

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO ex rel.  
VICTORIA E. ULLMANN,

Case No. 2013-1268

Relator,

v.

JOBSOHIO, et al.,

Respondents.

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**RESPONDENTS JOBSOHIO AND JOHN MINOR'S  
MEMORANDUM IN OPPOSITION TO RELATOR'S  
MOTION FOR RECONSIDERATION**

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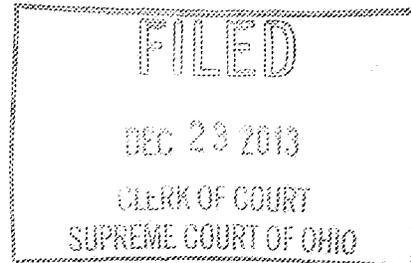
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## I. INTRODUCTION

Relator's Motion for Reconsideration ("Motion") raises only one new and novel argument: that the First Amendment provides Relator a right to access JobsOhio's records. This argument is one that Relator could have asserted earlier, but chose not to raise. Regardless, this argument is not supported by any Ohio or United States Supreme Court case law. The remainder of Relator's Motion is a repackaged version of her Memorandum in Support of Complaint for Writ of Mandamus and Memorandum Contra Motion to Dismiss. Her recycled arguments are not the proper basis of a Motion for Reconsideration. This Court has already considered Relator's arguments and rightly determined that JobsOhio is statutorily exempted from Ohio's public records laws and that Relator is therefore not entitled to a writ of mandamus. Accordingly, the Court should not reconsider its prior decision properly dismissing this case.

## II. LAW AND ARGUMENT

### A. **The First Amendment does not guarantee access to the records at issue in this case.**

Relator makes a wide-reaching statement in her Motion that "the overarching principle of right of access to public documents is grounded in the First Amendment to the United States Constitution." (Motion, p. 2.) In support of her argument, Relator cites two United States Supreme Court cases, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Both of these cases deal with a narrow right to access criminal court records or proceedings and have no application to this case. *Nixon*, 435 U.S. at 610 (finding that neither common law nor the First Amendment required the district court to release audio versions of the Nixon tapes that were introduced in a criminal trial); *Richmond Newspapers*, 448 U.S. at 558 (1980) (addressing the "narrow question" of "whether the right of the public and press to attend criminal trials is guaranteed under the United

States Constitution.”); *see also*, *State ex rel. Plain Dealer v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 66 (“In *Richmond Newspapers*, the United States Supreme Court held that the First Amendment prohibits the ‘government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.’”).

Unlike the cases on which Relator relies, this case does not involve a criminal matter let alone access to documents or court proceedings in such a matter. Moreover, this Court has previously confirmed that *Richmond Newspapers* does not apply outside the criminal context. *See State ex rel. Plain Dealer*, 106 Ohio St. 3d at ¶ 66 (quoting *Calder v. Internal Revenue Serv.*, 890 F.2d 781, 783 (5th Cir. 1989) to note that *Richmond Newspapers* and comparable cases have never been applied by the Supreme Court “to areas other than criminal proceedings.”). Thus, while the First Amendment does provide a limited right of access to a subsection of criminal court records and proceedings, it provides no guarantee of access to other public records, let alone the records of *private* organizations like JobsOhio.

This Court has also previously rejected arguments asserted by relators trying to broaden the First Amendment’s reach into public records law. *See, e.g., State ex rel. Plain Dealer Publ’g*, 106 Ohio St. 3d at ¶ 63-66 (distinguishing *Richmond Newspapers* and declining to apply the First Amendment to a case involving a request for police officer photographs); *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 9 (stating that even in the context of public access to criminal proceedings, the right “is not absolute,” “[n]o one has a right to any particular degree of openness . . . except as provided by law,” and “it is the proper role of the General Assembly to balance competing private and public rights.”) (internal citations omitted).

Relator has not provided a single case, and none appears to exist, in which this Court has found a First Amendment right to access the records of a government agency, let alone a private entity like JobsOhio. To the contrary, federal case law confirms that the First Amendment does not impose any requirement that the government open its doors to provide information. *See, e.g., Kallstrom v. City of Columbus*, 165 F.Supp.2d 686, 697 (S.D.Ohio 2001) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.”) (*citing Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (Burger, C.J., plurality opinion)). Relator attempts to conjure support for her argument by suggesting that the First Amendment was the basis for this Court’s adoption of the functional equivalency test of *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 456, 2006-Ohio-4854, 854 N.E.2d 193, (Motion, p. 2), but this argument is completely misplaced. Neither *Oriana House* nor its progeny make any reference to the First Amendment.

In sum, there is no authority to support a First Amendment right to the records at issue in this case and Relator’s Motion for Reconsideration should be denied.

**B. *Oriana House* is inapplicable in this case because JobsOhio is explicitly not a “public office” and is not subject to the requirements of R.C. Chapter 149.**

The remainder of Relator’s motion consists of a re-argument of the functional equivalency test under *Oriana House*. This is an attempt by Relator to file a more fulsome response to Respondents’ Motion to Dismiss after she filed a rushed response during the regular briefing period allowed by this Court’s rules. Relator even acknowledges that she is rehashing arguments that were already before the Court, stating in her Motion that the functional equivalency issue “was dealt with at length in the memorandum accompanying the complaint.” (Motion, p. 4.) Relator’s use of a motion for reconsideration to restate arguments previously

asserted is improper, and her motion should be denied for this reason alone. *See* S.Ct.Prac.R. 18.02(B) (“A motion for reconsideration shall not constitute a reargument of the case . . .”); *see also State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379, 381. 2002-Ohio-4905, 775 N.E.2d 493 (citing prior version of Supreme Court Rules of Practice and finding that respondents could not reassert arguments previously raised in a brief).

Moreover, even if the Court were inclined to allow Relator to use a motion for reconsideration to rehash her earlier arguments, Relator’s arguments regarding functional equivalency continue to lack merit. When this Court previously considered Relator’s arguments, it properly found that JobsOhio is explicitly exempted from the public records laws and declined to apply *Oriana House*. (*See* December 3, 2013 Judgment Entry) (“Judgment Entry”) (“Upon consideration of respondents’ motion to dismiss, it is ordered by the court that the motion to dismiss is granted because JobsOhio is specifically exempted from [Ohio’s public records laws].”).

Relator has again ignored the clear language of the Ohio Revised Code and, instead, asserted that JobsOhio is the “functional equivalent” of a public office making it subject to R.C. 149.43. Relator’s reliance upon the functional equivalency test 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. Relator seeks to side-step the plain language and clear limitation of *Oriana House* by claiming that the passage quoted above was “not from the holding” and asserting that the Court’s opinion was “merely noting that the functional equivalency test is used in other jurisdictions when there is no legislative definition of what constitutes a state agency.” (Motion, p. 3.) Relator’s argument is

clearly flawed. When the Court in *Oriana House* addressed the functional equivalency test, the very first clause it chose to use to introduce the subject was “In the absence of a precise legislative definition of what constitutes an agency or public office for purposes of the public-records acts . . .” *Oriana House*, 110 Ohio St. at ¶ 21. The whole discussion of functional equivalency then flows out of this one very basic circumstance: that the legislature has not directly addressed whether an entity is subject to the public records laws.

In this case, no functional equivalency analysis is necessary or appropriate 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 entities involved in the *Oriana House* cases. When the Court previously dismissed this case without reference to *Oriana House*, it held that “JobsOhio is specifically exempted from the requirements of R.C. 149.43 by R.C. 187.04(C)(1).” *See also* 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); 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 Court’s prior dismissal should stand.

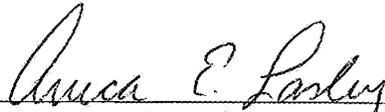
Neither *Oriana House* nor any of the cases interpreting it has found that an organization specifically exempted by the General Assembly from R.C. Chapter 149 is nonetheless subject to the provisions of that Chapter because of functional equivalency. Relator has not pointed to any authority suggesting that functional equivalency can negate a clear statutory exemption to the

public records laws. The Court should decline to override the legislative discretion to determine what entities are subject to the public records laws. *See State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992) (“It is the role of the General Assembly to balance the competing concerns of the public’s right to know and individual citizens’ right to keep private certain information that becomes part of the records of public offices.”); *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 1994-Ohio-246, 637 N.E.2d 911 (1994) (“in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations 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”); *State ex rel. Cincinnati Enquirer*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶21 (declining to create additional exemption from public records laws because “the General Assembly is the ultimate arbiter of public policy.”).

### III. CONCLUSION

Relator’s Motion is primarily an improper reargument of the issues that have already been ruled upon in this case. The Court has already found that JobsOhio is specifically exempted from Ohio’s public records laws and has declined to apply the functional equivalency test of *Oriana House*. Relator has provided no basis for this Court to decide otherwise. Relator’s strained attempt to invoke a First Amendment right to access JobsOhio’s records is not supported by law, and should be disregarded. Relator has no legal right to JobsOhio’s records. Therefore, the dismissal of her mandamus action should stand, and the Court should deny Relator’s Motion for Reconsideration.

Respectfully submitted,



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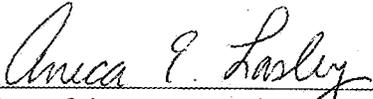
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 23rd day of December, 2013, by U.S. mail and electronic mail to the following:

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*Pro Se*

  
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One of the attorneys for JobsOhio