The Supreme Court of Ohio

CASE ANNOUNCEMENTS

September 25, 2019

[Cite as *09/25/2019 Case Announcements #2*, 2019-Ohio-3798.]

MERIT DECISIONS WITHOUT OPINIONS

2019-0277. State ex rel. McDougald v. Greene.

In Mandamus. Cause dismissed. Relator's motion to strike respondent's answer, motion for entry of default, and motion for leave to supplement writ of mandamus denied. Relator's motion to proceed to judgment denied as moot.

O'Connor, C.J., and Fischer, DeWine, and Donnelly, JJ., concur.

French and Stewart, JJ., would grant the motion for leave to supplement writ of mandamus.

Kennedy, J., dissents, with an opinion joined by Stewart, J., and would grant the motion for leave to supplement writ of mandamus.

KENNEDY, J., dissenting.

{¶ 1} I dissent from the majority's dismissal of relator's complaint for a writ of mandamus. Relator, Jerone McDougald, seeks a copy of the J-1ERH cell-block post orders ("post-orders record") from respondent, Larry Greene, the public-records custodian for the Southern Ohio Correctional Facility. The post-orders record declares that its purpose is "[t]o specify methods of operation when working the J-1ERH Cell block and to promote maximum safety, and security within Unit E." The post-orders record contains job descriptions, scheduling, policies, and the procedures for how to handle a number of situations, ranging from finding contraband to fighting among inmates to ensuring that inmates are using the laundry room properly. Respondent asserts that much of the information within the post-orders record may not be disclosed. But an in camera inspection of the redacted material in the post-orders record and a review of the explanations for

those redactions from respondent demonstrate that some of the redacted material fits within the definition of a public record and should be disclosed.

{¶ 2} R.C. 149.43, Ohio's Public Records Act, defines a public record as a "record[] kept by any public office." R.C. 149.43(A)(1). A "record" is "any document * * * created or received by or coming under the jurisdiction of any public office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). A "public office" is defined as "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). But some records that otherwise meet the definition of a public record are exempt from mandatory disclosure because they are excepted from the definition of "public record." This court has held that

> [e]xceptions 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. * * * A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.

State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

{¶ 3} Here, respondent relies on R.C. 149.433(B)(1), which declares that a "security record," as defined by R.C. 149.433(A)(1), is not a public record "and is not subject to mandatory release or disclosure." He further relies—although he does not explicitly say so—on R.C. 149.43(A)(1)(v), which excepts from the definition of "public record" "[r]ecords the release of which is prohibited by state or federal law." The additional statute cited by respondent, R.C. 5120.21(D), provides that the Ohio Department of Rehabilitation and Correction ("ODRC") "shall keep confidential and accessible only to its employees" certain records.

{¶ 4} In many instances, however, respondent falls short of demonstrating that the redacted material fits squarely within the exceptions that he cites. And this mandamus action is only at the answer stage. Because respondent has the burden to establish the applicability of an exception and because pursuant to R.C. 149.43(B)(3), the General Assembly affords a records custodian the

opportunity to provide "additional reasons or legal authority in defending a [mandamus] action," this court should direct respondent to present additional evidence and submit briefing. Accordingly, I would grant an alternative writ and order respondent to explain his redactions in greater detail. Because the majority seems content with respondent's incomplete explanations for his redactions and his overbroad interpretation of R.C. 149.433 and 5120.21(D), I dissent.

I. Background

{¶ 5} On January 21, 2019, relator made a public-records request seeking copies of two security-form templates from the ODRC and a copy of the post-orders record. Respondent denied relator's public-records request for the security forms and failed to provide a response to relator's request for the post-orders record.

{¶ 6} On February 21, 2019, relator filed a complaint for a writ of mandamus in this court. On March 21, 2019, respondent filed an answer to the complaint and also provided relator with a heavily redacted copy of the post-orders record. Respondent advised relator that the material that had been redacted from the post-orders record fell within the security-records exception of the Public Records Act, R.C. 149.433(A) and (B), or the exception for certain records maintained by the ODRC under R.C. 5120.21(D), which respondent referred to as "security plans."

II. Redactions from Public Records

{¶ 7} A public office is required to make available copies of a public record to any person upon request and must do so within a reasonable period of time. R.C. 149.43(B)(1). "When making that public record available * * * the [records custodian] * * * shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial * * * ." *Id*. If a request is denied "in part or in whole," the records custodian must provide the requester with an explanation. R.C. 149.43(B)(3). That explanation originally given to a requester "shall not preclude" the records custodian from "relying upon additional reasons or legal authority in defending" a mandamus action. *Id*.

{¶ 8} "Mandamus is [an] appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *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; *see also* R.C. 149.43(C)(1)(b). When interpreting R.C. 149.43, we resolve " 'any doubt * * * in favor of disclosure.' " *Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, at ¶ 5, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

To meet his burden, the records custodian must prove that the requested records "fall squarely within the exception" that is being cited to for purposes of withholding the requested record. *Jones-Kelley* at ¶ 10. Therefore, this court has an obligation to grant relator's request for a writ of mandamus unless respondent proves that all the material that has been redacted from the public record falls squarely within an exception.

III. Respondent's redactions are underexplained and overbroad

{¶ 9} In his answer to the complaint and the designation on the redacted post-orders record, respondent relies on the security-record exception in R.C. 149.433(A) and (B) and what he calls the "security plan" exception in R.C. 5120.21(D) as support for the decision to redact material from the post-orders record that was provided to relator. However, respondent does not specify which provisions within R.C. 149.433(A) and (B) or R.C. 5120.21(D) that he is relying on.

{¶ 10} R.C. 149.433(B)(1) provides that a "record kept by a public office that is a security record is not a public record under [R.C. 149.43] and is not subject to mandatory release or disclosure under that section." R.C. 149.433(A) sets forth three main categories of "security records"—two of which will be discussed below—with one of those two categories having three subcategories. Accordingly, a "security record" includes "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," R.C. 149.433(A)(1), or that is "assembled, prepared, or maintained by a public office * * * to prevent, mitigate, or respond to acts of terrorism," R.C. 149.433(A)(2). R.C. 149.433(A)(2) further categorizes security records as the "portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and communication codes or deployment plans of law enforcement or emergency response personnel," R.C. 149.433(A)(2)(a), "[s]pecific intelligence information and specific investigative records shared by * * * law enforcement agencies," R.C. 149.433(A)(2)(b), and national security records classified under federal executive order, R.C. 149.433(A)(2)(c). Respondent does not say which of these categories—or subcategories—apply to any of the redactions.

{¶ 11} Just as respondent's specificity is lacking when using R.C. 149.433 as the reason for redacting material from the post-orders record, respondent also fails to state which of the seven categories of records under R.C. 5120.21(D) applies to the redacted material. A review of the redacted material from the post-orders record in light of the provisions of R.C. 5120.21(D), which

lists the information that is to be kept confidential by the ODRC and the officers of its institutions, demonstrates that the following provisions are not applicable: R.C. 5120.21(D)(1) ("[a]rchitectural, engineering, or construction diagrams, drawings, or plans of a correctional institution"); 5120.21(D)(3) ("[s]tatements made by inmate informants"); 5120.21(D)(4) (records maintained by the department of youth services); 5120.21(D)(5) (victim-impact statements); 5120.21(D)(6) (information about groups that pose a security threat); and 5120.21(D)(7) (recorded conversations of monitored inmate telephone calls). Therefore, that leaves R.C. 5120.21(D)(2), which pertains to "[p]lans for hostage negotiation, for disturbance control, for the control and location of keys, and for dealing with escapes."

{¶ 12} In *State ex rel. Plunderbund Media v. Born*, this court held that the Department of Public Safety's records documenting direct threats against the governor met the definition of "security records" under R.C. 149.433(A). 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶ 30. However, a "department * * * of state government cannot simply label a criminal or safety record a 'security record' and preclude it from release under the public-records law, without showing that it falls within the definition of R.C. 149.433." *Id.* at ¶ 29. Likewise, a department of state government cannot simply label a record a "security plan" within the meaning of R.C. 5120.21(D) without showing that it falls within an express provision of the statute.

{¶ 13} A review of the redacted material, in light of the viable statutory provisions in play, reveals that respondent failed to give adequate reasons for the redactions and that the redacted information from the post-orders record does not squarely fall within any of the definitions, categories, or subcategories provided in R.C. 149.433(A) and (B) or R.C. 5120.21(D).

{¶ 14} Respondent's redactions that are based on R.C. 149.433(A) and (B) contain no explanation beyond "security record." As an example, under the definitions section of the post-orders record, the title, "ROLES AND AUTHORITY OF UNIT STAFF" (capitalization sic) and the definition following it are unredacted. But in other places on the same page of the document, the term "unit staff" is redacted. And in another place on the same page, "unit staff" is not redacted. In the margin of the page, respondent offers the following reason for his redaction: "All redactions on this page are security records per R.C. 149.43(A) & (B)." Assuming that respondent meant to cite R.C. 149.433(A) and (B)—which provide the definition for a "security record"—and declare that the redactions on that page are not public records, it is difficult to see how the term "unit staff" must be redacted as a security record. The redacted part of that page in the post-orders record does

not seem to contain "information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage." R.C. 149.433(A)(1). Throughout the document, there are numerous sections that are almost completely redacted even though the sections seem to involve nothing more than recordkeeping. Other redactions that are attributed to R.C. 149.433(A) and (B) include information pertaining to the distribution of copies of cell-inspection sheets and when information about an inmate's sexual orientation or gender identity may be shared.

{¶ 15} Many of respondent's redactions are also overbroad in using R.C. 5120.21(D) as authority. The only provision of that section that seems to be applicable is R.C. 5120.21(D)(2), which pertains to "[p]lans for hostage negotiation, for disturbance control, for the control and location of keys, and for dealing with escapes." But respondent uses it as the reason to redact the entire section about passes, which does not fit into any of the categories given in R.C. 5120.21(D)(2). Similar redactions in the post-orders record are made in sections discussing recreation, range procedures, and processing inmates in or out of cell block J-1. Other procedures, ranging from who conducts sick call and the closing time for showers, are redacted based on R.C. 5120.21(D) for no obvious reason.

{¶ 16} Further, respondent cites R.C. 149.433(A) and (B) and R.C. 5120.21(D) as the basis for redacting the fact that certain procedures are logged or recorded into reports. The portions of the post-orders record revealing that those logs and reports exist are not in and of themselves security records, regardless of whether the actual documents logging the activities are security records. These redactions seem aimed at keeping the public from knowing that certain records exist and therefore run counter to the purpose behind the Public Records Act, "to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997).

IV. Relator's incarceration does not affect his right to view these records

{¶ 17} " ' "[P]ublic records are the people's records, and * * * the officials in whose custody they happen to be are merely trustees for the people." ' " *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107, 109, 341 N.E.2d 576 (1976), quoting *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960), quoting 35 Ohio Jurisprudence, Inspection of Records: Generally, Section 41, at 45 (1934). That is why, when interpreting the Public Records Act, we resolve " 'any doubt * * * in favor of disclosure.' " *Jones–Kelley*, 118 Ohio St.3d 81,

2008-Ohio-1770, 886 N.E.2d 206, at ¶ 5, quoting *Hamilton Cty.*, 75 Ohio St.3d at 376, 662 N.E.2d 334.

{¶ 18} R.C. 149.43(B)(1) provides that "[u]pon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to *any person*." (Emphasis added.) Although relator is incarcerated, he has the same right to access records documenting prison procedures as any other person. The only restriction to a prisoner's right to access public records appears in R.C. 149.43(B)(8), which limits an incarcerated person's ability to review certain criminal-investigatory files.

V. Conclusion

{¶ 19} Respondent has the burden to prove that the redacted material falls squarely within one of the statutory exceptions. To this point, respondent has provided only imprecise statutory citations in the margins of the redacted post-orders record and a general reference to security records or security plans in his answer. Because R.C. 149.43(B)(3) affords a records custodian the opportunity to supplement his original decision regarding the redaction of material with "additional reasons or legal authority," I would grant an alternative writ and order respondent to provide additional reasoning for his redactions. Therefore, I dissent to the dismissal of the cause.

STEWART, J., concurs in the forgoing opinion.