

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00306-CV

Russell Jay Reger, Appellant

v.

The Attorney General of Texas; and Lance Kutnick, Assistant Attorney General Criminal Prosecutions Division, Appellees

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-15-001838, HONORABLE TIM SULAK, JUDGE PRESIDING**

MEMORANDUM OPINION

Russell Jay Reger, an inmate confined in the Institutional Division of the Texas Department of Criminal Justice appearing pro se, sued the Attorney General of the State of Texas and Lance Kutnick, Assistant Attorney General Criminal Prosecutions Division (collectively, the Attorney General) in Travis County district court seeking a writ of mandamus to compel them to direct two state agencies to refrain from refusing to accept or comply with his request for records pursuant to the Texas Public Information Act (PIA). *See* Tex. Gov't Code §§ 552.001-.353; .028(a) (governmental body is not required to accept or comply with request for information from individual who is imprisoned or confined in correctional facility). Reger also sought declaratory and injunctive relief to compel the Attorney General to (1) direct the Tarrant County District Attorney to issue written responses to his PIA requests, (2) advise the Tarrant County Community Supervision and Corrections Department that the PIA does not prohibit the release of certain of its files, and

(3) advise the Tarrant County District Attorney that PIA section 552.028 does not abrogate the obligation to comply with the disclosure duties imposed by Texas Code of Criminal Procedure articles 2.01 and 39.14. *See* Tex. Code Crim. Proc. arts. 2.01 (district attorneys shall not suppress facts or secrete witnesses capable of establishing innocence of accused); 39.14(h)-(m) (requirements relating to obligation to disclose exculpatory, impeachment, or mitigating information in state's possession, custody, or control that tends to negate guilt of defendant or to reduce punishment for offense charged for offenses committed on or after January 1, 2014). The district court dismissed Reger's claims for lack of subject-matter jurisdiction. We will affirm.

BACKGROUND

Prior Proceedings

A jury convicted Reger of murder in April 1996 and sentenced him to life imprisonment. The conviction was affirmed on appeal. *See Reger v. State*, No. 02-96-00217-CR (Tex. App.—Fort Worth July 31, 1997, pet. ref'd) (not designated for publication). In 1998, Reger filed an initial application for writ of habeas corpus under Texas Code of Criminal Procedure article 11.07, which the court of criminal appeals denied without a written order. *See Ex parte Reger*, No. WR-38,770-01 (Tex. Crim. App. Nov. 4, 1998). In 2005, Reger filed a motion for DNA testing, which the trial court denied after a hearing. *See* Tex. Code Crim. Proc. art. 64.01. The trial court's ruling was affirmed. *See Reger v. State*, 222 S.W.3d 510 (Tex. App.—Fort Worth 2007, pet. ref'd), *cert. denied*, 552 U.S. 1117 (2008). From 2004 to 2007, Reger and his agents¹ requested, pursuant

¹ Three individuals (none of whom were acting as Reger's attorney) made PIA requests on Reger's behalf. *See Reger v. Criminal Dist. Attorney of Tarrant Cnty.*, No. 02-09-00363-CV,

to the PIA, that the Tarrant County District Attorney and Dalworthington Gardens Department of Public Safety Detective Jerry S. Vennum produce fourteen color photographs that Reger and his agents asserted had been taken during the course of the criminal investigation preceding his 1996 murder trial. *See Reger v. Criminal Dist. Attorney of Tarrant Cnty.*, No. 02-09-00363-CV, 2011 WL 3546631 (Tex. App.—Fort Worth Aug. 11, 2011, pet. denied) (mem. op.). The District Attorney’s office responded by asserting that the PIA did not require compliance because Reger was imprisoned in a correctional facility. *See Tex. Gov’t Code § 552.028(a)*. In addition, the Dalworthington Gardens Department of Public Safety responded that the fourteen photographs were no longer in its custody and that it did not know their whereabouts. *See Reger*, 2011 WL 3546631, at *1. Reger filed a petition for writ of mandamus against the Tarrant County District Attorney and Vennum asking the district court to order them to make the photographs available. The Tarrant County District Attorney and Vennum moved to dismiss Reger’s suit as frivolous or malicious under chapter 14 of the Texas Civil Practice and Remedies Code. *See Tex. Civ. Prac. & Rem. Code § 14.003(b)(2)*. The district court granted the motion to dismiss, and the court of appeals affirmed. *See Reger*, 2011 WL 3546631, at *9.²

Underlying Proceedings

In June 2014, Reger made a request under the PIA to the Tarrant County Community Supervision and Corrections Department (the Corrections Department) for copies of any

2011 WL 3546631 (Tex. App.—Fort Worth Aug. 11, 2011, pet. denied) (mem. op.).

² Reger subsequently filed proceedings seeking DNA testing and various writs of mandamus, none of which have been successful.

presentencing investigation reports, psychiatric or psychological evaluation reports, and drug or alcohol abuse evaluation reports on William Matthew Storey, the person Reger was convicted of murdering. The Corrections Department responded to Reger's request by stating that specific records regarding individuals on probation and subject to direct supervision of a court are not subject to the PIA because such records are held on behalf of the judiciary. *See* Tex. Gov't Code § 552.003(1)(B) (for purposes of PIA "governmental body" does not include judiciary). Reger then filed a complaint with the Tarrant County District Attorney alleging that the Corrections Department had violated the PIA. *See id.* § 522.3215(e) (person who claims to be victim of violation of PIA by governmental body may file complaint with district attorney of county in which governmental body is located). According to Reger, the Tarrant County District Attorney did not notify him within 31 days of its determination of whether the violation alleged in Reger's complaint was committed and whether any action would be brought against the Corrections Department. *See id.* § 552.3215(g) (before 31st day after complaint is filed district attorney shall determine whether violation alleged was committed and whether action will be brought against governmental body and must notify complainant in writing of those determinations).

Reger then filed a complaint with the Attorney General. *See id.* § 552.3215(i) (if district attorney determines not to bring action against governmental body complainant is entitled to file complaint with attorney general who must determine within 31 days whether violation was committed and whether action will be brought against governmental body and must notify complainant in writing of those determinations). Kutnick, Assistant Attorney General Criminal Prosecutions Division, responded by letter to Reger's complaint. Kutnick's letter stated that the

Attorney General had determined that the information requested of the Corrections Department, which were records held on behalf of the judiciary, was not subject to the PIA and, additionally, that the Corrections Department was not required to accept or comply with Reger's request since he was an incarcerated individual. *See id.* §§ 552.003(1)(B), .028(a). The Attorney General stated that he would not take further action on the complaint and returned the complaint to Reger. *See id.* § 552.3215(h) (if attorney general determines not to bring action he shall include statement of basis for that determination and return complaint to complainant).

In August 2014, Reger made a request under the PIA to the City of Dalworthington Gardens and its Department of Public Safety (Dalworthington Gardens) for (1) copies of any 911 calls or police reports about Storey's relatives made by residents living in or around the location Storey was killed and (2) any protective orders sought by any such residents against Storey's relatives.³ Dalworthington Gardens responded to Reger's request by stating that it was refusing to accept his request because he was confined in a correctional facility. *See id.* § 552.028(a). Reger then filed a complaint with the Tarrant County District Attorney alleging that Dalworthington Gardens had violated the PIA. According to Reger, the Tarrant County District Attorney again did not notify him within 31 days of its determination of whether the violation alleged in Reger's complaint was committed and whether any action would be brought against Dalworthington Gardens. Reger then filed another complaint with the Attorney General. Kutnick, on behalf of the

³ Reger apparently believed that this information could lead to the identity of people who witnessed the events leading to Storey's death and whom he believes were intimidated by Storey's family members and coerced to not come forward to give their accounts of those events—accounts that Reger believes would support his claim that he killed Storey in self-defense.

Attorney General, responded to Reger's complaint by letter informing him that Dalworthington Gardens had not violated the PIA by refusing to accept a PIA request from an incarcerated individual. The Attorney General stated that it would not take further action on the complaint and returned the complaint to Reger.

Rather than filing a claim under the Uniform Declaratory Judgments Act or seeking mandamus relief against either Dalworthington Gardens or the Corrections Department, Reger filed a petition for writ of mandamus against the Attorney General. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (UDJA); *Kessling v. Friendswood Indep. Sch. Dist.*, 302 S.W.3d 373, 382-83 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (PIA requestors may seek relief from governmental entity's refusal to produce information by directly filing declaratory judgment action under UDJA against that entity); *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 352, 357 (Tex. 2000) (recognizing that persons seeking information under the PIA have sought mandamus relief against governmental body that refused to provide requested information); *Harrison v. Vance*, 34 S.W.3d 660, 663 (Tex. App.—Dallas 2000, no pet.) (mandamus is proper vehicle to seek disclosure of information from district attorney but relief not available because district attorney's decision whether to provide requested information to incarcerated individual is discretionary, not ministerial, act).⁴ The Attorney General filed a plea to the jurisdiction arguing that Reger's suit was

⁴ Texas Government Code section 552.321 also provides for statutory mandamus relief if a governmental body receives a request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions from disclosure set forth in sections 552.101 through 552.153 but either (1) fails to request a decision from the attorney general about whether the information is within that exception or (2) refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under sections 552.101 through 552.153. *See* Tex. Gov't Code § 552.321. This

barred by sovereign immunity. Alternatively, the Attorney General moved to dismiss Reger’s suit as frivolous or malicious. *See* Tex. Civ. Prac. & Rem. Code §§ 13.001 (court in which affidavit of inability to pay costs had been filed may dismiss action on finding that action is frivolous or malicious), 14.003 (court may dismiss action filed by inmate who files affidavit or unsworn declaration of inability to pay costs if it finds that claim is frivolous or malicious). After a hearing, the district court granted the Attorney General’s plea to the jurisdiction and dismissed the case for lack of subject-matter jurisdiction. The district court expressly declined to make a finding or otherwise rule on the Attorney General’s motion to dismiss Reger’s petition on the ground that it was frivolous or malicious.⁵ Reger then perfected this appeal.

DISCUSSION

Standard of Review

“A writ of mandamus will issue to compel a public official to perform a ministerial act. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.” *Anderson v. City of Seven*

statutory mandamus relief is not available to Reger in this case because the Corrections Department determined that the requested information was not subject to the PIA because it was held on behalf of the judiciary, *see* Tex. Gov’t Code § 552.003(1)(B), and Dalworthington Gardens refused to accept or comply with Reger’s request because he is an incarcerated individual, *see id.* § 552.028(a). Neither the Corrections Department nor Dalworthington Gardens withheld information because they considered it to be within one of the exceptions to disclosure set forth in Texas Government Code sections 552.101 through 552.153.

⁵ While the Attorney General asserts in its brief that this Court may affirm the trial court’s order of dismissal on the ground that Reger’s claims are frivolous, the trial court made no such finding. Our review is confined to the district court’s determination that it lacked subject-matter jurisdiction over Reger’s claims against the Attorney General.

Points, 806 S.W.2d 791, 793 (Tex. 1991); *see also Janek v. Harlingen Family Dentistry, P.C.*, 451 S.W.3d 97, 101 (Tex. App.—Austin 2014, no pet.). If an action involves personal deliberation, decision, and judgment, it is discretionary; actions that require obedience to orders or the performance of a duty to which the actor has no choice are ministerial. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994).

[S]uits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer’s exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.

City of El Paso v. Heinrich, 284 S.W.3d 366, 372 (Tex. 2009). Under the *ultra vires* exception to governmental immunity, a request for prospective injunctive relief from illegal unauthorized acts may be pursued under the UDJA. *See id.* at 370. Governmental immunity “does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions.” *Id.* at 368-69.

Relief Requested

Reger first requests that the district court order the Attorney General to order the Tarrant County District Attorney “to comply with Tex. Gov’t Code section 552.3215(g) and (h)—issuing written responses” to Reger’s complaints regarding the Corrections Department’s and Dalworthington Gardens’s alleged violation of the PIA by refusing to consider his request on the ground that he is an incarcerated individual. Reger provides no support, and we are aware of none,

for the proposition that the Attorney General has any ministerial duty to order the Tarrant County District Attorney to perform any acts related to or in response to PIA requests it receives. Rather, the PIA plainly states that the requestor's remedy is limited to filing an action for declaratory judgment or injunctive relief against the governmental body that he believes has not acted in compliance with the PIA, in this case the Tarrant County District Attorney, the Corrections Department, and Dalworthington Gardens. *See* Tex. Gov't Code § 552.3215(b).

Second, Reger requested that the district court order the Attorney General to issue an opinion that the Corrections Department is not "prohibited" by the PIA from releasing Storey's probation files. Again, there is no support for the proposition that the Attorney General has a ministerial duty to produce a particular opinion regarding a PIA request. To the contrary, the Attorney General's determination of whether information claimed to be exempt from the PIA is in fact exempt involves the exercise of the Attorney General's discretion to review the request and consider the nature of the requested materials in light of applicable law. The Attorney General's formulation of opinions regarding particular PIA requests is not a ministerial act.

Third, Reger requested that the district court order the Attorney General to direct the District Attorney that Reger is entitled to "potentially exculpatory, impeaching, or mitigating evidence" sought in his PIA requests, presumably because in his view the Attorney General has a ministerial or statutory duty to provide a criminal defendant with such material pursuant to article 2.01 of the Texas Code of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963). We construe Reger's petition as asserting a violation of article 2.01 and *Brady* by the Attorney General, the District Attorney, or both. Assuming without deciding that a party could ever enforce article 2.01

of the Texas Code of Criminal Procedure and his *Brady* rights through a civil mandamus proceeding or declaratory judgment action, Reger's petition does not, as a matter of law, set forth facts establishing that his rights have been violated such that the Attorney General has any ministerial or statutory obligation to order the records Reger seeks released to him. Reger's pleadings do not establish that any prosecuting attorney suppressed the documents he seeks at the time of trial nor has he alleged facts supporting a *Brady* allegation; i.e., he does not allege that the information he seeks is favorable and material. In fact, it is unclear what the contents of Storey's probation files might be and there is no indication that any of the supposed unidentified potential eyewitnesses to Storey's shooting would provide accounts that would support Reger's contention that he shot Storey in self-defense. Thus, Reger has not pleaded facts that establish a mandatory duty by any of the governmental entities involved to produce the documents he requests. *See United States v. Bagley*, 473 U.S. 667, 674 (1985) (citing *Brady*, 373 U.S. at 87) (holding that the *Brady* rule requires disclosure only of evidence that is both favorable to the accused and material either to guilt or to punishment). Reger has simply made a request for documents from governmental bodies that they have the discretion to refuse to act upon. *See* Tex. Gov't Code § 552.028(a); *Harrison*, 34 S.W.3d at 663 ("We join our sister courts in holding disclosure of information is discretionary when that information is requested by an individual imprisoned or confined in a correctional facility, regardless of whether such information pertains to the individual requesting it.").

CONCLUSION

Reger failed to plead or prove that the Attorney General failed to perform a ministerial act or has failed to comply with statutory or constitutional provisions such that his suit

against the state officials is not prohibited by sovereign immunity. Consequently, we affirm the district court's order dismissing the suit for lack of subject-matter jurisdiction.

Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: November 17, 2017