[Cite as *State ex rel. Bristow v. Chief of Police, Cedar Point Police Dept.*, 2014-Ohio-2842.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio, ex rel. Lonny Bristow — Court of Appeals No. E-14-008

Relator

v.

Chief of Police, Cedar Point Police Department

DECISION AND JUDGMENT

Respondent — Decided: June 25, 2014

* * * * *

Lonny Bristow, pro se.

Justin D. Harris, for respondent.

* * * * *

JENSEN, J.

{¶ 1} In this original action, relator Lonny Bristow has petitioned for a writ of mandamus to compel respondent Chief of Police, Cedar Point Police Department, to provide certain records relating to tire cutting or slashings at the Cedar Point Amusement Park in September and October 2012.

{¶ 2} Preliminarily, it is important to note that the Ohio Public Records Act provides that upon request, "all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." R.C. 149.43(B)(1). A person allegedly aggrieved by the failure to make a public record available "may commence a mandamus action to obtain a judgment that orders the public office or person responsible for the public record to comply with [R.C. 149.43(B)] * * *. R.C. 149.43(C)(1)." *See 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, ¶ 6 ("Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act.").

{¶ 3} "In order to be entitled to a writ of mandamus, the relator must establish a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law." *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). "Relators seeking public records in mandamus, however, need not establish the lack of an adequate remedy at law." *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 972 N.E.2d 607, 2012-Ohio-2074, ¶ 17 (1st Dist.), citing *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24.

{¶ 4} On April 25, 2014, the chief of police filed a motion to dismiss the mandamus action. Bristow filed a memorandum in opposition. The motion to dismiss is now before the court for consideration.

{¶ 5} In his first argument, the chief of police asserts that Bristow's petition is subject to dismissal for failure to seek leave of court pursuant to R.C. 2323.52. We acknowledge that relator has been determined a vexatious litigator, but note that relator was granted leave to file his petition after we determined, on March 6, 2014, that the action was not an abuse of process and that there were reasonable grounds on which this mandamus action may be pursued. Thus, the chief of police's first argument in support of his motion to dismiss is not well-taken.

{¶ 6} In his second argument, the chief of police asserts that Bristow is an incarcerated person who failed to file with this court, pursuant to R.C. 2969.25, an affidavit that contains a description of each civil action or appeal of a civil action that he has filed in the previous five years.

{¶ 7} R.C. 2969.25 applies only to inmates who commence civil actions or appeals against "a government entity or employee." Uncertain of the chief of police's legal status, we ordered the chief to file a supplemental memorandum addressing whether he is a "government entity or employee" as those terms are used in R.C. 2969.25.

{¶ 8} On May 22, 2014, the chief of police filed the requested supplemental memorandum wherein he indicates,

> After a thorough review of the applicable law, it appears Respondent, Chief of Police, Cedar Point Police Department, is not "a government entity or employee"; rather, Respondent is a private entity. Accordingly, Respondent no longer argues Relator's failure to strictly comply with R.C. § 2969.25 is a means for dismissal. Instead, Respondent argues it is a private entity and therefore not subject to the ordinary requirements of the Ohio Public Records Act which would compel Respondent to release the documents requested by Relator. Therefore, although Respondent's analysis has changed, it is still the Respondent's intention to file the within Motion to Dismiss Relator's Petition pursuant to Civ.R. 12.

{¶ 9} Asserting that he is not a public entity or employee, the chief of police concedes that Bristow was not required, under the mandatory requirements of R.C. 2969.25, to file an affidavit that contains a description of each civil action or appeal of a civil action that he filed in the previous five years in any state or federal court. Thus, the chief of police's second argument in support of his motion to dismiss is not well-taken.

{¶ 10} In his third argument, the chief of police asserts that the Ohio Public Records Act generally does not apply to private entities absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.

{¶ 11} In *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, the Ohio Supreme Court held that in determining

whether a private entity is a public institution under the Ohio Public Records Act, a court must apply the "functional-equivalency test." *Id.* at paragraph two of the syllabus. "Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a government 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.* The court acknowledged that R.C. 149.43 should be liberally construed, with any doubt in favor of disclosure. *Id.* at ¶ 15. But it further held that "the functional-equivalency 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.

{¶ 12} The chief of police argues that Bristow failed to allege that the Cedar Point Police Department is the functional equivalent of a public office. He further argues that Bristow failed to show by clear and convincing evidence that the Cedar Point Police Department is the functional equivalent of a public office.[1]

{¶ 13} When construing a complaint upon a motion to dismiss for failure to state a claim, it is presumed that all factual allegations in the complaint are true and it must appear beyond doubt that the plaintiff can prove no set of facts warranting recovery. *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975),

[1] The chief of police asserts that he moves to dismiss Bristow's petition "pursuant to Civil Rule 12." We will construe the chief of police's motion as one under division (B)(6).

syllabus. In his petition, Bristow alleges that he requested certain public records but that the chief of police failed to respond to his requests. Bristow further alleges that he is entitled to the public records pursuant to R.C. 149.43 and that the chief of police is under a clear legal duty to provide the public records. Accepting these allegations as true, as we must, Bristow's petition fulfills the requirements necessary to state a public records mandamus action against the chief of police. Thus, the chief of police's third argument in support of his motion to dismiss is not well-taken.[2]

{¶ 14} For the foregoing reasons, the chief of police's motion to dismiss is denied.

{¶ 15} The chief of police shall, within 14 days of the date of this order, file his answer to relator's petition pursuant to Civ.R. 8. The remaining schedule shall proceed in accordance with 6th Dist.Loc.App.R. 6(B) unless ordered otherwise by the court.

{¶ 16} It is so ordered.

{¶ 17} The clerk is directed to immediately serve upon all parties a copy of this order in a manner prescribed by Civ.R. 5(B).

Motion denied.

[2] This ruling does not prevent the court from revisiting the issue under a properly supported Civ.R. 56 motion for summary judgment.

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, P.J.

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JUDGE

James D. Jensen, J.
CONCUR.

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JUDGE