

IN THE SUPREME COURT OF OHIO

State ex rel.,  
ROBERT CONANT,

Relator,

v.

CORBY FREE, et al.,

Respondents.

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Case No. 2023-1513

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RESPONDENTS' MOTION TO DISMISS

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NOW COMES Respondents, Corby Free, Shane M. Stevens, Magee N., and K. Bayless by and through undersigned counsel, and hereby request that the Court dismiss Relator Robert Conant's Complaint in mandamus, pursuant to Ohio Civ.R. 12(B)(6), due to Relator's failure to state a claim upon which relief can be granted. A Memorandum in Support of this Motion is attached.

Respectfully submitted,

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Ohio Attorney General

s/Matthew Convery  
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## MEMORANDUM IN SUPPORT

### **I. Introduction and Statement of Facts**

On November 30, 2023, Relator, Robert Conant #768-904, an inmate, currently incarcerated at Chillicothe Correctional Institution (“CCI”), filed a Writ of Mandamus listing Corby Free, Shane M. Stevens, Magee N., and K. Bayless as Respondents. In his Petition, Relator alleges he made nine Public Records Requests. See generally Compl. Based upon Relator’s allegations, he now seeks statutory damages “totaling \$9000.00 dollars.” Compl. at P. 7.

#### **A. Request for Print Copies of Relator’s Kites from March 25, 2021, through March 25, 2022**

In his Petition, Relator alleges that on August 8, 2023, he requested “print off from March 25, 2021 through March 25, 2022 [of] kites and grevec (sic).”<sup>1</sup> Compl. at ¶ 1. Relator alleges that on the same day, Respondent Corby Free attempted to clarify the request and responded to Relator stating “[p]lease provide grievance numbers for your request.” *Id.* at P. 2.

Instead of responding to Respondent Corby Free’s attempt to clarify Relator’s initial request, Relator alleges he responded: “its public record to be able to get my jpays I am indegent (sic) so printing should be free of carge (sic) don’t know the kite or grievance numbers need all jpays from 3-25-21 to 3-25-22 for ongoing law suit if am able to see the jpays I can tell you want (sic) ones I need if not between those dates or all jpays I have filed.” *Id.*

Following which, Relator alleges that Respondent Corby responded: “the requested JPAYS were written when you were at NCI. NCI will have to get these for you as I do not have access to

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<sup>1</sup> Plaintiff alleges that each correspondence between Relator and Respondents to be a public records request. See Compl. (referencing nine requests: First Request: (Kite #270961281, Exhibit 1( Second Request: (Kite #272262081, Exhibit 2); Third Request: (Kite #282632131, Exhibit 2); Fourth Request: (Kite 3314364671, Exhibit 3); Fifth Request: (Kite #328740321); Sixth Request: (Kite #375317351); Seventh Request: (Kite #378401291) ; Eighth Request: (Kite # 376672651); and Ninth Request: (Kite #380926001)). For purposes of simplicity, Respondents categorizes Relator’s alleged public records requests into two categories: the first, a request for print copies of his Kites from March 25, 2021, through March 25, 2022; and, second, a request for his master file.

them. It will take some time. If you want to see me in person to discuss this request, will pass you to see me on Thursday, the 17<sup>th</sup>, let me know what you want to do.” *Id.* Following which, Relator maintains that he met with Respondent Free during his office hours, and Respondent Free informed him the request would take additional time. *Id.*

On September 22, 2023, Relator alleges he reached out to Respondent Free stating: “I still need jpays we discussed from 3-25-21 to 3-25-23.” *Id.* at P. 3. Respondent Free again responded to Relator and repeated: “jpays should have rolled over onto Viapath by now. I will need the reference numbers of all jpays you are requesting. Remember kites are not free. The charge of 5-cents will be charged and you will be expected to sign a cash slip to cover the charge.” *Id.*

On October 11, 2023, Relator communicated to Respondent Free: “Viapath does not bring up kites before July 22-2022 so I do not know the reference numbers. But I still need jpay request and responses between 3-25-21 and 3-25-22 printed off.” *Id.* Relator alleges following this request, Inspector Roman Secretary informed him: “[a]s you were told previously, these kites are from NCI, and I cannot get them either, I see you contacted the AA’s office, requesting the same documents. Please continued to contact that office for assistance in getting the documents you are approved to have per policy.” Instead, Relator reached out to Respondent Magee N. and stated: “I have been trying to get said jpay for over six months am trying to get them an (sic) just get run around.” *Id.* at P. 4. Following which, Inspector Roman Secretary responded: “[a]s you were told previously, these kites are from NCI, and cannot get them either, see you contacted the AA’s office, requesting the same documents. Please continue to contact that office for assistance in getting the documents you are approved to have per policy.” *Id.* Later, Respondent Magee N. again informed Relator: “I spoke with the inspector C. Free today. He advised me to notify you of the

open office hours every Thursday 8am-10am. Please see him then, so that he can print off the information you are requesting.”<sup>2</sup>

### **B. Relator’s Request for his “Master File”**

Relator alleges that on September 2, 2023, he contacted Respondent Corby Free and stated: “I need a copy of my master file please and thank you.” Compl. at P. 2. Following which Respondent Free answered and informed Relator that “[t]his request will need to go through the Warden’s AA office, Mr. Stevens.” *Id.* On September 8, 2023, Relator alleges he contacted Respondent Shane Stevens, stating: “I need a copy of my master file please and thank you.” *Id.* Respondent Stevens responded the same day, informing Relator that: “\* \* \* Master file records are not public record per Ohio Revised Code 5120.21(F). Thanks.” *Id. at P. 3.*

Assuming the facts as Relator alleges in his Petition, Relator fails to state a claim upon which this Honorable Court can grant relief. As such, Relator’s Petition should be dismissed.

## **II. Standard of Review**

### **A. Relator Failed to State a Claim Upon Which Relief May Be Granted as Required by Rule 12(B)(6) of the Ohio Rules of Civil Procedure.**

This Court has routinely held that dismissal of a mandamus petition is required when “it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of the relators, that they are not entitled to the requested extraordinary relief in mandamus.”” *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, ¶11 quoting *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d, 119, 120, 2002-Ohio-567, 760 N.E.2d 421. This standard is similar to the standard for Rule

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<sup>2</sup> It is unclear from the chronology of Relator’s Petition, but it appears that Relator alleges, labeled as his “Eighth Request: (Kite# 276672651), that he requested: “\* \* \* I want all and any I can get and the response thank you from 3-25-21 to 3-25-22.” Compl. at P. 4. Respondent Magee N. again responded: “please see C. Free during open office hours Thursday 8am-10am so he can print these out for you.” *Id.* Similarly unclear, Relator alleges he requested, labeled as his “Ninth Request: (Kite# 380926001),” “copy of email when you received it thank you.” *Id.*

12(B)(6) motions to dismiss for a failure to state a claim upon which relief may be granted. Under S. Ct. Prac. R. 12.01(A)(2)(b), parties to original actions, including mandamus actions, may use the Ohio Rules of Civil Procedure to supplement this Court's Rules of Practice unless they are clearly inapplicable or conflict with the Court's Rules of Practice.

A Rule 12(B)(6) motion to dismiss for failure to state a claim upon which a court may grant relief challenges the sufficiency of the complaint itself. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶11 citing *Assn. for the Defense of the Washington Local Sch. Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989). The movant may not rely upon allegations or evidence outside the complaint. *Volbers-Klarich*, 2010-Ohio-2057 at ¶11 citing Ohio Civ. R. Pro. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.*, 55 Ohio St.3d 98, 99, 562 N.E.2d 1383 (1990).

In considering a Rule 12(B)(6) motion to dismiss, one must accept the factual allegations stated within the complaint and other items properly incorporated therein as true, and the petitioner must be afforded all possible inferences. *Id.* at ¶12 (citations omitted). When it appears beyond doubt the petitioner can prove no set of facts entitling him to relief, the court must dismiss the complaint or petition. *Id.* (citations omitted).

**B. Relator's Petition Failed to State a Claim Upon Which Relief May Be Granted and Relator is not Entitled to the Requested Relief.**

Even after construing the facts stated within Robert Conant's petition in his favor, it is beyond doubt Relator Conant can prove no set of facts entitling him to relief. "This Court has consistently held that in order for a writ of mandamus to issue the relator must demonstrate (1) that he has clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law." *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983)

quoting *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). A Relator seeking such extraordinary relief bears the burden of proving the entitlement “by clear and convincing evidence.” *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶¶55-57 (citing *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967), and *State ex rel. Henslee v. Newman*, 30 Ohio St.2d 324, 325, 285 N.E.2d 54 (1972)).

In this action, Relator Conant clearly has no right to the relief for which he prayed. Mr. Conant also fails to state facts that show Respondents are under a clear legal duty to perform much of the relief that Relator Conant seeks.

### **III. Law and Argument**

#### **A. R.C. 149.43(B)(7)(a) Permits a Public Office Responsible for Producing Public Records to Require a Request to Pay in Advance the Cost Incurred for Delivery or Transmission of Public Records.**

Respondent informed Relator several times that printed copies required payment in advance. As Relator alleges, following Relator’s request for printed copies, Respondent stated: “[r]emember kites are not free. The charge of 5-cents will be charged and you will be expected to sign a cash slip to cover the charge.” Compl. at P. 3. Instead of providing the fee in advance, Relator alleges he stated: “\* \* \* I am indigent (sic) so printing should be free of carge (sic) \* \* \*.” *Id.* at P. 3.

Critically, however, the Ohio Revised Code permits a public office to require prepayment of postage or other actual delivery costs, as well as the actual cost of supplies used in mailing, delivery, or transmission. See R.C. 149.43(B)(7). Moreover, a public office complies with the Public Records Act when it identifies the cost of copies and offers to provide copies upon the payment of costs. *State ex rel. Ware v. City of Akron*, 164 Ohio St.3d 557, 2021-Ohio-624, 174 N.E.3d 724, ¶ 13-15; (stating because the city was willing to provide copies of the records once

the inmate had paid for the copies, a writ of mandamus compelling the city to provide the records was neither warranted nor necessary); see also *State ex rel. Watson v. Mohr*, 131 Ohio St.3d 338, 2012-Ohio-1006, 964 N.E.2d 1048, ¶ 2; *State ex rel. Dehler v. Mohr*, 129 Ohio St.3d 37, 2011-Ohio-959, 950 N.E.2d 156, ¶ 3 (requester was not entitled to copies of requested records because he refused to submit prepayment). Here, it is undisputed that Respondent timely answered Relator's request and informed Relator of the Five Cents per copy required for the requested records. Compl. at P. 3. After identifying the cost and offering to provide the copies accordingly, however, Relator never paid the cost, and alleged that he was indigent and the copies should be free of charge. *Id.* at P. 3.

Based upon Respondent identifying the cost of copies and offering to provide copies upon payment, Respondent has not denied Relator access to public records. Therefore, this Honorable Court should dismiss Relator's Petition.

**B. Respondent is Not in Possession of the "Kites and Grievances" Relator Requests.**

Following Relator's request for kites and grievances, Relator alleges Respondent promptly responded and informed Relator: "the requested JPAYS were written when you were at NCI. NCI will have to get these for you as do not have access to them. It will take some time. If you want to see me in person to discuss this request, will pass you to see me on Thursday, the 17<sup>th</sup>, let me know what you want to do." Compl. at P. 2. There is no duty to produce records that never existed or no longer exist. *State ex rel. Pietrangelo v. Avon Lake*, 149 Ohio St.3d 273, 2016-Ohio-5725, 74 N.E.3d 419, ¶20. Here, as Relator alleges, Respondent informed Relator that Chillicothe Correctional Institution is not in possession of the records he requested. As alleged by Relator, Respondent informed Relator that the records were maintained by "NCI," Noble Correctional Institution. Respondent offered to assist Relator in communicating his Request of NCI Custodian

of records, however, Respondent had no obligation to produce records that were not in their possession. As the records Relator requests do not exist, the Respondents do not have a legal duty to provide them, nor could they. Consequently, Relator has failed to sufficiently plead facts to show he is entitled to extraordinary mandamus relief under R.C. §149.43 and his petition must be dismissed.

**C. Relator Refused to Amend His Overly Broad Request Following Respondents Attempt to Clarify his Request.**

Relator must establish entitlement to the requested extraordinary relief by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011 Ohio 6117, 958 N.E.2d 1235, ¶ 3. As a required element of being entitled to the extraordinary relief, Relator must establish that he made a valid public records request. “[I]t is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.” *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006 Ohio 6365, 857 N.E.2d 1208, ¶ 29, quoting *State ex rel. Fant v. Tober*, 8th Dist. No. 63737, 1993 Ohio App. LEXIS 2591, 1993 WL 173743, \*1 (Apr. 28, 1993), affirmed, 68 Ohio St.3d 117, 1993 Ohio 154, 623 N.E.2d 1202 (1993). In identifying records for purposes of presenting a viable request, the Public Records Act “does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies.” *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 624, 1994 Ohio 5, 640 N.E.2d 174 (1994), citing *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (1989).

Here, Relator alleges he requested “print off from March 25, 2021 through March 25, 2022 [of] kites and grevec (sic).” Compl. at ¶ 1. Relator alleges that on the same day, Respondent Corby Free attempted to clarify the request and responded to Relator stating “[p]lease provide grievance numbers for your request.” *Id.* at P. 2. The Ohio Revised Code mandates when a “public office or



the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties." R.C. 149.43(B)(2). see also *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 11; see also *State ex rel. Huth v. Animal Welfare League of Trumbull Cty., Inc.*, 168 Ohio St.3d 574, 2022-Ohio-3583, 200 N.E.3d 241, ¶ 11-12 (in informing the requester how the public office maintains and accesses its records, office is not required to explain software and databases to requester). Here, the facts as alleged by Relator, affirm that Respondent conformed with their duty to attempt to clarify Relator's overly broad request, and even informed Relator of a path to amending his request consistent with ODRC records, i.e. listing the grievance numbers he requests instead of broad dates. Compl. at P. 2.

Following Respondent's attempt to clarify Relator's overly broad request, Relator alleges he responded: "its public record to be able to get my jpays I am indegent (sic) so printing should be free of carge (sic) don't know the kite or grievance numbers need all jpays from 3-25-21 to 3-25-22 for ongoing law suit if am able to see the jpays I can tell you want ones need if not between those dates or all jpays I have filed." *Id.* Moreover, subsequent Respondent's clarification request, Relator alleges that he communicated: "I still need jpays we discussed from 3-25-21 to 3-25-23." Notably, this request further extended the kite and grievance period Relator sought in his first communication by an additional year from "3-25-22," to "3-25-23." *Id.* at P. 3. Lastly, in Relator's requested labeled as his "Eighth Request: (Kite# 276672651), Relator makes a requested: "\* \* \* I want all and any I can get and the response thank you from 3-25-21 to 3-25-22." Compl. at P. 4.

As alleged, Relator was informed by Respondents of the path to clarifying his public records request – and offered assistance in coordinating with the proper records keeper. Instead, Relator refused to amend his request. By presenting an overly broad request, and repeating the same request following Respondents attempts to clarify, Relator failed to make a proper public records request. As such, this Honorable Court should dismiss Relator’s Complaint for failing to state a claim upon which relief can be granted.

**D. Relator’s Request for His Master File is Exempt from Release as a Public Record.**

Relator fails to state a claim upon which relief can be granted when he alleges Respondent denied his request for his “master file.” Following requesting his “master file,” Relator alleges that Respondent Stevens responded the same day, informing Relator: “\* \* \*, Master file records are not public records per Ohio Revised Code 5120.21(F) \* \* \*.” Compl. at P. 3. Relator does not allege he narrowed the request to specific portions for his “master file.”

As an inmate in Chillicothe Correction Institution, Respondent properly denied Relator’s request for his master file. Records of inmates committed to the department of rehabilitation and correction shall not be considered public records as defined in section 149.43 of the Revised Code. See R.C. 5120.21(F).

Although exception to disclose under the Public Records Act are construed against the public-records custodian and require the custodian to establish the applicability of the exception, the records custodian can overcome this burden by proving that the requested records "fall squarely within the exception." See *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St. 3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23; see also *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

In reviewing requests for Public Records, case law has clarified that the statute does not exempt from disclosure records of inmates that are not specifically mentioned in other parts of R.C. 5120.21. See *State ex rel. Barr v. Wesson*, 2023-Ohio-3028, ¶ 1; see also *State ex rel. Mobley v. Ohio Dept. of Rehab. & Correction*, 169 Ohio St.3d 39, 2022-Ohio-1765, 201 N.E.3d 853, ¶ 16-22 (holding that R.C. 5120.21(F) does not exempt certain records within the "inmate master file" specifically requested as they were not records identified in R.C. 5120.21). Here, distinguishable from *Mobley* or *Barr*, Relator requests the entirety of his master file. Compl. at P. 2. Relator's request for kites and grievances – which are a Public Record - is a separate request, to which Respondents attempted to address through clarifying the request, informing him of the copying fee and directing him to "NCI." Without any degree of specificity regarding asking for his "Master File," in conjunction with Relator's allegations that he could not be charged for copies, Relator has failed to state a claim. Relator has not alleged which portion of his "Master File" he seeks, that are not exempt. Therefore, this Honorable Court must dismiss Relator's Complaint.

**E. Relator is Not Entitled to Statutory Damages.**

Relator is not entitled to statutory damages. A requester is entitled to statutory damages under the Public Records Act if a court determines that the person responsible for the public records "failed to comply with an obligation" under R.C. 149.43(B). *State ex rel. Huth*, at ¶ 16 citing R.C. 149.43(C)(2). (holding that Relator is not entitled to damages when the Public Office responded within two weeks informing Relator how to narrow her request).

Here, as alleged by Relator, regarding Relator's request for print out copies of Kites and Grievances, Respondent answered Relator's request the same day, and informed him of the how to amend his request, that the records were kept at another institution, and that printed copies would require an upfront charge of five cents per page. Relator does not allege that he amended his request

by sending it to the correct institution, adding the grievance numbers, or paying the upfront charges. As such, Relator is not entitled to damages regarding his request for printed copies of kites and grievances.

Regarding Relator's request for his "master file," as alleged by Relator, Relator initially requested a copy of his master file to Respondent Corby Free on September 2, 2023, who informed him on September 7, 2023, that the Warden's Administrative Assistant was the proper Official to send his request to. Compl. at P. 2. Relator alleges he sent a request for his "master file" to the Warden's Administrative Assistant on September 8, 2023. *Id.* Critically, on the same day, Respondent Stevens informed Relator that master files are not a public record pursuant to Ohio Revised Code 5120.21(F). *Id.* at P. 3. Respondent timely responded and acted in good faith based upon reliable interpretation of the Ohio Revised Code. While specific records within an inmate's Master File may qualify as public records, Relator's inability to clarify, or name any of the documents within his master file in any of his correspondence with Respondent, justify Respondent's explanation to Relator that master files are exempt from public record. Therefore, Relator is not entitled to damages. *State ex rel. Fluty v. Raiff*, 2023-Ohio-3285, ¶ 1 (stating the Public Records Act did not authorize an award of statutory damages merely because respondent cited legal authority with which relator disagreed). As such, Relator is not entitled to statutory damages.

### III. Conclusion

For the foregoing reasons, Respondent respectfully requests that this Court dismiss Relator's Complaint with prejudice, assess costs to Relator, and award any other relief deemed necessary and just by this Court.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

s/Matthew Convery  
MATTHEW CONVERY (0095704)\*

*\*Lead Counsel*

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*Counsel for Respondents*

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Respondents Motion to Dismiss Complaint* has been electronically filed on December 22, 2023 and mailed to Relator Robert Conant, #A768-904, Chillicothe Correction Institution, P.O. Box 5500, Chillicothe, Ohio 45601 via U.S. mail, postage prepaid.

s/Matthew Convery  
MATTHEW CONVERY (0095704)  
Senior Assistant Attorney General