

[Cite as *State ex rel. Bardwell v. Cleveland*, 2009-Ohio-5688.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91831

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

RELATOR

VS.

CITY OF CLEVELAND, ET AL.

RESPONDENTS

**JUDGMENT:
WRIT GRANTED**

WRIT OF MANDAMUS
ORDER NO. 427057

RELEASE DATE: October 23, 2009

FOR RELATOR

Brian Bardwell, pro se
9854 Pebble Brook Lane
Strongsville, Ohio 44149

ATTORNEYS FOR RESPONDENT

Robert J. Triozzi
Director of Law

By: Jerome A. Payne, Jr.
Assistant Director of Law
City of Cleveland
601 Lakeside Ave., Room 106
Cleveland, Ohio 44114-1077

CHRISTINE T. MCMONAGLE, J.:

{¶ 1} On July 22, 2008, the relator, Brian Bardwell, pro se, commenced this public records mandamus action against the respondents, the City of Cleveland and Chief Michael McGrath of the Cleveland Division of Police. Bardwell sought to compel the respondents to make available for inspection or copying the following records: (1) all pawnshop reports submitted to the Cleveland Division of Police (hereinafter the "Division") pursuant to R.C. 4727.09 from May 23, 2008, to May 27, 2008; (2) the Division's list of pawnshops operating in the City of Cleveland; and (3) the Division's records retention schedule. Bardwell also seeks an award of statutory damages pursuant to R.C. 149.43(C). To this end he makes several claims: (1) failing to make the records

available promptly; (2) failing to release nonexempt portions of the records; (3) failing to organize and maintain the records “in a manner that they can be made available for inspection or copying;” (4) failing to have a copy of its current records retention schedule available for inspection or copying “at a location readily available to the public;” (5) failing to provide him with an opportunity to revise his request; (6) failing to explain why the request was denied or redactions made with supporting legal authority; (7) requiring Bardwell to identify himself as a prerequisite to fulfilling his public records request; (8) requiring Bardwell to make a written request or fill out the Division’s public records request form; and (9) failing to provide either an affirmative or negative response to the request in a timely manner.

{¶ 2} After receiving two extensions of time, the respondents filed on October 9, 2008, a “Response to relator’s writ of mandamus” which asserted the matter was moot because they were providing the requested records to Bardwell.

When neither party filed anything further, this court in late January 2009, ordered the parties to certify the status of the case. Bardwell replied that he was waiting for respondents’ counsel to tell him that the records were ready for inspection. The respondents stated that they had mailed a sampling of the requested records to Bardwell and that they were waiting for Bardwell to contact them to schedule an inspection of the remaining records. Subsequently, this court directed the parties to file cross-motions for summary judgment, which they did in July 2009.

On August 25, 2009, this court found that genuine issues of fact remained on whether Bardwell had been provided access to all of the requested records and whether he was entitled to statutory damages. Accordingly, this court scheduled an evidentiary hearing for September 29, 2009. This court further instructed the parties to follow Local Appellate Rule 45(B)(8) to make arrangements for the recording of proceedings, if so desired, by providing prior written notice.

{¶ 3} On September 29, 2009, this court, through the three panel members, conducted an evidentiary hearing on the remaining issues. Neither party provided prior written notice for making a record. For the following reasons, this court grants the writ of mandamus and orders the respondents to provide a list of pawn shops, if not already provided, and this court awards \$1000.00 in statutory damages.

FINDINGS OF FACT

{¶ 4} On May 23, 2008, Bardwell attended a Cleveland Indians game and parked his car near the ball field. During the game someone broke into Bardwell's car and stole his laptop computer. Bardwell promptly reported the theft to the Cleveland Police.

{¶ 5} R.C. 4727.09 requires every person licensed as a pawnbroker to furnish daily to the local police a description of all property pledged with or purchased by the pawnbroker. In Cleveland this is done through submitting 3 x

5 inch index cards for each item. Bardwell sought access to these cards in an effort to retrieve his computer.

{¶ 6} On May 28, 2009, Bardwell went to the Division of Police headquarters to submit a written request to inspect all R.C. 4727.09 reports from May 23, 2008, to May 27, 2008; the Division's list of pawn shops operating in Cleveland; and the Division's record retention schedule. At the entrance to police headquarters, an officer initially stopped Bardwell from entering. Bardwell specifically stated that he was there to make a public records request for the above records and handed the officer the written request. The officer returned it.

Bardwell then asked if he could obtain a copy of the incident report of the theft of his computer. The officer told him he could, but required Bardwell to supply his name, address and driver's license as identification before he let Bardwell into the building.

{¶ 7} Once at the public records office on the third floor, Bardwell obtained a copy of the incident report. He then endeavored to make his request for the other records. The public records administrator presented the Division's standard public records request form for his completion. This form asks for the requester's name, company, address, city, state, zip code, telephone number and fax number. It then provides the following disclosure: "The City provides this form to manage the public records request process more efficiently, and to help avoid delays and confusion. The availability of public records is not limited or

conditioned on completion of this form. A written request for records is not mandatory and you may decline to identify yourself. If you do not want to make a written request, or do not want to reveal your identity, please call the City's Public Records Administrator at 664-2772. If you choose to use this form, please provide specific details about what you want, including time frame, locations, etc. (if applicable). You may write on the back of this form if necessary. Thank you." The form then provides six lines for making the request. Bardwell completed the form and submitted it to the administrator.¹

{¶ 8} Bardwell returned the next day to check on his records request. The administrator told him that the cards were not yet ready and would not be ready until June 2. At this time Bardwell asked for a copy of the record retention schedule, and the administrator handed him one. Bardwell says he examined it and questioned whether this was a current schedule, because it was dated 2001.

Bardwell then said that the administrator called the City of Cleveland's Law Department, and after awhile returned and presented him with a fax of 17 pages of a retention schedule.²

¹ During the evidentiary hearing, Pat, a City of Cleveland public records administrator who helped handle the instant request, testified that if a requester does not wish to identify themselves, they will still process the request. The court further notes that neither party offered Bardwell's form as evidence during the hearing.

² This court notes that the Division's webpage provides a retention schedule. During the hearing Bardwell testified that he wondered if it was a current schedule, because it did not show the "sign-offs" from the Historical Society and the like.

{¶ 9} Bardwell stated that between June 2 and July 7, 2008, he returned several times to obtain the records, and each time was told that they were not yet ready. On July 22, 2008, he commenced this mandamus action.

{¶ 10} The Division's public records administrator testified at the evidentiary hearing that in 2008 they received approximately 3000 public records request which she and her co-worker had to fulfill. She further stated that the Financial Crimes Unit kept physical possession of the cards, and they had to obtain the cards from them. Everyone agrees that the number of cards in Bardwell's request were voluminous; in his pleadings Bardwell stated that there were over 1000 cards. At the hearing the witnesses testified that if the cards were stacked tightly together, they would be a foot or more thick. Pat testified that the cards were grouped and held together with rubber bands. She further testified that initially a lieutenant in the Financial Crimes Unit wondered if the cards were exempt from the public records statute because they were sometimes used as evidence. Apparently, it was decided that the cards were not confidential law enforcement records and were generally subject to disclosure.

{¶ 11} The respondents attached a sampling of cards which they had sent to Bardwell to their motion for summary judgment. These cards show that space is provided for the social security number, the driver's license number, and in at least two instances, an Ohio identification number. Although the line on the cards for a social security number is now left blank, it was decided that the

driver's license or Ohio identification numbers were subject to redaction like social security numbers, on the grounds of privacy. Thus, Pat testified that to prepare the cards for release, she had to make a copy of the card, which has information on both sides, make the redaction, and then copy the card again.³ Pat further testified that she was in the process of making these redactions along with fulfilling all the other public records requests, when Bardwell filed the instant action. At that time responsibility for the mandamus action and the public records request transferred to the law department.

{¶ 12} On October 9, 2008, the law department sent the following letter to Bardwell with a sampling of pawn shop cards: "Dear Mr. Bardwell: Per our conversation of yesterday, enclosed please find pawn shop records from May 23, 2008 to May 28, 2008. In addition, please contact me at your earliest convenience to review the remaining records." It appears that neither party pursued the matter further until this court directed the parties to certify the status of the case. At that time Bardwell arranged to inspect the cards. He did this on March 27, 2009. He testified that when he inspected all the cards there were no redactions.⁴

³ The attachments to the respondents' motion for summary judgment show the necessity of this procedure. The original, signed-in-ink motion has copies of the cards with black marker over the identification numbers. However, the numbers are readable through the black marker. In the copies of the motion for summary judgment, the numbers are effectively redacted.

⁴ See, also Bardwell's affidavit attached to his response in opposition to the

{¶ 13} On cross-examination he admitted that he subsequently made another public records request to view the pawn shop cards through June 5, 2008. The City complied quickly to allow inspection. He also admitted that at that time he saw a list of pawn shops, but was not certain that it was a complete list. On October 1, 2009, in the instant case, the respondents filed a list of pawnbrokers, which they asserted they had shown to Bardwell for the subsequent records request.

CONCLUSIONS OF LAW

{¶ 14} R.C. 149.43(C) provides that a mandamus action is the appropriate remedy to enforce the public records statute. Thus, to obtain relief Bardwell must show that he has a clear, legal, right to the relief and that the respondent has a clear, legal duty to perform the requested relief. However, because mandamus is the specifically statutorily appointed remedy for public records requests, the element of lack of an adequate remedy is dispensed. *State ex rel. Simonsen v. Ohio Department of Rehabilitation and Correction*, Franklin App. No. 08AP-21, 2008-Ohio-6826 and *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.* (1997), 78 Ohio St.3d 518, 678 N.E.2d 1388. The Public Records Act must be liberally construed in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Wadd v. City of Cleveland* (1998), 81 Ohio St.3d 50, 689 N.E.2d 25. Generally, the relator in a mandamus

respondents' motion for summary judgment.

action has the burden of proof by clear and convincing evidence to establish his case. *State ex rel. Pressley v. Industrial Comm. of Ohio* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 631 - “The facts submitted and the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.” However, in a public records mandamus action, the respondent must establish that it has provided the requested records to moot the mandamus claim. *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163; and *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port. Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221. Thus, this court holds that the respondent carries the burden to show that the public records have been provided, but the relator carries the burden in regard to proving statutory damages.

{¶ 15} In regard to Bardwell’s three requests the court rules as follows: (1) The respondents fulfilled the request to examine the pawn shop records. From the allegations in the complaint, statements in affidavits, and the evidence at the hearing, this court is convinced that the respondents have fulfilled this request. (2) This court is not convinced that the respondents fulfilled the request to provide a list of all the pawn shops in the City of Cleveland. It was not provided as part of the request in the instant case, and even the evidence about the subsequent request was not clear that it was a complete list. Accordingly, this court grants the writ of mandamus and orders the respondents to provide Bardwell with the list

of all pawn brokers in the City of Cleveland within fourteen days of this order, if the list as filed on October 1, 2009, is not a complete list of pawnbrokers. (3) Based upon all of the evidence submitted, the court is convinced that the respondents provided a current record retention schedule and that pursuant to Subsection (B)(2) a copy was at a location readily available to the public.⁵

{¶ 16} The court will now examine Bardwell's counts for statutory damages.

R.C. 149.43(C)(1) provides in pertinent part as follows:

If a requester transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed.

⁵ This duty is to be distinguished from the duty of Subsection(E)(2) that a public office must create a poster describing its public records policy and post the poster in a conspicuous place in the public office.

{¶ 17} Bardwell's first count is that the respondents failed their duty under Subsection (B)(1) that "all public records responsive to the request shall be promptly prepared and made available for inspection to any person * * *." This court concludes that the respondents did not fulfill this duty. They did not make the list of pawnbrokers available, and they did not make the pawn shop records available until October 9, 2009, 79 days after Bardwell filed the instant mandamus action. In *State ex rel. Simonsen v. Ohio Department of Rehabilitation and Correction*, Franklin App. No. 08AP-21, 2009-Ohio-442, the court of appeals concluded that a 37 day delay in responding to a public records mandamus was not prompt or reasonable. See, also, *State ex rel. Bardwell v. Rocky River Police Department*, Cuyahoga App. No. 91022, 2009-Ohio-727 and *State ex rel. Parker v. Lucas County Dept. Of Job and Family Services*, 176 Ohio App.3d 715, 2008-Ohio-3274, 893 N.E.2d 558.

{¶ 18} Bardwell's next contention is that the respondents improperly redacted the driver's license numbers or the Ohio identification numbers and did not provide legal authority to support those redactions. Subsection (B)(1) provides in pertinent part that a "redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction." Subsection (B)(3) provides in pertinent part: "If a request is ultimately denied, in part or in whole, the public office or person responsible for the requested public record shall provide

the requester with an explanation, including legal authority, setting forth why the request was denied.” In the instant case the court concludes that there were no effective redactions. The respondents provided the pawn broker cards for inspection without redaction, and the sampling as submitted to the court had ineffective redactions. In his sixth count Bardwell argues that the respondents breached a separate obligation under Subsection (B) by endeavoring to make redactions without supporting legal authority. This court rules that under the peculiar facts of this case, such a breach is inseparable from the duty to promptly provide the records for inspection. It is mooted by the failure to make effective redactions.

{¶ 19} Bardwell’s third count is that the respondent did not “organize and maintain public records in a manner that they can be made available for inspection or copying.” R.C. 149.43(B)(2). The court rules that Bardwell proved this count. The system of 3 x 5 inch index cards with information on both sides is antiquated. It produced an unwieldy number of cards. The process of copying, redacting and recopying in order to make effective redactions is not maintaining records in a manner to make them available for inspection or copying. The court further finds that this process substantially contributed to the delay in releasing the records.

{¶ 20} Subsection (B)(2) further provides that a “public office shall have available a copy of its current records retention schedule at a location readily

available to the public.” The court has already found that the respondents did not breach this obligation. Thus, Bardwell's fourth count is denied.

{¶ 21} Bardwell's next count is that the respondents breached their duty under Subsection (B)(2) to provide him with the opportunity to revise his request to make it more manageable, if the request is “ambiguous or overly broad” or if the person responsible for the public records “cannot reasonably identify what public records are being requested.” The court rules that this count is not well taken because the prerequisites are not fulfilled. Bardwell's request was very clear and understandable.

{¶ 22} The court will address Bardwell's seventh and eighth counts together. Subsection (B)(4) provides in pertinent part: “no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity * * *. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.” Subsection (B)(5) provides:

A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or

person responsible for public records to identify, locate, or deliver the public records sought by the requester.

{¶ 23} Bardwell submits that the respondents breached these duties by requiring him to provide his name, address, and identification just to be allowed into police headquarters when he had stated that he was there to make a public records request. He further submits that the respondents again breached these duties by requiring him to fill out the Division's public record request form. He argues that this form forced him to disclose his identity and to put the request into writing when he should not have been obligated to do so.

{¶ 24} The court rules that these arguments are not well taken. First, the court finds that the Division's public records request form makes all of the necessary disclosures required by Subsection (B)(5). The court further finds that by presenting the form to Bardwell the respondents timely made the disclosures and that the respondents would have processed Bardwell's request had he not filled out the form. Given that Bardwell had already prepared a written request and that Subsection (C)(1) conditions the award of damages upon the making of a written request, this court finds that Bardwell would have made a written request in any event. Thus, the court concludes that Bardwell by completing the Division's public records request form accepted the disclosures made therein and waived his claims to damages under Subsections (B)(4) and (5).

{¶ 25} Second, in *State ex rel. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727 and *State ex rel. Bardwell v. Cuyahoga Cty. Bd. Of Comm.*, Cuyahoga App. No. 93058, 2009-Ohio-3273, this court examined the award of damages for breaching the Subsection (B)(4) and (5) duty not to require a requester's name without making the necessary disclosures. In those cases this court found that the respondents had breached that duty. Nevertheless, this court reasoned that R.C. 149.43 (C)(1) authorizes statutory damages as “compensation for injury arising from *lost use* of the requested information.” (Emphasis not used in the statute, but used in the opinions.) Because in those cases Bardwell did not demonstrate any “lost use” from requiring his identification, this court held that the fact that he was asked for his name did not provide a basis for statutory damages. Again, in the present case Bardwell did not show that being asked for his name resulted in any lost use of information. Thus, he has not shown an entitlement to statutory damages for violations of Subsections (B)(4) and (5).

{¶ 26} Next, the court considers the issue of public records and security at public buildings. Bardwell argues that the officer at the entrance to police headquarters violated the duty under R.C. 149.43(B)(4) and (5) not to ask for a requester's name unless the necessary disclosures are made. Bardwell clearly identified himself as a requester of public records. He even presented a written request for records to the officer. Nevertheless, the officer required him to state

his name and address and to provide identification to be allowed into the building.

Bardwell argues that this constitutes a clear violation of the public records act, entitling him to statutory damages. The court holds that this argument is ill-founded because the General Assembly did not intend for the Public Records Act to circumvent or thwart basic security measures at public buildings. It did not intend to allow criminals and terrorists to use the Public Records Act as a pretext to gain anonymous entry into police stations, schools, city halls and other governmental buildings. The procedures at a building's entrance are separate and apart from the procedures for requesting public records. Accordingly, Bardwell is not entitled to statutory damages under counts seven and eight.

{¶ 27} Bardwell's last count is that the respondents "failed to provide an affirmative or negative response to the request within the time allowed by the Act." (Paragraph 93 of the Complaint.) This language parallels Subsection (C)(2)(b)(i): "The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section." However, this is not a requirement under R.C. 149.43(B) for which damages may be awarded; it is a requirement for an award of attorney's fees under Subsection (C)(2). Because Bardwell is representing himself, there can be no award of attorney's fees. Because this count is not based on a requirement in Subsection (B), there is no basis for statutory damages. To the extent that this count might

be based upon a duty under Subsection (B), this court holds it is inseparable from and merges with the duty to provide records promptly.

{¶ 28} Finally, this case presents the issue of “stacking” statutory damages. Bardwell in his filings, especially his motion for default judgment, asserts that statutory damages should be awarded for each breach of a Subsection (B) duty. Thus, in the instant case he would submit that he is entitled to \$1000.00 for the failure to provide the records promptly and an additional \$1000.00 for the failure to organize and maintain records in a manner that they can be made available to inspection and copying. He does not cite any authority for this proposition but assumes that it follows as a corollary from the wording of the statute.

{¶ 29} This court holds that the statute does not permit “stacking” of damages. The relevant language states “up to a maximum of one thousand dollars.” It does not state “up to a maximum of one thousand dollars per breach of duty.” The language of the statute caps the amount of damages at one thousand dollars, and this court will enforce the statute as written.

{¶ 30} Accordingly, this court grants the writ of mandamus as follows: the respondents are ordered to disclose a complete list of pawnbrokers in the City of Cleveland, if they have not already complied with that request. The court rules that the respondents have complied with the other two requests. This court further orders the respondents to pay Bardwell \$1000.00 in statutory damages.

Respondents to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

CHRISTINE T. MCMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR