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## **THE PURPOSE OF THE TOLEDO BLADE'S LITIGATION**

The Blade has brought you a Trojan horse. While it pretends to be a mandamus action for public records, the Blade does not have a claim for public records at all. The Blade wants this Court to assert the Blade's preference over valid decisions made by Seneca County's local elected representatives. The Blade wants this Court to amend public records law by judicial fiat to grant them power beyond subpoena: unbridled access to computers, with experts of their choosing paid by local government funds to rummage around on servers and hard drives. Neither R.C. Ch. 149 nor this Court's prior decisions allow such a result. Even if this Court has a preference to preserve historic buildings, a preference that the cash-strapped Commissioners share, that leaning should not drive this Court to corrupt the law for that end.

The Commissioners have acted reasonably at all times when responding to the Blade's ten public records requests. On occasion, the Blade has even praised the Commissioners for their cooperation and quick turnaround. However, the Blade finds it convenient to claim that public records law has been violated in order to report on itself taking a position on a matter of local interest. Instead of waiting for 48 hours to obtain additional records, as offered without objection, the Blade rushed to file this lawsuit. Nothing in the record supports the Blade's public records claim or its overreaching attempt to interject itself in a local decision. Upon reviewing the facts and considering policy implications, this Court should dismiss the Blade's case, or in the alternative deny on the merits the Blade's request for a writ of mandamus and attorneys' fees.

## **STATEMENT OF FACTS**

The Blade wants to motivate this Court to make new law on public meetings based upon its contrived connection to the former Courthouse. Hence, the Commissioners will provide the

facts concerning the Courthouse, as well as the facts concerning their full compliance with public records law.

**A. The dispute over the former Seneca County courthouse**

The Seneca County courthouse is closed to the public and has been in disuse for years. (Affidavit of Commissioner Benjamin Nutter, ¶ 1, attached hereto as Exhibit A). After the citizens of Seneca County soundly rejected a tax increase to refurbish the former courthouse, two Commissioners candidates said that something needed to be done with the decaying, obsolete building for the good of the county. (Nutter Affd. at 1-2). All the while, public debate raged on about the future of the former courthouse. (Nutter Affd. at 3). Local press covered the Commissioners' public deliberations, and the Commissioners sought involvement, participation, and counsel from the community in reaching their decision. (Id. at 3-4). The community spoke—the Commissioners had all the information they needed to make their decision. (Id.)

**B. The Commissioners' due diligence and advice of experts**

In an effort to be exhaustive of all issues, the Commissioners' hired Stilson & Associates ("Stilson") so that they could assess the space needs of Seneca County with expert assistance. (Nutter Affd. at 4). The Commissioners distributed the Stilson report to media, citizens, heard presentations, and discussed Stilson's findings in many open meetings. (Id.). During this time, the Commissioners continued consulting with citizens and conducting their own fact-finding. (Id.). The time was right for a decision to move forward on an important issue that had languished.

Without adding independent assessments, Commissioner Nutter summarized the Stilson report so that Seneca County would have a roadmap as their needs changed over the next 15

years for all county buildings. (Nutter Affd. at 5). His intentions were to provide the public with a rationale behind the Commissioners' future decisions, if they could agree upon his summary. (Nutter Affd. at 9). Commissioner Nutter's summary ("the 15-year plan") was designed to be flexible and adaptable. (Nutter Affd. at 4). It called for the replacement of the former courthouse with a functioning, modernized hall of justice to serve Seneca County. (Id. at 4). The roadmap was not the final or even necessary step in the movement toward a new courthouse. The Commissioners have already deviated from this plan. Independent of adopting this roadmap, the Commissioners have made multiple public decisions going forward toward replacement of the courthouse after public debate. (Id. at 9). The Blade (and the opponents of the Courthouse, presently litigating in both the trial and appellate courts as we speak) focus on the roadmap as if negating it for a claimed open meetings violation would stop the movement of government altogether. There is no open meeting violation in the adoption of the roadmap, and even if there were, it would not keep the Commissioners from future public debate and action on the courthouse.

**C. Commissioner Nutter forwarded his 15-year plan to the other Commissioners via email prior to their public meeting to encourage informed debate at that meeting after careful and thoughtful review**

The Commissioners have never met privately regarding the 15-year plan before or after the August 31, 2006 Commissioners' meeting. (Nutter Affd. at 8). On August 8, 2006, Commissioner Nutter forwarded a draft of the 15-year plan via email to the other two Commissioners<sup>1</sup> in order for them to be prepared for discussion and voting at future public

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<sup>1</sup> In August 2006, the Seneca County Commissioners were Benjamin Nutter, David Sauber, and Joseph Schock. Since that time, Commissioner Schock has been replaced by Michael Bridinger.

meetings. (Id. at 5, Ex. 2 and 3). Commissioner Nutter received no response by way of email from the other two Commissioners. (Id. at 5). In a Seneca County Court case on the same issues, Nutter testified that he made a few spelling changes that were brought to this attention but that no substantive changes were made. He then forwarded his final version to the other two Commissioners on August 28, 2006 for their review and preparation for discussion at the August 31, 2006 meeting. He unequivocally testified that he received no responses via email. (Id. at 5).

The Commissioners never deliberated outside public view regarding the 15-year plan. (Id. at 5-6). This report was not kept secret and the contents were widely available, evidenced by affiant Kendall Cable's story prior to the Commissioners' vote. (Id. at 6). The applicability of these emails to open meetings law have already been decided in the Seneca County lawsuit wherein Nutter was questioned at length by Plaintiffs' counsel and the Court on this topic. (Nutter Affd. at 5). The Seneca County Court already concluded that there was no evidence of a violation of open meetings law and denied the Plaintiffs' request for an injunction. (Id. at 5). Therefore, the Commissioners already have one Court's opinion that all of their actions regarding the 15-year plan were proper based upon review of these emails and after four days of live testimony. See August 28, 2007 Judgment Entry (filed as Ex. F with the Commissioners' Motion to Dismiss).

**D. Affiant Kendall Cable's history with the Commissioners**

This Court is an awkward court of original jurisdiction. The Blade has attempted to put this court in a position to decide credibility based upon affidavits. There is a trial court actively engaged in this identical dispute, and this Court should leave credibility determinations to it and should dismiss this case outright. If not, this Court should be well-informed on the contours of the credibility dispute.

Ms. Cable has opposed this Board of Commissioners from the time that she served as campaign manager for Commissioner Sauber's opponent. (Nutter Affd. at 2). After carefully reading Ms. Cable's affidavit, Nutter recalled that Ms. Cable frequently expressed her belief that open meetings laws prohibited the Commissioners' from conducting any fact-finding or transmittal of information between Commissioners outside public meetings. (Nutter Affd. at 7). Her lack of legal training is apparent in this statement. While working for a local newspaper, she ran several stories regarding her interpretation of open meetings laws, an interpretation that would have crippled the Commissioners' efforts to obtain information or prepare for intelligent debate at their meetings. (Id.). Her stories continually criticized the Commissioners' actions. (Id.).

Contrary to Cable's view, the Commissioners may gather information so long as deliberations do not take place, as they did here. (Nutter Affd. at 7). Mr. Nutter drafted the 15-year plan, so any deliberations would have needed to go through him to contribute to the final product. Importantly, Nutter disagrees with Ms. Cable's affidavit regarding how the 15-year master plan was drafted. (Id.). As described below, the Commissioners' testimony and Ms. Cable's affidavits are not mutually exclusive.

**E. No evidence exists that the Commissioners deliberated outside public view**

In direct response to Ms. Cable's affidavit, Nutter categorically denied that the Commissioners "appeared to agree" or "would talk things over" outside public meetings with regard to the 15-year master plan.<sup>2</sup> (Nutter Affd. at 8). There is only mere conjecture that any private deliberations occurred either in person or via email. Instead, the Blade's focus is on what "might" have happened with the 15-year plan or what else "might" have happened that they do not know about.

The adoption of the 15-year plan was not a necessary step in the potential replacement of the former Seneca County courthouse. (Id. at 9). As proof that the plan was a roadmap and not a final commitment, numerous deviations have occurred. (Id. at 4). Nutter wanted to provide guidance to future Commissioners or future generations on the board's intended path. (Id. at 9). As such, the Commissioners could have followed the path they are on without ever passing the 15-year plan. Decisions independent from the passage of the 15-year plan are still yet to come.

This path of public meetings, presentation, and debate includes all of the following items not specifically enumerated in the 15-year plan:

- the hiring of Stilson & Associates;
- the many reports from Stilson presented to the Commissioners at open meetings;
- the approval of a request for qualifications for a company to draft a bid packet for the potential replacement of the courthouse;
- the opening of bids for that contract;

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<sup>2</sup> Ms. Cable claimed that her familiarity with this content was based upon a recent review of a tape recording she made of her conversation with the Commissioners. (Affidavit of Kendall Cable, ¶ 11). Interestingly, neither the transcript of Ms. Cable's conversations with the Commissioners nor the tape recording has been produced.

- the hiring of MKC, a demolition firm, to draft the bid packet for the demolition of the former Seneca County courthouse;
- MKC's report to the Commissioners on their work and their proposal for an additional study in an attempt to avoid replacement of the former courthouse;
- the presentation of the MKC study at the public meeting;
- an additional study done by MKC at the Commissioners' direction regarding the potential salvage of the courthouse with a discussion of potential grant sources for funding;
- including the instances listed above, MKC has come before the Commissioners approximately 10 times; and,
- attendance at public meetings by supports of both sides of the courthouse issue with lengthy public comment and debate.

(Nutter Affd. at 9). Based upon all of these facts, the Commissioners' actions have been open to the public and not shrouded in secrecy, as the Blade wants this Court to believe.

If the above is not enough, the Commissioners have not yet made the decision to replace the former courthouse. The ultimate decision that the Blade and the Seneca County Plaintiffs seek to enjoin has not yet been made. The Commissioners expect MKC to present the bid packet for courthouse demolition sometime the week of October 15, 2007. (Nutter Affd. at 9). Then, the Commissioners have to open the bids once they are advertised. (Id.). Finally, the Commissioners will vote on whether to accept any of the bid proposals for the replacement of the former courthouse. (Id.). At that time and only at that time with the final courthouse decision be made. Until then, the Commissioners would be free to change course, if they so choose.

**F. The Blade's numerous records requests aimed at saving the former courthouse**

The Blade has made public records requests to the Commissioners on at least ten separate occasions since August 6, 2007, and multiple requests were contained each time. (See Affidavit of Mark H. Troutman, attached hereto as Exhibit B; see also Affidavit of Tonya Hemmer, ¶ 2, attached hereto as Exhibit C). Based upon the Blade's briefing, the Blade only seeks its mandamus action with regard to its August 6 and 22, 2007 records requests. In relevant part, the Blade requested all incoming and outgoing emails to or from the Commissioners from January 1, 2006 until the present.<sup>3</sup> (Troutman Affd. at 4, 9). All public records responsive to the Blade's August 6 and 22, 2007 requests have been produced. (Troutman Affd. at 16). The Blade has not challenged any other responses offered by the Commissioners, although the Blade's exhaustive request have been outlined in Mr. Troutman's affidavit for the Court's convenience and historical background.

**G. Events leading to the Blade's filing of this action**

The Blade rushed to the courthouse to file this Complaint before an oversight could be corrected, as had been pledged to them. The Blade received records responsive to its August 6, 2007 requests for emails on August 16, 2007. (Troutman Affd. at 8). The Blade received records responsive to its August 6, 2007 requests and never objected to their timeliness. The Blade received records responsive to its August 22, 2007 requests for emails on August 31, 2007 and September 4, 2007. (Id. at 9-11). The Commissioners had these records available before

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<sup>3</sup> On August 6, 2007, the Blade requested all incoming or outgoing emails from the Commissioners from January 1, 2007 until the present. On August 22, 2007, the Blade followed up on its previous request to seek all incoming and outgoing emails from the three current Commissioners and past Commissioner Joseph Schock from January 1, 2006 until December 31, 2006.

that date. (Id. at 11). However, counsel review of privileged communications and IT issues related to the Blade's request for electronic copies caused the records to be produced the next business day after August 31, 2007—September 4, 2007. (Id.). Mr. Eder never objected to their timeliness. (Id. at 13),

As of September 4, 2007, the Commissioners had produced every single email that they knew existed without even determining whether they were subject to deletion per Seneca County's records retention schedule. (Hemmer Affd. at 2). The Blade received emails from Commissioner Nutter and Commissioner Sauber, but Commissioner Bridinger and former Commissioner Schock had no emails that they retained, pursuant to their records retention schedule. (Troutman Affd. at 13).

They and their staff were unaware that a hidden or "archive" file existed on Mr. Nutter's computer until September 10, 2007. (Hemmer Affd. at 3). The Commissioners had even consulted an information technology professional to assist them in responding to the Blade's requests. (Affidavit of Jake Schaaf, ¶ 2, attached hereto as Exhibit D). The Blade never objected to the production of any records or timeframes for production until the date they filed their lawsuit. (Troutman Affd. at 14). In fact, the Blade even praised the Commissioners for their quick turnaround. (Troutman Affd. at 18).

On September 10, 2007, Mr. Eder from the Toledo Blade contacted the Commissioners' counsel regarding some additional emails that he believed were not produced but were responsive to his previous requests. (Troutman Affd. at 14). Immediately, the Commissioners' counsel contacted the Commissioners' office to confirm whether additional records existed. (Id.). At that time, the Commissioners' immediately again utilized an IT professional for

assistance with finding additional emails. (Id.). Despite their previous efforts, more records were found. (Id.).

As such, the Commissioners' counsel called Mr. Eder from the Blade within 15 minutes of his original call and explained the oversight and discovery of the one hidden file containing more emails responsive to the Blade's requests. (Id.). The Commissioners pledged to produce these records within 48 hours after an opportunity to review them for attorney-client privileged communications, and Mr. Eder only replied that he wanted them "as soon as possible." (Id.). Instead of objecting or asking for quicker production, the Blade filed its 29-paragraph Complaint and Memorandum in Support in Columbus within 2 hours of this discussion. (Id.). The Blade has evidently referred to this singular incident as their alleged "pattern of delay," owing to their lack of objection and even praise on other occasions. (Blade's Merit brief, p. 13).

After the Commissioners and counsel met regarding the newly-filed litigation, all emails have been produced in response to these requests. (Troutman Affd. at 16). Still, the Blade maintains this meritless claim despite the mootness of their requests. (Blade's Merit brief, p. 10).

#### **H. Status of Seneca County Court litigation regarding the same evidence**

While this Court reviews briefing, the Seneca County Court has been asked to review the same evidence to determine whether to grant a second preliminary injunction hearing after a motion for reconsideration was filed by the Plaintiffs in that lawsuit. On October 11, 2007, the Plaintiffs filed a Motion for Relief from Judgment based upon Newly Discovered Evidence—the Kendall Cable affidavit. (See Motion for Relief from August 28, 2007 Judgment Entry, attached hereto as Exhibit E). As previously argued, this Court is now being asked to review evidence

that goes to issues already determined in the Seneca County Court of Common Pleas—whether the Commissioners violated public records or open meetings laws. The risk for prejudice and conflicting judgments is high. Additional arguments in support of these concerns are below.

### **ARGUMENT**

The Blade wants to this Court to create binding judicial precedent that public offices must expend tens of thousands of dollars for forensic computer specialists on the mere hint that records “may” be there. The Blade’s mechanism for getting its case to this Court was a hidden computer file. Instead of waiting 48 hours for the documents, as promised, the Blade rushed to file this lawsuit and expend countless public resources. Despite the Blade’s arguments, this Court should deny the Blade’s request for mandamus and find that the Commissioners acted reasonably within the bounds of the law.

**RESPONSE TO PROPOSITION OF LAW NO. 1: A WRIT OF MANDAMUS SHOULD NOT BE ISSUED COMPELLING A PUBLIC OFFICE TO HIRE FORENSIC COMPUTER EXPERTS TO SEARCH FOR RECORDS BASED UPON ONLY CONJECTURE THAT RECORDS “MAY” BE RECREATED.**

Public offices should not be compelled to pay for forensic computer analyses when evidence is lacking that any public records can be obtained or that they even exist. The Blade has not brought claims that records were unlawfully destroyed<sup>4</sup> under R.C. 149.351, even though the Blade makes the unverified claim that the Commissioners have admitted that deleted emails can no longer be produced. Blade’s Merit brief, p. 12. Also as set forth above, Blade has no evidence that any emails allegedly deleted by Commissioner Bridinger or former Commissioner Schock were emails other than ones which lacked administrative, legal, fiscal, or historical value per the Commissioners’ records retention schedule. See Ex. C4, retention schedule. Similarly,

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<sup>4</sup> This is evident from the Blade’s request for a forensic computer expert to examine the Commissioners’ computers. If they were destroyed, this would be a fruitless task.

the Blade has no evidence that the allegedly deleted emails were not identical to those sent to all three Commissioners and retained by Commissioners Sauber, Nutter, and/or former Commissioner Schock, and already produced to the Blade.

Despite the fact that it lacks both a claim for the unlawful destruction of records as well as any evidence, the Blade asks this Court to order the Commissioners to “take the necessary steps to restore [the allegedly deleted e-mails] to a condition in which they will be available for inspection and copying,” which includes paying for a forensic analysis consisting of “the scanning [of] a hard drive with the appropriate forensic data recovery software and hardware,” followed by a report to this Court of their efforts. Blade’s Merit brief at 15; see also Affidavit of Matthew A. Zuccarell, ¶¶ 13, 17, attached to Blade’s Merit brief). The Blade requests such extraordinary relief without any evidence of wrongdoing—only mere conjecture and assumption. The Blade wants the local citizens of Seneca County to pay for their fishing expedition.

The Blade is essentially seeking relief in mandamus which it believes, if granted, *might* provide evidence to support both its non-claim for the unlawful destruction of records, as well as its actual claims for a violation of the public records act and open meetings law. Blade’s Merit brief at 15-16. The Blade seeks a writ of mandamus, complete with an award of attorneys’ fees, so that it can conduct discovery to support its current conclusory and unsupported beliefs. This result is not only absurd, but is contrary to prior holdings of this Court, which make clear that unsupported conclusions will not support an action in mandamus. *State ex rel. Boccuzzi v. Cuyahoga Co. Bd. of Comm.*, 112 Ohio St. 3d 438, 2007-Ohio-323, 860 N.E.2d 749, at ¶ 19.

In the event that this Court determines that the Blade is entitled to this relief, the cost of the forensic analysis to allow for the copying of the e-mails *should be paid for by Blade*, as

required by R.C. 149.43(B).<sup>5</sup> This Court has previously recognized that “a governmental agency must allow the copying of the portion of computer tapes to which the public is entitled pursuant to R.C. 149.43,” so long as the person requesting the copying “assumes the expense of copying.” See *State ex rel. Margolius v. City of Cleveland* (1992), 62 Ohio St. 3d 456, 460, 584 N.E. 2d 665. In *Margolius*, the Court even noted that the city could respond to future requests by making arrangements with an outside contractor to make copies of tapes or disks in compliance with the statute, and then the city could then pass the cost of the service directly to the requestor. *Id.* at fn. 4; see also *State ex rel. Call v. Fragale*, 104 Ohio St. 3d 276, 2004-Ohio-6589, 819 N.E.2d 294, at ¶ 6 (citing *State ex rel. Mayrides v. City of Whitehall* (1990), 62 Ohio App. 3d 225, 228, 575 N.E. 2d 224 (holding that nothing in R.C. 149.43(C) provides for the Blade’s suggestion that he should receive records free of charge as a sanction)).

The Blade’s own IT experts’ testimony lacks any certainty that this information is retrievable, let alone that any retrievable documents are public records. In Mr. Zuccarell’s affidavit, he testified that deleted emails or portions thereof “may” be retained on a hard drive until overwritten by existing data. Zuccarell Affd. at 12. Data “may” be recoverable, backups “may” be available, but “[i]t is not possible to know whether deleted email messages or other data is recoverable.” *Id.* at 13-17. The Commissioners’ IT expert already searched for existing emails, pursuant to the Blade’s requests. Schaaf Affd. at 2-4. The IT experts agree on at least one thing—information that is deleted has no certainty of recovery. With unequivocal testimony

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<sup>5</sup> The Blade suggests that R.C. 2713.16 provides this Court with authority to order Respondent to bear the cost of this forensic analysis. Blade’s Merit brief at 15. However, this Court has long refused, and should continue to refuse, invitations to go outside of the plain language of R.C. 149.43(C) in awarding relief. See *Fant v. Bd. of Trustees, Regional Transit Authority* (1990), 50 Ohio St. 3d 72, 552 N.E. 2d 639.

from the Commissioners that no emails exist to support the Blade's claims, this Court should not compel the Commissioners to use public resources on such a whim.

The Commissioners have produced all emails that they have available and that have been retained according to their records retention schedule. *Hemmer Affd.* at 2. They have sought IT expertise to accomplish this task. *Schaaf Affd.* at 2-4. As with many public offices, the Commissioners may delete emails without review by the Ohio Historical Society if they no longer have any administrative, fiscal, legal, or historical value. *Hemmer Affd.* at 4. The individual holder of the public record is charged with this responsibility. *Id.* Under this retention policy, not every email is a public record merely because it is sent by a public office. The Blade has not challenged whether one or any of the Commissioners failed to make this assessment. The Blade seeks what have already been determined by the Commissioners to no longer have any value as public records, pursuant to the Commissioners' policy. Without evidence otherwise, the Blade seeks to interpose its interpretation of what is a public records instead of allowing the individuals with those records to make those determinations. Given that this records retention schedule is common throughout the state, the Court is invited to cause mischief throughout government in the hands of newspapers and militiamen alike: every user of a government computer could be compelled to pay for a digital image of their computer without more than a whim in the heart of the requestor, for good cause or bad.

Mandamus here is additionally unwise, because no evidence exists that the Blade has been denied identical copies of emails that have allegedly been deleted. The Blade has admitted that the Commissioner have produced hundreds, if not thousands, of sheets of paper from their email accounts. In occasions that all Commissioners received an email, only one copy of that

emails requires retention once determined to be administratively, fiscally, legally, or historically necessary. No review by the Historical Society is necessary to delete an email or a voicemail, for good reason. Ex. C4. Three county commissioners need not keep duplicates of the same email to document the business of the public office. Again, the Blade lacks any proof to argue or counter these assertions.

This Court must view this case and issue its decision in light of modernized technology needs. Emails are crucial to the conducting of modern business. Emails increase efficiency. These needs are not served if forensic computer specialists are necessary for public offices, or if a public officer cannot decide whether the countless emails received on a daily basis must be retained. Imagine the ramifications of requiring independent review of 50 emails received by a public officer for approximately 250 business days per year—12,500 documents necessitating review. Emails would inhibit rather than promote efficiency. This holds no less true for the Commissioners or this Court.

If this Court adopts the Blade's arguments, a public office's ability to use email will be severely compromised. Public offices will be forced to expend countless hours of time and endless finances to respond to requests such as the Blade's. Public offices already struggle with finances and keeping up with current technological advances. This Court should not further inhibit public office's abilities to efficiently conduct business, when, as in this case, no evidence exists to support that any improper actions have occurred. Accordingly, this Court must deny the Blade's request for ancillary relief which seeks an order compelling Commissioners to conduct a forensic analysis, at its cost, and to update this Court on the steps Commissioners takes in this regard.

**RESPONSE TO PROPOSITION OF LAW NO. 2: WHEN A PUBLIC OFFICE REASONABLY OFFERS ADDITIONAL RECORDS WITHIN 48 HOURS OF THEIR DISCOVERY AND HAS NO OTHER OBJECTIONS RELATED TO THEIR RECORDS PRODUCTION, THIS COURT SHOULD NOT ISSUE MANDAMUS RELIEF WHEN PREVIOUSLY UNKNOWN EMAILS ARE RECOVERED FROM HIDDEN FILES.**

**A. The Commissioners have always acted reasonably in complying with the Blade's records requests.**

This Court should not grant a writ of mandamus compelling the Commissioners to promptly comply with the Blade's records requests because the Commissioners have always acted reasonably and produced records without objection from the Blade. This Court should not issue mandamus relief compelling future performance from the Commissioners because these issues are moot and not capable of repetition. The Blade has stated in their brief that their claim for a writ of mandamus regarding documents already produced is moot, upon their receipt of the contents of the hidden archive file. Blade's Merit brief at 9. This Court has denied mandamus relief if the issue is moot. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1999), 80 Ohio St.3d 513, 518, 687 N.E.2d 661; see also *State ex rel. Breaux v. Cuyahoga Cty. Court of Common Pleas* (1977), 50 Ohio St.2d 164, 4 O.O.3d 352, 363 N.E.2d 743; *Maranze v. Montgomery Cty. Bd. Of Elections* (1958), 167 Ohio St. 323, 4 O.O.2d 401, 148 N.E.2d 229. The Commissioners' dealings with the Blade and the Blade's praise of the Commissioners' responses fail to support any need for relief.

The Commissioners have reasonably and admirably complied with the numerous public records requests propounded on them in recent days. The dispute over the former courthouse has led several entities to pursue public records requests, including the six opponents in the Seneca County case, several television media outlets, and the Blade. Hemmer Affd. at 2. The Blade has

failed to show how the Commissioners have failed to comply with their requests, let alone the alleged “pattern of non-compliance.”

If anything, the Commissioners have shown a pattern of compliance with the Blade’s public records requests through their diligent response to all of the following Blade requests:

- the Blade’s August 6, 2007 public records request was responded to by the Commissioners on August 16, 2007;
- the Blade’s August 8, 2007 public records request was responded to by the Commissioners on August 13, 2007;
- the Blade’s August 22, 2007 public records request was responded to by the Commissioners on September 4, 2007;
- the Blade’s August 29, 2007 public records request was responded to by the Commissioners on August 31, 2007;
- upon learning of a hidden, archived file, the Commissioners pledged supplemental responses to the Blade’s records requests within 48 hours;
- the Blade’s September 13, 2007 public records request were able to be picked up by Blade’s on September 20, 2007 from the Commissioners;
- the Blade’s September 26, 2007 public records request was responded to by the Commissioners on October 1, 2007;
- the Blade’s September 27, 2007 public records request was responded to by the Commissioners on October 5, 2007;
- the Blade’s October 1, 2007 public records request was responded to within a few days; and,
- the Blade’s October 8, 2007 public records request was partially responded to on October 8, 2007 and will be completed within days.

Troutman Affd. at 3-28.

Until this lawsuit was filed, the Blade never objected to the Commissioners' timely turnaround of public records in response to their plethora of requests. Id. at 7-8, 13. In fact, the Blade even praised the Commissioners for their efforts in producing public records in response to their requests. Id. at 18. The Commissioners endeavored for quick turnaround on these responses, despite being subpoenaed for court hearings on 5 days during this time in the Plaintiffs' Seneca County case. Due to the endless litigation on the courthouse, the Commissioners sought review from counsel, which also has justified additional response time in past cases.

The only timeliness issue that the Blade has challenged is when the Commissioner first learned that an additional archived email folder existed. Despite the Blade's contentions, this is not a file that was recklessly not examined—the issue is a folder in which emails, many of which are not even public records, were kept to organize an email inbox. Mere oversight caused this issue, but it is not as apparent as an improperly filed document, like the Blade wants this Court to believe. Now that that folder has been found, this issue is incapable of repetition. Emails are complicated, and the Blade's unreasonableness has led to this protracted litigation. Instead of 48 hours of patience, they filed a lawsuit. Given the Commissioner's admirable responses to their other requests, 48 hours was not unreasonable. For instance, Ms. Feehan requested Commissioner emails on August 6, 2007 amidst a preliminary injunction hearing in the Plaintiffs' Seneca County case, and she got them promptly. Troutman Affd. at 4.

**B. The Blade lacks any evidence beyond mere conjecture that an open meetings violation occurred in August 2006 or at any other time.**

The Blade has not come forth with any evidence that open meetings law violations occurred so that this Court can find against the Commissioners. The Blade's arguments are mere

inferences that some deliberations may have occurred before the August 31, 2006 Board meeting. The same inferences were available to Judge Wittenberg after four days of hearings, and his determinations of credibility should guide this Court. While the Blade hopes to fish for recreated emails, those requests should be denied for independent reasons below. As such, this Court should find that the Blade lacks evidence that any open meetings law violations have occurred.

**1. No improper deliberations occurred.**

The term “deliberation” has specific legal meaning under Ohio law. A “deliberation” is the weighing and examination of reasons for and against a particular course of action. *Piekutowski v. South Cent. Ohio Educ. Servs. Ctr. Governing Bd.* (4<sup>th</sup> Dist. 2005), 161 Ohio App.3d 372, 379, 830 N.E.2d 423; *Theile v. Harris* (June 11, 1986), Case No. C-860103, 1986 WL 6514, at \*5. “Deliberations involve a decisional analysis, *i.e.*, an exchange of views on the facts in an attempt to reach a decision.” *Piekutowski*, 161 Ohio App.3d at 379, 830 N.E.2d 423 (emphasis added). In *Piekutowski*, the board members had a closed door “free-for-all” that resulted in each member giving their opinion (voting) regarding a particular course of action. *Id.* at 379. The Court upheld the lower court’s finding that those actions violated the law. *Id.* at 385. There is no such evidence here.

The Fourth District Court of Appeals has defined deliberations in the following manner:

a public body deliberates upon official business after it has obtained the relevant and salient facts necessary to reach a correct, proper, prudent and responsible decision. We hold that after a public body has obtained the facts, it deliberates by thoroughly discussing all of the factors involved, carefully weighing the positive factors against the negative factors, cautiously considering the ramifications of its proposed action, and gradually arriving at a proper decision which reflects this legislative process.

*Theile*, 1996 WL at \*5 (emphases not added). As such, “deliberation” requires more than merely passing a document around for review before a meeting.

Deliberations do not include fact-finding or informational sessions. *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass’n of Pub. Sch. Empl. Local 530* (9<sup>th</sup> Dist. 1995), 106 Ohio App.3d 855, 864, 667 N.E.2d 458. “Question-and-answer sessions between board members and other persons who are not public officials do not constitute “deliberations” unless a majority of the board members also entertain a discussion of public business with one another.” *Id.* (emphasis added). As a result, the law permits the Commissioners to engage in fact-finding sessions outside their open meetings so long as deliberations do not occur in private. After four days of testimony, Cook has failed to establish any examples of private deliberations.

The Blade argued that Ms. Cable’s affidavit supports that violations occurred, but she is neither legally trained nor is her testimony uncontradicted. Both she and the Blade have interpreted statements the Commissioners made in their favor, but that disregards the unequivocal testimony of Commissioner Nutter—he never deliberated on his 15-year plan prior to the August 31, 2006 meeting.

The fact that the Commissioners deliberated little, if at all, on August 31, 2006 establishes nothing. No deliberation was necessary:

- the 15-year plan was a summary of a study done by Stilson, a plan in the public for months and discussed repeatedly by the Commissioners in public;
- the issue of the courthouse had been in the public discourse for many years; and,
- the August 31, 2006 vote was to set a blueprint for future public actions toward the replacement of the former courthouse. The final decision has yet to occur.

Even if an improper deliberation is established, which has not occurred, it must have also caused the public action taken after an improper deliberation. *Greene County Guidance Ctr. v. Greene-Clinton Comm. Mental Health Bd.* (2<sup>nd</sup> Dist. 1984), 19 Ohio App.3d 1, 5, 482 N.E.2d 982. In the *Greene* case, the Court analyzed this part of the test closely because public discussion on same issue discussed in private had occurred for more than two years. *Id.* at 5. The public body extensively discussed the issues and went around the room to get a straw poll of the opinions of all of its members. *Id.* The Court found the “straw polls” to be improper deliberations. *Id.* Again, Cook has failed to establish any evidence of such actions here.

The evidence in this proceeding amounts to the following:

- Years of public deliberation, debate, and an election on what to do with the former courthouse.
- Commissioner Nutter’s August 8, 2006 and August 28, 2006 emails wherein he forwarded his 15-year plan to the other Commissioners, which consisted mainly of verbatim language from a report to the Commissioners nearly three months earlier;
- Commissioner Sauber’s testimony that he never discussed the plan with Commissioner Nutter before approving it at the Board’s August 31, 2006 open meeting;
- Commissioner Nutter’s testimony that the only changes he made were minor grammatical changes, such as the misspelling of former Commissioner Schock’s name;
- Commissioner Nutter’s testimony, repeated numerous times at the hearing, that “we have never had any improper deliberations;”
- Plaintiff Engle’s testimony that she saw the three Commissioners in an office looking at an unidentified, stapled packet before the August 31, 2006 Board meeting;
- Plaintiff Engle’s testimony that she heard Commissioner Nutter refer to some Option B” while examining the stapled sheet; and,

- numerous witnesses' testimony that the Commissioners' August 31, 2006 approval of Commissioner Nutter's 15-year plan was made with little or no discussion that date.

Based upon this evidence, no improper deliberations have been shown.

Despite its efforts, the Blade lacks the following information to prove by clear and convincing evidence an entitlement to an injunction:

- that Commissioner Nutter's two August 2006 emails led to any deliberations with any other Commissioner regarding his 15-year plan before August 31, 2006;
- that Commissioner Sauber deliberated with anyone in private regarding the 15-year plan;

When reviewing the evidentiary deficiencies, the Blade lacks any support that the Commissioners deliberated before August 31, 2006.

Commissioner Nutter's email does not even implicate Ohio's public meetings law. See *Haverkos v. Northwest Loc. Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489 (attached hereto as Exhibit A). In *Haverkos*, one school board member emailed other board members about considering a response to a newspaper article criticizing the school board. *Id.* at 1. No board member responded. *Id.* Another board member drafted a response to the article. *Id.* The letter was read at the meeting before all board members signed it. *Id.* Applicable to this case, the Court concluded that the email did not violate open meetings laws in part because it failed to meet the prearrangement requirement necessary for an open meetings law violations. *Id.* at 7.

The *Haverkos* case went further and declared all emails inapplicable to Ohio's open meeting laws. *Id.* at 9. The Court determined that the email was not a "discussion" because it was one email to others without any responses or counter-responses. *Id.* In addition, the Court analyzed law from other jurisdictions to conclude that Ohio law does not include emails as part

of open meetings law. *Id.* Even in jurisdictions where emails are explicitly subject to open meetings laws, the mere sending of an email is not a “meeting” because members must collectively intend to meet to conduct formal business. *Id.* As a result, the *Haverkos* case makes Commissioner Nutter’s emails irrelevant to this Court’s analysis because they are either inapplicable to open meetings law and do not constitute meetings or discussions.

**2. Even if this Court could invalidate the August 31, 2006 15-year plan, the Commissioners may still proceed towards replacement of the former Seneca County courthouse.**

The Commissioners’ current course towards replacement of the former Seneca County Courthouse should not be undone by this Court, even if it finds that some actions were improper on August 31, 2006. As the uncontested evidence established, the 15-year plan adopted on that date is a “roadmap” from which the Commissioners have strayed already. It was not a necessary vote for the replacement of the courthouse and so it should not invalidate future decisions that are independent of it. Even if a technical violation is conjectured to have occurred on August 31, and that decision could be invalidated, the Commissioners would have remedied that numerous times over. On June 25, 2007, the Commissioners requested a bid package from a contractor so that the demolition project could go out for bid. The Commissioners approved the bid package on August 6, 2007 so that they could proceed with getting bids for the work in the near future. The Commissioners still must contract with a company to replace the courthouse. As such, this Court should not issue a preliminary injunction regarding the former Seneca County courthouse because an invalidation of the August 31, 2006 resolution would not affect current and future decisions.

On June 25, 2007, the Commissioners met and decided in a 2-1 vote that the courthouse should be demolished. At that meeting, the Commissioners did all of the following:

- listened to an estimation of the costs of various options for the courthouse;
- entertained public comment;
- engaged in open discussion amongst themselves; and,
- Commissioners Nutter and Sauber voted in favor of going forward with a manual so that demolition of the courthouse could be properly bid in accordance with Ohio law.

Since that date, the Commissioners have made numerous additional public decisions regarding the courthouse.

More recently, the Commissioners voted to approve the bid package and begin environmental studies on the courthouse. Numerous courthouse decisions are yet to come, including the decision that Commissioner Nutter testified would mean “no turning back”—approval of a contract for the demolition the former Seneca County courthouse. The decision to contract for the demolition of the courthouse is yet to come and requires a separate, formal resolution by the Board. As such, Cook has not established that any actions, let alone futures actions, should be invalidated or enjoined by this Court.

A close reading of R.C. 121.22(H) is required for this case. It provides:

[a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) of this section and conducted at an executive session held in compliance with this section.

While this statute makes the formal action invalid if discussed in an improper meeting, it does not and should not prevent the public body from ever acting on that issue. To do so would interminably cripple a public body's ability to do business for a technical violation. In fact, the authority dealing with invalidation of decisions deals with situations in which distinct resolutions are invalidated, not a series of resolutions subsequently enacted by the public body. Therefore, all of the Commissioners' subsequent resolutions should not be invalidated under any of this authority.

If this Court remains concerned with the August 31, 2006 events, the Commissioners' actions subsequent to the August 31, 2006 decision have cured their actions that date many times over. Some of the cases regarding this issue are as follows, despite their minimal relevancy:

- *Beisel v. Monroe Cty. Bd. of Educ.* (Aug. 29, 1990), Case No. CA-678, 1990 WL 125485—This case held that a Court may award an injunction regardless of the public body's subsequent attempt to cure the violation. *Id.* at 2. However, the Court held that the public body's actions were cured by a subsequent public discussion on an issue, despite prior improper discussions in executive session. *Id.* This case has little important because the Commissioners' decision to raze the courthouse involves more than the August 31, 2006 acceptance of the 15-year plan.
- *State ex rel. Cincinnati Enquirer v. Hamilton Co. Comm'rs* (Apr. 26, 2002), Case No. C-010605, 2002 WL 727023—The Court observed that the remedy for Sunshine Law violations is to order the resulting resolution invalid and order the public body to re-deliberate.<sup>6</sup> *Id.* at 1. With regard to Cook's allegations, the courthouse plans can go forward without the 15-year plan. In addition, the Commissioners have already deliberated on subsequent issues and made numerous decisions so that nothing would be left for the Court to remedy. None of these subsequent decisions have been challenged by Cook.

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<sup>6</sup> See also *Theile v. Harris* (June 11, 1986), Case No. C-860103, 1986 WL 6514, at \*6 (refusing to invalidate formal action taken in public because of prior investigatory sessions, even if "fatuous" violations are found); *Kuhlman v. Vill. of Leipsic* (Mar. 27, 1995), 1995 WL 141528, at \*3 (allowing a decision made in an open meeting with public discussion to stand, even if prior closed meeting may have began the discussion).

- *Gannett Satellite Info. Network v. Chillicothe City Sch. Dist. Bd. of Educ.* (1988), 41 Ohio App.3d 218, 221, 534 N.E.2d 1239—The Court held that a technical violation of rules providing for executive session could not be cured by subsequent discussion in an open meeting. The Court never provided that invalidation is necessary if formal action is subsequently taken in accordance with the open meetings act, as occurred here, especially when different resolutions have been passed.
- *M.F. Waste Ventures, Inc. v. Amanda Twp. Bd. of Trustees* (Feb. 12, 1988), Case No. 1-87-46, 1988 WL 17731—The Third District held that adoption of resolutions discussed in improper meetings were invalid. *Id.* at 4. However, the Court never discussed whether full deliberations took place on these issues in subsequent meetings and their potential effect. This case also never discussed whether subsequent separate and distinct resolutions should be invalidated. As such, it should not forever preclude the Commissioners from making any decisions with regard to the former Seneca County courthouse.

Here, the Commissioners openly met dozens of times since August 31, 2006 and have taken several affirmative steps to proceed to the demolition of the courthouse. As Commissioner Nutter testified, the 15-year plan is a roadmap and not the final act to replace the courthouse. Otherwise, the Commissioners would not need to meet openly and have the opportunity to debate everything they have since August 31, 2006. Future decisions such as choosing a demolition contractor would be unnecessary. Post-August 31, 2006 actions are yet to be challenged by Cook. Future actions cannot be challenged yet. No evidence supports that any of these should be invalidated.

This Court should not extend any of the cases above to prevent the Commissioners from acting on the courthouse indefinitely. This caselaw pertains only to individual resolutions challenged by the petitioners in those cases. Even if the August 31, 2006 decision is invalidated, the law cannot be construed to make the courthouse forever “untouchable.” As such, this Court should not issue a preliminary injunction against the Commissioners.

**C. The same case is being tried at the Common Pleas level and the same evidence is being used in both cases.**

Although thus far not granted, this Court should again consider the risks posed by the Blade's duplicitous filing of a lawsuit already filed in Seneca County. This Court should dismiss the Blade's case without ruling on its merits. For reasons that continue to mount, this Court should dismiss the Blade's action because of the jurisdictional-priority rule and the risk for inconsistent judgments. Within the past 30 days, both the issues of forensic computer research and Ms. Cable's affidavit have been brought in front of the trial Court. That Court has jurisdiction on these issues and raises the risk for inconsistent judgments from this Court and the Seneca County Court based upon the same evidence for the same parties.

In the Seneca County case, the Plaintiffs filed a motion and obtained the following language in a Court Order:

The parties . . . are hereby ordered to preserve all electronic data and equipment, until after such time that the opposing party has had an opportunity to hire a forensic computer specialist to obtain possible discovery . . .

See September 25, 2007 Discovery Order (Ex. F). In both lawsuits, the State of Ohio by different relators are seeking the same emails in order to make public records and open meetings law claims against the Commissioners. Both seek to prevent the former courthouse from coming down via these mechanisms. For this reason, the jurisdictional-priority rule provides that the court in which the lawsuit was filed first has jurisdiction—not this Court.

The Plaintiffs in the Seneca County case have recently filed a motion to reopen their request for preliminary injunction that was denied on August 28, 2007, based upon Ms. Cable's affidavit. Just as in this case, they have argued that this affidavit refutes prior testimony given by the Commissioners regarding their open meetings compliance. Just as in this case, they argued

that this means that the Commissioners violated open meetings laws with regard to the same issue—the 15-year plan. The same issues between these parties should not be in the Seneca County Court of Common Pleas and the Ohio Supreme Court at the same time.

Relevant samples from recent filings in both cases shows this similarity and the attendant risk for inconsistency in judgments:

- “The Plaintiffs have now discovered a witness coming forward who has provided sworn testimony that the Board members had *private discussions* and shared *private emails* about the 15 Year Plan prior to the August 31, 2006 public meeting. Kendall Cable, the then county reporter for the Advertiser Tribune . . . discloses for the first time that *the Commissioners admitted* to Kendall Cable that they were able to produce the 15 Year Plan, have it prepared and ready for signature at the August 31, 2006 public meeting without prior public disclosure . . . *because they had met privately in their respective offices*, discussed 15 Year Plan and exchanged private emails related to the 15 Year Plan.” See Plaintiffs’ Motion for Relief, p. 4.
- *Compare* Blade’s Merit brief, p. 4: “In particular, in conversations with Kendall Cable . . . the commissioners expressly acknowledged that they had conducted extensive substantive private discussions among themselves prior to their formal action at the August, 2006, meeting. As they said at that time, they conducted regular and numerous discussions among themselves about the plan prior to the meeting, visiting one another’s office to “talk things over” regarding the Space Needs Master Plan; they said also that they common exchanged emails, sending back and forth comments regarding the Master Plan.”
- “The affidavit of Kendall Cable calls into question, and most certainly challenges the truthfulness of the sworn testimony of Ben Nutter and Dave Sauber, under oath, that they never discussed the 15 Year Plan prior to the public presentation on August 31, 2006 . . . the only logical inference for the trial court to clearly deduce from all the facts is that the Board members met privately, discussed the 15 Year Plan privately, deliberated over the 15 Year Plan privately, and agreed on the 15 Year Plan in private, all in violation of the law.” See Motion for Relief, p. 5.
- *Compare* Blade’s Merit brief, p. 4: “These statements [those reported in Ms. Cable’s affidavit] were plainly and directly contrary to their testimony in the Cook litigation that no such discussions had ever taken place.”

- “As described above, production of the deleted records is likely to produce evidence that the decision to demolish the Seneca County Courthouse was arrived at by means that were at least arguably incompatible with the Meetings Act. Moreover, the deleted records may well add documentary proof to the already existing testimonial proof tending to show the falsity of the commissioners’ Cook-litigation testimony that they had never discussed the demolition plan other than in public meetings.” See Blade’s Merit brief, p. 10.

A review of these quoted portions shows that they could be substituted for each other in each case. The State of Ohio through different relators is arguing the same legal theories to keep the former courthouse from coming down in two different locations. Before this Court, the Blade has generally referenced testimony given in the trial court by the Commissioners. Instead of this Court’s passing judgment without reviewing those witnesses or even a transcript of that testimony, this Court should allow the State of Ohio’s case to proceed where it has already begun--in Seneca County. As the quotes above show, both lawsuits involve both public record and open meetings issues. Therefore, this Court should strongly consider dismissing the Blade’s case now that their arguments have been articulated in their Merit brief and the litigation has advanced in Seneca County.

**RESPONSE TO PROPOSITION OF LAW NO. 3: ATTORNEYS’ FEES ARE INAPPROPRIATE WHEN A PUBLIC OFFICE ACTS REASONABLY IN COMPLYING WITH PUBLIC RECORDS REQUESTS BY OFFERING TO PRODUCE ONE ARCHIVED FILE WITHIN 48 HOURS OF LEARNING OF ITS EXISTENCE.**

- A. The former version of R.C. 149.43 applies to the Blade’s request for attorneys’ fees because it was in effect at the time that the request were made and the Complaint was filed.**

This Court should not apply newly-enacted R.C. 149.43(C) with regard to the Blade’s attorneys’ fees request because it was not enacted at any relevant time during this litigation. Statutes should not be construed to apply retroactively unless specifically provided for in the statute by the General Assembly. All relevant events and the Blade’s filing of its Complaint took

place prior to the effective date of the amended version of R.C. 149.43. The Blade's Complaint was filed on September 10, 2007, and the effective date of 2006 HB 9 (which amended R.C. 149.43) was September 29, 2007. Therefore, the prior version of R.C. 149.43 governs this action.

The retroactive application of newly-enacted laws is frowned upon. The amended version of R.C. 149.43 is not to be applied retroactively. As R.C. 1.48 provides, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." See *State v. LaSalle*, 96 Ohio St.3d 178, 181, 2002-Ohio-4009, 772 N.E.2d 1172. Absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may only be applied prospectively. *Id.* Retroactive application of laws is unfair to those affected because they cannot adjust their behavior to comply with the law.

House Bill 9 lacks any indication that the General Assembly intended that the attorneys' fees provision in the amended version of R.C. 149.43 should be applied retroactively. Compare *State ex rel. Beacon Journal v. Ohio Department of Health* (1990), 51 Ohio St.3d 1, 553 N.E.2d 1345 (1987 amended version of R.C. 149.43(C) applied to mandamus action pending at time of effective date where legislature clearly stated that the amended statute is to be applied retroactively). Due to the absence of the General Assembly's intent to make 2006 HB 9 retroactive, the prior version of R.C. 149.43 applies to this action. Therefore, this Court should assess the Blade's request for attorneys' fees according to the analyses below.

**B. Commissioners did not act unreasonably in complying with Blade's public records requests when it pledged to provide one formerly hidden email folder within 48 hours of its finding.**

This Court should deny the Blade's request for attorneys' fees because the Commissioners acted reasonably in offering to produce recently-discovered public records within 48 hours of their discovery. This Court's precedent under former R.C. 149.43 supports that the Blade is only entitled to attorneys' fees if the Commissioners acted unreasonably. The Blade seeks attorneys' fees for the contents of one hidden archive file that were produced by Commissioners shortly after the filing of Blade's complaint and counsel had an opportunity to meet with the Commissioners. The Blade brought this lawsuit and alleged that the Commissioners were unreasonable when the Commissioners offered two hours earlier to produce public records within 48 hours. Troutman Affd. at 14. Such expectations from public offices do not justify attorneys' fees for impatient relators, so this Court should deny the Blade any of its fees.

The Blade has failed to show that attorney fees are merited in this action. An award of attorneys' fees under R.C. 149.43(C) is not mandatory. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 626, 640 N.E.2d 174; see also *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108, 529 N.E.2d 443. R.C. 149.43(C) permits courts to exercise discretion in awarding attorneys' fees. *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 54, 689 N.E.2d 25. A court may still award attorney fees when a writ is moot, but this is subject to the analysis set forth below. *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 314, 750 N.E.2d 156.

The Blade must demonstrate sufficient benefit to the public to warrant an attorneys' fees award. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 626, 640 N.E.2d 174. More importantly to this case, the Court must also determine whether the public office's delay or failure to turn over records was reasonable. *Id.* This is because attorneys' fees awards are viewed as punitive under former-R.C. 149.43. Under these facts, the Commissioners' actions were certainly reasonable.

This Court has denied attorney fees in actions where records were provided after the commencement of a writ of mandamus. For instance, this Court did not award attorneys' fees to a relator where the public office provided prior notice to the requester of public records that the records would be provided at a time that was shortly after the mandamus action was filed. See *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 285, 715 N.E.2d 179. In denying the relator's attorneys' fee request, this Court provided that "[r]espondents acted responsibly and with the requisite diligence" while responding to voluminous records requests. *Id.* at 392.

As in the *Taxpayers Coalition* case, the Commissioners acted with the requisite diligence and responsibility in responding to all of Blade's voluminous public records requests. The Commissioners and their counsel have worked diligently to provide prompt responses to the Blade's requests. Blade would have had all of the archived records if they had waited a mere 48 hours before filing this lawsuit.

The Commissioners' responsiveness to every public records request made by the Blade directly contradicts the Blade's allegations of a "pattern of non-compliance." In fact, the Commissioners promptly responded to public records requests made by six different people

opposing a new courthouse, many news organizations, and the Blade—all while attempting to keep up with public business. Hemmer Affd. at 2. Commissioners responded to and promptly replied to every public records request made by Blade prior to and after the filing of this action by Blade. Troutman Affd. at 3-25; see also Section A in Response to Proposition of Law No. 2 above. The Commissioners' responsiveness and due diligence support that attorneys' fees are unwarranted.

The Commissioners' efforts are important to the reasonableness analysis. The Commissioners have received 10 or more broad, voluminous requests for public records from the Toledo Blade in the past 2 months. Troutman Affd. at 3-28; Hemmer Affd. at 2. The Blade is not the only requester of documents in Seneca County. The Commissioners take their public records responsibilities very seriously, but the volume at which the Blade has requested these records is relevant to whether the Commissioners acted reasonably. They must balance to maintain their public business with public records requests, an act that they have admirably performed.

The Commissioners' efforts cannot be viewed without considering the 3 different stages of pending litigation against them in all levels of courts in Ohio. Due to the sensitivity of these issues, the Commissioners sought review by counsel on all public records requests regarding courthouse information. The Commissioners are entitled to have counsel review documents, especially when attorney-client privileged information is contained within them. The need for attorney review only further adds to the reasonableness shown by the Commissioners.

With regard to the archived folder, the Commissioners reasonably pledged to provide these records to the Blade within 48 hours. Troutman Affd. at 14. The Blade never objected. *Id.*

Instead of waiting for the records, the Blade rushed to the courthouse to file its lawsuit. *Id.* Now it wants this Court to grant it attorneys' fees for a 48 hour wait after previously-unknown records were found. Instead of doing the least burdensome and costly option, the Blade has wasted this Court's resources on an issue that the Commissioners believed had already been resolved. Attorneys' fees are not justified under such facts. Any well-informed office would have believed they complied and met the spirit of public records law in such timely turnaround of public records.

Instead of using proven public records violations to support an award of attorneys' fees, the Blade wants this Court to award their fees connected with their theory and hope that public records "may" still exist on the Commissioners' computers. The Blade can cite to no public record that they have not been produced or one that has been destroyed. The Blade wants this Court to award it attorneys' fees before any violation has even been established with regard to the retention of public records. This Court should deny such a request as absurd and inapposite to its prior caselaw regarding recovery of attorneys' fees. *State ex rel. Boccuzzi v. Cuyahoga Co. Bd. of Comm.*, 112 Ohio St. 3d 438, 2007-Ohio-323, 860 N.E.2d 749, at ¶ 19.

This Court should not award attorneys' fees to the Blade for the Commissioners' actions with regard to the hidden email folder. R.C. 149.43 requires that the Commissioners act reasonably in responding to the Blade's records requests. The Commissioners contacted the Blade as soon as their oversight was recognized. They attempted no delay. They attempted to trickery. They admitted the oversight and pledged prompt compliance. This Court should not set the precedent that public offices that have properly retained files be held so such strict

standards—all public offices will suffer. As such, this Blade should not be awarded any attorneys' fees for its action.

### CONCLUSION

For all the foregoing reasons, this Court should deny the Toledo Blade's request for a writ of mandamus to compel the Seneca County Commissioners to hire a forensic computer specialist to retrieve emails when the Toledo Blade cannot establish any violation of public records or open meetings laws. The Toledo Blade has not established that any emails have been unlawfully deleted. Mere conjecture is insufficient. None of these arguments support this Court's enjoining the Commissioners from proceeding with replacement of the former Seneca County courthouse. This Court should also deny the Toledo Blade's request for attorneys' fees and costs associated with this action for reasons already set forth above.

Respectfully submitted,



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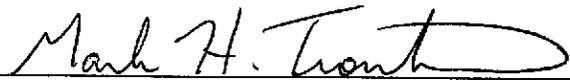
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on October 16, 2007 to the following counsel via regular U.S. mail and email:

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