[Cite as *Walker v. Ohio State Univ. Bd. of Trustees*, 2010-Ohio-373.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

N. Kathryn Walker,	:	
Plaintiff-Appellant,	:	No. 09AP-748
v.	:	(C.P.C. No. 06CVH-16990)
The Ohio State University Board of Trustees et al.,	:	(ACCELERATED CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 4, 2010

William E. Walker, for appellant.

Richard Cordray, Attorney General, and *Todd R. Marti,* for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, N. Kathryn Walker, appeals from a judgment of the Franklin County Court of Common Pleas that dismissed plaintiff's R.C. 149.351(B) civil forfeiture action alleging defendants-appellees, The Ohio State University ("OSU") and its Board of Trustees, its Department of Human and Community Resource Development ("the department"), and records custodians it employed (collectively "the university") violated Ohio's Public Records Act. Because the trial court properly determined plaintiff

was not "aggrieved by" the university's allegedly wrongful destruction of "intellectual property records" that were not subject to disclosure under the Public Records Act, we affirm.

I. Factual and Procedural History

{¶2} The uncontroverted facts reveal that in 2002 the university contracted with the Muskingum Watershed Conservancy District ("the district") to conduct a study to determine both the types of watershed development programs the district should implement and the public's attitude concerning a possible assessment to support the district ("the study"). The study was organized and performed under the direction of the university's Professor Ted Napier, whose academic interests included the effect of demographic factors on public opinion and decision-making. For the study, randomly selected residents of the district were asked to complete a four-page questionnaire about their satisfaction with the district's services, their views on and support for future watershed development, and their general background, including age, education, occupation, and income. A cover letter accompanying the questionnaire advised the study's participants that their completed questionnaire forms would be destroyed when the information they provided was entered on a computer disk.

{¶3} Professor Napier's research team collected a total of 1,190 completed questionnaires. Other than county of residence, the completed forms provided no identifying information regarding participating individuals. University staff entered each participant's individual responses to the study's questions ("the raw data") into computer files on Professor Napier's home and office computers, as well as a computer disk

belonging to Professor Napier and the department. The completed questionnaire forms were secured in a locked filing cabinet in Professor Napier's office.

{¶4} After the raw data was tabulated, cumulative tallies of the raw data were presented in a written report to the district. Professor Napier discussed the study's results at a public meeting, and he authored three scholarly papers analyzing some of the study's results. The only other person who had access to and permission to use the raw data collected in the study was Corrine Cockrill, one of the professor's research assistants, who utilized some of the study's data to write her dissertation on the process of decision-making.

{¶5} Upon Professor Napier's retirement in 2005, the completed questionnaire forms were moved to files in a storage room located in the department. Professor Napier subsequently authorized the department's personnel to do as they pleased with the files, resulting in the files' destruction in June 2006. Although the paper copies of the participants' questionnaire responses were destroyed, the data provided in the participants' 1,190 responses, electronically input onto a computer disk, could be recreated and the contents of the responses reproduced.

{¶6} Ostensibly to verify the accuracy of the study's results published in the written report to the district, plaintiff on November 1, 2006 made a public records request to the university for copies of all of the written responses it received from the study's participants. By letter dated December 4, 2006, the university provided plaintiff with a copy of the questionnaire furnished to the study's participants, but it informed her it no longer possessed the completed questionnaire pages. According to plaintiff, she learned a short time later that the university had destroyed all the completed questionnaire forms.

{¶7} On December 27, 2006, plaintiff filed a civil forfeiture action against the university pursuant to R.C. 149.351(B)(2), claiming the university's failure "to maintain, preserve and make available," as well as the university's ultimate destruction of, the completed questionnaires was contrary to the university's records retention and disposition program and thus violated R.C. 149.351(A). In October 2007, plaintiff moved for summary judgment, arguing that each page of the 1,190 completed questionnaires was a separate "public record," so that the university committed a separate and distinct violation of R.C. 149.351(A) for each questionnaire page it destroyed. Plaintiff thus sought recovery under R.C. 149.351(B)(2) of $4,760,000 as a civil forfeiture, $1,000 for each of the four pages of the 1,190 completed questionnaire forms the university destroyed.

{¶8} Following the university's cross-motion for summary judgment and a hearing on both parties' motions, the trial court rendered its decision on July 2, 2009. The court concluded the records in question were not "public records" subject to disclosure to plaintiff under R.C. 149.43 of Ohio's Public Records Act because they fell within the "intellectual property records" exception provided in R.C. 149.43(A)(1)(m). The court determined that because plaintiff was not entitled under the Public Records Act to view the records, she was not "aggrieved by" their destruction and therefore could not commence a civil forfeiture action against the university pursuant to R.C. 149.351(B)(2). Concluding the university was entitled to summary judgment as a matter of law, the trial court granted summary judgment in favor of the university, denied plaintiff summary judgment, and dismissed plaintiff's action.

II. Assignments of Error

{¶9} Plaintiff appeals, assigning the following errors:

> FIRST ASSIGNMENT OF ERROR: The court below erred to Walker's prejudice when it failed to find that Defendants['] unauthorized destruction of "records" warranted the imposition of a civil forfeiture because even if the destroyed records were not "public records," they were still "records" as defined in R.C. 149.011(G) and therefore subject to the records retention law.
>
> SECOND ASSIGNMENT OF ERROR: The court below erred to Walker's prejudice when it found that Walker was not entitled to commence a forfeiture action based upon any alleged violations of R.C. 149.351 because the surveys she requested were intellectual property and therefore exempt from disclosure.

III. Standard of Review

{¶10} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.,* 78 Ohio St.3d 181, 1997-Ohio-221.

IV. Second Assignment of Error – Intellectual Property Records Exception

{¶11} To facilitate our analysis, we first address plaintiff's second assignment of error, in which she contends the trial court wrongly determined the questionnaire forms subject of plaintiff's public records request were "intellectual property records" and exempt from disclosure to plaintiff under Ohio's Public Records Act.

{¶12} In order for documents or materials to be subject to disclosure under Ohio's Public Records Act, they must fall within the statutory definition of a "public record." R.C. 149.43; *State ex rel. Rea v. Ohio Dept. of Edn.*, 81 Ohio St.3d 527, 529, 1998-Ohio-334; *State ex rel. Beacon Journal Publishing Co. v. Bodiker* (1999), 134 Ohio App.3d 415, 422. R.C. 149.43(A) defines a "public record" as "any record that is kept by any public office," provided none of the exceptions delineated in the statue apply. *Rea; Beacon Journal.* The parties do not dispute that the university is a "public office" and that the questionnaires the study's participants completed are "records" for purposes of the Public Records Act. See *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169, 1994-Ohio-246, and *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244, paragraph one of the syllabus.

{¶13} The issue instead is whether the records in question are "intellectual property records" under the exception set forth in R.C. 149.43(A)(1)(m) and therefore are not subject to disclosure as "public records." R.C. 149.43(A)(5) defines an "intellectual property record" as "a record, other than a financial or administrative record," that (1) was "produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue," whether or not "the institution alone or in conjunction with a governmental body or private concern" sponsored "the study or research," and (2) "has not been publicly released, published, or patented."

{¶14} "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." *State ex rel. Perrea v. Cincinnati Public Schools,* 123 Ohio St.3d 410, 2009-Ohio-4762, ¶17, citing *State ex rel. Cincinnati*

Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph two of the syllabus. See also *State ex rel. Physicians Cmmt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, ¶28; *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 398, 2000-Ohio-207; *Beacon Journal* at 424. "A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." Id.

{¶15} The parties do not dispute that the completed questionnaire forms and, more pertinently, the participants' responses to the questions posed in the study's questionnaire, are "records" that satisfy the definition of intellectual property records insofar as they (1) were not financial or administrative records, (2) were produced or collected by or for faculty or staff at the university, and (3) were produced or collected "in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue." The remaining issue is whether the "records" have been "publicly released, published, or patented"; if they have been, they fall outside the intellectual property records exception set forth in R.C. 149.43(A)(1)(m). Because no one suggests the records in question have been patented, the issue in this case reduces to whether the records have been publicly released or published. Resolving that issue turns upon "the factual question of whether the records had or had not been placed into the public domain." *Physicians* at ¶29. Comparison of two Ohio Supreme Court cases is instructive in settling the issue.

{¶16} In *Rea,* the relators sought access under R.C. 149.43 to previously administered 12th-grade proficiency tests and vocational examinations. See *Rea*, supra, at 527. The Ohio Supreme Court concluded the records were placed into the public

domain since they were disclosed to thousands of public school students, teachers, and administrators all over the state. Id. at 533; *Physicians* at ¶33. Because the records were placed in the public domain, the court concluded the records had been "publicly released" and therefore were not protected from disclosure under the intellectual property exception to the Public Records Act. *Rea* at 533-34.

{¶17} By contrast, the Supreme Court in *Physicians* determined the records at issue there, dealing with the use and treatment of laboratory animals in spinal-cord research programs at OSU, were "intellectual property records" not subject to public disclosure to a health advocacy organization, as the records had not been placed in the public domain. Id. at ¶33. In reaching its conclusion, the court observed that the university securely stored the records, restricted access to the records, and did not release or make the records available to members of the public. Id. at ¶30-35.

{¶18} The court in *Physicians* further noted that although OSU researchers described some of their research techniques in a published article, the research records the relator sought had not been published or released, and the information was not available to members of the public. Id. The court decided that even though OSU loaned a small number of the records to small groups of researchers and scientists at other institutions, it did so under controlled circumstances and for limited scientific use, with the result that OSU's "limited sharing of the records" did not mean that the records had been "publicly released." Id. at ¶35. The court therefore concluded the records "remain the intellectual property of OSU and none of OSU's actions suggest that it intends to give up its right to the scientific and financial benefits that might redound to OSU from its research in the treatment of spinal-cord injuries." Id.

{¶19} Here, as in *Physicians*, the university presented uncontroverted evidence that it tightly controlled access to and disclosure of the subject records, including the paper copies of the questionnaire forms the study's participants completed as well as the electronic raw data derived from the participants' responses. Professor Napier's research team personally collected the completed questionnaire forms and then securely stored them in either a locked filing cabinet in the professor's office or a storage room in the department after university personnel entered the information collected in the study into select electronic files.

{¶20} Moreover, only two persons had permission to access and use the data collected in the study: Professor Napier and one of his research assistants, who published a few papers and publicly discussed the results of the study. Notably, the underlying data collected in the study was never published, released, or made available to members of the public or to other researchers or scientists. Indeed, not only were the participants of the study assured of the confidentiality of their responses, but the university presented uncontroverted evidence that the confidentiality of the data collected in the study is vital to its economic and academic value. The university explained that if the proprietary research data were publicly disclosed, Professor Napier and the university could suffer substantial harm, including loss of grants and potential liability for breaching the confidentiality of the participants. Here, as in *Physicians,* "none of OSU's actions suggest that it intends to give up its right to the scientific and financial benefits that might redound to OSU from its research." Id. at ¶35.

{¶21} The university met its burden of establishing that the records plaintiff sought have not been "publicly released, published, or patented." Accordingly, the trial court

properly found that the records at issue are "intellectual property records" as defined in R.C. 149.43(A)(5) and thus are not "public records" subject to disclosure under the Public Records Act. Plaintiff's second assignment of error is overruled.

V. First Assignment of Error – R.C. 149.351(B)'s "Aggrieved" Person Requirement

{¶22} In her first assignment of error, plaintiff asserts the trial court erred in determining that, because plaintiff failed to demonstrate she is "aggrieved by" the university's destruction of the records in question, she cannot bring a civil forfeiture action under R.C. 149.351. Plaintiff contends a civil forfeiture action lies under R.C. 149.351(B) whenever a "public office" destroys "records," regardless of whether the records are "public records" or the person commencing the action has a right to see the records.

{¶23} As relevant here, R.C. 149.351(A) states that "[a]ll *records* are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or * * * under the records programs" that "the boards of trustees of state-supported institutions of higher education" establish under R.C. 149.33. (Emphasis added.) R.C. 149.351(B)(2) provides that "[a]ny person who is *aggrieved by* the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a *record* in violation of" R.C. 149.351(A), may commence "[a] civil action to recover a forfeiture in the amount of one thousand dollars for each violation." (Emphasis added.)

{¶24} Plaintiff is correct in her assertion that R.C. 149.351(A) prohibits the destruction of "records" as defined in R.C. 149.011(G). The university concedes it is a "public office" and the completed questionnaire forms it destroyed are "records" for purposes of Ohio's Public Records Act. See R.C. 149.011(A) and (G). Even if we

assume, without deciding, that the university violated R.C. 149.351(A) when it destroyed the study's completed questionnaire forms, R.C. 149.351(B) expressly limits who may sue to enforce the statute. R.C. 149.351(B) authorizes only persons allegedly "aggrieved by" a violation of R.C. 149.351(A) to file a civil forfeiture action under R.C. 149.351(B)(2). Because the Ohio Public Records Act does not define the term "aggrieved" as used in the act, the term is interpreted "by looking at the purpose of the specific statute, being faithful to the General Assembly's intent in promulgating it, and by giving effect to the 'usual, normal and customary meaning' of the term being interpreted." (Citations omitted.) *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244, ¶35.

{¶25} In *Kish*, the Ohio Supreme Court addressed the purpose of R.C. 149.351, concluding R.C. 149.351 "proscribes the destruction, mutilation, removal, transfer, or disposal of or damage to *public records*" and concluded the legislature's intent in promulgating the statute was to protect and preserve "public records." (Emphasis added.) *Kish* at ¶18, 36. Under its normal and customary meaning, an "aggrieved" person is defined as one "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Black's Law Dictionary (9 ed.2009) 77.

{¶26} Giving effect to the statute's purpose and the customary meaning of the term "aggrieved," we conclude, as pertinent here, that a person is "aggrieved by" a violation of R.C. 149.351(A), and therefore is statutorily authorized to commence an action under R.C. 149.351(B), when (1) the person has a legal right to disclosure of a record of a public office, and (2) the removal, destruction, mutilation, transfer, damage, or disposal of the record, not permitted by law, allegedly infringes the right. See *State ex rel. The Cincinnati Enquirer v. Allen,* 1st Dist. No. C-040838, 2005-Ohio-4856, ¶15, appeal

not allowed, 108 Ohio St.3d 1439, 2006-Ohio-421; *State ex rel. Sensel v. Leone* (Feb. 9, 1998), 12th Dist. No. CA97-05-102, reversed on other grounds (1999), 85 Ohio St.3d 152.

{¶27} Here, plaintiff never had a legal right to disclosure of the records in question because they were "intellectual property records," not "public records," and were not subject to disclosure under R.C. 149.43(A). Because plaintiff never had a legal right to disclosure of the records, their allegedly wrongful destruction did not infringe one of her rights. The trial court thus properly concluded plaintiff is not an "aggrieved" person for purposes of commencing a civil forfeiture action under R.C. 149.351(B). Plaintiff's first assignment of error accordingly is overruled.

VI. Conclusion

{¶28} Having overruled plaintiff's two assignments of error, we affirm the trial court's judgment dismissing plaintiff's action.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.