

IN THE SUPREME COURT OF OHIO

JASON MAHE,	:	CASE NO. 2011-2207
	:	
Relator,	:	Original Action in Mandamus
	:	
v.	:	
	:	
MR. GARY C. MOHR, DIRECTOR,	:	
MR R. MICHAEL DEWINE, ESQ., and	:	
MR. RICHARD T. CHOLAR, JR.,	:	
	:	
Respondents.	:	

**ANSWER OF RESPONDENT, MR, GARY C. MOHR, DIRECTOR OF
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION,
WITH JURY DEMAND**

Relator’s “Complaint for Original Writ of Mandamus (Public Records)” seeks an order from this Court compelling the production of certain public and non-public records, and the providing of “information.” Relator’s Complaint seeks restitution for “the costs of this action, including reasonable attorneys’ fees, pursuant to Ohio Revised Code § 149.43(C)(2),” as well as “statutory damages pursuant to Ohio Revised Code § 149.43(C)(1) in the amount of one hundred dollars (\$100.00) for each day during which Respondents fail to comply with the statute, beginning on the date of this action.” Complaint, p. 5-6.

As an initial matter, Relator’s Complaint contains a mixture of precise and imprecise factual allegations, statements of fact, and attached exhibits, many of which are irrelevant to Respondent Gary C. Mohr’s obligations under Ohio’s public records laws, R.C. § 149.43, *et. seq.* At best, the inclusion of this irrelevant information can only be construed as Relator’s attempt to support the proposition that Relator has been “aggrieved” by the alleged failure on the part of unnamed personnel of the Ohio Department of Rehabilitation and Correction (ODRC) to perform

their statutory duties under R.C. § 149.43 *et. seq.* However, there is no express, affirmative pleading in Relator's Complaint that asserts he has been "aggrieved" by any alleged failure on the part of Respondent Gary C. Mohr.

At worst, however, Relator's inclusion of this irrelevant background information reveals that Relator's requests for public and non-public records, as well as "information," taken in their entirety, are actually, and arguably more reasonably and properly to be construed as pre-complaint *discovery* requests under Civ. R. 26(B)(3) and Civ. R. 34(D), and not a valid and proper public records request in the first instance, despite the written requests being as "Public Records Request." Complaint, Relator's Exhibits B and D. Admittedly, within Relator's two "Public Records Request" letters there are a few valid requests for public records. However, many of the requests do not seek records at all, whether characterized as public or non-public, but rather "information," and as such these specific requests fail to invoke any statutory obligations under Ohio's public records laws.

In addition to the aforementioned irrelevant background information included in Relator's pleadings, Relator also includes a "Memorandum in Support of Complaint for Original Writ of Mandamus (Public Records)." Complaint, p. 6-15. Relator also attaches to his Complaint other irrelevant documents and exhibits, particularly, Relator's Exhibit A, a series of institutional kites sent from Relator to ODRC personnel while Relator was imprisoned, Relator's Exhibit F, a pre-complaint litigation hold letter sent from Relator's counsel to Respondent Gary C. Mohr, and finally, Relator's Exhibit I, titled "Public Records Requests – Response Times By State."

In light of this, and for the purposes of this Answer, Respondent Gary C. Mohr responds only to those allegations in Relator's Complaint that are relevant to his original action in

mandamus. Any and all other allegations that may be relevant to some other cause of action that Relator may initiate in the future are disregarded. With that necessary caveat in mind Respondent Gary C. Mohr answers as follows:

First Defense

1. Relator's marked paragraph 1, Respondent Gary C. Mohr denies allegations that he failed to provide certain requested public records to Relator's counsel in response to his two (2) letters titled "Public Records Request" in violation of R.C. § 149.43(B). Respondent Gary C. Mohr avers that certain public records responsive to Relator's counsel requests were provided to Relator's counsel on or about January 12, 2012 and January 17, 2012. To the extent that many of Relator's "public records requests" were actually pre-complaint discovery requests and not valid and proper requests for public records, Respondent Gary C. Mohr denies that this Court has subject-matter jurisdiction over Relator's Complaint pursuant to Article IV, § 2 of the Constitution of the State of Ohio, and R.C. §§ 149.43(C) and 2731.02. However, for those valid and proper requests for public records, Respondent Gary C. Mohr admits this Court's proper subject-matter jurisdiction under the aforementioned authorities.
2. Relator's marked paragraph 2 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
3. Relator's marked paragraph 3 Respondent Gary C. Mohr admits that he is a public official and that he is the Director of the ODRC, a state agency and public office. Any other allegations in Relator's marked paragraph 2 concerning the responsibilities of the ODRC as to Relator's housing, rehabilitative, and safety needs are not relevant to the present Complaint, therefore responses are neither required nor appropriate.

4. Relator's marked paragraph 4 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
5. Relator's marked paragraph 5 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
6. Relator's marked paragraph 6 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
7. Relator's marked paragraph 7 Respondent Gary C. Mohr admits that the ODRC possesses both public and non-public records that document certain events and circumstances concerning Relator's period of time of incarceration under the custody and control of the ODRC, as well as certain records related thereto, and which were created or received by, or coming under the jurisdiction of the ODRC and that document the organization, functions, policies, decisions, procedures, operations, or other activities of the ODRC. Any other allegations in Relator's marked paragraph 7 concerning work assignments performed by Relator during the period of time in which he was under the custody and control of the ODRC, and/or any alleged disclosure of those records to others, regardless of the alleged effects of any such alleged disclosures are irrelevant to the present Complaint and are therefore ignored.
8. Relator's marked paragraph 8 contains no relevant factual allegations against Respondent Gary C. Mohr concerning Relator's incarceration at Marion Correctional Institution (MCI) therefore a response is neither required nor appropriate. Concerning the allegation that Respondent Gary C. Mohr is in possession of certain records mentioned in Relator's paragraph 8 relative to Relator's incarceration at MCI, Respondent Gary C.

Mohr incorporates by reference, as if fully rewritten herein, his response to paragraph 7 above concerning records, both public and non-public in possession of the ODRC.

9. Relator's marked paragraph 9 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
10. Relator's marked paragraph 10 contains no relevant factual allegations against Respondent Gary C. Mohr concerning Relator's transfer to and incarceration at London Correctional Institution (LoCI) therefore a response is neither required nor appropriate. Concerning the allegation that Respondent Gary C. Mohr is in possession of certain records mentioned in Relator's paragraph 10 relative to Relator's incarceration at LoCI, Respondent Gary C. Mohr incorporates by reference, as if fully rewritten herein, his response to paragraph 7 above concerning records, both public and non-public in possession of the ODRC.
11. Relator's marked paragraph 11 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
12. Relator's marked paragraph 12 contains no relevant factual allegations against Respondent Gary C. Mohr, therefore a response is neither required nor appropriate.
13. Relator's marked paragraph 13 Respondent Gary C. Mohr admits that on July 19, 2011 Relator's counsel sent a letter titled "Public Records Request" via regular United States mail and facsimile transmission, and not by hand-delivery or certified mail, to Respondent Ohio Attorney General Michael DeWine and Respondent Richard T. Cholar, Jr., then Unit Coordinator of the Corrections Litigation Unit, Criminal Justice Section of the Ohio Attorney General's Office. Respondent Mohr denies that the "Public Records Request" letter was sent to him or served upon him, or any other employee of the ODRC,

by any means either by Relator or Relator's counsel. Respondent Mohr avers that Relator's counsel's letter contained fifty-seven (57) separate requests, not including sub-parts, failed to make any distinction between public records or non-public records for those requests that did seek records, and in many of the requests failed to identify any records at all for production, instead seeking "information."

14. Relator's marked paragraph 14 Respondent Gary C. Mohr admits that a response to Relator's counsel's letter of July 19, 2011 was sent to Relator's counsel on behalf of Respondent Ohio Attorney General Michael DeWine's office by Assistant Attorney General Gene Park, dated July 27, 2011. Respondent Gary C. Mohr does not have sufficient information or knowledge to form a belief as to the truth of whether Respondent Ohio Attorney General Michael DeWine acknowledged Relator's counsel July 19, 2011, either by letter or any other means, and therefore denies it. Respondent Gary C. Mohr admits that the acknowledgement letter from Assistant Attorney General Gene Park indicated that the request had been forwarded to Respondent Richard T. Cholar, Jr., then Unit Coordinator for the Corrections Litigation Unit, Criminal Justice Section of the Ohio Attorney General's Office. Respondent Gary C. Mohr admits the quoted text of Assistant Attorney General Gene Park's July 27, 2011 letter as cited in Relator's marked paragraph 14.
15. Relator's marked paragraph 15 Respondent Gary C. Mohr admits that on July 28, 2011 Relator's counsel sent a letter titled "Public Records Request" via regular United States mail and facsimile transmission, and not by hand-delivery or certified mail, to Respondent Ohio Attorney General Michael DeWine and Respondent Richard T. Cholar, Jr., then Unit Coordinator of the Corrections Litigation Unit, Criminal Justice Section of

the Ohio Attorney General's Office. Respondent Mohr denies that the "Public Records Request" letter was sent to him or served upon him or any other employee of the ODRC by any means either by Relator or Relator's counsel. Respondent Mohr avers that Relator's counsel's letter contained two (2) additional requests for records, and failed to make any distinction between public records or non-public records.

16. Relator's marked paragraph 16 Respondent Gary C. Mohr admits that a response to Relator's counsel's letter of July 28, 2011 was sent to Relator's counsel on behalf of Respondent Ohio Attorney General Michael DeWine's office by Assistant Attorney General Gene Park, dated August 4, 2011. Respondent Gary C. Mohr does not have sufficient information or knowledge to form a belief as to the truth of whether Respondent Ohio Attorney General Michael DeWine acknowledged Relator's counsel July 28, 2011, either by letter or any other means, and therefore denies it. Respondent Gary C. Mohr admits that the acknowledgement letter from Assistant Attorney General Gene Park indicated that the request had been forwarded to Respondent Richard T. Cholar, Jr., then Unit Coordinator for the Corrections Litigation Unit, Criminal Justice Section of the Ohio Attorney General's Office. Relator's allegations concerning Relator's counsel's litigation hold letter to Respondent Gary C. Mohr on July 19, 2011 are not relevant to the instant Complaint, therefore a response is neither required nor appropriate. However, Respondent Gary C. Mohr denies that Relator's counsel's July 19, 2011 litigation hold letter placed Respondent Gary C. Mohr on notice of anything other than the subject of the letter, and certainly not on any type of notice that requests for public records were being had, had been made, or were about to be made of the ODRC.

In fact, Relator's counsel's litigation hold letter dated July 19, 2011 never used the phrase "public records" anywhere in its four (4) page text. Complaint, Exhibit F.

17. Relator's marked paragraph 17 Respondent Gary C. Mohr is without sufficient information or knowledge to form a belief as to the truth of the allegations that Paralegal Ms. Kirsten Dell, an employee of Relator's counsel, left voice mail messages for Respondent Richard T. Cholar, Jr. during mid to late October, 2011 in an attempt to follow up on the previous "Public Records Request" letters. Complaint, Exhibits G & H. Respondent Gary C. Mohr avers that if any voice mail messages had been left for Respondent Richard T. Cholar, Jr., it is unclear why any attempts would be made to follow up with Respondent Richard T. Cholar, Jr. when both acknowledgement letters from Assistant Attorney General Gene Park to Relator's counsel specifically stated that ODRC Legal Services Division had been forwarded both "Public Records Request" letters, that ODRC Legal Services Division would be handling the requests since the identified public records being requested were created by, in the possession of and under the control and jurisdiction of the ODRC, and provided the names and phone numbers of ODRC Legal Services Division attorneys. Complaint, Exhibits C & E.
18. Relator's marked paragraph 18 Respondent Gary C. Mohr admits that ODRC Legal Services Division Attorney Trevor Clark placed a phone call to Relator's counsel on or about November 1, 2011 to discuss the "Public Records Request" letters. Respondent Gary C. Mohr admits that Relator's counsel, Ms. Kirsten Dell, Paralegal for Relator's counsel, and Mr. Trevor Clark, Attorney for ODRC Legal Services Division participated. Respondent Gary C. Mohr denies that Mr. Trevor Clark is an Assistant Attorney General, and avers that instead, he is employed by the ODRC Legal Services Division. Finally,

Respondent Gary C. Mohr is without sufficient information or knowledge to form a belief as to the truth the allegations regarding the content and context of any alleged statements attributed to Mr. Trevor Clark during the phone conference. Complaint, Exhibit G, p. 1-2, ¶ 7 & Exhibit H, p. 2, ¶ 7.

19. Relator's marked paragraph 19 Respondent Gary C. Mohr is without sufficient information or knowledge to form a belief as to the truth of the allegations that "As of the filing of this action, no further communications have been received from Respondents." Respondent Gary C. Mohr admits that as of the date of the filing of Relator's Complaint (December 30, 2011), no written denials had previously been provided to Relator's counsel in response to his two (2) "Public Records Request" letters, and that as of that date no public records responsive to these requests had been provided. Respondent Gary C. Mohr avers, however, that on January 12, 2012, Mr. Austin Stout, Attorney in the ODRC Legal Services Division sent a letter to Relator's counsel itemizing each of Realtor's counsel's two (2) previous "Public Records Request" letters. The letter from Mr. Stout included legal bases for denying several of the requests, and conversely provided copies of identified public records that were responsive to the requests. Finally, Respondent Gary C. Mohr avers that on January 17, 2012 Mr. Stout sent the remaining identified public record that was responsive to a previous request.
20. Relator's marked paragraph 20, Respondent Gary C. Mohr incorporates by reference, as if fully rewritten herein, his admissions, denials, denials for lack of information or knowledge, and averments as previously responded to in paragraphs 1-19.
21. Relator's marked paragraph 21 Respondent Gary C. Mohr denies a "failure and refusal of Respondent[s] to provide any of the requested records." Relator's allegation that the

alleged failure and refusal to provide any of the requested records “violates their [Respondent Gary C. Mohr’s] duties under Ohio Revised Code § 149.43, thereby entitling Relator to the issuance of a Writ of Mandamus” states a legal conclusion, and as such a response is neither required nor appropriate. However, Respondent Gary Mohr avers that all identified public records responsive to Relator’s counsel’s two (2) previous “Public Records Request” letters were provided to Relator’s counsel on January 12, 2012, and January 17, 2012. Finally, Respondent Gary C. Mohr avers that because both of the “Public Records Request” letters were transmitted by regular U.S. Mail and facsimile, and were not transmitted by certified mail, or by hand-delivery, any statutory damages for any period of time deemed unreasonable under these circumstances for any delay in providing the records, and/or any delay in denying certain other requests in writing, are not available under R.C. § 149.43(C)(1).

22. Relator’s marked paragraph 22 Respondent Gary C. Mohr denies a “failure of Respondent[s] to respond promptly or in writing to the Relator’s written public record requests.” Relator’s allegation that the alleged failure to respond promptly or in writing “violated Revised Code § 149.43(B)(3) entitling Relator to the issuance of a Writ of Mandamus” states a legal conclusion, and as such a response is neither required nor appropriate. However, Respondent Gary Mohr avers that a written response in writing was provided to Relator’s counsel on January 12, 2012, and on January 17, 2012. Finally, Respondent Gary C. Mohr avers that because both of the “Public Records Request” letters were transmitted by regular U.S. Mail and facsimile, and were not transmitted by certified mail or hand-delivery, any statutory damages for any period of

time deemed unreasonable under these circumstances for any delay in providing a prompt written response are not available under R.C. § 149.43(C)(1).

Second Defense

23. Relator's Complaint fails to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6).
24. Relator's Complaint fails to join an indispensable party pursuant to Civ.R. 12(B)(7).

Third Defense

25. Respondent Gary C. Mohr acted at all times in good faith compliance with the law, including any and all statutory award and/or attorney fees reduction provisions in R.C. § 149.43(C)(1)(a) and (C)(1)(b), and/or R.C. § 149.43(C)(2)(c)(i) and (C)(2)(c)(ii).
26. Supervening, intervening acts or omissions by third parties, including Relator's counsel and Relator's counsel's employee, not named as Defendants herein, and not under the control of Respondent Gary C. Mohr caused Relator's claimed damages, in whole or in part.
27. Relator's cause of action is barred since he has not expressly and affirmatively alleged, and cannot establish that he has been "aggrieved" by any alleged failure and/or delay by Respondent Gary C. Mohr under R.C. § 149.43(C)(1).
28. Relator's cause of action is barred as Relator's requests for records, whether characterized as public or non-public, and requests for "information" should have been made under the authority of Civ.R. 26(B)(3) and Civ.R. 34(D), and not as public records requests under R.C. § 149.43.
29. Relator's Complaint fails to establish a clear legal duty on the part of Respondent Gary C. Mohr, and fails to establish a clear legal right to the relief requested. Further, to extent

Relator may be required to prove the lack of an alternate legal remedy in the ordinary course of the law, said alternative legal remedy is readily available, and indeed perhaps required under the totality of the facts and circumstances here, by the aforementioned Civ.R. 26(B)(3) and Civ.R. 34(D).

30. Without regard to the lack of an alternate legal remedy in the ordinary course of law, Relator's "Public Records Request" letters fail to constitute valid and proper requests for public records, in whole or in part, since in actuality, despite their labels, the requests are pre-complaint requests for discovery governed exclusively by the Ohio Rules of Civil Procedure.

Fourth Defense

31. Relator's Complaint, to the extent that it seeks equitable relief, fails due to the clean hands doctrine.
32. Relator's Complaint is barred by the mootness doctrine.
33. Relator's Complaint must be dismissed for failing to comply with R.C. § 2731.04.
34. Relator's claim for statutory damages under R.C. § 149.43(C)(1) of one hundred dollars (\$100.00) per day capped at a total of ten (10) days, or one thousand dollars (\$1,000.00) cannot be granted inasmuch as Relator's "Public Records Request" letters were neither hand-delivered nor transmitted by certified mail as required under R.C. § 149.43(C)(1).

JURY DEMAND

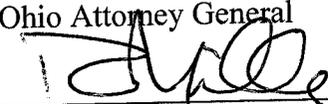
To the extent that a jury trial may be available under the cause of action brought in this Court, and the Rules and Practices under which this Court functions, Respondent Gary C. Mohr demands a trial by jury, or if trial by jury is not available, and if trial to the Court or any assigned

Magistrate of this Court is available, Respondent Gary C. Mohr demands a trial to the Court or its assigned Magistrate.

WHEREFORE, Respondent Gary C. Mohr respectfully requests that the Court issue an Order that dismisses Relator's Complaint for a Writ of Mandamus with prejudice as frivolous; assess any costs to Relator; and award any other relief deemed necessary, and just by the Court.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



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*Trial Counsel for Respondent,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing ANSWER OF RESPONDENT, MR, GARY C. MOHR, DIRECTOR OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, WITH JURY DEMAND, has been filed with the Clerk of the Supreme Court of Ohio this 5th day of March, 2013. I further certify that a file-stamped copy of the foregoing will be sent to the following parties by Regular U.S. Mail on the 6th day of March, 2013: Mr. John S. Marshall and Mr. Edward R. Forman, Marshall and Morrow, L.L.C., 111 West Rich Street, Suite 430, Columbus, Ohio 43215; Mr. Louis A. Jacobs, 66871 Rayo del Sol, Desert Hot Springs, California 92240-1871, Counsel for Relator, Mr. Jason Mahe; Mr. Damian W. Sikora and Ms. Sarah E. Pierce, Assistant Attorneys General, Ohio Attorney General's Office, Constitutional Offices Section, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, Counsel for Respondents Mr. Michael DeWine, Ohio Attorney General, and Mr. Richard T. Cholar, Jr.



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