

IN THE SUPREME COURT OF OHIO

07 - 1694

The State of Ohio, *ex rel.*  
The Toledo Blade Co.,

Relator,

Original Action in Mandamus

v.

Seneca County Board of Commissioners,

Respondents.

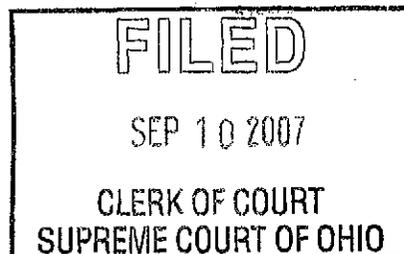
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**MEMORANDUM IN SUPPORT OF COMPLAINT FOR AN ORIGINAL  
WRIT OF MANDAMUS AND ANCILLARY INJUNCTIVE RELIEF,  
INCLUDING TEMPORARY RESTRAINING ORDER**

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IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*  
THE TOLEDO BLADE CO.  
541 North Superior Street  
Toledo, OH 43660,

Relator,

- vs -

Case Number:

SENECA COUNTY BOARD OF  
COMMISSIONERS  
111 Madison Street  
Tiffin, OH 44883

ORIGINAL ACTION IN  
MANDAMUS  
(Public Records)

Respondent.

MEMORANDUM IN SUPPORT OF  
COMPLAINT FOR AN ORIGINAL WRIT OF MANDAMUS  
AND ANCILLARY INJUNCTIVE RELIEF,  
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Counsel for Relator

## MEMORANDUM

This is an action in mandamus to enforce the provisions of Ohio's Public Records Act, R.C. ch. 149 ("the Act"). Relator seeks a writ of mandamus directing Respondent forthwith to comply with the Act. Relator further seeks ancillary relief, including a temporary restraining order. The temporary injunctive relief is necessary to maintain the status quo and prevent irreparable harm to the public pending this Court's entry of a final judgment in this action.

As set forth in the Complaint (which is supported by the Affidavit of Steven D. Eder), relator seeks a writ compelling the respondent county commissioners of Seneca County to provide access to various electronic-mail communications regarding plans to demolish the Seneca County courthouse. Respondents have claimed that a large number of these communications have been deleted and are not retrievable. As set out in the complaint, the destruction of the e-mails is itself independently a violation of the Act, since the destruction was contrary to the records-retention policies of the county record commission and was accomplished without prior notice to the state auditor and the Ohio Historical Society. R.C. 149.351 & 149.38. Moreover, as has been repeatedly demonstrated, deleted e-mails are rarely totally expunged but frequently can be retrieved recovery experts.<sup>1</sup>

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<sup>1</sup> See, e.g., ABC News, "White House E-mails: Gone But Not Forgotten?" (April 12, 2007), available online at [http://blogs.abcnews.com/theblotter/2007/04/white\\_house\\_ema.html](http://blogs.abcnews.com/theblotter/2007/04/white_house_ema.html).

In this case, the e-mails in question are of special importance because they are likely to demonstrate respondents' violation of the Open Meetings Act, R.C. § 121.22 ("the Meetings Act"), in their consideration and adoption of plans for the demolition of the Seneca County courthouse. Indeed, emails obtained by Relator from another source demonstrate such a violation. While respondents took the formal action authorizing the demolition at a public meeting, it is clear (and in any event clearly inferable) that the Respondent's deliberations on that action were conducted not in open public meetings but through email correspondence and meetings and discussions of two or more members of the Respondent Board that occurred other than in meetings

That inference is further supported by the inferences properly to be drawn from respondents' unlawful destruction of the e-mails. Indeed, as this Court has long held, the spoliation of evidence can properly raise, not merely an inference, but a *presumption* that the lost information is adverse to the spoliator. *Banks v. Canton Hardware Co.* (1952), 156 Ohio St. 453, 461.<sup>2</sup> If the decision to authorize demolition was – as it must be presumed to have been – the product of non-public deliberations, then the decision itself is invalid even though formally adopted at public meeting. R.C. 121.22(H).

Notwithstanding these considerations, respondents are proceeding as if the authorization was validly adopted. They are, in short, cynically employing their lawless

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<sup>2</sup> In cases of intentional destruction, "the maxim, *omnia praesumuntur contra spoliatorem* (all things are presumed against a wrongdoer)" applies, so that "the utmost inference logically possible should favor the party aggrieved, and that the contents of the documents destroyed should be presumed to be what the party aggrieved so alleges them." 156 Ohio St. at 461.

flouting of the Records Act as a vehicle for insulating from scrutiny and sanction their probable violations of the Meetings Act.<sup>3</sup>

In this proceeding, relator seeks to remedy the Records Act violations. In particular, relator seeks a writ and ancillary relief to obtain access to the supposedly deleted e-mails, prospective relief to prevent recurrence of respondents' lawlessness, and substitutionary relief to the extent that the e-mails are in fact non-recoverable. An essential part of any remedy, however, will be depriving respondents of the fruits of their Records-Act violations, including assurances that any Meetings Act violations disclosed by the missing e-mails are themselves remedied.

In the present motion for a temporary restraining order, relator seeks to hold the situation in the status quo in order to permit this Court to arrive at an orderly and lawful determination of Relator's right of access to the e-mails under the Records Act. In particular, Relator seeks a restraining order that would forbid any action by respondents to render any of their electronic communications or their backups inaccessible or even less accessible. In addition, the restraining order would prohibit Respondent Board from capitalizing on its behavior to date by holding the fruits of the misconduct – the demolition authorization – in abeyance until this Court has ruled and the deleted documents have been restored or accounted for.

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<sup>3</sup> Indeed, there has been a painfully clear demonstration of this. A group of local residents sued the Seneca County Board of Commissioners in the Seneca County Court of Common Pleas, alleging a violation of the Open Meetings Act. The trial court rejected that claim, ruling that the plaintiffs had failed to adduce evidence of the violation. In other words, the plaintiffs lost in substantial part because the Board destroyed the evidence that would have supported the plaintiffs

If, at the conclusion of the case, the e-mails have been disclosed and no Meetings-Act violation has been shown, respondents will be free to proceed. If, on the other hand, and as is far more likely, the e-mails disclose violations of the Meetings Act (or if such violations are to be presumed due to the non-recoverable destruction of the e-mails), the authorization will be established as invalid pursuant to the Meetings Act.

Interlocutory relief by way of a restraining order is precisely the appropriate remedy in a situation such as this. Original actions in this Court are governed by the Civil Rules unless the Civil Rules are “clearly inapplicable.” *Supreme Court Rules of Practice*, Rule 10 § 2. Civil Rule 65(A) provides for the issuance of temporary restraining orders upon a showing of irreparable injury to the moving party in the event that the order is not issued. Even in the absence of the rule, of course, this Court would have the inherent authority to preserve the status quo by such an order:

That the court has jurisdiction in equity, pending the final determination of the case, in the interest of justice, to make such interlocutory injunctive orders as may be necessary to preserve the rights of the parties in the subject-matter of the controversy, to the end that the final judgment of the court may not be defeated by the action of either party to the litigation in advance of the rendition of such judgment has long been the law \*\*\*\*

*State ex rel. City of Cleveland v. Court of Appeals for Eighth Dist.* (1922), 104 Ohio St. 96, 105.

In this case, a final judgment as to respondents’ numerous Records-Act violations would not afford complete relief if respondents could capitalize on the fruits of the violations during this Court’s deliberations. Respondents no doubt expect that the wheels of

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claim. Of course, under long-settled rules of collateral estoppel and res judicata, Relator here is not bound by that result, nor does it preclude this action. But the outcome is instructive.

justice will grind sufficiently slowly that the product of their Meetings-Act violations will be a fait accompli before those violations can be fully remedied. If respondents are permitted to proceed, and the destruction of the Seneca County courthouse is permitted to occur, no subsequent judgment in this case or in any other can fully remedy the wrong. The loss to the public in that event will be undeniable, not only in terms of the financial loss from the expenditure of funds on an unlawful project, but far more deeply and irreparably from the loss of the historical and aesthetic value of the courthouse. Indeed, the destruction of a historic building presents perhaps the archetypal example of irreparable harm.

This Court must enter a temporary restraining order in order to assure that the relief ultimately given for respondents' Records-Act violations does not fall short of complete relief. The present motion must be granted.

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