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## State ex. rel. WTOL TV, L.L.C. v. Fair, L.P., 2023-Ohio-4593

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**State ex. rel. WTOL TV, L.L.C. v. Fair, L.P.**  
**2023-Ohio-4593**

I. INTRODUCTION

The Ohio Public Records Act “requires ‘public office[s]’ or ‘person[s]’ responsible for public records’ to provide public records in response to requests.”<sup>1</sup> When the case *State ex. rel. WTOL TV, L.L.C. v. Fair, L.P.* came before the Ohio Supreme Court, the issue was whether the Cedar Point Police Department (CPPD) was required to submit various records to three Ohio media outlets that submitted public records requests.<sup>2</sup> Cedar Point is a park owned by the Cedar Fair Company (Fair) and Fair is protected by its own Cedar Point Police Department.<sup>3</sup> Fair is a private company, and, as such, the CPPD might not ordinarily be considered a “public office” or a “person responsible for public records,” which is why Fair argued that they and the CPPD do not have to follow the Ohio Public Records Act.<sup>4</sup>

However, the definition of “public office” from the Ohio Revised Code section 149.011(A) is as follows: “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.*”<sup>5</sup> Based on this statutory language, the court found that in this instance, CPPD was acting “as a functional equivalent of a public institution for the purposes of the Public Records Act, R.C. 149.43,” and accordingly was “required to respond to public-records requests.”<sup>6</sup>

In reaching this conclusion, the Court looked at the Ohio Revised Code, the Sandusky Codified Ordinances that led to the development of the CPPD, and two prior Ohio Supreme Court decisions.<sup>7</sup> The dissent agreed with the Court’s ultimate conclusion but took issue with the majority’s decision not to impose statutory damages and attorney’s fees, following Fair’s refusal to provide the information for the record request.<sup>8</sup>

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1. State ex. rel. WTOL TV, L.L.C. v. Fair, L.P., 2023-Ohio-4593, at ¶ 21 (citing OHIO REV. CODE ANN. § 149.43(B) (West 2024)).

2. *Id.*

3. *Id.* at ¶ 2.

4. *Id.* at ¶ 4.

5. OHIO REV. CODE ANN. § 149.011(A) (West 2024) (emphasis added).

6. *State ex. rel. WTOL*, 2023-Ohio-4593, at “Holdings.”

7. *Id.* at ¶ 10-12.

8. *Id.* at ¶ 50-51.

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Fair operates Cedar Point, where the CPPD serves the visitors to the park.<sup>9</sup> The CPPD serves the visitors by providing law-enforcement services like security and policing.<sup>10</sup> CPPD officers have the power to “arrest,” “investigate claims,” and make reports.<sup>11</sup> The CPPD was created through several Sandusky City Ordinances.<sup>12</sup>

Ordinance 127.04(a) states that “the city manager shall appoint private police officers when requested by a person or business in Sandusky.”<sup>13</sup> Ordinance 127.04(c) provides that private officers are “paid for by the person or business requesting them.”<sup>14</sup> Ordinance 127.04(b) states that the officers also have to follow the same regulations and have the same powers as other police officers.<sup>15</sup> Ordinance 127.04(b) also permits the private police officers to “perform such police duties at such place or places within the City limits as the person, firm, or corporation requesting their appointment may direct,” but the duties cannot contradict state laws or other City ordinances.<sup>16</sup> Finally, Ordinance 127.04(d), states that private police officers must be qualified by the Ohio Peace Officer Training Commission.<sup>17</sup>

Based on these ordinances, Sandusky and Fair entered into an agreement in 2014.<sup>18</sup> In the present case, the city manager commissioned the CPPD officers, and they swore an oath to the city manager.<sup>19</sup>

In addition to Fair and the CPPD, this case involves three different media companies (The Companies).<sup>20</sup> The Companies include WTOL Television, WKYC-TV, and WBNS-TV.<sup>21</sup> All three companies made public-records requests to CPPD, arising from two separate incidents at the Cedar Point Park.<sup>22</sup> The first request was made on August 18, 2021, three days after an incident which led to an alleged injury to a Cedar Point Park guest near the Top Thrill Dragster ride.<sup>23</sup> The second request came in 2022 regarding an alleged sexual assault that occurred in 2017.<sup>24</sup> Specifically, WKYC

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9. *Id.* at ¶ 2.

10. *Id.*

11. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 24.

12. *Id.* at ¶ 10-12.

13. *Id.* at ¶ 10.

14. *Id.*

15. *Id.*

16. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 10.

17. *Id.*

18. *Id.* at ¶ 11.

19. *Id.* at ¶ 13.

20. *Id.* at ¶ 1.

21. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 1.

22. *Id.* at ¶ 1, 6-9.

23. *Id.* at ¶ 3, 6.

24. *Id.* at ¶ 3, 7, 9.

requested the reports from CPPD relating to the Top Thrill Dragster incident, while WTOL and WBNS requested records and statements regarding the sexual assault allegations.<sup>25</sup> Neither CPPD nor Fair produced any of the records requested by any of the Companies.<sup>26</sup>

In response to no records being produced, the Companies filed a mandamus action in July 2022.<sup>27</sup> The Companies sought a writ of mandamus ordering Fair and Gilson, the chief of the CPPD, to produce the requested records additionally, the Companies sought statutory damages, court costs, and attorney fees.<sup>28</sup> In response, Fair and Gilson, 1) denied “that CPPD is an entity that is required to respond to public-records requests,” 2) denied that they possessed any of the requested documents, and 3) asserted that even if they did possess such documents, those documents were exempt from disclosure, “as confidential law-enforcement investigatory records and privileged private-security documents.”<sup>29</sup>

The Court then issued an alternative writ that ordered the parties to submit evidence and support briefs.<sup>30</sup> However, neither party submitted any further evidence for the Court to review.<sup>31</sup> The Supreme Court issued a writ of mandamus to Fair and Chief Gilson for them to produce the records that were asked for by the Companies through public-records requests.<sup>32</sup> The Court also granted court costs to the Companies but denied awarding statutory damages and attorney fees.<sup>33</sup>

### III. THE COURT’S DECISION AND RATIONALE

The majority opinion was written by Justice Fisher who was joined by Justice DeWine, Justice Donnelly, Justice Brunner, and Justice Deters.<sup>34</sup> Justice Kennedy wrote a dissenting opinion and was joined by Justice Stewart.<sup>35</sup>

#### *A. Majority Opinion by Justice Fisher*

The Court began its opinion by confirming that mandamus is the appropriate remedy for gaining compliance with the Ohio Public Records

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25. *Id.* at ¶ 6-9.

26. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 3-4.

27. *Id.* at ¶ 4.

28. *Id.*

29. *Id.*

30. *Id.* at ¶ 5.

31. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 5.

32. *Id.* at ¶ 40.

33. *Id.* at ¶ 42.

34. *Id.* at “Case Summary.”

35. *Id.*

Act.<sup>36</sup> The Court next addressed the argument made by Fair, who claimed the case was moot because they had already provided some of the records that were requested.<sup>37</sup> The Court held that the case was not moot, in any event, because the case not only addressed the records, but also addressed, the issues of court costs, attorney fees, and statutory damages, which still needed to be evaluated.<sup>38</sup>

The Court's opinion focused on "whether the CPPD [was] required to respond to public-records requests."<sup>39</sup> Initially, the Court noted: 1) The Public Records Act requires "'public office[s]' or 'person[s] responsible for public records' to provide public records in response to requests," and 2) the definition of "public office" which "includes 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."<sup>40</sup>

The Companies argued that CPPD was required to produce documents and records from Public Record Act requests in two ways.<sup>41</sup>

First, relying on the precedent *State ex. rel. Schiffbauer v. Banaszak*, the Companies argued that CPPD was subject to the Public Records Act because it was created by enabling laws and ordinances "to perform a core function of government: the exercise plenary police power."<sup>42</sup> The Court declined to adopt this application of *Schiffbauer* to the present case primarily because of the way the CPPD was created and the purpose the CPPD was established for.<sup>43</sup> The *Schiffbauer* case involved Otterbein University and considered the creation of their campus police department to determine whether the Otterbein University Police Department was subject to the Public Records Act.<sup>44</sup> The Court in *Schiffbauer* analyzed the definition of "public office" that is stated above.<sup>45</sup> The majority in the present case noted that although the Otterbein police officers and the CPPD had similar training and connections with other local law enforcement, unlike the Otterbein police officers, the CPPD was not established to create a private police department

36. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 17.

37. *Id.* at ¶ 20. ("Relators agree that Cedar Fair and Gilson have provided some of the requested documents, but relators contend that Cedar Fair and Gilson may not have provided all requested documents. We will not deny a writ petition seeking public records based solely on an unsupported assertion. . . . And even if all responsive records had been produced, such a production would not moot relators' requests for attorney fees, costs, or statutory damages").

38. *Id.*

39. *Id.* at ¶ 21.

40. OHIO REV. CODE ANN. § 149.011(A) (West 2024).

41. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 21.

42. *Id.* at ¶ 22.

43. *Id.* at ¶ 25-26.

44. *State ex. rel. Schiffbauer v. Banaszak*, 33 N.E.3d 52 (Ohio 2015).

45. *Id.* at 536.

or organization.<sup>46</sup> Rather, while the CPPD was performing a “core function of government”, it was not established to do so.<sup>47</sup> There was also an indication made by the Court that the record and facts did not clearly establish the manner, development, or creation of the CPPD.<sup>48</sup> The Court did not find the limited facts to be the appropriate basis for the *Schiffbauer* precedent to apply to the CPPD and Fair.<sup>49</sup>

Second, the Companies argued that under the holdings of *State ex. rel. Oriana House, Inc. v. Montgomery*, the CPPD was “the functional equivalent of a public institution.”<sup>50</sup> The Court agreed with this argument.<sup>51</sup>

*Oriana House, Inc. v. Montgomery*, involved a private entity that contracted with a county agency.<sup>52</sup> The Public Records Act came to issue because of a special audit conducted by the State of Ohio regarding the transactions between Summit County and Oriana House due to their contract.<sup>53</sup> Oriana House received a public-records request from the auditor for personnel files and records of transactions, but Oriana House rejected the request because the company believed it was not required because it was a private, not a public, entity.<sup>54</sup> The Court in *Oriana House* used case law from other jurisdictions, including the State of Connecticut, to develop a “functional equivalency” test.<sup>55</sup>

In applying the “functional equivalency” test, the Court in the present case listed the factors to be considered as: “(1) whether the entity performs a government function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government to avoid the requirements of the act.”<sup>56</sup> The Court further held that these factors must be established by “clear and convincing evidence.”<sup>57</sup>

In the present case, the Court primarily relied upon the first factor, the government function of the entity, to support its holding that the Public Records Act does apply to the CPPD, reasoning that the CPPD protects Cedar Point property and has law enforcement services it provides.<sup>58</sup> The Court also found that the third factor weighed in favor of considering the CPPD as

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46. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 24-26.

47. *Id.* at ¶ 25-26.

48. *Id.* at ¶ 26.

49. *Id.*

50. *Id.* at ¶ 27.

51. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 27.

52. *State ex. rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193, 195 (Ohio 2006).

53. *Id.* at 196.

54. *Id.*

55. *Id.* at 198.

56. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 28.

57. *Id.*

58. *Id.* at ¶ 29.

a functional equivalent of a public institution.<sup>59</sup> The Court found that not only was the CPPD regulated by the city, but the Sandusky City Ordinance 127.04(b) requires that the Cedar Point officers follow the “same regulations as other police officers.”<sup>60</sup> There was also evidence that the CPPD works with the Sandusky Police Department and the city manager, since the officers are appointed by that office.<sup>61</sup>

The Court found that two factors of the “functional equivalency” test weighed against considering the CPPD a functional equivalent of a public institution.<sup>62</sup> First, the CPPD does not receive any funding from the government, and secondly, there was no evidence that the CPPD was created to avoid the Public Records Act.<sup>63</sup>

Nevertheless, after weighing the factors, the Court concluded that “the CPPD is the functional equivalent of a public institution.”<sup>64</sup> Accordingly, the majority opinion held that “when it performs these [police] duties, the CPPD acts as the functional equivalent of a public institution and *must respond to valid public-records requests related to those duties*,” and therefore ordered that Fair and Gilson must provide the records that were requested by the Companies.<sup>65</sup>

The majority proceeded to determine what costs and/or fees should be awarded to the Companies that sought the writ of mandamus.<sup>66</sup> First, the majority awarded court costs to the Companies because it is mandatory to award these costs when a writ is ordered to produce public records.<sup>67</sup> The second issue the majority considered was the request for statutory damages.<sup>68</sup> Damages of this nature are typically awarded when the records are correctly requested and the public office or relevant person does not comply with the request.<sup>69</sup> This awarding of fees can be modified, however, when “a well-informed person responsible for the requested public records would have reasonably believed that R.C. 149.43(B) did not require their disclosure.”<sup>70</sup> In applying this modification to the case at hand, the majority reasoned that the factors used from the *Oriana House* case could have been viewed differently by different responsible persons who could have believed that the

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59. *Id.* at ¶ 31.

60. *Id.*

61. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 31.

62. *Id.* at ¶ 30, 32.

63. *Id.*

64. *Id.* at ¶ 33.

65. *Id.* at ¶ 33, 40. (emphasis added).

66. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 42.

67. *Id.* at ¶ 43.

68. *Id.* at ¶ 44.

69. *Id.*

70. *Id.* at ¶ 45.

CPPD was not the functional equivalent of a public institution.<sup>71</sup> This led the Court to hold that statutory damages should not be awarded.<sup>72</sup> Lastly, the Companies asked for attorney fees, which may be appropriate when the respondent has been ordered to comply with the Public Records Act obligations.<sup>73</sup> In this case, the majority found that the reasonable person exception quoted above also applied to the issue of attorney fees.<sup>74</sup> As a result, the Court did not order Fair to pay the Companies' attorney fees.<sup>75</sup>

*B. Dissenting Opinion by Justice Kennedy*

Justice Kennedy's opinion began with her concurrence that CPPD is a functional equivalent to a public institution, and because of that, CPPD must comply with the Public Records Act.<sup>76</sup> Justice Kennedy disagreed with the majority on the damages and fees that should have been awarded to the Companies that filed the writ, citing the "abundance of relevant facts and analogous cases that would lead a well-informed person responsible for the requested public records to reasonably believe that respondents had an obligation under R.C. 149.43(B) to produce the records."<sup>77</sup> As a result, Justice Kennedy concluded that the factors were not met to justify not awarding statutory damages and attorney fees to the Companies.<sup>78</sup> Because of this reasoning, the dissenting opinion found that statutory damages and attorney fees should have been awarded.<sup>79</sup>

IV. ANALYSIS

*A. Introduction*

The Court's holding on the case reaffirms and relies upon the factors already set forth in *Oriana House*.<sup>80</sup> However, this Note argues that the Court did not need to consult the factors from *Oriana House*, because the *Schiffbauer* case alone would have supported the same conclusion. Nevertheless, it is clear that taken together, the *Schiffbauer* and *Oriana House* tests represent the correct approach for the development of the law in this area. Not only does Ohio have these tests, but Florida and Washington also

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71. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 46.

72. *Id.*

73. *Id.* at ¶ 47.

74. *Id.*

75. *Id.* at ¶ 48.

76. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 50.

77. *Id.* at ¶ 51, 60.

78. *Id.* at ¶ 64-65.

79. *Id.* at ¶ 64-65.

80. *Id.* at ¶ 27-28.



have similar tests.<sup>81</sup> Notably, these tests all support the access and use of public records, which are a vital part of public accountability.<sup>82</sup>

*B. Applying Schiffbauer Holding to Facts of State ex. rel. WTOL*

The Court in the present case did not find the Companies argument that the CPPD was established to serve a core government function persuasive, in large part because the Court found that there were not enough facts in the record about when the CPPD was established and created.<sup>83</sup> However, there are other facts that can be used to support the Companies' first argument based on comparisons to the *Schiffbauer* case. The first is comparing the way the two police forces were formed. In *Schiffbauer*, the relevant guidelines authorized the board of trustees to "establish a campus police department and appoint members of the campus police department to act as police officers."<sup>84</sup> On the other hand, The CPPD was created by an ordinance that stated that "the city manager shall appoint private police officers when requested by a person or business in Sandusky."<sup>85</sup>

The language in both cases shows that the police force in each instance was created by an office that appointed officers to serve a third party.<sup>86</sup> In addition, both Otterbein and Cedar Point police officers are required to be state-certified by the Ohio Peace Officer Training Commission and both have the power and authority that other police officers have.<sup>87</sup> The majority opinion noted all of these points, but ultimately found that "nothing in either Sandusky's ordinances or the agreement between Sandusky and Cedar Fair creates, or authorizes the creation of, a private police department."<sup>88</sup>

However, this statement is not entirely accurate. Not only is the name of the Cedar Point Police Department indicative of the organization that was established by their Agreement, but the members of the CPPD must swear an oath to the city manager that the CPPD officers will uphold the laws.<sup>89</sup> Thus, even if the city manager or Fair claimed to not consider the CPPD as an "organized body, office, agency, institution, or entity. . .for the exercise of

81. Robert Rivas, *Access to Private Documents under the Public Records Act*, 16 NOVA L. REV. 1229 at 1238-39 (1992); Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government Agencies under Washington Public Records Act*, 33 SEATTLE U. L. REV. 741 at 742 (2010).

82. *Public Records Access*, OHIO ATTORNEY GENERAL (2024), <https://www.ohioattorneygeneral.gov/About-Ag/Public-Records-Access>; Ginger McCall, *The Importance of Public Records*, AMERICANS FOR PROSPERITY (2024), <https://americansforprosperity.org/the-importance-of-public-records/>.

83. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 22, 26.

84. *State ex. rel. Schiffbauer*, 33 N.E.3d at 53-54.

85. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 10.

86. *Id.* at ¶ 10; *State ex. rel. Schiffbauer*, 33 N.E.3d at 53-54.

87. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 24; *State ex. rel. Schiffbauer*, 33 N.E.3d at 54.

88. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 25.

89. *Id.* at ¶ 13.

any function of government,” many other people, including not only the general public, but the officer of the CPPD itself, likely did see the title and oath as constituting the ability to exercise a government function.<sup>90</sup> On this basis alone, the Court could have found that the CPPD was established to perform a core government function, and thus held that the CPPD was subject to the Public Records Act.

*C. Other Jurisdictions Approaches to Determining Compliance with Public Records Acts*

The Ohio Supreme Court listed two strong precedents for the two arguments that were made against Fair by the Companies.<sup>91</sup> It is important to note the tests that other jurisdictions apply when dealing with a similar issue to further reinforce the validity of the opinion in the present case.<sup>92</sup>

*a. Florida’s Approach*

Florida also uses two main tests to determine when an agency is subject to respond to records requests from the Public Records Act.<sup>93</sup> The two tests Florida applies are the “totality of factors” test and the “essentially government function” test.<sup>94</sup>

The “totality of the factors” test examines factors such as “the not-for-profit corporation’s creation and existence, funding and capitalization, goals, purposes, ownership and interdependence with the local hospital taxing district” when looking at a non-profit, like the case that led to this test.<sup>95</sup> On the other hand, the “essentially government function” test looks to “determine if a particular activity undertaken by a private entity is one in which the entity is ‘acting on behalf of’ a public agency to perform the agency’s functions.”<sup>96</sup> The main difference between these two tests is that one looks at the way the entity works and the other looks at the entity itself.<sup>97</sup>

Although these tests have different names and are from a different jurisdiction, they are clearly consistent with the analysis and holdings of the Ohio precedent cases. This further reinforces that there are factors of formation and/or governance and operation in which ostensibly private entities can become subject to the Public Records Act.<sup>98</sup>

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90. OHIO REV. CODE ANN. § 149.011(A) (West 2024).

91. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 22, 27.

92. Rivas, *supra* note 81; Ware, *supra* note 81.

93. Rivas, *supra* note 81 at 1240.

94. *Id.* at 1238-240.

95. *Id.* at 1241.

96. *Id.* at 1240.

97. *Id.*

98. Rivas, *supra* note 81 at 1235.

*b. Washington's Approach*

Simply put, Washington uses the identical “functional equivalency” test and relies upon the same four factors as Ohio does to determine whether a private entity should be subjected to the Public Records Act.<sup>99</sup>

*D. Importance of the Public Record Act*

Why is it important that citizens and other entities have access to records from a private company in certain instances? The Ohio Attorney General states that “[r]ecords are a crucial component of the governing process. Like other important government resources, records and the information they contain must be well managed to ensure accountability, efficiency, economy, and overall good government.”<sup>100</sup> Not only are records crucial to governing, but they are crucial to providing information on events, like the Top Thrill Dragster ride incident, to those who need the information.<sup>101</sup> In the larger scope of national-level politics and governance “the truth is that citizens cannot engage meaningfully with government or make educated choices about their democracy if citizens do not know what their government is doing. And public records are key to gaining that knowledge.”<sup>102</sup>

V. CONCLUSION

The Ohio Supreme Court held in *State ex. rel. WTOL TV, L.L.C v. Fair, L.P.* that a private entity, Cedar Fair, had to provide records that the CPPD created because the CPPD is the “functional equivalent” to a public office.<sup>103</sup> This Note submits that this holding is consistent with the precedents already set before it, but the Court’s determination that it could not find that CPPD was established to perform a core government function led the Court to apply the “functional equivalency” test instead.<sup>104</sup> Access to public records is highly essential to life in American society, and the decision of the Ohio Supreme Court in this case helps citizens get access to records from private entities that function as a public office does.<sup>105</sup>

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99. Ware, *supra* note 81 at 749.

100. *Public Records Access*, *supra* note 82.

101. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 3.

102. McCall, *supra* note 82.

103. *State ex. rel. WTOL*, 2023-Ohio-4593, at ¶ 33.

104. *Id.* at ¶ 26-27.

105. *Id.* at ¶ 49.