

[Cite as *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.*, 2009-Ohio-3273.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93058

**STATE OF OHIO, EX REL.,
BRIAN BARDWELL**

RELATOR

vs.

**CUYAHOGA COUNTY BD. OF
COMMISSIONERS**

RESPONDENT

**JUDGMENT:
WRIT DENIED**

WRIT OF MANDAMUS
MOTION NO. 422893
ORDER NO. 423684

RELEASE DATE: July 2, 2009

FOR RELATOR

Brian Bardwell, pro se
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Strongsville, Ohio 44149

ATTORNEYS FOR RESPONDENT

William D. Mason
Cuyahoga County Prosecutor

BY: Charles E. Hannan, Jr.
Assistant County Prosecutor
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1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} This is an original action for a writ of mandamus to compel the Cuyahoga County Board of Commissioners (“Board”), the respondent, to provide Brian Bardwell, the relator, with access to the following documents: (1) communications from the Plain Dealer or its attorneys regarding the release of Medical Mart project contracts or drafts of contracts; (2) drafts of contracts or development agreements that relate to the Medical Mart project; and (3) a record retention schedule. Bardwell also seeks statutory damages for violation of R.C. 149.43(B)(5), which provides that employees of a public office “may ask for the requester’s identity, * * * but may do so only after disclosing to the requester * * * that the requester may decline to reveal the requester’s identity * * *.” Because

Bardwell's complaint for a writ of mandamus is procedurally defective and the requested documents were excepted from disclosure under the Public Records Act by the attorney-client privilege or have been already timely provided, we deny the writ. We further find that Bardwell is not entitled to statutory damages.

{¶ 2} The facts, which are pertinent to this judgment, are gleaned from Bardwell's complaint for a writ of mandamus and the Board's motion for summary judgment with attached affidavit and supporting exhibits. On March 26, 2009, Bardwell presented himself at the office of the Cuyahoga County Prosecutor and hand-delivered a written request to the receptionist that provided:

{¶ 3} "I would like to inspect the following records:"

{¶ 4} "- records of communications from the Plain Dealer or its

{¶ 5} attorneys regarding the release of Medical Mart contracts or drafts of those contracts"

{¶ 6} "- drafts of development agreements related to Medical Mart projects"

{¶ 7} " - your record retention schedule"

{¶ 8} "Thank you."

{¶ 9} Bardwell, when asked to provide his identity and contact information, refused to do so and was than promptly referred to the Public Information Office. Bardwell was informed that none of the requested documents were immediately available, whereupon Bardwell offered to return later in the afternoon. Bardwell returned to the Prosecutor's Office later in the day of March 26, 2009, and was

provided with a copy of the requested record retention schedule. In addition, Bardwell was informed that copies of communications between the Board and the Plain Dealer would be available the next morning. Bardwell was also informed that no copies of development agreement drafts would be available until the agreement was actually finalized.

{¶ 10} Bardwell returned to the Prosecutor's Office the next day, on March 27, 2009, and was provided with a written response to his request for records and copies of all communication records from the Plain Dealer to the Board regarding release of Medical Mart contracts or drafts. The letter of March 27, 2009, from the Prosecutor's Office, further provided that drafts of the development agreement were not records and fell within the attorney-client privilege exception. However, Bardwell was further informed that "when an agreement is finalized and ready to be submitted to the Board of County Commissioners for approval, the final agreement and drafts will be made available."

{¶ 11} On March 27, 2009, Bardwell filed his complaint for a writ of mandamus. On April 9, 2009, Bardwell was provided with a Compact Disc, in PDF format, with copies of the proposed development agreement as well as preceding drafts of the proposed agreement. On June 8, 2009, the Board filed a motion for summary judgment with attached affidavit and exhibits. Bardwell has not filed a brief in opposition to the Board's motion for summary judgment.

{¶ 12} Initially, we find that Bardwell's complaint for a writ of mandamus is procedurally defective. Loc.App.R. 45(B)(1)(a) provides that a complaint for an extraordinary writ must be supported by a *sworn affidavit* that specifies the details of the claim. (Emphasis added.) Bardwell has failed to attach a sworn affidavit to the complaint for a writ of mandamus. Thus, the complaint for a writ of mandamus is procedurally defective and subject to immediate dismissal. *State ex rel. Davis v. Fuerst*, Cuyahoga App. No. 90553, 2008-Ohio-584; *State ex rel. Edinger v. Cuyahoga Cty. Dept. of Children & Family Serv.*, Cuyahoga App. No. 86341, 2005-Ohio-5453.

{¶ 13} Notwithstanding the aforesaid procedural defect, a substantive review of the complaint for a writ of mandamus and the Board's motion for summary judgment, fails to establish that Bardwell is entitled to a writ of mandamus.

{¶ 14} The appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act, is mandamus. *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174. R.C. 149.43 must also be construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 1996-Ohio-214, 662 N.E.2d 334.

{¶ 15} In the case sub judice, Bardwell's request for public records encompassed three distinct demands: (1) communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts; (2) drafts of contracts of development agreements that related to the Medical Mart Project; and (3) the prosecutor's record retention schedule. In essence, the main issue before this court is whether Bardwell has shown that the Board has failed to promptly prepare and make available for inspection the requested records. Contrary to Bardwell's claims, we find that all requested records were provided in a reasonable and timely manner.

{¶ 16} R.C. 149.43(B)(1) provides that "upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost within a reasonable period of time." Herein, Bardwell made his request for public records and the record retention schedule on March 26, 2009. The record retention schedule was provided to Bardwell in the afternoon of March 26, 2009, the same day of his request, and clearly provided within a reasonable period of time. In addition, records of communications from the Plain Dealer or its attorneys, regarding the release of Medical Mart contracts or drafts of contracts, were provided to Bardwell on March, 27, 2009, just one day after the request was made. A lapse of one day cannot, under any circumstances, be considered a failure to provide a requested record within a

reasonable period of time. *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105. In general, promptly providing Bardwell with the retention schedule and the record of communication requests from the Plain Dealer rendered the mandamus claim moot. *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711; *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163.

{¶ 17} On March 27, 2009, Bardwell was also provided with a letter that specifically delineated that the request for drafts of the development agreement were not public records, because they constituted confidential communications between the Board and its attorneys and thus were exempt from disclosure pursuant to the attorney-client exception as contained within R.C. 149.43. We agree. The preliminary drafts of the development agreement do not qualify as a record under R.C. 149.011(G), since the preliminary drafts do not document the public office's organization, functions, policies, decisions, procedure, operations or other activities. To the contrary, the preliminary drafts of the development agreement, as prepared by the Board's attorneys, were confidential communications between a government agency and its attorneys, which fall within the attorney-client privilege exception contained within R.C. 149.43. See *State ex rel. Leslie v. Ohio House. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-

1508, 824 N.E.2d 990. See, also, *State ex rel. Toledo Blade Co. v. Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221; *State ex rel. Benesch, Friedlander, Coplan & Arnoff, L.L.P. v. Rossford* (2000), 140 Ohio App.3d 149, 746 N.E.2d 1139. It must also be noted that copies of all drafts of the development agreement, as related to the Medical Mart project, were provided to Bardwell on April 9, 2009, once the development agreement was ready for submission to the Board for approval. Once again, the requested records were provided within ten business days of the request, clearly rendering Bardwell's complaint for a writ of mandamus moot. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686; *Miner v. Witt* (1910), 82 Ohio St. 237, 92 N.E. 21.

{¶ 18} Finally, we decline to award Bardwell statutory damages for the alleged violation of R.C. 149.43(B)(5), the failure of the employees of the Prosecutor's Office to inform Bardwell that he need not disclose his identity upon requesting copies of public records. This court, in *State v. Bardwell, et al., v. Rocky River Police Dept, et al.*, Cuyahoga App. No. 91002, 2009-Ohio-727, held that:

{¶ 19} "As noted above, when [relator] delivered the requests, at each office reception staff asked him his name. Respondents do not refute these averments. These inquiries violate R.C. 149.43(B)(5) which requires that employees of a public

office ‘may ask for the requester's identity, *** but may do so only after disclosing to the requester *** that the requester may decline to reveal the requester's identity ***.’ Although respondents argue that these inquiries were made as a ‘courtesy,’ the failure of the respective employees to inform [relator] that he need not disclose his identity was clearly a violation of R.C. 149.43(B)(5).”

{¶ 20} “Yet, R.C. 149.43(C)(1) authorizes the recovery of statutory damages as ‘compensation for injury arising from *lost use* of the requested information.’ (Emphasis added.) Relators have not demonstrated that the requests for [relator's] identity resulted in ‘lost use’ of the records requested. We hold, therefore, that the fact that reception staff asked [relator] his name does not provide a basis for statutory damages.” *State v. Bardwell, et al. v. Rocky River Police Dept., et al.*, *supra*, at ¶ 62.

{¶ 21} Herein, Bardwell has not even attempted to demonstrate that the request for his identity resulted in the “lost use” of any requested record. Thus, we find that the request as directed toward Bardwell, with regard to his name and other personal information, does not provide a basis for the imposition of any statutory damages per R.C. 149.43(C)(1).

{¶ 22} Having found that Bardwell was provided with the requested records within a reasonable period of time and that he is not entitled to any statutory damages, we must inquire into whether Bardwell’s conduct, through the act of filing a complaint for a writ of mandamus, requires the imposition of sanctions pursuant to

Civ.R. 11 and/or R.C. 2323.51. Within fourteen days of the date of this judgment, Bardwell is ordered to show cause in writing, why this court should not impose sanctions based upon the possible determination that the complaint for a writ of mandamus was: (1) frivolous and filed in bad faith; (2) filed to simply harass or maliciously injure the Board; (3) not warranted under existing law; (4) caused a needless increase in the cost of litigation; (5) cannot be supported by a good faith argument; or (6) contained allegations or other factual contentions that had no evidentiary support or, if so specifically identified, were not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. See *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, 561 N.E.2d 1001. See, also, *Burrell v. Kassicieh* (1998), 128 Ohio App.3d 226, 714 N.E.2d 442. The Board is granted leave to file a responsive brief and argument within fourteen days of the filing of Bardwell's response to our order to show cause. No extension of time shall be granted to any party.

{¶ 23} Accordingly, we granted the Board's motion for summary judgment. Costs to Bardwell. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and

LARRY A. JONES, J., CONCUR