

IN THE SUPREME COURT OF OHIO

JASON MAHE

Relator,

v.

MR. GARY C. MOHR, DIRECTOR
R. MICHAEL DEWINE, ESQ., AND
RICHARD T. CHOLAR, JR.

Respondents

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: Case No. 2011-2207
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: Original Action in Mandamus
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**MOTION TO DISMISS OF RESPONDENTS OHIO ATTORNEY GENERAL DEWINE
AND ASSISTANT ATTORNEY GENERAL CHOLAR**

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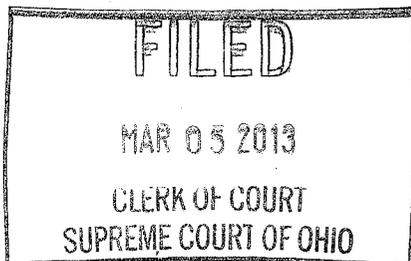
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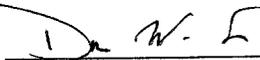
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AND ASSISTANT ATTORNEY GENERAL CHOLAR**

Pursuant to Supreme Court Practice Rule 12.04 and Ohio Civil Rule 12(B)(6), Respondents Ohio Attorney General Michael DeWine and Assistant Attorney General Richard Cholar hereby move this Court to dismiss Relator's petition for a writ of mandamus. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

Relator Jason Mahe seeks a writ of mandamus compelling Respondents to produce documents related to his prison sentence. Respondents Attorney General DeWine and Assistant Attorney General Richard Cholar (“AGO Respondents”) are not proper parties to this action, however. Because the Office of the Ohio Attorney General is not the public office that maintains the records requested by Relator, Relator’s claims against the AGO Respondents should be dismissed as a matter of law.

II. STATEMENT OF FACTS

Relator’s counsel addressed a letter, containing a public records request for an extensive list of documents, to the Office of the Ohio Attorney General (“AGO”). Complaint, ¶ 13, citing Relator’s Ex. B. Assistant Attorney General Gene Park responded to that letter, informing Relator’s counsel that the AGO was not in possession of the documents requested. Complaint, ¶ 14, citing Relator’s Ex. C. In the interim, Relator’s counsel addressed a supplemental public records request to the AGO. Complaint, ¶ 15, citing Relator’s Ex. D. Assistant Attorney General Gene Park responded to this second letter, again informing Relator’s counsel that the AGO did not possess the requested documents. Complaint, ¶ 16, citing Relator’s Ex. E. As Relator notes throughout the complaint, it is the Ohio Department of Rehabilitation and Correction that is in possession of the requested documents. See, e.g., Complaint, ¶¶ 8, 10.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d. 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. A court must accept the factual allegations of the complaint as true and “the plaintiff must be afforded all reasonable inferences possibly derived therefrom.” *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). “Additionally, in order to dismiss a complaint under Civ. R. 12(B)(6), it must appear beyond doubt that relator can prove no set of facts warranting relief.” *State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Educ.*, 72 Ohio St.3d 106, 108, 1995-Ohio-251, 647 N.E.2d 799.

B. Relator’s Request for a Writ of Mandamus must Fail

A court will issue a writ of mandamus to a relator only when: (1) the relator has a clear legal right to the relief he or she requests; (2) the respondent has a clear legal duty to perform the requested relief; and (3) the relator has no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm’n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996). The AGO Respondents are not proper parties to this action because the AGO is not the public office in possession of the requested documents. Therefore, Relator cannot satisfy the requirements of a mandamus action and his complaint must be dismissed.

A “public record” is a record kept by a public office. R.C. 149.43(A)(1). A “record” is a document “created or received by or coming under the jurisdiction of any public office.” R.C. 149.011. The records requested by Relator are not records of the AGO because the

AGO did not create, receive, or have control over the records requested by Relator. Where a relator “fail[s] to demonstrate that Respondent is the public office or person responsible for the records” at issue, the request for a writ of mandamus is denied. *State ex rel. Chatfield v. Flautt*, Case No. 11-CA-6, 2011-Ohio-4659, ¶ 8 (5th Dist.) (internal quotations omitted). Further, “R.C. 149.43(B)(1) provides that the right to inspect public records or to obtain copies of them is dependent upon a request to the public office responsible for the public records.” *Cvijetinovic v. Cuyahoga County Auditor*, No. 96055, 2011-Ohio-1754, ¶ 4 (8th Dist.), citing *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 485 N.E.2d 706, paragraph two of the syllabus (1985). Where the respondent “is not the official responsible for the requested records,” the respondent “has no duty to provide copies of those records under R.C. 149.43.” *Cvijetinovic v. Cuyahoga County Auditor*, No. 96055, 2011-Ohio-1754, ¶ 4 (8th Dist.), citing *State ex rel. Keating v. Skeldon*, No. L-08-1414, 2009-Ohio-2052 (6th Dist.); *State ex rel. Austin v. Fuesrt*, No. 83253 (8th Dist. Nov. 25, 2003); *State ex rel. Johnson v. Cuyahoga Cty. Court of Common Pleas*, No. 76156, 1999 Ohio App. LEXIS 2408 (8th Dist. May 27, 1999).

Therefore, the AGO Respondents have no clear legal duty to provide the records, and Relator does not have a clear legal right for the records to be provided by the AGO Respondents. R.C. 149.43(A)(1). Accordingly, Relator’s mandamus action must fail.

IV. CONCLUSION

For the these reasons, the Respondents Ohio Attorney General Michael DeWine and the Office of the Ohio Attorney General respectfully ask this Court to dismiss Relator's Complaint.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



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*Counsel for Respondents, R. Michael DeWine,
Esq. and Richard T. Cholar, Jr.*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Motion to Dismiss* was served by regular U.S. mail, postage prepaid, on March 5, 2013, upon the following:

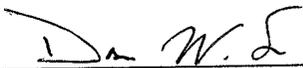
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