

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, *ex rel.*
ANNA SCHIFFBAUER

Case No. 2014-0244

Relator,

vs.

Original Action in Mandamus

LARRY BANASZAK

and

ROBERT M. GATTI

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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

FILED
AUG 01 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
AUG 01 2014
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION.

The United States Supreme Court has acknowledged the “plenary discretionary power” of police officers, who enjoy an “almost infinite variety of discretionary powers” that affect the public “significantly and often in the most sensitive areas of daily life.” *Foley v. Connelie*, 435 U.S. 291, 298, 297 (1978). Even with constitutional limitations, each police officer may, in a wide variety of circumstances and without prior judicial approval, stop and frisk suspicious individuals on the street, break down doors to enter a home or other building, stop and search vehicles traveling on public highways, seize private property, and arrest and incarcerate individual citizens, “one of the most awesome weapons in the arsenal of the state.” *Foley*, 435 U.S. at 297; *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 199 (Wis. 1979).

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), the United States Court of Appeals for the First Circuit made the following observation that no thoughtful person could dispute: “Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).” The *Glik* court continued, “[t]his is **particularly true of law enforcement officials**, who are granted substantial discretion that may be misused to deprive individuals of their liberties.” *Id.* (emphasis added).

Notwithstanding this clear admonition, Respondents ask this court to allow the Otterbein University Police Department to exercise its arrest powers in secret and to issue such an edict without affording the Relator her day in court. This court should decline Otterbein’s invitation to read the Ohio Public Records Act (“PRA”) so narrowly so as to frustrate the public’s right to observe campus police exercising their statutorily granted power to arrest Ohio citizens.

II. ARGUMENT.

The request at issue in this mandamus action is simple and straightforward—it seeks only Criminal Reports relating to offenders referred by the Otterbein Police Department (“OPD”) to the Westerville, Ohio court system. The request thus seeks records only of the uniquely public activity of the OPD.

Respondents¹ do not dispute the limited nature of the request. But they argue that a police force armed 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” is somehow not a public office. Respondents are mistaken not only as a matter of common sense and public policy, but by the very terms of the Ohio Revised Code.

A. **The Statutory Definition of a “Public Office” Includes a Campus Police department.**

A review of the applicable statutes makes the point crystal clear. First, R.C. 149.43(A)(1) defines a “Public record” as “records kept by any public office”

R.C. 149.011(A) 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.**” (emphasis added).

In Ohio, a campus police department such as the Otterbein Police Department exists only by virtue of R.C. 1713.50(B), which provides:

The board of trustees of a private college or university may establish a campus police department and appoint members of the campus police department to act as police officers. . . . [T]he board shall appoint as members of a campus police department only those persons who have successfully

¹ There is no dispute that Larry Banaszak, Director of the OPD and Robert Gatti, Vice President and Dean for Student Affairs for Otterbein University, are “persons responsible” for the records. They are proper parties to this action. R.C. 149.43(C)(1).

completed a training program approved by the Ohio peace officer training commission and have been certified as having done so or who have previously successfully completed a police officer basic training program certified by the commission and have been awarded a certificate to that effect by the commission.

R.C. 1713.50(C) describes in more detail the statutory authority of campus police officers:

Each member of a campus police department appointed under division (B) of this section 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.... 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 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.

Were it not for R.C. 1713.50(B), Otterbein could only maintain a security force, not vested 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.” But Otterbein has opted to invoke the provisions of the Ohio Revised Code, which permit it to maintain a police force authorized to effect arrests and to carry deadly weapons.

There is no question then that a campus police department is an entity established by the laws of this state for the exercise of a function of government, i.e. the power to arrest and use deadly force. The Otterbein Police Department is thus a public office.

Respondents argue that the Otterbein Board of Trustees appointed the OPD and therefore, the department was “established” by Otterbein, not the State of Ohio. But that argument focuses so intently on the trees, it badly misses the forest. A campus police department with the power to arrest and use deadly force is established by the Ohio Revised Code. But for that law, no such entity could exist. Again, while Otterbein can establish a campus security force, it cannot establish a police department in the absence of the applicable Revised Code section.

The records at issue in this case are therefore, unquestionably “records maintained by a public office” and subject to the PRA.

B. Records of a Campus Police Department Are Included in R.C. 149.43.

The Ohio Revised Code, moreover, recognizes that records relating to campus police officers are covered by the Public Records Act. R.C. 149.43(A)(7) provides that for purposes of the sections of the Public Records Act which address information and records of “peace officers,” the term “peace officer” has the same meaning as in section 109.71 of the Revised Code.

R.C. 109.71(A)(14) provides: “Peace officer” means: A member of a campus police department appointed under section 1713.50 of the Revised Code.

By definition, therefore, records of a campus police department are included within the coverage of Ohio’s Public Records Act, R.C. 149.43.

C. The OPD is a Political Subdivision.

R.C. 2744.01(F) defines a “political subdivision” as “a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” R.C. 2744.01(F) provides a non-exhaustive list of entities which fall under that definition, but an entity’s absence from that list

doesn't exclude it from the statute's coverage. *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 554-555.

The *Greene* case also explained the meaning of the term "body politic." Quoting Black's Law Dictionary, it ruled a "body politic" is "[a] group of people regarded in a political (rather than private) sense and organized under a single government authority." *Id.* at 555. The OPD is a group of people organized under the authority of R.C. 1713.50.

In *Uricich v. Kolesar* (1936), 132 Ohio St. 115, the Ohio Supreme Court said that a "body politic" is "a group or body of citizens organized for the purpose of exercising governmental functions." That passage defines the OPD to a tee.

In *Greater Heights Academy v. Zelman* (6th Cir. 2008), 522 F.3d 678, the Sixth Circuit noted:

An entity is a political subdivision of a state if it is a creation of the state, if its power to act rests entirely within the discretion of the state, and if it can be destroyed at the mere whim of the state. . . ." *Id.* at 680.

Ohio case law establishes that police departments are political subdivisions. In *Winegar v. Greenfield Police Dept.*, 2002-Ohio-2173, 2002 WL 853460 (4th Dist. Ct. App.), the court stated unequivocally:

Appellee Greenfield Police Department is undoubtedly a "political subdivision" as defined by R.C. 2744.01(F) and performs "governmental functions" as defined by R.C. 2744.01(C)(2)(a).

See also, *Griffits v. Newburgh Heights*, 2009-Ohio-493, 2009 WL 280376 (8th Dist. Ct. App.); *Barstow v. Waller*, 2004-Ohio-5746, 2004 WL 2427396 (4th Dist. Ct. App.).

A Campus Police Department is created by R.C. 1713.50. Its power to arrest is entirely within the state's discretion. And the state could withdraw that power if it chose. By this definition, the OPD is a political subdivision. This conclusion is significant for two reasons.

First, it is an additional reason that the OPD is subject to the PRA. Records of political subdivisions unquestionably are covered.

Second, it refutes Respondents' contention that the OPD would not have immunity for their activities. The OPD, in effecting arrests, would be entitled to the immunity provided by R.C. 2744.²

D. The “Functional Equivalency” Test does Not Apply.

Respondents' mistakenly rely on the “functional equivalency” test. The cases applying that doctrine involve situations where a public office delegates duties to a private body. But that is not the case here. Instead, this case involves a private entity relying on a public actor to provide state delegated police powers. The state actor—whose powers exist only by virtue of a statutory grant—does not lose its state identity when employed by a private entity.

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.³

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.

² Respondents mistakenly rely on *Wells v. Xavier University*, S.D. Ohio No. 1:13-cv-00575, 2014 WL 972172 (March 11, 2014). That case concerned the activities of Xavier's “University Conduct Board,” not its campus Police Department.

³ *Harmon v. Grizzel*, S.D. Ohio No. 1:03-cv-169, 2005 U.S. Dist. LEXIS 42425 (April 21, 2005).

None of the cases applying the “functional equivalency” test dealt with campus police departments. And more importantly, in none of those cases did the private entity’s ability to carry out its duties require a statutory grant of authority. The OPD exists only because of R.C. 1713.50. In none of the Respondents’ cases did the entity at issue exist solely by virtue of the Ohio Revised Code.

This fact also demonstrates the utter fallacy of Otterbein’s argument that “[u]nder Relator’s reasoning, every corporation established under Title 17 of the Revised Code would be a public office because corporations are established under statute and subject to regulation.” Private corporations are not established to exercise a function of government. Unlike a private corporation, OPD is a public office because: (1) it was established by the laws of the state of Ohio; and (2) it was established to exercise a government function. Respondents ignore item number 2 in their “corporation” analogy.

E. The State Retains Control Over the Operation of the OPD.

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 basic training course and basic firearms training at a school the POTC approves. 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

⁴ O.R.C. §109.75.

⁵ O.R.C. §109.801.

law enforcement agents vested with the authority to make arrests and enforce state and local laws.

Terms of the officers' employment, including hiring guidelines 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.

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.

These facts also explain why the "functional equivalency" test does not apply here. In the cases applying that test the private entities were not subject to direct state supervision of the entity's hiring or training its employees.

The functional equivalency test says that a private enterprise which contracts with a public entity to perform certain tasks does not sacrifice its private identity. *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, ¶ 36. But that test has **no** relevance to a police department whose authority is granted by statute, whose training and qualifications are set by the state and whose hiring and termination decisions are dictated by state statute.

A university which opts to employ a state created police department is in no way similar to a private entity which provides services to a public entity pursuant to a private contract. The policy underlying the functional equivalency test does not apply here.

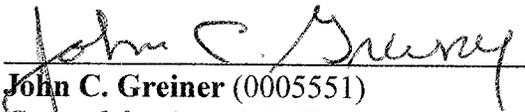
III. CONCLUSION.

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. This Court should dismiss Respondents’ Motion to Dismiss.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS* was served by regular U.S. Mail, postage prepaid, this 31st day of July, 2014, upon the following:

Richard S. Lovering, Esq.
Anne Marie Sferra, Esq.
Warren I. Grody, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 45215
Attorneys for Respondents


John C. Greiner (0005551)