CASE NO. 06-0789

IN THE SUPREME COURT
OF THE STATE OF OHIO

STATE OF OHIO *EX RELATIONE*
KENT LANHAM

Relator,

v.

JAMES T. SMITH
Chief, Police Department, Pierce Township, Clermont County, Ohio,

and

PIERCE TOWNSHIP, CLERMONT COUNTY, OHIO

Respondent.

FILED
MAR 12 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

ORIGINAL ACTION FOR MANDAMUS

RELATOR'S MOTION FOR RECONSIDERATION

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IN THE SUPREME COURT
OF THE STATE OF OHIO

STATE OF OHIO *EX RELATIONE* KENT LANHAM,	:	**Case No. 06-0789**
	:	
	:	***Original Action in Mandamus***
Relator,	:	***Public Records Action***
	:	
v.	:	
	:	
JAMES T. SMITH	:	**RELATOR'S MOTION FOR**
Chief, Police Department, Pierce	:	**RECONSIDERATION**
Township, Clermont County, Ohio,	:	
ET AL.,	:	
	:	
Respondents.	:	

COMES NOW Relator, Kent Lanham ("Relator") on relation to the State of Ohio, by and through undersigned counsel, and moves to reconsider its Opinion issued on February 28, 2007, tendering two basis for this motion: (i) to strike or modify the Opinion so as to remove irrelevant and false, scurrilous and scandalous matter with respect to Relator's counsel; and (ii) to address the specificity required for public records requests versus the liberal construction in favor of disclosure.

<u>The Opinion States as Fact Irrelevant and False, Scurrilous and Scandalous Matters</u>

Relator (and his counsel) requests that the Court, at a minimum, modify the final opinion (that is ultimately published and maintained on the Court's website) so as to remove false, scurrilous and scandalous matters that are also irrelevant to this public records case. Specifically, within the opinion, the Court declares in paragraph 5, as an apparent fact, that "During the investigation, attorney Curt C. Hartman admitted to Police Chief Smith and Special Agent Karen

Rebori that he had obtained access to Register's computer and had altered the meeting minutes." *Opinion*, at ¶5. Such a statement as a fact is false and, most pertinent for the pending motion, irrelevant! Accordingly, paragraph 5 of the Court's Opinion should be stricken.

Firstly, whatever occurred during the investigation into the alleged break-in and tampering is irrelevant to the issue before the Court, as is the involvement of Relator's counsel therewith. The issue before the Court in this case was a public records request – nothing more, nothing less. While some factual background is usually necessary to put into context the substantive aspect public records requests (as well as the public benefit being served by such a request), in this case, whatever occurred (or, more accurately, whatever allegedly occurred) during the subsequent investigation is irrelevant. Evidence that this Court (or any Court) may consider must be admissible pursuant to the Rules of Evidence, *i.e.*, it must be relevant, *i.e.*, tending to make "the existence of any fact <u>that is of consequence to the determination of the action</u> more probable or less probable than it would be without the evidence". Ohio Evid. R. 401 (emphasis added); see Ohio Evid. R. 402.

Whether Relator's counsel made such a statement or admission is absolutely of no consequence to the determination of whether Relator was entitled to the requested writ of mandamus relative to the requested public record; it is simply scandalous and should not be included in any published opinion of the Court.[1] <u>See</u> 75 Ohio Jur.3d, Pleading, § 308

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[1] Relator would note to the Court that his counsel in this action has represented him previously in various personal and business endeavors. <u>See</u> <u>Hughes v. Lanham</u>, 2004-Ohio-7142. Thus, it was natural and logical for Relator to seek the assistance of such counsel and for counsel to provide services to Relator. But now, in light of the Opinion, the Court would be condoning and promoting attacks against opposing counsel in pleadings and motions, even when such counsel's remote or tangential involvement has nothing to do with the substantive issue before the Court.

("[s]candalous matter is said to consist of any unnecessary allegation which reflects cruelly upon the moral character of an individual, or states anything in repulsive language that detracts from the dignity of the court"); Nault's Auto. Sales, inc. v. Am. Honda Motor Co., 148 F.R.D. 25, 30 (D.N.H. 1993) ("[s]candalous material is that which 'casts an adverse light on the character of an individual or party'"). The content of paragraph 5 of the Opinion adds nothing to the determination of this public records case.[2]

Additionally, the statement that Relator's counsel made such a statement or admission (as indicated in the Court's opinion) is false (or, at a minimum, subject to dispute)! It should be noted that, earlier in this case, Relator stated clearly to the Court, with respect to the affidavit upon which the Court apparently relied for the statement in paragraph 5 in the Opinion:

> Unequivocally, the only purpose that Respondents and their counsel sought to be gained by filing such an affidavit is to cast publicly false, scurrilous, slanderous and scandalous attacks and dispersions against Relator's counsel – nothing more. A simple review of the affidavit demonstrates such; consider the following false declarations within the Rebori Affidavit: (i) Relator's counsel "lied to the Board of Trustees" (Rebori Aff. ¶ 3) or Relator's counsel "admitted that he had, in fact, altered . . . computer records of minutes" (Rebori Aff. ¶ 4). The relevance of such alleged declarations by Relator's counsel to the issue of Respondents' failure to comply with their obligations under the Ohio Public Records Act is . . . ? While such declarations are, in fact, false and never occurred, the inclusion of such items in the pleadings in this case serves no purpose relative to the Relator's public records request for a police incident or offense report, as well as a narrative statement taken by the police.

(Motion for Sanctions, at 4 n.5 (emphasis added).) Thus, Relator raised the falsity (and irrelevance) of such assertions within the affidavits that Respondent submitted as part of its Answer (not, as developed below, as part of the evidence pursuant to the issuance of the alternate

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[2] If one were to read the Opinion without paragraph 5 included, there would be no change whatsoever to the substantive and legal aspects of the Opinion.

writ). Unfortunately, by including such irrelevant and false, scurrilous and scandalous matters within the Court's Opinion, the Court will have promoted and aided the concerted effort of Respondents and their counsel. As stated in the Motion for Sanctions:

> It is quite easy for Respondents and their counsel to publish the false, scurrilous and scandalous attacks against Relator's counsel in this action, as this forum does not provide the opportunity for a response to such attacks. Instead, the inclusion of such matter in the record[] is simply an effort by Respondents and their counsel to invite and encourage the inevitable public consumption of such false, scurrilous and scandalous matter – be it in the local press or the insidious local rumor mills that promote Respondents' personal agenda.

(Motion for Sanctions, at 3 (emphasis added).) Unless corrected immediately, such efforts will undoubtedly continue and be pursued in the future, now, with the imprimatur of this Court.

Finally, in this case, pursuant to the issuance of the alternative writ, the Court's ordered the parties to submit evidence for the consideration on the merits. In response, Relator identified all such evidence; Respondents did not tender or identify any evidence. Had Respondents done so and identified such affidavits as somehow being relevant to this public records case, then Relator (and his counsel) would have responded by tendering a separate declaration that disputes the contentions within the affidavits submitted by Relator, as well as reiterating the lack of relevance of such accusations. Specifically, the attached Affidavit of Curt C. Hartman would have been tendered to demonstrate, at a minimum, the dispute of concerning the contention within the affidavits.[3]

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[3] The Declaration attached to the Affidavit was submitted in a civil rights action currently pending in federal court that arises from, *inter alia*, defamatory accusations of the township clerk. Generally speaking, the contention within that federal action is that no break-in or tampering ever occurred and that any modification to a draft set of minutes on the computer was undertaken by the township clerk herself who simply made the accusation of a break-in and tampering in order to divert attention from and in retaliation for criticism of her performance as township clerk.

For the foregoing reasons, and especially to avoid the imprimatur of this Court on such disputed and irrelevant matters, Relator and his counsel requests the Court to forthwith remove and strike the offending paragraph from its opinion, especially any permanent or published record of any kind.

Reconsideration of the Opinion Is Necessary Because of It Failed to Address or Consider the Specificity of Description that Must be Provided in Making a Public Records Request

With respect to the merits of the case, Relator would seek reconsideration as to the specificity with which a public records request must be made.

It is well established that the provisions of the Ohio Public Records Act should be construed to provide the broadest access possible to governmental records, with any doubt resolved in favor of disclosure. E.g., State ex rel. Wallace v. State Medical Bd. of Ohio (2000), 89 Ohio St. 3d 431, 433, 2000-Ohio-213, 732 N.E.2d 960, 964. But instead of promoting such access, the Opinion in this case will now enable and encourage public officials to engage in word-smithing and linguistic gymnastics when responding to public records requests. The failure of Respondents to review public records requests in favor of disclosure was raised in the Relator's Merit Brief: "[the] admonition [to construe the Public Records Act to provide the broadest access to governmental records] applies not solely to courts reviewing mandamus actions to obtain public records, but also to all public officials, such as Respondent Smith, in responding to public records requests." (Merit Brief, at 14.) The Opinion did not address this aspect of Relator's argument which, Relator believes would obligate Respondents to produced the subject notes, even though Relator's requests did not specifically identify the notes as such.

Those seeking public records do not necessarily know the specifics of the record keeping

and maintenance system of a public body so as to make a precise request. Thus, as noted above, this Court has required that the Act and request be liberally construed in favor of full disclosure. This is situation was recognized in the FOIA context in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.1973). With respect to the withholding of documents based upon a claimed exemption, the Vaughn court recognized the one-sided nature to public records requests:

> it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure.

See also State ex rel. Natl. Broadcasting Co. v. Cleveland (1988), 38 Ohio St.3d 79, 83 ("a party requesting disclosure of a record is at a distinct disadvantage when challenging a government's claim of an exception to the public records law. . . . [T]he custodian of the record has knowledge of the contents of the record").

In State ex rel. Beacon Journal v. Univ. of Akron (1980), 64 Ohio St.2d 392, 397-398, 415 N.E.2d 310, 314, this Court described offense or incidents reports as routine factual reports wherein police are "simply fulfilling the duty imposed upon all law enforcement agencies to generate ongoing offense reports, chronicling factual events reported to them". Now, in light of this Court's opinion, in order to be considered an "offense or incident report" the standardized "form report" must be utilized; otherwise, according to the Opinion, it is not an offense or incident report even if a police officer documented an initial report received by him or her.[4] Such a construction, limitation and necessity for precision in a request is completely contrary to the

[4] And "document" was the unsolicited term that Respondent Smith used to describe what he did in preparing the report from his interview with the township clerk.

admonition stated above and repeatedly by this and other courts that the Public Records Act must be construed to provide the broadest access possible to governmental records, with any doubt resolved in favor of disclosure. Should not any doubt relative as to whether a document is responsive to a request also be resolved in favor of disclosure?

Furthermore, with the Opinion, the Court would have those seeking public records run a gauntlet in couching their requests. Now, those seeking public records find themselves between the Syclla of failing to identify the request recorded with sufficient clarity and the Charybdis of failing to request the record in the specific form by which the public office maintains its records. Compare State ex rel. Dillery v. Icsman (2001), 92 Ohio St.3d 312, 2001-Ohio-193 (writ denied because person seeking public records "failed in her duty to identify the records she wanted with sufficient clarity") with State ex rel. Lanham v. Smith (2007), __ Ohio St.3d ___, 2007-Ohio-609 (writ denied because requestor did not couch the request to seek the requested record in the specific form in which respondents maintained its records and, thus, the court concluded no responsive record existed). Odysseus never had such a challenge.

For the foregoing and to reiterate the liberal construction afforded the Public Records Act, Relator requests that the Court reconsider its Opinion. And, specifically, to find that the notes at issue constituted a responsive record to Relator's request, for they documented the initial report received by Respondent Smith, which comports with the Court's description of offense-and-incident reports in Beacon Journal. Relator's request, as all public records requests, should be construed liberally in favor of disclosure, with any doubt resolved in favor of disclosure.

For the foregoing reasons, Relator requests the reconsideration of the merits of the case.

Respectfully submitted

Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, Ohio 45102
(513) 752-8800
Attorney for Relator Kent Lanham

CERTIFICATE OF SERVICE

Pursuant to Rule XIV, Section 2, of the Rules of Practice of the Supreme Court of Ohio, the undersigned counsel certifies that a copy of the foregoing document ~~will~~ was served, ordinary mail, postage prepaid, on the 5th day of March 2007, to the following:

Elizabeth Mason
Office of the Clermont County Prosecutor
101 East Main Street
Batavia, Ohio 45103

Curt C. Hartman (0064242)

SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO *EX RELATIONE* KENT LANHAM,	:	**Case No. 06-0789**
	:	
	:	***Original Action in Mandamus***
Relator,	:	***Public Records Action***
	:	
v.	:	
	:	
JAMES T. SMITH, et al.	:	**AFFIDAVIT OF CURT C. HARTMAN**
	:	
Respondents.	:	

COUNTY OF CLERMONT)
) ss:
STATE OF OHIO)

Comes now CURT C. HARTMAN, having been duly cautioned and sworn, and declares as follows:

1. Attached hereto is a true and accurate copy of a Declaration that I submitted in the case cited therein.

Further the Affiant sayeth not.

Curt C. Hartman

Sworn to, affirmed and subscribed to before me, a Notary Public in and for the State of Ohio, and in my presence, this 9th day of March 20007.

NOTARIAL SEAL STATE OF OHIO

Kim A. Crowthers
Notary Public, State of Ohio
My Comm. Expires ~~May 1, 2008~~
3-31-08

Kim A. Crowthers
exp 3-31-08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURT C. HARTMAN,	:	**Case No. 1:06-CV-033**
	:	
Plaintiff,	:	**Judge Beckwith**
	:	**Magistrate Judge Black**
v.	:	
	:	**DECLARATION OF**
KAREN REGISTER, et al.,	:	**CURT C. HARTMAN**
	:	
Defendants	:	

Pursuant to 28 U.S.C. § 1746, I, Curt C. Hartman, declare the following:

1. I have personal knowledge of the facts stated herein.

2. At no time did I admit to either James Smith or Karen Rebori that I had "lied to the Board of Trustees with respect to whether [my] handwriting appeared on draft minutes of the Township Trustees."

3. At no time did I admit to either James Smith or Karen Rebori that I had "obtained access to Ms. Register's computer and . . . made changes to meeting minutes" or that I "had, in fact, altered Karen Register's computer records of minutes."

4. At no time did I obtain unauthorized access to the computer in the Pierce Township clerk's office and make changes thereon to meeting minutes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of June 2006.

Curt C. Hartman

Exhibit A