

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel.*
VICTORIA E. ULLMANN
Relator

Case Number 2013-1268

An Original Action in Mandamus

vs.

JOBSOHIO, *et al.*
Respondent

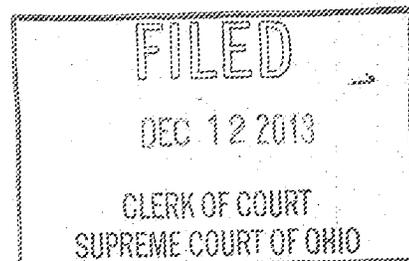
MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION OF DISMISSAL

I. Introduction

Relator requests that this Court reconsider its dismissal of this case.¹ It is fully supported in law and a writ should issue.

Although R.C. 149.43 is the basis of most public documents requests in Ohio including this one, the overarching principle of right of access to public documents is grounded in the First Amendment to the United States Constitution. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)² “The First Amendment, in conjunction with the Fourteenth, prohibits governments from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), at 575. This is why state courts around the country created the functional equivalency test that this Court adopted in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193. If the government creates a bogus corporation to hide what are in fact government operations, it violates a core value of democratic society. The statutory exemption to R.C. 149 requirements for JobsOhio cannot override this constitutional imperative, if JobsOhio is in fact, the functional equivalent of a state agency.

¹ As indicated in relator’s skeletal response to the Motion to Dismiss, Relator was tied up working on the merit brief and a variety of motions in *Plunderbund v. Born*, 2013-0596. That public documents case is exceedingly complex and took more time to complete that relator anticipated. As that case is for a client and an alternative writ had been granted there, but with only four votes, that case had to take precedence over this one. That however should not be viewed in any way as an indication that this case against JobsOhio is not fully grounded and supported in law, quite the contrary.

² Ohio Const. Art. 1.02, 1.11, and 1.20 all support this concept on the state level.

This Court's recent opinions regarding functional equivalency support the First Amendment basis of all document access. This case is on all fours with the test this Court created in *Oriana House, Id.* When the test is applied to Jobs Ohio, it becomes apparent that this entity is merely a spun off division of the department of development. The functional equivalency test was designed to cut through the tissue of lies that governments can fabricate to hide their activities to protect the constitutional right of access. JobsOhio, and the exemptions designed to hide its deeds, are just such an unconstitutional deceit.

JobsOhio opines that the exemption in the statute is all that this Court should consider. They claim that *Oriana House, Id.* holds this, based upon an out of context quote from the opinion. The quote is not from the holding of *Oriana House*, but rather in the discussion of cases from other jurisdictions. The Court is merely noting that the functional equivalency test is used in other jurisdictions when there is no legislative definition of what constitutes a state agency. R.C. 149.011 contains a definition of what a state agency is and the Court still adopted the test. Para. 21. This is consistent with the First Amendment right of access. So clearly the intent is to use this test in addition to statutory definitions and exemptions.

The four part test of *Oriana House, Id.* indicates that whether the entity was created to hide what are in fact public documents is to be considered as the fourth prong of the test. This would include the analysis of any specific exemption language at that point. An improper exemption is the most obvious indicator that a government is improperly concealing public documents from the public, but the analysis of the exemption would only occur once it is otherwise determined that the entity is acting as a governmental body. It is the exemption in 149.011 that is the irrefutable proof that JobsOhio was created to avoid the requirements of R.C.

149 and to violate the First Amendment rights of the citizens of Ohio to reasonable access to documents concerning government functions.

I. Mandamus is the proper form of action for all public documents cases.

“Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 16. There is no doubt that this mandamus action is the only method of bringing this issue before the Court since the case is based upon R.C. 149. et seq. JobsOhio attempts to argue that this is just a disguised declaratory judgment action. Of course this is not a declaratory judgment because Relator is trying to get documents, not just a judicial opinion. Everyone in the media wants the documents too. This case is indisputably a mandamus.

JobsOhio argues that since the exemption has to be determined first and Relator says it is unconstitutional, that that makes this action a declaratory judgment. Relator is arguing the constitutionality of the exemption should only be considered if JobsOhio is found to be the functional equivalent of a state agency pursuant to the other parts of the *Oriana House* test. If it is found to be a functional equivalent, then the Court at that point would have to deal with the unconstitutional exemption. So the constitutionality of the exemption is not the first issue. Although the exemption does trigger the constitutional questions regarding Ohio Const. 13, it would first be a First Amendment issue so the determining the validity of JobsOhio itself could be avoided.

II. JobsOhio is the functional equivalent of a state agency.

This was dealt with at length in the memorandum accompanying the complaint. As JobsOhio’s Motion to Dismiss was based on the exemption and not on lack of functional

equivalency, this material does not need to be repeated at length at this point, and will only be summarized here.

The Oriana House test is set forth in the syllabus of the case:

Private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office — In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the functional-equivalency test — Under the functional-equivalency test, a court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

The *Oriana House* test was developed by this Court to determine whether an entity is acting secretly as a governmental body. As this Court has observed: “By homing in on the functional realities of a particular contractual arrangement, the functional-equivalency test provides greater protection against unintended public disclosures while affording a more suitable framework for determining the extent to which an entity has actually assumed the role of a governmental body.” *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713.

JobsOhio performs duties previously handled by the former Ohio Department of Development. It advises the agency, now called the Development Services Agency, regarding the award of development grants and business development in the state, R.C. 187.04. It performs a variety of other functions in the same way as a similar division in the department of development did for years. Economic development has been considered a government function in Ohio since at least the 1960's.

JobsOhio could not and would not exist without massive funding by the state. The state granted/leased/franchised its wholesale liquor business to JobsOhio, which is worth billions of dollars. It is the intent and the current reality that this provides 90% or more of JobsOhio's funding. There is no doubt, regardless of the semantic games played by the legislature to hide JobsOhio's funding from the public and the auditor, that JobsOhio is entirely dependent on the state's resources.

Skipping to part one of the fourth test, it is indisputable that JobsOhio was created by the General Assembly. R.C. 187 creates this pseudo corporation and sets forth its unconstitutional powers and authorities. Related to this is the third prong which concerns government regulation and control of the entity. JobsOhio is thoroughly intertwined with government. The governor appoints the Board of Directors for what is allegedly a private company.³ It has some document production obligations to the Development Services Agency and numerous other entanglements with the state. R.C. 187.01 *et seq.*

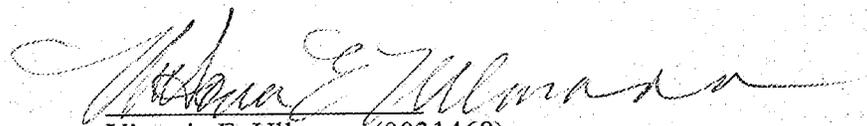
Because the General Assembly was aware that this entity absolutely would be subject to the provisions of R.C. 149 *et seq.*, it attempted to exempt it. The fact that there was an attempt to legislatively exempt what is in fact nothing more than a division of the Development Services Agency is the final proof that JobsOhio is nothing more than a spinoff of DSA. Once JobsOhio is determined to be the functional equivalent of a governmental body, the First Amendment right of access kicks in, and the exemption has to be ruled unconstitutional.

³ The only reason the governor himself is not on the board of JobsOhio is that Relator testified before the Senate Finance Committee that that would be unconstitutional since the governor can only hold one position.

It would be truly unfortunate if Relator's obligations to a client prevent this case from properly determined by this Court. JobsOhio was willing to agree to the short extension to respond to their motion initially but the Court's rules do not allow it. Relator has great hopes that the Court will find standing for ProgressOhio in the first case she created and the Court appeared to be considering that with great care. But even with a determination that standing exists, there will be no final resolution of the merits of that case for many years. Relator was able to expedite the *ProgressOhio* case initially at common pleas because it contained a motion for a temporary restraining order. There is no current basis to expedite that case and it will be on the on the common pleas docket for a long time. In the meanwhile, meaningful access to JobsOhio's activities is mandated by the public records law, constitutionally, statutorily, and by common law. A writ can issue from this case in the matter of a few months and provide some protection from the massive problems inherent in JobsOhio until its constitutionality can be determined.

Relator respectfully moves this Court to reopen this case and issue the appropriate writ as soon as possible.

Respectfully submitted,

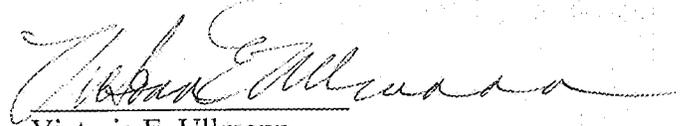


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this report was served on attorneys for the parties on
date of filing.

A handwritten signature in cursive script, appearing to read "Victoria E. Ullmann", written in black ink.

Victoria E. Ullmann
Attorney at law