

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Barr v. Wesson*, Slip Opinion No. 2023-Ohio-3080.]

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SLIP OPINION NO. 2023-OHIO-3080

THE STATE EX REL. BARR v. WESSON.

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Mandamus—Public-records requests—R.C. 149.43—Warden’s assistant provided records in response to inmate’s public-records request—Inmate failed to carry his burden to show that warden’s assistant had additional public records responsive to inmate’s request—Writ and request for statutory damages denied.

(No. 2022-1450—Submitted May 16, 2023—Decided September 5, 2023.)

IN MANDAMUS.

Per Curiam.

I. INTRODUCTION

{¶ 1} This is an original action in mandamus brought under Ohio’s Public Records Act, R.C. 149.43, by relator, Harry M. Barr, an inmate at the Grafton

Correctional Institution (“GCI”), against respondent, James Wesson, the warden’s assistant at GCI. Barr seeks a writ of mandamus to compel Wesson to produce the job description for, and the certification or license held by, Jennifer A. Whitten, a GCI employee. Barr also seeks statutory damages for Wesson’s failure to promptly make those records available to him.

{¶ 2} We granted an alternative writ and set a schedule for the submission of evidence and briefing. 169 Ohio St.3d 1440, 2023-Ohio-482, 203 N.E.3d 728. Both parties have submitted evidence, and Barr has submitted a merit brief. Barr has also filed (1) a complaint for a temporary restraining order (“TRO”) and a preliminary injunction, (2) a motion for an order pursuant to S.Ct.Prac.R. 4.01(A), (3) a motion to “dismiss” his motion for an order pursuant to S.Ct.Prac.R. 4.01(A), and (4) a motion to amend the evidence.

{¶ 3} For the reasons that follow, we dismiss Barr’s complaint for a TRO and a preliminary injunction, consider his motion to dismiss his motion for an order pursuant to S.Ct.Prac.R. 4.01(A) as a motion to withdraw the earlier filed motion and grant it, and grant his motion to amend the evidence. We also deny the writ of mandamus and Barr’s request for statutory damages.

II. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 4} On September 21, 2022, Barr electronically transmitted a kite to GCI Warden Keith Foley requesting the full names, job titles, job descriptions, and certifications of “A-4 CSOP person[nel] starting with Ms. Whitten and those under her authority.” On September 26, Barr submitted a nearly identical electronic request to Wesson.

{¶ 5} The warden responded on October 3, informing Barr that the request needed to be sent to Wesson and that he would forward it to Wesson. On October 7, Wesson sent Barr a message stating that he was in the process of collecting the requested information. On October 13, Wesson provided Barr with a two-page document containing the full names, job titles, and job descriptions of four GCI

employees, including Whitten. Wesson’s response did not mention Barr’s request for the certifications held by those employees.

{¶ 6} In a kite dated October 22, Barr informed Wesson that he had failed to provide the requested certifications and that the job descriptions he had provided consisted of generic Ohio Department of Rehabilitation and Correction (“DRC”) “web description[s]” of what the job duties may include. Additionally, Barr narrowed his request to seek only Whitten’s certification and specific job duties. Wesson acknowledged receipt of the narrower request and told Barr, “We will have a clear answer for you early next week.” But in his mandamus complaint filed in November 2022, Barr claimed that he had not received any response to his October 22 request.

III. PRELIMINARY MATTERS

A. Complaint for a TRO and a preliminary injunction

{¶ 7} While this case was pending, Barr filed in this case and in Supreme Court case Nos. 2022-1044 and 2023-0113 a document styled as an “instantner” “complaint” for a TRO and a preliminary injunction pursuant to Civ.R. 65(A) and (B). The complaint identifies Foley as an additional respondent even though Barr has not moved this court to add Foley as a party.

{¶ 8} In his complaint for a TRO and a preliminary injunction, Barr alleges that Wesson and Foley have retaliated against him for filing his public-records request and commencing an unrelated declaratory-judgment action and an unrelated small-claims action. Barr alleges that Wesson and Foley caused his television to be confiscated as contraband and that Foley failed to tell unit staff to make Barr available for a telephonic pretrial conference in his small-claims case. Barr suggests that those actions are part of a larger pattern of retaliation by Wesson, Foley, and other prison staff. He seeks a TRO or a preliminary injunction to restrain Wesson and Foley from committing further retaliatory acts against him.

{¶ 9} On April 5, 2023, we dismissed an identical complaint for a TRO and a preliminary injunction in another case involving the same parties. *See State ex rel. Barr v. Wesson*, 169 Ohio St.3d 1484, 2023-Ohio-1116, 206 N.E.3d 724. Because this court does not have original jurisdiction over actions for injunctive relief, *see* Article IV, Section 2(B)(1), Ohio Constitution, and because Barr has identified no other basis for our jurisdiction on the matter, we dismiss the complaint for a TRO and a preliminary injunction in this case as well.

**B. Motion for an order pursuant to S.Ct.Prac.R. 4.01(A)
and motion to dismiss it**

{¶ 10} On March 7, 2023, Barr filed his evidence and an affidavit supporting the evidence. He filed with those documents a motion for an order directing Wesson to produce three kites he claimed were relevant to this mandamus action. The following week, Barr filed a motion to “dismiss” the motion for an order because he had obtained copies of the kites he sought. In essence, the later motion seeks to withdraw the earlier motion. We thus treat the later motion as a motion to withdraw and grant that motion.

C. Motion to amend the evidence

{¶ 11} On March 13, 2023, Barr filed a motion to amend his evidence to include four kites, which he attached to the motion. He also attached to the motion an affidavit in which he states that he has personal knowledge of the attached kites, that they are complete and accurate copies of the kites, and that he was unable to obtain the kites before filing his other evidence. In the interest of justice, we grant this unopposed motion.

IV. ANALYSIS OF BARR’S MANDAMUS CLAIM

{¶ 12} Mandamus is an appropriate remedy to compel compliance with Ohio’s Public Records Act. R.C. 149.43(C)(1)(b). As the relator, Barr bears the burden of production to plead and prove facts showing that he requested a public record pursuant to R.C. 149.43(B)(1) and that the records custodian did not make

the record available to him. *See Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 26. He also bears the burden of persuasion to establish his entitlement to the writ by clear and convincing evidence. *See id.*

{¶ 13} In this case, Wesson responded to Barr's initial public-records request on October 13, 2022, and provided Barr with the names, job titles, and lists of job duties for four GCI employees, including Whitten. However, the document Wesson provided to Barr stated the following with respect to each employee: "JOB DUTIES IN ORDER OF IMPORTANCE (These duties are illustrative only. Incumbents may perform some or all of these duties or other job-related duties as assigned.)" (Capitalization sic.) Wesson's letter did not address Barr's request for the employees' certifications.

{¶ 14} Barr avers that the job descriptions that Wesson provided "were nothing more than what one would find on the [DRC] website as if looking for a job giving that description as what it *may* entail, *not*, what that person's job description actually entails." (Boldface and emphasis sic.) He further claims that when he asked about the certifications, Wesson instructed him to send another kite and Wesson would take care of it. Consistent with that instruction, Barr sent another electronic kite to Wesson on October 22, limiting his request to records related to Whitten. Specifically, Barr requested Whitten's "certification, i.e., a] copy of her L[icensed] P[rofessional] C[linical] C[ounselor] License," and a list of her "specific job duties * * * at GCI, i.e., her day-to-day operations; does she do interviews and with who and in what mann[e]r; does she hold classes herself and in what capacity; does she have one-on-one interviews and what they may entail; open office days and hours, etc." Approximately one week later, Wesson responded that he would have "a clear answer" for Barr "early next week." Barr avers that "[e]arly next week has not arrived."

{¶ 15} In an affidavit Wesson filed in this mandamus proceeding, he attests that the prison has no other documents in its possession that are responsive to Barr’s public-records request regarding Whitten’s certification and specific job duties. A public office has “ ‘no duty to create or provide access to nonexistent records.’ ” *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 25, quoting *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 15.

{¶ 16} Barr bears the burden of proving by clear and convincing evidence that the records he requested exist and are public records maintained by the prison. *See State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 1170, ¶ 8. However, he has offered no evidence to rebut Wesson’s averment that GCI possesses no other records responsive to his request. Therefore, Barr has failed to establish that he is entitled to a writ of mandamus. *See State ex rel. McDougald v. Greene*, 160 Ohio St.3d 82, 2020-Ohio-2782, 153 N.E.3d 75, ¶ 9 (holding that a relator who failed to rebut the affidavit of a records custodian stating that the requested records did not exist was not entitled to a writ of mandamus). We therefore deny the writ.

V. STATUTORY DAMAGES

{¶ 17} Barr seeks statutory damages for Wesson’s failure to comply with the Public Records Act, based on Wesson’s failure to timely provide Whitten’s certification and job description as requested on October 22, 2022, or to offer any legal authority as to why those documents have not been made available.

{¶ 18} R.C. 149.43(C)(2) allows a relator to recover \$100 for each business day during which a records custodian failed to comply with the Public Records Act, starting from the day the mandamus action was filed, up to a maximum of \$1,000. The statute provides that a “requester shall be entitled to recover” statutory damages if (1) he has submitted a written request for public records “by hand delivery, electronic submission, or certified mail * * * to the public office or person

responsible for the requested public records,” (2) the request “fairly describes the public record or class of public records,” and (3) “a court determines that the public office or the person responsible for public records failed to comply with an obligation” imposed by R.C. 149.43(B). R.C. 149.43(C)(2).

{¶ 19} Barr’s transmission of his public-records request by an electronic-kite system qualifies as an electronic submission under R.C. 149.43(C)(2), *see State ex rel. Griffin v. Sehmeyer*, 165 Ohio St.3d 315, 2021-Ohio-1419, 179 N.E.3d 60, ¶ 21, and Barr’s request fairly describes the public records that he seeks. Therefore, he has satisfied the first two elements of his claim for statutory damages.

{¶ 20} However, Barr cannot satisfy the third element of his claim— i.e., that Wesson has failed to comply with an obligation imposed by R.C. 149.43(B)— because Wesson has now satisfied his duty under R.C. 149.43(B)(3) by attesting that GCI has no other records responsive to Barr’s request. *See State ex rel. Ware v. Giavasis*, 160 Ohio St.3d 383, 2020-Ohio-3700, 157 N.E.3d 710, ¶ 11-12 (holding that statutory damages are not warranted for a public-records custodian’s delay in justifiably denying a public-records request, because R.C. 149.43(B)(3) does not impose a timeliness requirement). We therefore deny Barr’s request for statutory damages.

VI. CONCLUSION

{¶ 21} Based on the foregoing, we dismiss Barr’s complaint for a TRO and a preliminary injunction, grant his motion to withdraw his March 7, 2023 motion for an order pursuant to S.Ct.Prac.R. 4.01(A), and grant his motion to amend the evidence and deem the record supplemented. We also deny the writ of mandamus and Barr’s request for statutory damages.

Writ denied.

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

SUPREME COURT OF OHIO

Harry M. Barr, pro se.

Dave Yost, Attorney General, and George Horváth, Assistant Attorney
General, for respondent.
