ORIGINAL

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.	:	

RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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IN THE SUPREME COURT OF OHIO

JASON MAHE,	:	**CASE NO. 2011-2207**
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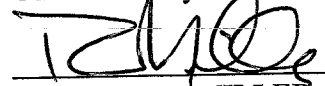
RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Respondent Mr. Gary C. Mohr, Director of the Ohio Department of the Ohio Department of Rehabilitation and Correction timely files his Motion for Judgment on the Pleadings contemporaneously with Respondent's Answer, also filed this date pursuant to S. Ct. Prac. R. 10.5(B) and Civ.R. 12(C). When considering only Relator's pleadings and the attachments and exhibits attached thereto and/or incorporated therein, construing all relevant factual allegations in a light most favorable to Relator, and drawing all reasonable inferences in Relator's favor, Relator can prove no set of facts of his stated claim that would entitle Relator any relief, and therefore, Respondent Gary C. Mohr is entitled to judgment as a matter of law. The attached Memorandum supports Respondent's Motion for Judgment on the Pleadings.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General



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MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION – RELATOR'S COMPLAINT & STATEMENT OF FACTS

Relator, Mr. Jason Mahe, through counsel filed a Complaint for a Writ of Mandamus in this Court on December 30, 2011. Complaint, p. 1. Relator's Complaint seeks an Order from the Court compelling Respondent Gary C. Mohr, Director of the Ohio Department of Rehabilitation and Correction (ODRC) to comply with two "Public Records Request" letters, dated July 19, 2011 and July 28, 2011 that Relator's counsel sent via regular U.S. Mail and facsimile transmission, and not transmitted *by certified mail or hand delivery*, to Respondents the Honorable Michael DeWine, Ohio Attorney General, and Richard T. Cholar, Jr., then an Assistant Attorney General and Unit Coordinator in the Criminal Justice Section, Corrections Litigation Unit. July 19, 2011 letter: Complaint, p. 1, ¶ 1; p. 4, ¶ 13; Exhibit B, p. 1; Exhibit G, p. 1, ¶ 2; Exhibit H, p. 1, ¶ 2. July 28, 2011 letter: Complaint, p. 4, ¶ 15; Exhibit D, p. 1; Exhibit G, p. 1, ¶ 3; Exhibit H, p. 1, ¶ 3].

Relator's Complaint alleges in several instances, incorrectly, that the two letters titled "Public Records Request" were sent to "Respondents *Mohr* and DeWine." Complaint, p. 4, ¶¶ 13 and 15; Memorandum in Support" p. 7, ¶ 3 ("issued two written public records request to the Ohio Attorney General *and the Director of the Ohio Department of Rehabilitation and Correction.* (*See* Affidavits of John S. Marshall and Kirsten L. Dell, Exhibits H and G, respectively, detailing the requests, attached Exhibits B and D, and efforts to obtain response to same.))" (emphasis added). However, an examination of Exhibits B and D does not support, and in fact directly contradicts these assertions. Exhibits B and D are prominently addressed to two (2) individuals, and two (2) individuals only: Respondent Michael DeWine, Ohio Attorney General, and Richard T. Cholar, Jr., then an Assistant Attorney General. Exhibits B and D

correctly lists the contact addresses and facsimile numbers for these two individuals. Respondent Gary C. Mohr's name does not appear anywhere in either letter, either as an addressee or otherwise. As a result, Relator's counsel is incorrect when he alleges the letters were sent to *Respondent Mohr*, or any other employee of the ODRC. The letters were sent to Attorney General DeWine and Mr. Cholar *only*.

Relator's counsel may be confused. Relator's counsel did send a letter to Respondent Gary C. Mohr, also dated July 19, 2011. However, this letter was a litigation hold letter and had nothing to do with his "public records requests." Exhibit F. In fact the litigation hold letter sent to Respondent Gary C. Mohr mentions nothing at all about requests for public records. Id.

The July 19, 2011 "Public Records Request" letter sent to Respondents DeWine and Cholar enumerated fifty-seven (57) separate requests, not including sub-parts. Exhibit B. The July 28, 2011 letter listed two (2) additional requests. Exhibit D. Both letters contain a mixture of requests for identified records, some of which are clearly public records while others are clearly non-public records. Finally, both letters contain request(s) that fail to even identify a record for copying and production. Instead these requests seek only "information" and as a result are more properly construed as pre-complaint discovery requests (interrogatories, or production of documents). See Civ.R. 26(B)(3) and Civ.R. 34(D).

Relator's counsel's July 19, 2011 letter was responded to by Assistant Attorney General Gene Park on July 27, 2011. Complaint, p. 4, ¶ 14; Exhibit C. Mr. Park's response was on behalf of both Respondent Attorney General Michael DeWine, as well as on behalf of Respondent Assistant Attorney General Richard T Cholar, Jr. That letter indicated that none of the requested items were in the possession of the Ohio Attorney General's Office. The letter referred Relator's counsel to the Legal Services Division of the ODRC, and informed Relator's

counsel that his letter had been forwarded to ODRC Legal Services Division. Mr. Park's letter also included the names and phone numbers of three attorneys in the ODRC Legal Services Division whom Relator's counsel could contact to follow-up his letter. Exhibit C. The ODRC is the state administrative agency that would have created, possessed, and maintained the records, and/or under whose jurisdiction the records would have been created and/or possessed.

Upon receipt of Relator's counsel second letter, dated July 28, 2011, again sent by regular U.S. Mail and facsimile transmission, *and not by certified mail or hand delivery,* and sent to Ohio Attorney General Michael DeWine and Assistant Attorney General and Unit Coordinator Richard T. Cholar, Jr., Mr. Park sent a nearly identical follow-up letter to Relator's counsel, dated August 4, 2011. Complaint, p. 4, ¶ 16; Exhibit E. Thereafter, according the Realtor's Complaint, in October, 2011, Relator's counsel's Paralegal, Ms. Dell placed follow-up phone calls to Respondent Richard T. Cholar, Jr., despite having admitted in Relator's Complaint that in two (2) written responses received from Mr. Park that ODRC Legal Services Division attorneys would be handling his requests consistent with the representations of Mr. Park that the records sought were ODRC records, and not the records of the Ohio Attorney General's Office. Complaint, p. 4, ¶ 17.

On November 1, 2011 a phone conference was held concerning the July 19 and July 28 letters, involving Relator's counsel, his Paralegal, Ms. Kirsten Dell, and Mr. Trevor Clark, attorney for ODRC Legal Services Division. Complaint, p. 4-5, ¶ 18. On December 30, 2011, Relator's counsel filed the present action in this Honorable Court. Id., p. 1.

On January 12, 2012, Mr. Austin Stout, attorney for the ODRC Legal Services Division sent Relator's counsel a letter including an item by item response to Relator's counsel's various requests. Mr. Stout provided citations to legal authorities for those records that were requested

but not produced, as well as including approximately two hundred and nineteen (219) pages of public records that were responsive to Relator's counsel' requests. These 219 pages were responsive to only four (4) of Relator's counsel's enumerated fifty-seven (57) requests, not including sub-parts. The remaining requests were denied as either not constituting public records for which disclosure was required, or other various authorities for their denial such as constituting a security record, or the request was improper in the first instance for its failure to identify a certain record. Finally, on January 17, 2012, Mr. Stout sent the final public record responsive to Relator's counsel's requests.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW OF A MOTION FOR JUDGMENT ON THE PLEADINGS

"A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. See *Nelson v. Pleasant* (1991), 73 Ohio App. 3d 479, 482, 597 N.E.2d 1137, 1139, and *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App. 3d 160, 163, 644 N.E.2d 731, 733. In fact, in *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St. 3d 565, 569-570, 664 N.E.2d 931, 936, this court noted the similarities between the two motions. However, we also recognized that 'Civ.R. 12(C) motions are specifically for resolving questions of law.' *Id.* at 570, 664 N.E.2d at 936." *Whaley v. Franklin County Bd. of Comm'rs*, 92 Ohio St. 3d 574, 581 (Ohio 2001).

Numerous appellate courts across the state have held that the standard of review for deciding a motion to dismiss under Civ.R. 12(B)(6) is the same standard used for deciding a motion for judgment on the pleadings under Civ.R. 12(C). *Carver v. Mack*, No 2005-CA-0053, 2006 Ohio 2840, 2006 Ohio App. LEXIS 2667 (5th Dist. June 5, 2006); *Rosenbrook v. Bd. of Lucas County Comm'rs*, No. L-11-1272, 2012 Ohio 6247, 2012 Ohio App. LEXIS 5373 (6th

Dist. Dec. 31, 2012); *Rogers v. Akron City Sch. Sys.*, No. 23416, 2008 Ohio 2962, 2008 Ohio App. LEXIS 2487 (9th Dist. June 18, 2008); *Lawson v. Mahoning County Mental Health Bd.*, No. 10-MA-24, 2010 Ohio 6388, 2010 Ohio App. LEXIS 5409 (7th Dist. Dec. 22, 2010); *Inskeep v. Burton*, No. 2007-CA-11, 2008 Ohio 1982, 2008 Ohio App. LEXIS 1696 (2nd Dist. April 25, 2008). One difference between the two considerations however, is that when deciding a motion to dismiss pursuant to Civ.R. 12(B)(6), the court may look only to the factual allegations in the complaint, together with any attachments or exhibits attached thereto, and/or incorporated by reference therein. In deciding a motion for judgment on the pleadings under Civ.R. 12(C), the court may consider all the pleadings, including the plaintiff's answer.

"When considering a defendant's Civ.R. 12(C) motion for judgment on the pleadings, the trial court is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 165-166, 63 Ohio Op. 2d 262, 264, 297 N.E.2d 113, 117. Id., at 581. A dismissal under Civ.R. 12(C) is appropriate where a court finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570 (1996), *citing Lin v. Gatehouse Constr. Co.*, 84 Ohio App. 3d at 99, 616 N.E.2d at 521. Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Burnside v. Leimbach*, 71 Ohio App.3d 399, 403, 594 N.E.2d 60, 62 (10th Dist. March 21, 1991).

B. RELATOR'S COMPLAINT MUST BE DISMISSED FOR FAILING TO COMPLY WITH R.C. § 2731.04.

R.C. § 2731.04 provides that an "Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.

The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice." R.C. § 2731.04. Here, Relator's Complaint is neither by petition, nor is it captioned in the name of the state on the relation of the person applying. As a result, Relator's Complaint has failed to comply with R.C. § 2731.04.

This Court has previously held that upon asserting a defense under R.C. § 2731.04, the relator must thereafter seek leave of the court to amend his or her petition within the period prescribed, and a relator's failure to do so within any times so prescribed must result in dismissal. *Litigaide, Inc. v. Custodian of Records for Lakewood Police Dep't,* 75 Ohio St. 3d 508 (1996); *Rust v. Lucas County Bd. of Elections*, 108 Ohio St. 3d 139 (2005); *Blankenship v. Blackwell,* 103 Ohio St. 3d 567 (2004).

Respondent Gary C. Mohr has raised a defense in his Answer pursuant to R.C. § 2731.04. Answer of Respondent, Mr. Gary C. Mohr, p. 12, marked ¶ 33. Thus, it is incumbent upon Realtor to seek leave to amend his Complaint.

Further, assuming that Realtor does seek such leave from this Court, and is granted leave to amend to comply with R.C. § 2731.04, it would additionally be incumbent upon Relator to amend his pleadings to conform to the facts as they exist at the time of his requested amendment. This would include Relator amending his factual allegations as to events occurring after December 30, 2011 when his Complaint was first filed. Specifically, Relator could no longer in good faith under Civ. R. 8(E)(2) and Civ. R. 11 assert that his July 19, 2011 and July 28, 2011 letters labeled as "Request for Records" have gone unanswered, or that there has been a refusal on the part of the ODRC to provide any of the requested records. Indeed, it would seem that Relator's entire Complaint would have to be amended to indicate to the Court what the present case or controversy entails. Relator can no longer, in good faith allege in any amended

complaint that he may file in the future that he is dissatisfied with not having received responses, and/or that he has received no records. Instead, given ODRC's January 12, 2012, and January 17, 2012 responses, including citations to legal authorities for those records that were denied together with the approximately 219 pages of records that were provided, Relator's Complaint must instead reflect the current dispute, since the January 12, 2012 and January 17, 2012 responses have rendered those issues moot. Relator may still be dissatisfied with the decision to deny most of the requested records, and may still express his dissatisfaction with the allegedly untimely responses, but he cannot in good faith continue to represent that he has not received any written denial responses or conversely, any records. These allegations, if repeated in any amended complaint that may be filed, are simply no longer true.

In summary, Relator has failed to comply with R.C. § 2731.04 and thus his Complaint for a Writ of Mandamus (Public records) should be dismissed. In the alternative, should Relator seek leave of the Court to amend his Complaint to bring it into compliance with R.C. § 2731.04, and should leave be granted by the Court for Relator to do so, Relator must amend his factual allegations to bring them current and up to date, given the responses Relator received subsequent to the filing of his original Complaint.

C. RELATOR IS NOT ENTITLED TO STATUTORY DAMAGES UNDER R.C. § 149.43(C)(1).

In any case, either under the present Complaint, or any other amended complaint that may in the future be filed, Relator cannot change the fact that the means he chose to utilize to transmit his two (2) "Public Records Request" letters deny Relator any relief under the statutory damages provisions of R.C. § 149.43(C)(1). Construing only Relator's Complaint and its attached relevant exhibits to this issue, there can be no question but that his July 19, 2011 and July 28, 2011 letters titled "Public Records Request," and addressed and sent to Respondent

Michael DeWine, Ohio Attorney General, and Richard T. Cholar, Jr., then Assistant Attorney General and Unit Coordinator for the Corrections Litigation Unit, fail to qualify for the statutory damages remedy afforded by R.C. § 149.43(C)(1). R.C. § 149.43(C)(1) provides, in pertinent part,

> (C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection 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. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.
>
> *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.

R.C. § 149.43(C)(1) (emphasis added).

An examination of Realtor's Exhibits B & D attached to his original Complaint clearly denotes that both letters were sent **"VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/466-5087"** as to Respondent Michael DeWine, and **"VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/728-9327"** as to Respondent Richard T. Cholar, Jr. Exhibit B, p. 1. (See also Exhibit D as to the identical markings, also on p. 1). Further, nothing in Realtor's Complaint, or in any other attached exhibits are there any representations or allegations about a certified mail delivery or hand-delivery for either of these letters. As a result of Relator's failure to transmit his requests by either certified mail or hand delivery to appropriate officials responsible for the public records requested, Relator has not established the prerequisites to any entitlement to statutory damages.

In fact, strictly speaking, and despite Assistant Attorney General Gene Park's letters indicating that as a courtesy Realtor's letters were forwarded to ODRC Legal Services Division personnel, it can fairly be said that Relator's counsel has never served upon any ODRC personnel, and certainly not Respondent Gary C. Mohr, the Department's Director, *any* request for public records. This fact remains undisputed despite Relator's counsel's allegations to the contrary, as previously explained above.

R.C. § 149.43(B)(1) provides, in pertinent part to requests for copies of public records, the following:

> (B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. *Subject to division (B)(8) of this section, 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.*

R.C. § 149.43(B)(1) (emphasis added).

It is axiomatic under the plain language of the statute that before any obligations under R.C. § 149.43 are triggered, a request must be made to the public office or person responsible for the public records requested. Here, Relator's counsel made his requests, not to any ODRC personnel, including Respondent Mohr as he alleges, but instead to the Ohio Attorney General and an Assistant Attorney General. Relator's counsel may have been under the mistaken belief that by making his requests upon ODRC personnel's statutory attorneys, he had discharged his burden to satisfy that he did in fact effectively meet the "upon request," language, and that he made such requests to "a public office or person responsible for public records." In both regards, Relator's counsel is incorrect.

Under the strict terms of R.C. § 149.43, as cited above, Relator cannot prove that he made valid requests for public records to a public office, or to persons within a public office who are responsible for the public records sought. Further, even if any such request is deemed to be sufficient to trigger the obligations to provide copies of requested public records, because Relator's counsel did not transmit his requests by either certified mail or hand delivery, statutory penalties of up to $1,000.00 are not available. Therefore, under the plain language of R.C. § 149.43(C)(1), Relator is ineligible to seek statutory damages of one hundred dollars ($100.00) per day, capped at a maximum of one thousand dollars ($1,000.00), or for no more than ten (10) days.

III. CONCLUSION

Respondent Gary C. Mohr respectfully requests that the Court dismiss the pending Complaint for its failure to comply with R.C. § 2731.04. Additionally, Respondent Gary C. Mohr seeks dismissal on the basis that Relator cannot prove any set of facts that would entitle him to relief under the statutory damages provisions of R.C. § 149.43(C)(1) since Relator's own

exhibits attached to his Complaint clearly reveal that the two (2) letters in question titled "Public Records Request" were sent via regular U.S. Mail and facsimile, and not either by hand-delivery or certified mail as required in order to be eligible for statutory damages. Finally, Respondent Gary C. Mohr seeks dismissal of Relator's Complaint since he failed to make his request for public records to the public office or person responsible for the requested records.

Alternatively, should the Court choose to defer dismissal, and provide Relator an opportunity to amend his present Complaint in order to bring it into compliance with R.C. § 2731.04, Relator's Complaint must be amended in all material respects to bring it current and up-to-date as to any and all known events that have transpired since the original filing date of December 30, 2011. Specifically this would necessarily include representations that responses, including denials with citations to legal authority, and certain requested records were provided on January 12, 2012, and on January 17, 2012. Finally, any amended complaint filed must address and correct what can only be construed as materially false allegations in the Complaint (Complaint, p. 4, ¶¶ 13 and 15, p. 5, ¶ 20; Memorandum in Support, p. 7, ¶ 3), as well as materially false affidavits attached thereto (Exhibit G, p. 1, ¶¶ 2 & 3; Exhibit H, p. 1, ¶¶ 2 & 3).

Respectfully submitted,

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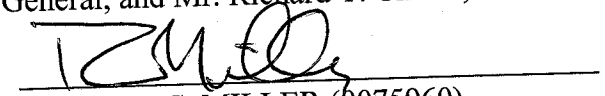
Trial Counsel for Respondent,
Mr. Gary C. Mohr, Director,
Ohio Department of Rehabilitation and Correction

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS 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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