

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.
VICTORIA E. ULLMANN,

Case No. 2013-1268

Relator,

v.

JOBSOHIO, et al.,

Respondents.

**RESPONDENTS JOBSOHIO AND JOHN MINOR'S
MOTION TO DISMISS COMPLAINT FOR WRIT OF
MANDAMUS**

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I. INTRODUCTION

The public records request giving rise to this mandamus action was improper and contrary to statute. The legislation enabling the creation of JobsOhio, a private not-for-profit entity, could not be clearer in pronouncing that JobsOhio is not a “public office” (and, therefore, not properly subject to a public records request) and that documents requested from JobsOhio are not “public records.” See R.C. 187.03(A) (JobsOhio shall not constitute a “public office” for purposes of R.C. Chapter 149); R.C. 187.04(C)(1) (records created by JobsOhio are not public records); see also R.C. 149.43(A)(1)(cc) (providing that “public record” does not mean records described in R.C. 187.04(C) that are not designated to be made available to the public); R.C. 149.011(A) (“‘Public office’ does not include the nonprofit corporation formed under section 187.01 of the Revised Code.”). Because any right to access the documents at issue must be born out of statute, those express statutory provisions are determinative of this case, and the case should be dismissed.

Relator is perfectly aware of this law, but nevertheless served her public records request on JobsOhio and then filed this action as part of her ongoing efforts to obstruct the implementation of R.C. Chapter 187. Relator’s efforts began in 2011 in her former capacity as the attorney for ProgressOhio.org, Inc. (“ProgressOhio”), and then continued as an amicus curiae in the case of *ProgressOhio v. JobsOhio*, Case No. 2012-1272, pending before this Court. Relator has been unsuccessful in having those claims heard, however, because ProgressOhio lacks standing under Ohio law.

This lawsuit, masquerading as a mandamus action to enforce a contrived request for records under R.C. 149.43, is Relator’s weakest effort yet to obstruct and undermine JobsOhio. Relator claims to be pursuing a request for records under R.C. 149.43—the very statute from

which JobsOhio is expressly excepted. But what Relator is really pursuing is a thinly-disguised request for a declaratory judgment on the constitutionality of the JobsOhio statute coupled with a prohibitory injunction. This Court has long held that it lacks original jurisdiction over such matters.

In sum, this mandamus action should be dismissed. Relator lacks a clear legal right to relief because JobsOhio is not a public office (and thus is not subject to the requirements of R.C. Chapter 149) and the documents requested do not constitute public records. The remainder of this action—a disguised declaratory judgment action—is one over which this Court lacks subject matter jurisdiction.

II. FACTUAL BACKGROUND

When Relator instigated this lawsuit with her July 31, 2013 records request, she admitted that her request was contrived and that she actually wanted to “test JobsOhio’s status[.]” (*See* July 31, 2013 letter attached to Affidavit Supporting Complaint, Ex. 1.) She advised that such a test required her to serve a formal records request on JobsOhio, and she imposed a one-week deadline for JobsOhio to respond before she would file suit to compel production of the documents. (*Id.*) Relator’s request was very broad and included the following categories of documents:

1. All board meeting minutes for JobsOhio between January 1, 2012 and the present.
2. All in house policy or procedure memos regarding conflict of interest for board members and others.
3. A list of all donors, donation amount and donation dates for any individual or organization that provided funds to JobsOhio between January 1, 2012 and present.
4. Any documents used to determine that any particular board member has a conflict of interest and what JobsOhio and that

member did to eliminate that conflict between January 1, 2012 and the present.

5. All correspondence between the Governor's office and any employee or board member at JobsOhio related to private contributions made to JobsOhio between January 1, 2012 and the present.

6. All correspondence between John Kasich's campaign staff (at Kasich Taylor for Ohio) and any employee or board member of JobsOhio related to private contributions made to JobsOhio between January 1, 2012 and the present.

7. All correspondence between the Department of Development and/or the Development Services Agency and any employee or board member at JobsOhio related to private contributions made to JobsOhio between January 1, 2012 and the present.

8. All correspondence between the Department of Development and/or the Development Services Agency and any employee or board member at JobsOhio related to funds granted to JobsOhio by the department and then returned to it between January 1, 2012 and the present.

Following the close of the one-week response period, and with no direct follow-up communication with counsel for Respondents, on August 8, 2013, Relator filed this Complaint for Writ of Mandamus.

One day later, on August 9, 2013, and just seven business days after receiving Relator's request for documents (and before service of Relator's Mandamus Complaint), the undersigned counsel responded to Relator on behalf of JobsOhio via letter. In that letter, JobsOhio explained to Relator that JobsOhio is not subject to the requirements of Chapter 149. JobsOhio also explained that because it is not a "public office" or "person responsible for the public record," Relator's request was not properly directed to JobsOhio. JobsOhio did, however, acknowledge that certain of its documents are to be made available to the public under R.C. 187.04(B)(2). Therefore, JobsOhio agreed to provide copies of all its documents that are to be made publicly

available, including approved minutes of all public board meetings, the JobsOhio Conflict of Interest and Standards of Conduct Policies adopted by its Board, and the JobsOhio IRS Form 990 for the fiscal year ending June 30, 2012. JobsOhio also advised Relator that some of her requests could be properly directed under the Public Records Act to the actual public offices identified in her letter. Rather than direct her request to the appropriate public office, Relator is intent on using this case as a vehicle to raise her constitutional challenges.

III. LAW AND ARGUMENT

There are three requirements for a writ of mandamus to issue: (1) the relator must have a clear legal right to the requested relief; (2) the respondent must have a clear legal duty to perform the act; and (3) the relator must lack an adequate remedy in the ordinary course of the law.¹ *State ex rel. Lane v. City of Pickerington*, 130 Ohio St.3d 225, 2011-Ohio-5454, 957 N.E.2d 29, ¶ 10. In order to establish entitlement to mandamus relief under the Public Records Act, a relator must “establish entitlement to the requested extraordinary relief by clear and convincing evidence.” *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 135 Ohio St. 3d 416, 2013-Ohio-1532, 988 N.E.2d 546, ¶ 15 (quoting *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16). The Court should dismiss this case “if it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of the relators, that they are not entitled to the requested extraordinary relief.” *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 632, 1999-Ohio-130, 716 N.E.2d 704.

¹ In a public-records mandamus action, the relator is not required to establish the lack of an adequate remedy in the ordinary course of law. *ACLU v. Cuyahoga Cty. Bd. of Comms.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24.

Here, two grounds warrant dismissal. First, JobsOhio is expressly not a “public office” and is not subject to the requirements of R.C. 149.43. As a result, Relator has no clear legal right to the requested relief, and Respondents have no clear legal duty to produce any documents beyond those already produced. Second, the Court does not have subject matter jurisdiction over the remainder of this action, which is nothing more than a disguised declaratory judgment action.

A. JobsOhio is not a “public office” and is not subject to the requirements of R.C. Chapter 149.

Dismissal is warranted because JobsOhio is specifically and explicitly exempted from the Public Records Act and the requirements of R.C. 149.43.² Revised Code 149.43(B)(1) requires public records to be made available only by “a public office” or “the person responsible for the public record,” neither of which includes JobsOhio. Revised Code 187.03(A) directly controls in this case and states that JobsOhio “shall not be considered a state or public department, agency, office, body, institution, or instrumentality for purposes of . . . [Chapter 149].” The documents maintained by JobsOhio are therefore not “public records,” because R.C. 149.43(A)(1) limits “public records” to those documents “kept by any public office” Revised Code 187.04(C)(1) supports this conclusion, stating that “Records created by JobsOhio are not public records for the purposes of Chapter 149 of the Revised Code” Revised Code 149.011(A) similarly states that “‘Public office’ does not include the nonprofit corporation formed under section 187.01 of the Revised Code.” Finally, R.C. 149.43(A)(1)(cc) expressly states that

² It is the General Assembly’s role to weigh and balance public policy considerations related to access to records. *See State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 36 (stating that the Ohio Supreme Court has “consistently repudiated” attempts to apply a test weighing public policy concerns while analyzing R.C. 149.43); *State ex rel. James v. Ohio State Univ.*, 70 Ohio St. 3d 168, 172, 1994-Ohio-246, 637 N.E.2d 911 (deferring to General Assembly’s decision balancing “between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure”).

“public record” does not mean records described in R.C. 187.04(C) that are not designated to be made available to the public. It is indisputable from these numerous, express provisions of both R.C. Chapters 149 and 187 that JobsOhio is not subject to the requirements of R.C. Chapter 149 and, therefore, it was not proper for Relator to direct her request to JobsOhio in the first instance.³

Although it is expressly not subject to R.C. Chapter 149, JobsOhio does have disclosure obligations. Specifically, the General Assembly, in R.C. 187.04(B)(2), required that JobsOhio’s contract with the Development Services Agency (“DSA”) include “[t]erms designating records created or received by JobsOhio that shall be made available to the public under the same conditions as are public records under section 149.43 of the Revised Code.” The following categories of documents must be made available:

- (a) The corporation’s federal income tax returns;
- (b) The report of expenditures described in R.C. 187.03(B)(3);
- (c) The annual total compensation paid to each officer and employee of the corporation;
- (d) A copy of the audit report for each financial audit of the corporation performed by an independent certified public accountant pursuant to R.C. 187.01(J);
- (e) Records of any fully executed incentive proposals, to be filed annually;
- (f) Records pertaining to the monitoring of commitments made by incentive recipients;

³ Moreover, it is also clear that the General Assembly, through statute, knows how to expressly and clearly declare that certain documents held by non-profit corporations do constitute public records. *See, e.g.*, R.C. 149.43(A)(1) (“‘Public record’ means records kept by any public office, including, but not limited to . . . records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code.”).

(g) A copy of the minutes of all public meetings described in R.C. 187.03(C) not otherwise closed to the public.

R.C. 187.04(B)(2). In accordance with Section 187.04(B)(2), JobsOhio has designated in Section 10 of its contract with DSA fifteen categories of records that are subject to this disclosure requirement. Accordingly, in its August 9, 2013 response to Relator, JobsOhio proffered, and has now provided, the documents requested by Relator that fall within these categories. By providing these documents, JobsOhio has satisfied its legal obligations.

Relator has turned a blind eye towards JobsOhio's full compliance with its statutory and contractual obligations and, instead, asserted that JobsOhio is the "functional equivalent" of a public office making it subject to R.C. 149.43. In support of this argument (which is expressly contradicted by the statutes cited and quoted above), Relator relies upon *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193. Her reliance is misplaced. *Oriana House* and its progeny do not apply to JobsOhio because the functional equivalency test is used only "[i]n the absence of a precise legislative definition of what constitutes an agency or public office for purposes of public-records acts" *Oriana House*, 110 Ohio St.3d at ¶ 21. Here, no such analysis is necessary because the General Assembly *has* expressly and precisely declared that JobsOhio is not a public office for purposes of R.C. Chapter 149, something that the legislature did not declare about any of the private corporations involved in *Oriana House* and its progeny. Indeed, neither *Oriana House* nor any of the cases interpreting it has found that an organization that the General Assembly specifically excepted from R.C. Chapter 149 is nonetheless subject to its provisions because of functional equivalency. The Court should decline to do so here.

B. The Court does not have subject matter jurisdiction to hear the remainder of this case seeking a declaratory judgment on the constitutionality of JobsOhio.

The remainder of Relator's complaint amounts to an attempt to raise a constitutional challenge over which this Court does not have original jurisdiction. In her prayer for relief, Relator asks "this Court to determine that R.C. 187 and R.C. 4313⁴ are wholly unconstitutional and void" and for "the court to order JobsOhio be dissolved as a corporate entity and its duties returned to the Development Services Agency."

A person allegedly aggrieved under the public records laws may only bring a mandamus action before this Court "to obtain a judgment that orders the public office . . . to comply with [the public records laws], 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" R.C. 149.43(C)(1). Relator attempts to abuse this limited grant of jurisdiction by bootstrapping to her specious public records action constitutional challenges to JobsOhio.

This Court has long held that when "the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction." *Grendell, supra*, 86 Ohio St.3d at 634. Indeed, JobsOhio itself filed a mandamus action in this Court seeking to compel the Director of Commerce to execute the Franchise and Transfer Agreement which granted JobsOhio a franchise on the merchandising and sale of spirituous liquor in the State. *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153. Despite the fact that the suit was brought as a mandamus action seeking to compel a public official to perform his statutory duties, the Court found that the

⁴ R.C. 4313 authorizes the Franchise and Transfer Agreement between the State and JobsOhio relating to the State Liquor Enterprise.

lawsuit did “not raise a justiciable controversy” because it was “essentially seeking either a declaratory judgment or an advisory opinion on the constitutionality of the statute.” *Id.* at ¶ 1.

The Court’s rationale and holding in *State ex rel. Jobs Ohio v. Goodman* also applies to the claim brought by Relator. The Court stated that, “If the allegations of a mandamus complaint indicate that the real object sought is a declaratory judgment, the complaint does not state a viable claim in mandamus and must be dismissed for lack of jurisdiction.” *Id.* at ¶ 14 (citing *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶ 21); *see also State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 13 (quoting *Grendell*, 86 Ohio St.3d at 634).

It is clear from Relator’s prayer for relief that the real object of this lawsuit is a declaratory judgment and a prohibitory injunction based on a contrived constitutional challenge to the JobsOhio legislation. Such relief is far outside the scope of a mandamus action under R.C. 149.43(C)(1) and reveals the true intent of this lawsuit. Moreover, constitutional challenges to legislation “are normally considered in an action originating in a court of common pleas rather than an extraordinary writ action filed here.” *Id.* at 635. Relator’s complaint violates both of these fundamental precepts.⁵

Relator, as then-counsel for ProgressOhio, has already sought to raise constitutional questions concerning JobsOhio in a separate lawsuit brought as a declaratory judgment action that is currently pending before the Court. In *ProgressOhio.org, Inc. v. JobsOhio*, Case No. 2012-1272, both the trial court and the Tenth District Court of Appeals held that the plaintiffs, including Relator’s former client, do not have standing to challenge the constitutionality of JobsOhio. After her withdrawal as counsel for ProgressOhio in that case, Relator sought to

⁵ Even if Relator’s claims were appropriate in mandamus, they would still fail because she has no clear legal right to the relief she seeks.

intervene as a pro se appellant but was denied intervention by this Court. (See April 24, 2013 Entry.) Nevertheless, Relator filed an amicus brief in that case. After being denied intervention in the declaratory judgment action against JobsOhio, Relator has now filed this sham public records mandamus action in a transparent attempt to moot ProgressOhio's case, bring her own constitutional challenge before the Court, and skirt well-established standing requirements by attempting to bootstrap her questions about the constitutionality of JobsOhio into a mandamus action under the Public Records Act.

The purpose of R.C. 149.43 is not to provide individual plaintiffs who lack standing a Trojan horse through which to challenge the constitutionality of legislation directly in this Court. *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St. 3d 350, 355, 1997-Ohio-271, 673 N.E.2d 1360 (1997) (finding that the purpose of R.C. 149.43 is to allow the public to scrutinize *government* action) (citing *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St. 3d 416, 420, 667 N.E.2d 1223 (1996)). Never before has this Court allowed R.C. 149.43 to be used to circumvent the standing requirements for bringing a constitutional challenge to a statute. To do so now would completely eviscerate the concept of standing and distort beyond recognition the purpose of Ohio's public records law.

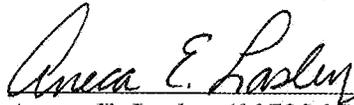
While Relator may argue that resolution of her constitutional challenge of JobsOhio generally is wrapped up in her request for documents, the Court has consistently held that it should not consider constitutional questions unless it is "absolutely necessary to do so" to resolve the matter at hand. *State ex rel. Miller v. Brady*, 123 Ohio St. 3d, 2009-Ohio-4942, 915 N.E.2d 1183, ¶ 11 (citing *State ex rel. Carr v. Akron*, 112 Ohio St. 3d 351, 2006-Ohio-6714, ¶ 57, 859 N.E.2d 948); *see also State ex rel. Steffen v. Kraft*, 67 Ohio St. 3d 439, 440, 619 N.E.2d 688 (1993) (declining to read public records statute in a way that would "raise serious constitutional

questions.”). In this case, there is no need to consider the constitutional questions that Relator raises. Any right to access the types of records at issue in this case would be conferred solely by statute, not the Ohio Constitution, and it is well-established that the General Assembly has the power to define the scope of what constitutes a “public agency” or “public record” under R.C. Chapter 149. *See, e.g.*, R.C. 149.43(A)(1) (exempting various categories of documents from the definition of “public record” including proprietary information of or relating to any person that is submitted to or compiled by the Ohio Venture Capital Authority, certain records maintained by the Department of Job and Family Services, and financial statements and data submitted to the Ohio Housing Finance Agency); R.C. 122.36 (exempting certain materials “submitted to, made available to, or received by the director of development” from the public records laws). Because the General Assembly has exercised its power to except both JobsOhio and the records at issue in this case from R.C. Chapter 149, there is no need for the Court to consider the constitutionality of JobsOhio to resolve Relator’s baseless public records request, and therefore the Court should decline to do so.

IV. CONCLUSION

Relator is not entitled to mandamus relief stemming from her request for documents served on JobsOhio. Relator has no clear legal right to the requested relief because JobsOhio is expressly not a public office and the documents created by JobsOhio are expressly excluded as public records. As a result, the requirements of R.C. Chapter 149 have no application here, and Relator’s functional equivalency argument fails. Furthermore, the remainder of Relator’s complaint regarding the constitutionality of JobsOhio is a disguised declaratory judgment action over which this Court lacks subject matter jurisdiction. Accordingly, Respondents respectfully request that the Court dismiss this action.

Respectfully submitted,



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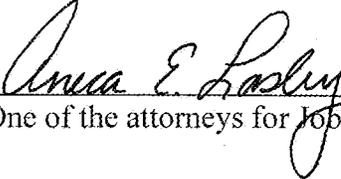
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 3rd day of September, 2013, by U.S. mail and electronic mail to the following:

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One of the attorneys for JobsOhio