

THE STATE EX REL. BARR v. WESSON.

[Cite as *State ex rel. Barr v. Wesson*, 173 Ohio St.3d 94, 2023-Ohio-3028.]

Public records—Inmate demonstrated clear legal right to access requested records if they exist—Writ of mandamus granted in part.

(No. 2022-1044—Submitted May 16, 2023—Decided August 31, 2023.)

IN MANDAMUS.

Per Curiam.

{¶ 1} Relator, Harry M. Barr, seeks a writ of mandamus ordering respondent, James Wesson, to provide documents that Barr requested under Ohio’s Public Records Act, R.C. 149.43.

{¶ 2} Wesson, the institutional public-information officer at Grafton Correctional Institution (“GCI”), produced some of the records that Barr, an inmate there, requested after Barr filed his amended complaint. As to the unfulfilled requests, Wesson contends that Barr failed to sufficiently specify what records he wanted and that Barr’s requests for inmate records predated *State ex rel. Mobley v. Ohio Dept. of Rehab. & Corr.*, 169 Ohio St.3d 39, 2022-Ohio-1765, 201 N.E.3d 853, which Wesson asserts ushered in a “significant change in the law” relating to certain inmate records under R.C. 5120.21. Wesson argues that because inmate kites were not considered public records before *Mobley*, Barr’s pre-*Mobley* requests for inmate records are unenforceable.

{¶ 3} Barr has also filed a complaint for a temporary restraining order and preliminary injunction and has moved to strike the affidavit that Wesson filed as evidence in this original action.

{¶ 4} For the reasons that follow, we grant Barr a limited writ of mandamus as to the prison-kite logs predating *Mobley*, order Wesson to certify whether the

email messages that Barr requested exist and to produce them if they do, deny the writ as to Barr's request for a list of cross-gender employees, dismiss Barr's complaint for a temporary restraining order and preliminary injunction, and deny his motion to strike.

I. BACKGROUND

A. *First request*

{¶ 5} In mid-April 2022, Barr sent a kite through the institution's electronic kiting system ("KIOSK") to the "Deputy Warden of Operations and Deputy Warden of Special Services" asking for the name of the institution's current public-records officer. Barr avers that the deputy warden of operations' secretary responded that Wesson was the "acting public records person."

{¶ 6} Later in April, Barr used KIOSK to submit a public-records request for a copy of his printed log of kites and related documents that he had sent since January 1, 2019. Wesson responded to Barr within a week through KIOSK, stating that he was not the institution's public-records officer. After this initial exchange, Barr asked "the Warden on the yard" to whom he should address his public-records request; the warden told Barr to send the request to the warden's office and that he "would cut and paste [Barr's] request to the person responsible," whom the warden identified as "Michelle," his secretary.

{¶ 7} Barr "attempted" to send his records request to Michelle through KIOSK, but he was unable to do so. On May 20, 2022, Barr sent his request through the "institutional U.S. mail system" to Michelle. His amended complaint alleges that Michelle forwarded Barr's public-records request to Wesson and that on May 25, Wesson told Barr to allow him "a couple of weeks to comply with the request."

{¶ 8} More than two weeks elapsed without a response from Wesson, so Barr sent Wesson an electronic kite asking for an update. Shortly thereafter, Wesson "summoned" Barr to his office to "make sure of what" Barr was requesting, and Barr alleges that "[t]o make things easier * * * [he] simplified his request to

just the printout log of his kites on the KIOSK.” On July 14, Barr sent Wesson an electronic kite indicating that he was waiting for Wesson to produce the requested kite logs, and within the week, Wesson replied, “I am actively working on your first request.”

B. Second request

{¶ 9} On July 5, Barr sent a second request for public records through KIOSK, requesting “a list of all cross gender employe[es] at GCI and GRC [Grafton Reintegration Center], and copies of all emails from [a] Ms. Osborne to the DWSS [Deputy Warden of Social Services], Ms. Freeman, DWO [Deputy Warden of Operations], [a] Mr. Reynolds, IT TECH, [a] Mr. Myers and [a] Drisendorff, Warden Foley, and Dr. Amy Biggs, Columbus from June 1 to July 8, 2022.” Wesson apparently responded to Barr’s second request within a week, stating that he was not sure how to acquire the “information” but that he would investigate the matter. On July 25, Barr requested an update through KIOSK, and Wesson did not reply. Barr sent Wesson another electronic kite on July 26 regarding the second request, but Wesson did not respond.

{¶ 10} On September 1, Wesson provided Barr with “*a portion*” of the records responsive to his first public-records request but did not explain why the remaining records identified in that request had not been produced or why Wesson had not responded to Barr’s second request. (Emphasis sic.)

C. This original action

{¶ 11} On August 22, Barr filed his complaint for a writ of mandamus which he amended on November 16. On September 1, Wesson “hand-delivered” to Barr 20 pages of logs of kites sent between March 8, 2020, and August 1, 2022, and a copy of a “personal a/c withdrawal check out-slip.” Barr states that Wesson provided an additional “35 pages of miscellaneous non-requested records,” but, according to Barr, these 35 pages “have no bearing” on his mandamus claim.

{¶ 12} We denied Wesson’s motion to dismiss the complaint. 168 Ohio St.3d 1451, 2022-Ohio-3903, 198 N.E.3d 102. In December 2022, we struck Wesson’s untimely answer to Barr’s amended complaint. 168 Ohio St.3d 1474, 2022-Ohio-4456, 199 N.E.3d 554. On January 25, 2023, we granted an alternative writ and ordered the submission of evidence and briefing. 169 Ohio St.3d 1419, 2023-Ohio-152, 201 N.E.3d 903. Barr filed the evidence described above, and Wesson submitted his affidavit as evidence that he had provided Barr “with a portion of [the records responsive to] his April 2022 [request] for a Kiosk printout log of kites for jpay electronic kites after June 1, 2022.” Wesson further attests that there are no records responsive to Barr’s second public-records request.

II. ANALYSIS

A. *Motion to strike*

{¶ 13} Barr asks this court to strike Wesson’s affidavit, arguing that paragraphs five and six of the affidavit should be stricken because they are false. In the fifth paragraph, Wesson states: “In April 2022 * * * Barr[] made a verbal public records request (“PRR”) for a Kiosk printout log of Barr’s kites from January 1, 2019 to April 2022.” Wesson further attests, “I advised Relator that I do not have access to that information because I was not the warden’s administrative assistant or the public information officer at that time.” The sixth paragraph reasserts that on May 20, 2022, Wesson was not the public-information officer at GCI and that consequently, he did not have access to the requested documents. Wesson further avers, “Harry Barr kept making duplicate records requests upon the wrong person.” Wesson continues:

In addition, I further advised Relator in late July 2022 to revise his PRR for the Kiosk printout log for any relevant kites after June 1, 2022. Specifically, I advised Harry Barr that he would need to provide me a reference number for which kites he was looking for

because his initial request of wanting all kites since January 1, 2019 was overly broad and difficult to search without the reference numbers. I explained to Relator to revise and resend his request by providing me with the reference numbers to the kites he was seeking and that I would attempt to locate them. I was trying to help Relator even though I was not the public information officer prior to late July 2022. Thereafter, Harry Barr never complied with my request and never assisted me with the requested reference numbers in order to accomplish the completion of accurately searching for his electronic jpay kites.

{¶ 14} To be admissible, affidavits must be based “on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit.” S.Ct.Prac.R. 12.06; *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 15. Because Barr has not challenged Wesson’s personal knowledge of the events he describes, we deny his request to strike Wesson’s affidavit.

B. Complaint for temporary restraining order and preliminary injunction

{¶ 15} On February 21, 2023, Barr filed a complaint for a temporary restraining order and preliminary injunction pursuant to Civ.R. 65(A) and (B), seeking a judgment ordering Wesson to refrain from retaliating against him. Barr argues that Wesson and other GCI staff are retaliating against him for exercising his constitutional, statutory, and Department of Rehabilitation and Correction (“DRC”) policy rights. Wesson did not respond to the complaint for a temporary restraining order.

{¶ 16} Article IV, Section 2 of the Ohio Constitution grants us original jurisdiction over the following types of cases: quo warranto, mandamus, habeas corpus, prohibition, procedendo, “any cause on review as may be necessary to its

complete determination,” and cases involving the practice of law. We do not have original jurisdiction under the Ohio Constitution over actions in the nature of declaratory judgment and/or injunction. *See State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 11 (“[N]either the Supreme Court of Ohio nor the Ohio courts of appeals have original jurisdiction over claims for declaratory judgment”); *see also State ex rel. Duncan v. Am. Transm. Sys., Inc.*, 166 Ohio St.3d 416, 2022-Ohio-323, 186 N.E.3d 800, ¶ 7 (“Because the Constitution does not grant the courts of appeals original jurisdiction to * * * grant declaratory, injunctive, or compensatory relief, the court of appeals correctly dismissed those aspects of [the] complaint”). We do, however, have “such jurisdiction as ancillary to other *appropriate* relief.” (Emphasis sic.) *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 187, 648 N.E.2d 808 (1995). A claim ancillary to other appropriate relief is a “claim that is collateral to, dependent on, or auxiliary to another claim, such as a state-law claim that is sufficiently related to a federal claim to permit federal jurisdiction over it.” *Black’s Law Dictionary* 312 (11th Ed.2019).

{¶ 17} Barr’s complaint for a preliminary injunction does not allege a claim ancillary to his mandamus claim. Rather, this complaint is more akin to a civil action claiming a deprivation of rights under 42 U.S.C. 1983. We therefore dismiss Barr’s complaint for a temporary restraining order and preliminary injunction.

C. Mandamus

1. Preliminary issue

{¶ 18} Before turning to the main issue presented, we consider the issue whether Barr delivered a proper records request to the institution’s public-records officer. Wesson argues that Barr’s mandamus claim must fail because his amended complaint “fails to specifically plead or demonstrate that he delivered his original public records requests to the proper Public Information Officer.” The amended

complaint alleges that Barr asked the name of the new public-information officer and was informed that Wesson was the individual who was acting as the public-records custodian at GCI. Wesson filed a motion for leave to file an answer to Barr's amended complaint along with an answer, but this court sua sponte struck both documents. 168 Ohio St.3d 1474, 2022-Ohio-4456, 199 N.E.3d 554. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings." Civ.R. 8(D); see *Rhoden v. Akron*, 61 Ohio App.3d 725, 727, 573 N.E.2d 1131 (9th Dist.1988) ("It is elementary in the law of pleading that an admission in a pleading dispenses with proof and is equivalent to proof of the fact"). Accordingly, we do not consider any denials Wesson made in his stricken answer.

{¶ 19} We reject Wesson's argument that he had no duty to respond to Barr's requests until he was promoted to the position of the warden's administrative assistant in late July 2022. In addition to the admitted allegation that Barr was instructed to send his request to Wesson, Wesson followed up with Barr regarding his requests before Barr filed this mandamus action in August 2022. Although Wesson attests that he informed Barr that he was "not the warden's administrative assistant or the public information officer," Wesson evidently voluntarily filled the role of public-information officer by considering Barr's records requests. According to Wesson's affidavit, he instructed Barr "to revise and resend his request by providing [Wesson] with the reference numbers to the kites he was seeking, adding that Wesson "*would attempt to locate them.*" (Emphasis added.) Wesson's affidavit thus belies his claim that Barr failed to deliver his public-records request to the appropriate officer at GCI. Wesson concedes that he was the "Public Information Officer" for GCI beginning in "late July 2022," and thus, Barr properly named Wesson as the respondent when he filed this original action in August 2022.

2. Request for prison-kite logs

{¶ 20} R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request “within a reasonable period of time.” Mandamus is an appropriate remedy by which to compel a public office’s compliance with the Public Records Act. *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6.

{¶ 21} To be entitled to the writ, Barr must demonstrate that he has a clear legal right to the requested relief and that Wesson has a clear legal duty to provide the relief. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 10. However, producing the requested records to a relator in a public-records mandamus case moots the claim. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22.

{¶ 22} Barr acknowledges that after he filed this mandamus action, Wesson produced some of the requested prison-kite logs. Barr’s evidence demonstrates that Wesson produced Barr’s kite logs that were sent between March 8, 2020, and August 1, 2022. Therefore, Barr’s first request is partially moot. *State ex rel. McDougald v. Greene*, 161 Ohio St.3d 130, 2020-Ohio-3686, 161 N.E.3d 575, ¶ 9.

{¶ 23} Barr’s request for prison-kite logs sent between January 2019 and March 2020 is not moot. But Wesson argues that before this court’s decision in *Mobley*, 169 Ohio St.3d 39, 2022-Ohio-1765, 201 N.E.3d 853, on June 1, 2022, prison kites were not considered public records. Wesson contends that *Mobley* announced “a significant change in the law” and that Barr’s requests for prison-kite logs between the dates of January 1, 2019, and March 8, 2020, are therefore unenforceable.

{¶ 24} *Mobley* involved a public-records request made to DRC for a paper copy of an “inmate master file,” which included “ ‘kites and the charges and decisions from inmate-disciplinary-infraction cases.’ ” *Id.* at ¶ 2, 4. DRC did not

produce any records responsive to inmate Alphonso Mobley’s request and argued that the documents Mobley was seeking qualified as “records of inmates” that are exempt from public-records disclosure under R.C. 5120.21(F). *Id.* at ¶ 13. We held that under R.C. 5120.21(F), kites are “public records subject to disclosure under R.C. 149.43” because they “document operations and activities of the prison, namely, the institution’s communications with [inmates].” *Id.* at ¶ 26. And because “a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction,” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994), our decision in *Mobley* did not change the law in this regard. Rather, *Mobley* 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. *Id.* at ¶ 23-25.

{¶ 25} And similar to the records at issue in *Mobley*, the records that Barr requested here include prison-kite logs, which “document operations and activities of the prison, namely the institution’s communications” with Barr. *Id.* at ¶ 26. Wesson has not argued that the records that Barr requested fall within one of the categories of “records of inmates” identified in R.C. 5120.21 or under any other exception to the Public Records Act.

{¶ 26} Barr thus has a clear legal right to disclosure of all the prison-kite logs relating to his account that he requested, and Wesson had a clear legal duty to provide the records. By failing to provide Barr with the logs of kites sent between January 2019 and March 8, 2020, Wesson has breached his duty under R.C. 149.43(B)(1). We therefore grant a writ of mandamus ordering Wesson to produce the outstanding prison-kite logs.

3. List of cross-gender employees and email messages

{¶ 27} “Requests for information and requests that require the records custodian to create a new record by searching for selected information are improper

requests under R.C. 149.43.” *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.3d 1208, ¶ 30. In his amended complaint, Barr asked for “a list of all cross gender employe[es] at GCI and GRC” in addition to emails sent between certain identified personnel. In his affidavit, Wesson states that there is no list of all cross-gender employees at the institution. Barr’s request for “a list” of cross-gender employees is a request for information to be compiled and summarized in a newly created document and is therefore improper, which Barr concedes. *See State ex rel. Griffin v. Sehlmeier*, 165 Ohio St.3d 315, 2021-Ohio-1419, 179 N.E.3d 60, ¶ 12.

{¶ 28} But Barr’s request for copies of “all emails from Ms. Osborne to the DWSS, Ms. Freeman, DWO, Mr. Reynolds, IT TECH, Mr. Myers and Drisendorff, Warden Foley, and Dr. Amy Biggs, Columbus” from June 1 to July 8, 2022, is a request for records. Barr asserts that Wesson has not produced any of the requested emails or explained to Barr why the emails are exempt from disclosure. In Wesson’s affidavit, he indicates that he received Barr’s second public-records request and that he “advised [Barr] that there is no such information or a list of all cross gender employees at” the institution. Wesson’s affidavit says nothing about Barr’s requests for the specified emails.

{¶ 29} In the absence of a justification for Wesson’s withholding the requested emails, assuming they exist, Barr is entitled to their production. Thus, we grant a writ of mandamus ordering Wesson to produce the requested emails or to certify that they do not exist. *See State ex rel. Sultaana v. Mansfield Corr. Inst.*, 172 Ohio St.3d 438, 2023-Ohio-1177, 224 N.E.3d 1086, ¶ 43.

4. Statutory damages

{¶ 30} Barr asserted a claim for statutory damages in his original complaint for a writ of mandamus but did not include the claim in his amended complaint. Because an amended complaint supersedes the first-filed complaint and Barr did

not ask for statutory damages in his amended complaint, he has abandoned his claim for statutory damages and we decline to address it.

III. CONCLUSION

{¶ 31} For the foregoing reasons, we deny the motion to strike Wesson’s affidavit and dismiss Barr’s complaint for a temporary protection order and preliminary injunction. However, we hold that Barr has demonstrated that he has a clear legal right to access the prison-kite logs and specified email messages if they exist and that Wesson has a clear legal duty to produce them. Accordingly, we grant a writ of mandamus ordering Wesson to provide Barr with the public records responsive to his April and July 2022 public-records requests. We deny the writ of mandamus as to Barr’s request for a list of cross-gender employees.

Writ granted in part
and denied in part.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER,
and DETERS, JJ., concur.

Harry M. Barr, pro se.

Dave Yost, Attorney General, and John H. Bates, Assistant Attorney
General, for respondent.
