

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

MEMORANDUM IN SUPPORT.....2

INTRODUCTION2

STATEMENT OF THE CASE AND FACTS3

ARGUMENT.....4

I. Otterbein is Not a “Public Office” or the “Functional Equivalent” of a “Public Office” for Purposes of the Ohio Public Records Act; thus, it is Not Subject to the Disclosure Requirements of R.C. 149.43.....5

 A. Otterbein and its Campus Police Department are Not “Public Offices” Under the Public Records Act.....5

 B. Neither Otterbein Nor its Police Department are the Functional Equivalent of a Public Office Under *Oriana House*7

 1. Relator Cannot Establish that Campus Security is a Governmental Function Reserved to the State8

 2. Relator Has Failed to Allege Any Facts to Satisfy the “Level of Government Funding” Requirement.....10

 3. No Government Entity Controls the Day-to-Day Operations of Otterbein11

 4. Otterbein and Its Police Department Were Not Created by the Government To Avoid the Requirements of the Public Records Act.....13

 5. The Weighing of the Factors Demonstrates That Respondents Are Not the “Functional Equivalent” Of Public Offices13

II. Otterbein and its Police Department Are Not Persons Responsible for Public Records as They Did Not Contract with a Government Office to Provide Government Work14

 A. Otterbein Was Not Created by and Did Not Contract with a Governmental Entity to Perform Work14

 B. The Attorney General Does Not Control the Otterbein Police Department15

CONCLUSION.....17

CERTIFICATE OF SERVICE18

IN THE SUPREME COURT OF OHIO

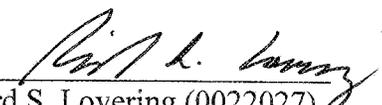
STATE OF OHIO ex rel.	:	
Schiffbauer, et al.	:	Case No. 2014-0244
	:	
Relator,	:	
	:	ORIGINAL ACTION IN
v.	:	MANDAMUS
	:	
Larry Banaszak, et al.	:	
	:	
Respondent.	:	

MOTION TO DISMISS

Now come Larry Banaszak and Robert Gatti, jointly, as Respondents in the above captioned action, and respectfully move this Court to dismiss Relator’s Complaint for Writ of Mandamus pursuant to S.Ct.Prac. R. 10.5(A).

A Memorandum in Support of this motion is attached and incorporated herein by reference.

Respectfully Submitted,


Richard S. Lovering (0022027)
Anne Marie Sferra (0030855)
Warren I. Grody (0062190)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
Email: rlovering@bricker.com

*Counsel for Respondents,
Larry Banaszak and Robert M. Gatti*

MEMORANDUM IN SUPPORT

INTRODUCTION

This original action in mandamus was brought by Anna Schiffbauer (“Relator”) in an attempt to compel Larry Banaszak and Robert Gatti (collectively “Respondents”), in their capacities as private employees of a private university, to produce documents under the Ohio Public Records Act, R.C. 149.43, notwithstanding the fact that their employer, Otterbein University (“Otterbein”), is a private entity that is not subject to the requirements of the Act. Relator submitted public records requests to Respondents, who are employees of a private university, requesting documents created and maintained by Otterbein’s police department. These requests were denied because Otterbein is not a “public office” for purposes of R.C. 149.43. Relator then initiated this action.

Under R.C. 149.43, only “public records,” defined as records kept by a “public office,” are subject to disclosure under the Ohio Public Records Act. The term “public office” is defined by statute.¹ In her Complaint, Relator fails to even allege that Otterbein is a “public office.” Instead, Relator alleges that Otterbein’s police department, which was created by the Otterbein Board of Trustees, is a public office. Otterbein’s campus police department, however, is not a separate legal entity apart from Otterbein; it is simply an internal department of Otterbein.

There is no question that Otterbein is a *private* institution of higher learning. In Ohio, a private entity does not open its records to public scrutiny merely by performing services that

¹ The General Assembly has enacted a consistent statutory framework whereby a “public office” subject to Public Records Act disclosure requirements has public entity immunities for such disclosure. As part of the consistent statutory scheme enacted by the General Assembly, private universities are not subject to the Public Records Act disclosure requirements and do not have public entity immunities from defamation or other lawsuits that could be asserted if they were required to disclose the names of accused suspects. *See, e.g., Wells v. Xavier University*, S.D. Ohio No. 1:13-cv-00575, 2014 WL 972172 (March 11, 2014) and *Havlik v. Johnson & Wales University*, 490 F. Supp. 2d 450, 2007 LEXIS 34690 (R.I. 2007).

often are performed by the government. *Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, ¶ 36. Rather, Ohio law begins with the presumption that “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.” *Id.*, at ¶ 26. Here, Relator cannot show, by clear and convincing evidence or otherwise, that Otterbein is the “functional equivalent” of a public office.

For the reasons stated herein, Respondents respectfully request that this Court dismiss Relator’s Complaint.

STATEMENT OF THE CASE AND FACTS

For purposes of this Motion only, Respondents accept the statements of fact alleged by Relator in its Complaint, and stipulate that the documents appended to Relator’s Affidavit are authentic copies of the documents they purport to be. Respondents, however, do not accept Relator’s characterizations of the facts, nor do Respondents agree with Relator’s legal conclusions.

Relator submitted public records requests pursuant to R.C. 149.43 upon Respondent Banaszak on January 16, 2014.² (Relator’s Affidavit at Ex. A). By letter dated January 21, 2014 and email dated January 22, 2014, Respondent Gatti denied Relator’s request, noting that Otterbein is a private entity and, consequently, not subject to R.C. 149.43. (*Id.*, at Exs. B-C.) Consequently, Otterbein did not produce the records requested by Relator.

² Relator’s January 16, 2014 request for records listed more than 40 individuals by name, along with “offense dates.” Although Relator did not indicate where she obtained this information, it is available from the Westerville Mayor’s Court, which is a public office that has public entity immunity under the Public Records Act.

Subsequently, Relator brought this original action in mandamus requesting this Court to compel Respondents to provide the requested records and to award attorney fees and statutory damages. (Relator's Complaint at ¶ 11 and prayer for relief.)

Relator maintains that the records requested constitute "public records" under R.C. 149.43, which are not exempt from disclosure, and further claims that Otterbein's campus police department is required to produce these records because it is a "public office" under the Ohio Public Records Act. (Relator's Complaint at ¶ 5, 10.)

Notably, Relator does not (1) name Otterbein as a respondent, (2) allege that Respondents are officials of the "functional equivalent" of a "public office," nor (3) allege that Respondents are persons responsible for public records for purposes of R.C. 149.43.

ARGUMENT

Relator seeks an extraordinary writ of mandamus to compel the production of documents pursuant to her public records request. Before a court may issue a writ of mandamus, "the relator must demonstrate '(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.'" *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, ¶11, quoting *State ex rel. Harris v. Rhodes*, (1978) 54 Ohio St.2d 41, 42.

Relator cannot demonstrate a clear legal right, and a corresponding clear legal duty, on the part of the Respondents because, as a matter of law, Otterbein is not a public office subject to the requirements of the Ohio Public Records Act. The allegations in the Complaint establish nothing more than that Otterbein is a private entity providing non-governmental services to its students that has also created its own campus police department. Under this Court's public

records jurisprudence, this does not make either Otterbein or its police department a “public office.” Consequently, the Respondents, who are individuals employed by Otterbein, are not public officials subject to the Ohio Public Records Act or mandamus.

A private entity, such as Otterbein, may be subject to R.C. 149.43, but only if it is established by clear and convincing evidence that the private entity is the “functional equivalent” of a public office. Here, Relator fails to even allege that Respondents are officials of the “functional equivalent” of a “public office.” But even if Relator had so alleged, as a matter of law, Otterbein is not the “functional equivalent” of a public office.

I. Otterbein is Not a “Public Office” or the “Functional Equivalent” of a “Public Office” for Purposes of the Ohio Public Records Act; thus, it is Not Subject to the Disclosure Requirements of R.C. 149.43

A. Otterbein and its Campus Police Department are Not “Public Offices” Under the Public Records Act

Relator does not (and cannot) allege that Otterbein, which is a private institution of higher education founded in 1848, is a “public office” for purposes of the Public Records Act. See R.C. 149.011(A) (defining a “public office” as including “any a state agency, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of Ohio for the exercise of any function of government.”) As such, there is no dispute that Otterbein is not a “public office” subject to Ohio’s Public Records Act.

Because Relator cannot allege that Otterbein is a public office, she instead asserts that Otterbein’s police department is a public office. (Relator’s Complaint at ¶ 5.) Relator’s entire argument — that the campus police department is a public office — is predicated on the fact that the Otterbein Board of Trustees created the department pursuant to R.C. 1713.50. (Relator’s Memorandum in Support at 3-4.) However, R.C. 1713.50, which allows private colleges and universities to establish campus police departments *only* applies to *private* colleges and

universities. R.C. 1713.50(B) (“The board of trustees of a private college or university may establish a campus police department * * * .”) The statute defines a private college or university as one that “is not owned or controlled by the state or any political subdivision of the state.” R.C. 1713.50(A)(2)(a).

Pursuant to R.C. 1713.50, a campus police department can only be established by the board of trustees of a private college or university. *See* R.C. 1713.50(B). Relator concedes, as she must, that the Otterbein police department was created by the Otterbein Board of Trustees through R.C. 1713.50. (Relator’s Memorandum in Support at 3.) Otterbein’s Board created the campus police department as a part of Otterbein to enforce Otterbein’s regulations. Plainly, Otterbein could not have created its campus police department if it were not a private entity. And, there is nothing in the statute that suggests that creating a campus police department transforms a wholly private entity, to which the statute exclusively applies, into a “public office.”

Further, Relator’s argument is not that the department was established *by* the laws of this State (as required by 149.011(A)), but that it “was established *under*, and regulated by, the statutory framework of §1713.50.” (Relator’s Memorandum in Support at 5) (emphasis added). There are at least two problems with this position. First, R.C. 149.011(A) clearly states that an entity must be “established by,” not merely “established under” the laws of the State. Second, Relator’s argument proves too much. Under Relator’s reasoning, every corporation established in Ohio under Title 17 of the Revised Code would be a public office because corporations are established under statute and subject to regulation.

As a matter of law, neither Otterbein nor its campus police department is a “public office” under the Public Records Act.

B. Neither Otterbein Nor its Police Department are the Functional Equivalent of a Public Office Under *Oriana House*

A private entity can be subject to the Public Records Act if it is the functional equivalent of a public office. *Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854.

Here, Relator has not even alleged that Otterbein and its police department are the functional equivalent of public offices under *Oriana House*. Perhaps Relator does not make this claim because she knows that she could not sustain her burden in prosecuting such a claim. Regardless, as demonstrated below, Relator cannot show that Otterbein and its campus police department are the functional equivalent of a public office.

In *Oriana House*, this Court adopted the functional-equivalency test for 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. *Oriana House*, at paragraph 1 of the syllabus. Under this test, the “analysis begins with the presumption that 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.” *Id.*, at ¶ 26.

With this presumption in mind, a court applying the functional-equivalency test “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.” *Id.*, at ¶ 25. These factors are to be weighed by the court on a case-by-case basis with no single factor being dispositive. *Id.*, at ¶ 23.

Applying the functional-equivalency test in *Oriana House*, this Court determined that a nonprofit company operating a community-based correctional facility was not a public office for purposes of the Public Records Act. *Id.*, at ¶¶ 27-36. The Court reached this conclusion despite

the fact that the company performed a traditional governmental function by operating the correctional facility and received a “significant” level of government funding. *Id.*, at ¶¶ 27-32 (stating that between 88% and 100% of revenue was from public funds). Importantly, this Court further noted that “a private business does not open its records to public scrutiny merely by performing services on behalf of the state or a municipal government.” *Id.*, at ¶ 36.

This Court later applied *Oriana House's* functional-equivalency test to a nonprofit corporation providing community mental-health services under contract with a county and to a private executive committee formed to assist a county advisory board during the transition phase from the statutory plan for county government to a new charter form of government. *See State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713, and *State ex rel. Am. Civ. Liberties Union of Ohio. v. Cuyahoga Cty Bd. of Comm'rs*, 128 Ohio St.3d 256, 2011-Ohio-625. In each case, this Court applied the functional-equivalency test of *Oriana House* and determined that the private entities at issue were not subject to the Public Records Act.

As set forth below, the same result should be reached here.³

1. Relator Cannot Establish that Campus Security is a Governmental Function Reserved to the State

Under the functional equivalency test, the first inquiry is whether the Otterbein “performs a governmental function.” *Oriana House*, 110 Ohio St. 3d 456, at ¶25. In making this determination, this Court has focused on whether the entity performs what has “traditionally been a *uniquely* governmental function.” *Id.*, at ¶28 (emphasis added). To meet this standard the

³ This Court has previously determined that it is appropriate to grant a motion to dismiss a complaint seeking a writ of mandamus to compel the production of records under the Public Records Act where *Oriana House's* functional-equivalency test was at issue. *See State ex rel. Dayton Tea Party v. Ohio Municipal League*, 2011-Ohio-4751 (dismissing complaint without opinion).

“private entity [must] exercise powers which are traditionally *exclusively* reserved to the state, such as holding elections ... or eminent domain.” *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (emphasis added) (cited by *Nova Behavioral Health*, 112 Ohio St. 3d at 343).

In *Nova Behavioral Health*, this Court concluded that “a private entity that provides community mental-health services under contract with an alcohol, drug-addiction, and mental-health services board is *not* performing a historically governmental function,” because “providing mental health services has not been a power which has traditionally been exclusively reserved to the state.” *Nova Behavioral Health*, at ¶ 27.

Otterbein is akin to the entity at issue in *Nova Behavioral Health* in that it provides a service that is sometimes provided by a governmental entity, but not exclusively provided by a governmental entity (such as voting or access to the ballot). While police services often are provided by a governmental entity, such as a municipality, in those circumstances the police force is not only providing service to the public at large, it is also funded with public funds. In contrast, the Otterbein campus police department was created to enforce Otterbein’s regulations and to provide security on Otterbein’s campus (*see* R.C. 1713.50(B) and (C)), and there is no allegation that it receives public funding. *See infra*, at 8-9. Additionally, a private university’s police department does not supplant other law enforcement. Rather, by law, a campus police department exercises its authority “concurrently with the law enforcement officers of the political subdivisions in which the private college or university is located * * *.” R.C. 1713.50(C).

Even if providing campus security is a governmental function, that determination alone is insufficient to establish that Otterbein is the functional equivalent of a public office. In *Oriana House*, the entity operated a correctional facility, which was determined to be a governmental

function. Yet the private entity was not required to provide records under the Public Records Act because performing a governmental function is only one element of the test.

2. Relator Has Failed to Allege Any Facts to Satisfy the “Level of Government Funding” Requirement

“[T]he fact that a private entity receives government funds does not convert the entity into a public office for purposes of the Public Records Act.” *Oriana House*, at ¶ 29. Instead, the level of government funding is merely a relevant factor to be considered in determining whether an entity is a public office for purposes of the Public Records Act. *Id.*, at ¶ 32.

Here, Relator failed to make any allegations regarding the level of government funding received by Otterbein, which is a private university. In contrast to relying on public funds to compensate its campus police, members of the campus police department are prohibited by law from being reimbursed with state funds for any training they receive and from participating in any state or municipal retirement system. *See* R.C. 1713.50(B); *see also State ex rel. Stys v. Parma Community General Hospital*, 93 Ohio St.3d 438, 441-443, 2001-Ohio-1582 (holding that the hospital is not a public institution under the Public Records Act, in part because the hospital employees are not covered by PERS and the hospital is not supported by public taxation).

Even in cases involving a high level of government funding, this Court has determined that a private entity was not the functional equivalent of a public office within the meaning of the Public Records Act. For example, in *Oriana House* the private entity received between 88% and 100% of its revenue from public sources. Yet, the Court concluded that it was not subject to the Public Records Act. *Oriana House*, at ¶ 35. Similarly, in *Nova Behavioral Health*, this Court found an entity not to be the functional equivalent of a public office (subject to the Public

Records Act) even though it received approximately 92% of its revenue from public sources. *Nova Behavioral Health*, at ¶¶ 32, 38.

These holdings are consistent with the intent of the Public Records Act, “which was designed by the General Assembly to allow public scrutiny of *public* offices, not of all entities that receive funds that at one time were controlled by the government.” *Oriana House*, at ¶ 36 (emphasis added).

3. No Government Entity Controls the Day-to-Day Operations of Otterbein

The third factor in the functional-equivalency test focuses on the extent of government involvement or regulation of a private entity’s affairs. In examining this factor, this Court has consistently analyzed whether any government entity controls the day-to-day operations of the private entity, or whether involvement or regulation constitutes day-to-day government supervision. *See, e.g., Oriana House*, at ¶ 33 and *Nova Behavioral Health*, at ¶¶ 34-35.

In *Oriana House*, the private entity operating the correctional facility was governed by a six-member board of directors that operated independently from the county’s supervision. *Id.*, at ¶ 6. As such, this Court found that no government entity controlled the day-to-day affairs of *Oriana House*, and that it was an independent, private corporation. *Id.*, at ¶ 35.

Similarly, the private entity in *Nova Behavioral Health* maintained its own facilities, established its own terms and conditions for its staff, and maintained its own retirement plan. *Nova Behavioral Health*, at ¶ 8. The relators in *Nova Behavioral Health* maintained that the county controlled the private entity’s day-to-day operations because the county was obligated to perform certain statutory monitoring requirements in addition to its requirements under the contractual terms. The Court rejected relators’ argument stating that “these requirements and stipulations constitute only the control necessary to ensure that government funds are properly

used and to protect the government's interest in the development of an effective community-based mental-health system." *Id.*, at ¶ 34. The private entity was found to be a "self-directed, independent, private corporation, and not subject to the Public Records Act." *Id.*

Consistent with *Oriana House* and *Nova Behavioral Health*, Otterbein and its police department are not operationally controlled by any governmental entity. Otterbein is governed by a Board of Trustees. Moreover, the Board appoints a full-time President to manage Otterbein's day-to-day affairs. The Board employs the Respondents, who are directed by the President. Respondents are private citizens who hold no public office. The Board establishes its own policies and agendas and maintains its own facilities.

Relator alleges that Otterbein's police department is controlled by the State because it is subject to the Attorney General's regulatory power. (Relator's Memorandum in Support at 4-5.) This allegation fails to consider the aforementioned independent management and the fact that no governmental entity has the ability to control the day-to-day operations of Otterbein, Respondents, or Otterbein's police department. Absent that sort of control, the Board is truly independent. *See State ex rel. Bell v. Brooks*, 10th Dist. App. Nos. 09AP-861, 09AP-944 and 09AP-1055, 2010-Ohio-4266, at ¶¶ 60-61.

Relator's allegations also fail to account for the requirements of R.C. 1713.50, which provides the Board of Trustees with the exclusive power to establish the campus police department, appoint its officers, and assign their duties. *See* R.C. 1713.50(B). The statute also recognizes the power of the Board of Trustees to suspend and terminate its police officers. *See* R.C. 1713.50(D). The Board's ability to hire, fire, and assign duties to its police officers demonstrates it has day-to-day control of its police department. This prong of the test indicates that Otterbein and its police department are not the functional equivalent of public offices.

Otterbein takes pride in providing an excellent education to its students in a safe environment. At its core, Otterbein is simply an institution of higher learning that happens to have a campus police department to keep its students, faculty and staff safe. Absent the circumstance of a government entity controlling the day-to-day operations of Otterbein and/or its police department, Relator cannot establish that the extent of governmental involvement or control cuts in favor of deeming Respondents to be the functional equivalent of public offices. See *Oriana House*, at ¶ 33, citing *State ex rel. Stys v. Parma Community Gen. Hosp.*, 93 Ohio St.3d 438, 442, 2001-Ohio-1582. This court should hold that, as a matter of law, there is no “control” of the Respondents by any “government” entity.

4. Otterbein and Its Police Department Were Not Created by the Government To Avoid the Requirements of the Public Records Act

Otterbein is a private university. It was not established by any government entity or pursuant to any special legislation. No law requires its existence. Further, Otterbein was not created or used by any government entity to avoid the requirements of the Public Records Act, and Relator has made no allegations to that effect.

Otterbein’s police department was created by the Board of Trustees; not by a governmental entity. As a result, the police department could not have been created by the government to avoid the requirements of the Public Records Act.

5. The Weighing of the Factors Demonstrates That Respondents Are Not the “Functional Equivalent” Of Public Offices

Considering the totality of the foregoing factors, Otterbein and its police department are not public institutions and, thus, are not public offices, and Respondents are not public officials subject to the Public Records Act. Instead, Otterbein is a private institution of higher learning with its own campus police department to enforce Otterbein’s regulations and provide campus

security. Providing campus security is not exclusively a governmental function. As a private institution, Otterbein's funding comes from many sources. Further, it is governed by its own independent Board of Trustees, creates its own independent policies, and manages its own day-to-day affairs and operations, including the operation of its campus police department. Otterbein and its police department were not created by a government entity, nor were they used by a government entity to circumvent the requirements of the Public Records Act. Therefore, Otterbein and its police department are independent private entities, and the Respondents are private officials.

Based on the facts contained in the Complaint, none of the factors of the functional-equivalency test fall in Relator's favor. Thus, providing public access to Respondents' records does not serve the policy of governmental openness that underlies the Public Records Act. As such, Relator can establish neither that it has a clear legal right to the requested relief nor a corresponding legal duty on the part of Respondents. Accordingly, mandamus should not issue and Relator's Complaint should be dismissed.

II. Otterbein and its Police Department Are Not Persons Responsible for Public Records as They Did Not Contract with a Government Office to Provide Government Work

A. Otterbein Was Not Created by and Did Not Contract with a Governmental Entity to Perform Work

A private entity may also be required to respond to a public records request if it is a person responsible for public records. This Court has laid out a three-part test to determine when a person is responsible for public records. Specifically, a private entity that contracts with a public office to perform government work has to respond to public records requests when: (1) the private entity prepared the records to perform responsibilities normally belonging to the public office; (2) the public office is able to monitor the private entity's performance; and (3) the

public office may access the records for this purpose. *State ex rel. Carr v. City of Akron*, 112 Ohio St. 3d 351, 2006-Ohio-6714, at ¶36 (firefighter promotional examinations kept by testing contractor); *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St. 3d 654, 657, 2001-Ohio-1895. The purpose of this rule is to ensure “governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity.” *Krings*, at 659. There can be no allegation here that any governmental entity delegated its duties to Otterbein and its police department to conceal information.

B. The Attorney General Does Not Control the Otterbein Police Department

In this case, Relator argues that Otterbein’s police department prepares its records to carry out the responsibilities of the Attorney General and that the Attorney General has access to those records to monitor the department’s performance. (Relator’s Memorandum in Support at 5). The fatal flaw with this argument is that Relator does not allege (and cannot establish) that the Attorney General has the responsibility or the authority to perform the functions performed by Otterbein’s police department, including enforcing Otterbein’s regulations and ordinances of the political subdivision in which it is located. *See* 1713.50(B) and (C).

As one court recently read the statute:

R.C. 1713.50 grants campus police officers the powers and authority to enforce the ordinances of the political subdivisions in which the private college or university is located on campus property. It may also authorize campus police to enforce local ordinances on city streets, sidewalks and areas “outside the property of the college or university” as long as the campus police act pursuant to a valid mutual aid agreement.

City of Cleveland v. Schmidt, 8th Dist. Cuyahoga No. 98603, 2013-Ohio-1547, at ¶ 7.

Relator does not allege that the Attorney General has the authority to enforce campus regulations or local ordinances on Otterbein’s campus. Under R.C. 1713.50, members of a campus police department are empowered to act as police officers and have the authority to

enforce a private university's regulations. R.C. 1713.50(B). The Attorney General does not have these responsibilities. Therefore, the Attorney General cannot delegate them to Otterbein or its police department. If the Attorney General were capable of such a delegation, there would be no need for R.C. 1713.50.

In short, Otterbein is not exercising derivative powers from the Attorney General or any other office, nor is it supplanting the authority of other law enforcement officers who have concurrent jurisdiction when it operates its campus police. Instead, it is exercising the direct statutory rights that it gained when it established a campus police department.

Because Relator cannot establish that Otterbein and its police department are performing duties assigned to the Attorney General, she instead points to regulatory powers granted to, and training requirements established by, the Attorney General that apply to peace officers across the state. (Relator's Memorandum in Support at 4.) These are not the types of powers contemplated by *Krings*. Once again, Relator's argument simply proves too much. For instance, if *Krings* were applied as Relator suggests, every lawyer in Ohio would be a person responsible for public records because all lawyers are subject to regulation and training as required by this Court.

Otterbein and its police department do not create records to perform any duty required of a third-party public office. Thus, Otterbein is not subject to monitoring from such an office to determine if it is properly performing the public office's duties. Accordingly, there can be no mandate that such a public office be allowed access to the records that Otterbein created while performing the public office's duties, as there are none.

Hence, under this Court's jurisprudence, Otterbein and its police department are not persons responsible for public records.

CONCLUSION

Because Otterbein is a private entity, Ohio's Public Records Act is not applicable to Respondents (who are private employees of a private university) unless Relator shows, by clear and convincing evidence, that Otterbein (1) is the functional equivalent of a public office or (2) is a person responsible for public records by virtue of its relationship with a governmental entity.

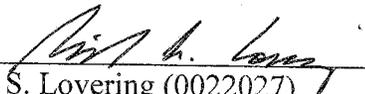
Relator has not and cannot satisfy the functional-equivalency test under *Oriana House* because:

- the campus police department was created by Otterbein's Board of Trustees to enforce campus regulations and to provide security to Otterbein's students, faculty and staff on campus, and Relator cannot establish that doing so is an exclusive governmental function;
- Relator has failed to allege any facts to show that Otterbein receives any government funding;
- as a matter of law, members of the campus police department are precluded from being reimbursed with state funds for any training they receive and from participating in any state or municipal retirement system; and
- the day-to-day operations of Otterbein, including its police department are directed by its Board of Trustees and not by any governmental entity.

Similarly, Relator cannot show that Otterbein is a person responsible for public records under the *Krings*' test because Otterbein was not created by a governmental entity to avoid public records laws and no governmental entity has delegated its responsibility to Otterbein.

Relator's Complaint should be dismissed as the Public Records Act is not applicable to Respondents.

Respectfully Submitted,

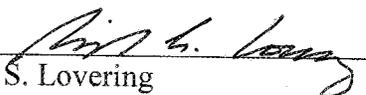

Richard S. Lovering (0022027)
Anne Marie Sferra (0030855)
Warren I. Grody (0062190)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
Email: rlovering@bricker.com

*Counsel for Respondents,
Larry Banaszak and Robert M. Gatti*

CERTIFICATE OF SERVICE

A copy of the foregoing *Respondents' Motion to Dismiss Relator's Complaint for Writ of Mandamus and Memorandum in Support* has been sent via regular U.S. mail, postage pre-paid on July 22, 2014, to:

John C. Greiner
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Counsel for Anna Schiffbauer


Richard S. Lovering