

In the
Supreme Court of Ohio

STATE OF OHIO, *ex rel.*
ANNA SCHIFFBAUER
c/o Tan & Cardinal/Otterbein360.com
1 South Grove Street
Westerville, Ohio 43081

Relator,

vs.

LARRY BANASZAK
Director of Campus Police
Otterbein University
194 West Main Street
Westerville, Ohio 43081

and

ROBERT M. GATTI
Vice President & Dean for Student Affairs
Otterbein University
1 South Grove Street
Westerville, Ohio 43081

Respondents.

Case No.

14-0244

MEMORANDUM IN SUPPORT
OF COMPLAINT FOR WRIT OF
MANDAMUS

JOHN C. GREINER (0005551)*

**Counsel of Record*

GRAYDON HEAD & RITCHEY LLP

1900 Fifth Third Center

511 Walnut Street

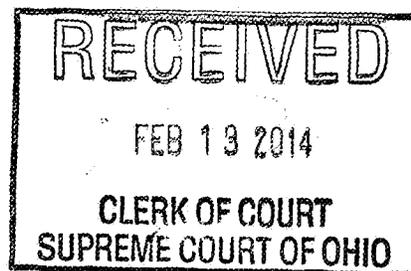
Cincinnati, OH 45202-3157

Phone: (513) 629-2734

Fax: (513) 651-3836

E-mail: jgreiner@graydon.com

COUNSEL FOR ANNA SCHIFFBAUER



Relator Anna Schiffbauer submits this as her Memorandum in Support of her Complaint for Writ of Mandamus.

I. STATEMENT OF FACTS.

Otterbein360.com (“Otterbein360”) is an online newspaper of general circulation that provides instant information to students, faculty, parents, alumni, and staff at Otterbein University, a private liberal arts college in Westerville Ohio. Otterbein360 primarily covers campus news and events, while also reporting on areas of interest to the Otterbein and Westerville communities.

On January 16, 2014, Relator Anna Schiffbauer, news editor for Otterbein360, sent a letter to Larry Banaszak, Director of the Otterbein Campus Police Department (“OPD”), requesting the criminal reports for individuals (Otterbein University students and non-students) whose cases were referred to Westerville’s Mayor’s Court. (“the Records”). (A true and correct copy of Ms. Schiffbauer’s request for the Records is attached as Exhibit A to the Affidavit of Anna Schiffbauer.)

On January 22, 2014, Robert M. Gatti, Vice President and Dean for Student Affairs for Otterbein University, sent Relator a letter denying the Records request. Mr. Gatti alleged that the OPD is part of Otterbein University – a private university – and thus not subject to the Ohio Public Records Act. (A true and correct copy of Mr. Gatti’s January 22 response is attached as Exhibit B to the Affidavit of Anna Schiffbauer.)

Relator has a clear legal right to inspect and copy the Records and Respondents have a clear legal duty to promptly make the Records available to Relator for inspection and copying.

II. ARGUMENT.

The Ohio Public Records Act (“PRA”) requires a public office provide any person the opportunity to inspect any requested public records promptly and at no cost, or provide copies of requested public records within a reasonable period of time.¹ The PRA defines a public office to include “any state agency, public institution, political subdivision, *or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.*”²

The OPD is an organized body, established by the laws of this state, which exercises a governmental function. The OPD is thus bound by the PRA and must provide access to its public records, and its refusal to allow Ms. Schiffbauer access to the Records is a violation of the PRA.³

The OPD was created by the Otterbein University Board of Trustees through §1713.50 of the Ohio Revised Code, which deputizes a university’s or college’s campus police once they complete certain training requirements. Under §1713.50:

“Each member of a campus police department...is vested, while directly in the discharge of that member's duties as a police officer, with the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure, including the same powers and authority relating to the operation of a public safety vehicle that are vested in a police officer of a municipal corporation or a county sheriff under Chapter 4511. of the Revised Code. Except as otherwise provided in this division, members of a campus police department may exercise, concurrently with the law enforcement officers of the political subdivisions in which the private college or university is located, the powers and authority

¹ See *Ohio Sunshine Laws, An Open Government Resource Manual*, at 1 (Ohio Sunshine Laws 2013).

² O.R.C. §149.011(A) (emphasis added).

³ The Records do not fall under any PRA exception. The Ohio Supreme Court made this clear in *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St.3d 54, 741 N.E.2d 511(2001). Therefore, Otterbein360’s argument will focus solely on OPD’s qualification as a public office under the PRA.

granted to them under this division in order to preserve the peace, protect persons and property, enforce the laws of this state, and enforce the ordinances and regulations of the political subdivisions in which the private college or university is located, but only on the property of the private college or university that employs them. The board of trustees of a private college or university may enter into an agreement with any political subdivision pursuant to which the members of the campus police department of the college or university may exercise within that political subdivision, but outside the property of the college or university, the powers and authority granted to them under this division...”

By law, OPD officers must complete an Ohio peace officer training program at a school approved by the Ohio Peace Officer Training Commission (“POTC”) and ultimately be certified by POTC.⁴ The POTC is a governmental body responsible for public and private law enforcement training. It operates under the directive of the Ohio Attorney General. Individuals who undergo the training must successfully complete a private security academic course and basic firearms training at a school the POTC creates. The OPD officers and the OPD chief of police also successfully complete a yearly firearms requalification program approved by the Executive Director of the POTC.⁵ Without POTC certification, the OPD officers cannot be employed as law enforcement agents vested with the authority to make arrests and enforce state and local laws.

Furthermore, OPD officers, as public servants, operate under the continuing supervision of the state and are subject to a hierarchical structure supervised by the Ohio Attorney General and the POTC. The officers conduct administrative investigations, including those investigations required under Title IX and other state and federal anti-discrimination laws. The terms of the officers’ employment, including proper hiring procedures and grounds for termination, are dictated by O.R.C. §1713.50(E)(1) and (2). Accordingly, it is the state of Ohio that supervises and controls the OPD, rather than Otterbein University.

⁴ O.R.C. §109.75.

⁵ O.R.C. §109.801.

The OPD prepares its records in part to assist the Westerville Police Division, and other state and local authorities, in maintaining law and order. The records are used to carry out the prosecution of crimes to the fullest extent under the law, similar to any state police records. All state and local law enforcement agents, including the OPD officers, are under the directive of the Ohio Attorney General. Accordingly, the OPD prepares its records to carry out the Attorney General's responsibilities. The Ohio Attorney General also has access to these records to monitor the OPD's performance.

Similar claims against an officer acting as a "public official" yield an identical result. Under a §1983 claim for a civil rights violation, a police officer is a "public official" when off-duty and out of uniform, or employed in a second occupation as a private security guard, *if that officer acts under the color of state law*. The test is whether, during the activity in question, the officer purports to "exercise official authority," such as flashing a badge, identifying oneself as an officer, placing an individual under arrest, or using his or her department-issued weapons.⁶

The same analysis applies here. The Records relating to the OPD's uniquely public function are public records. That fact does not change simply because Otterbein University pays their salary.

The Records are "public records" for purposes of the PRA, and subject to public disclosure under either O.R.C. §149.43. The OPD was established under, and regulated by, the statutory framework of §1713.50. OPD officers are trained and regulated by the State, and exercise nearly every official authority granted to state police officers, including carrying firearms, making arrests, and creating records used to carry out the prosecution of crimes to the

⁶ *Harmon v. Grizzel*, S.D. Ohio No. 1:03-cv-169, 2005 U.S. Dist. LEXIS 42425 (April 21, 2005).

fullest extent under the law. Records of their conduct when carrying out their official authority must be available for public inspection under the PRA.

III. RELATOR IS ENTITLED TO RECOVER STATUTORY DAMAGES AND ATTORNEY'S FEES.

Relator is entitled to her attorney's fees and statutory damages for enforcing her right to copies of the Records by way of this mandamus action. Respondents' refusal to produce the Records was contrary to the unambiguous language of §149.43, and in no way did Respondents conduct serve the public policy that public records are freely available.

If this Court orders Respondents to comply with §149.43 and produce copies of the Records it may award statutory damages and reasonable attorney's fees, subject to reduction *only* if the court determines *both* of the following⁷:

“(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct ... a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records...would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.”⁸

As to criteria (i), there is no way that Respondents could have believed that their conduct did not violate the PRA. The OPD was created under, and regulated by, Ohio law, to enforce state and local laws. The OPD's status as a “public office,” as defined in the PRA, obligates it to produce upon request public records not otherwise excluded under the PRA.⁹

⁷ O.R.C. §149.43(C)(2)(b), (c)(emphasis added).

⁸ O.R.C. §149.43(C)(2)(c)(i) & (ii).

⁹ O.R.C. §149.011(A).

As to criteria (ii), there is, similarly, no way that Respondents reasonably believed that their conduct -- withholding arrest records - served the public policy of the Ohio Public Records Act. The OPD is a police force, empowered with State authority to arrest and deprive individuals of their right to liberty. As explained in the Ohio Sunshine Laws manual:

“Liberty cannot be preserved without a general knowledge among the people, who have a right and a desire to know; but besides this, they have a right, an indisputable, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers.¹⁰”

Respondents’ actions ignore the plain letter and spirit of the Ohio Public Records Act. Their efforts to keep arrest records from public view without legal or public policy justification shocks the conscience. This Court should award statutory damages and attorney’s fees to Relator as a remedial measure for this mandamus action to compel Respondents to obey the law and grant the public access to records not otherwise exempt under O.R.C. §149.43.

IV. CONCLUSION.

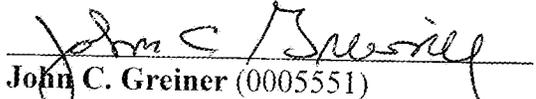
The Records are “public records” as defined by the PRA. Otterbein University cannot avail itself of Ohio law to create a law enforcement agency that has the power to make arrests, conduct investigations, and carry firearms, only to disclaim any associated duties that accompany this power. The OPD, in denying the students’ information requests, ignored its obligations under the PRA.

¹⁰ See *Ohio Sunshine Laws, An Open Government Resource Manual*, at page iv, quoting John Adams.

Respectfully submitted,

Of Counsel:

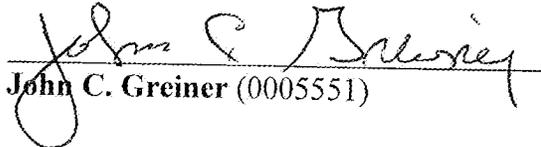
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836


John C. Greiner (0005551)
Counsel for Anna Schiffbauer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this *MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS* along with the Summons and Complaint to the Respondents identified in the caption on page one via Certified Mail, return receipt requested.


John C. Greiner (0005551)