleventh hour.**

The timing of Bardwell’s action does not demonstrate bad faith. The Commission, through, counsel, did not give Bardwell any indication when the Medical Mart records would be produced. Bardwell therefore had a reasonable belief that the Commission intended to delay production beyond a time during which the records could be useful to the public in examining the Medical Mart deal. Indeed, the Commissioners provided the drafts and the “finalized agreement” to Bardwell eight business days after his request, and only five business days before their vote. The Commissioners’ delay allowed the Medical Mart agreement to be finalized without any public scrutiny of the negotiations memorialized in the draft contracts the parties exchanged. This is precisely the type of transmogrification of records this Court refused to allow in *Kish, supra*, when it declined to hold that non-final, individual time sheets were not public records until they had been compiled into a final form. *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶21.

Bardwell therefore had no obligation to sit on his rights under the Ohio Public Records Act. It does not prescribe any limitation on the timing of a mandamus action to compel production of records. Moreover, the Medical Mart deal was imminent. Bardwell and *The Plain Dealer* had been stonewalled in their efforts to obtain non-privileged draft contracts exchanged between and among the Commissioners and the other parties involved. Had he waited, he may

not have received the requested documents timely enough for them to be reviewed in advance of the Commissioners' vote. Bardwell's decision to file a mandamus action immediately after the Commissioners rejected his request does not demonstrate bad faith. Rather, under the circumstances, Bardwell's decision to file and seek immediate relief was reasonable and prudent.

C. The Ohio Public Records Act demands transparency in the operation of state, county, and local government, and must not be diluted by unreasonable and arbitrary sanctions orders.

1. The draft contracts the Commissioners shared with adverse negotiating parties outside of the attorney-client relationship were "public records" under R.C. 149.011(G).

Revised Code 149.011(G) provides:

"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.

"Even if a record is not in final form, it may still constitute a 'record' for purposes of R.C. 149.43 if it documents the organization, policies, functions, decisions, procedures, operations or other activities of a public office." *Calvary*, 89 Ohio St. 3d at 232, 2000-Ohio-142 (citing *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53 (1998) (holding that preliminary, unnumbered accident reports not yet processed by Cleveland into final form were public records)). See also *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶20 ("[u]nless otherwise exempted, almost all documents memorializing the activities of a public office can satisfy the definition of 'record'" (citing *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶13); *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 173 (1988) (holding that preliminary work product that had not reached its final stage or official destination was public record); *State ex rel. Dist. 1199 Health Care & Social Serv. Union, SEIU, AFL-CIO v.*

Gulyassy, 107 Ohio App.3d 729, 734 (1995) (holding that drafts of proposed changes to collective bargaining statutes prepared by state agency were public record); *State ex rel. Cincinnati Enquirer, a Div. of Gannett Satellite Information Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶20.

In *Calvary*, this Court ultimately held that a “draft agreement [was] a record for purposes of R.C. 149.43 because it documents the activities of respondents Upper Arlington and its officials, i.e., it represents the city’s version of what it and the union agreed on during collective bargaining, and the city relied on that version in submitting the draft to the city council for approval.” *Calvary*, 89 Ohio St.3d at 232 (citing *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St.3d 578, 581 (1998)). “Indeed, any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record.” *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶20 (citing *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 33 (1985)). Likewise, “any material upon which a public office *could* rely in such determinations” reasonably is a record subject to disclosure under the Public Records Act. *Id.* (citing *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 40 (1990)).

Under well-established precedent, the communications and draft contracts exchanged between and among adverse parties created records that document the function, decisions, policies, operations and other activities of the Cuyahoga County Commissioners. Those non-privileged records should have been subject to public scrutiny at all times. The Commissioners ensured that they were not. To contend, as the Commissioners do, that such drafts do anything less than document these things and are not public records defies Ohio law, the public policy of this state and common sense.

2. Bardwell properly sought statutory damages and attorney's fees in his mandamus complaint.

Revised Code 149.43(C)(1) provides the standard for awarding statutory damages in a public records case. It states:

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

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. ***The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed.*** The award of statutory damages shall be in addition to all other remedies authorized by this section.

(Emphasis added.) The Commissioners summarily rejected Bardwell's request for all draft contracts as privileged without any good faith basis for this decision, and without giving any indication as to a date on which the drafts would be produced. The non-privileged drafts and

other communications exchanged by the Commissioners and other parties should have been produced promptly.

Accordingly, once Bardwell knew that the Commissioners refused his request and intended to prohibit access to non-privileged documents, he immediately filed a mandamus action and sought statutory damages. Statutory damages under R.C. 149.43(C)(1) are “compensation for injury arising from lost use of the requested information.” Those damages “*shall be conclusively presumed.*” R.C. 149.43(C)(1) (emphasis added). Bardwell’s request for statutory damages in his mandamus complaint was entirely appropriate under the plain language of the statute.

Furthermore, Bardwell had a right to seek attorney’s fees regardless whether his claims became moot after he received the requested records. “A court may award attorney fees pursuant to R.C. 149.43 where (1) a person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person’s request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records and (4) the person receives the requested public records only after the mandamus action is filed, thereby rendering the claim for a writ of mandamus moot.” *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus (1996).

The appellate court here could have declared Bardwell’s mandamus claims moot, and bifurcated the issue of attorney’s fees and statutory damages before rendering an advisory opinion on the merits of his claims. Bardwell at least would have had an opportunity to demonstrate, potentially, that the Commissioners unlawfully denied him public records by claiming a privilege or exception where none exists. Bardwell also would have had an opportunity to demonstrate that he lost the use of the requested public records, assuming

arguendo that the appellate court would have failed to “conclusively presume” an injury as required under R.C. 149.43(C).

Under these standards, there is no such thing as a game of “gotcha” as the appellate court and Commissioners suggest. Bardwell had a clear right to obtain the records he requested. The Commissioners, unreasonably and without legal justification, refused to produce them. Bardwell filed a mandamus action under R.C. 149.43. He sought attorney’s fees and statutory damages under R.C. 149.43(C)(1). Even after his claims became moot, Bardwell had the right to seek fees and damages because Ohio law and public policy have recognized that the filing of a mandamus action has tremendous value in holding public offices accountable to their obligations under the Ohio Public Records Act. *Pennington*, 75 Ohio St.3d 71, syl.

D. Rule 11 sanctions must be stringently imposed in Public Records Act cases.

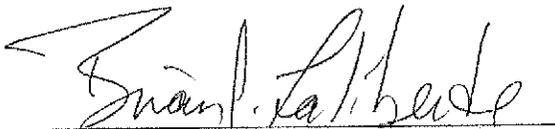
The appellate court erroneously sanctioned Bardwell. It misapplied Rule 11’s subjective bad faith standard based merely on Bardwell’s efforts to enforce R.C. 149.43 in a mandamus action he had good grounds to file. Because there may be a tendency to treat open government activists like Bardwell more harshly for their aggressive efforts to hold public offices accountable under the Ohio Public Records Act, this Court should declare that Ohio public policy requires clear and convincing evidence of bad faith or willful misconduct by a litigant in filing a mandamus action under R.C. 149.43 before Rule 11 sanctions can be entered. Such a declaration would sustain the importance of the Ohio Public Records Act as an open government tool, and thwart any effort to chill citizen enforcement of it.

III. CONCLUSION

This Court should vacate the decision of the Cuyahoga County Court of Appeals sanctioning Relator Brian Bardwell, and further declare that Ohio public policy requires clear

and convincing evidence of a bad faith or willful misconduct before sanctions can be entered against a litigant who brings a mandamus action to enforce the Ohio Public Records Act.

Respectfully submitted,



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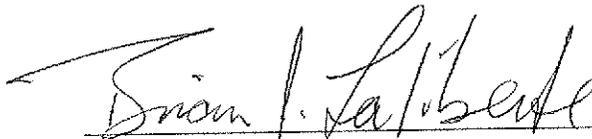
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served this 26th day of April 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, reading "Brian J. Laliberte". The signature is written in a cursive style with a large, sweeping initial "B".

Brian J. Laliberte
Lead Counsel for the Relator-Appellant