

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: 07-1694

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

ORIGINAL ACTION IN MANDAMUS
(Public Records)

Respondent.

REPLY BRIEF OF RELATOR

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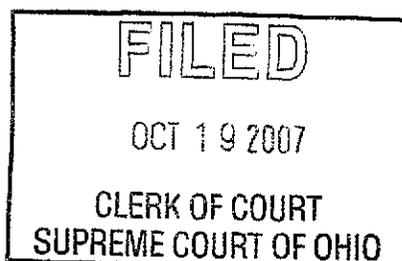


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ARGUMENT

Introduction.

This is an action to enforce Respondent's obligations under the Public Records Act, R.C. 149.43 ("the Act"). Respondent apparently disagrees. On the very first page of its brief, Respondent claims that the action is really an Open Meetings Act case in disguise. *Merit Brief of Seneca County Board of Commissioners*, p. 1 ("*Respondent's Brief*").¹ But, according to Respondent, the case is not really about open meetings either: it is, rather, an "overreaching attempt" by Relator "to interject itself in a local decision." *Id.*, p. 1. But, then again, that is not exactly right, either, for, according to Respondent, this proceeding is merely a "convenient" vehicle for Relator "to report on itself taking a position on a matter of local interest." *Id.* After all, Respondent says, the "[l]ocal press" has already fully covered the Commissioners' work. *Id.*, p. 5. In the end, the Commissioners claim, the case and the uncomfortable scrutiny are beside the point because "the Commissioners had all the information they needed to make their decision." *Id.*, p. 2 (underscoring in original).

Respondent's hostility to scrutiny apparently extends, not only to Relator, but to this Court as well. According to Respondent (and notwithstanding the Constitution), "[t]his Court is an awkward court of original jurisdiction," and it would be far better if the Court just left matters in the hands of the local Court of Common Pleas. *Id.*, p. 5. But even this suggestion's limited nod to judicial oversight cannot be taken seriously, since a centerpiece of Respondent's public-records argument (when it actually makes such an argument) is the proposition that *no one* has the power to review the legality of its destruction of public records, or, indeed its decision as to what records are public, *Id.*, p. 14 (arguing that Relator cannot prevail because it must "allow[] the individuals with

¹ See also *id.*, pp. 3, 6-7, 10-11, 18-29.

those records [i.e., the office holders] to make th[e] determinations” whether particular documents are public records).

In sum: We, the governors, don’t need you, the governed, to inspect our records, or to question our decisions about what we choose to destroy or allow you to inspect.

Neither this Court nor Relator is a stranger to frantic claims by public officials that the skies will fall if the Public Records Act is enforced according to its terms, and Respondent advances its fair share of such claims here.² What is unusual in this case is the audacity – indeed, shamelessness – of Respondent’s indifference to its responsibilities under the Act.

Respondent engaged in wholesale purges of thousands of electronic records (using Respondent’s own estimates, 25,000 or more³) without even pretending to comply with its responsibilities both under R.C. 149.351(A) and under *its own statutorily required* records-retention-and-disposal policy. And now that this stunning act of lawlessness has been made public, Respondent’s answer is *not* a claim of innocent mistake or an effort to undo the damage. Instead, Respondent asserts an unfettered power to destroy electronic records. And as for the prospects of judicial review of these decisions: No chance, since, because of the Board’s own wrongful conduct

² Undoubtedly the most colorful of Respondent’s claims is the prediction that if Relator prevails then local government offices throughout the state will be overrun by “newspapers and militiamen alike” demanding copies of every hard drive in sight. *Respondent’s Brief*, p. 14. Curiously, what appears to be Respondent’s chief source of worry about that scenario is less the idea of militiamen copying hard drives than the prospect that they might get their copies for free. *Id.* (“every user of a government computer could be compelled to pay for a digital image”).

³ *See Respondent’s Brief*, p. 15 (calculating that each public officer easily receives approximately 12,500 e-mails per year). In this case, Commissioner Nutter has acknowledged deleting all of his incoming e-mails for a six-and-a-half-month period. *Complaint* ¶ 15 (*see Eder Affidavit* ¶ 3 [attesting on personal knowledge to the truth of the Complaint’s factual allegations]). Commissioner Bridinger similarly acknowledged deleting all of his e-mails (incoming and sent) from the time he took office in January, 2006, until August or September of this year. *Complaint* ¶ 17.

in making the records inaccessible, no one can prove that the records have been unlawfully deleted, or even existed in the first place.⁴

Moreover, having insisted that it can hardly afford to pay the “tens of thousands of dollars” it would supposedly cost to recover the deleted e-mails, *Respondent’s Brief*, p. 11, Respondent nonetheless invites Relator to seek relief for the destruction in the form of forfeitures under R.C. 149.351(B)(2). *Id.* At \$1,000 per violation, of course, the cost of that to Respondent would not be Respondent’s imaginary “tens of thousands of dollars” figure, but \$25 million. *See Kish v. City of Akron*, 109 Ohio St. 3d 162, 2006-Ohio-1244.⁵

Respondent’s approach to its public-records obligations, in sum, is of a piece with its approach to open governance generally: its principal characteristic is a readiness to do any act, to say any thing, and to pay any price if it will help to limit public scrutiny of the public’s business, and especially public scrutiny by “outsiders” like Relator.

In view of Respondent’s wide-flung assertions about what is at issue, it is well to begin with a few simple points.

Despite Respondent’s strident assertions, this *is* a case under the Public Records Act, and only under the Public Records Act. The sole cause of action alleged in the Complaint arises under the Act. *Complaint* ¶¶ 1, 13-22, and pp. 9-10 (prayer). Relator’s merits brief sets out three propositions

⁴ “Chutzpah is a quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.” Leo Rosten, *The Joys of Yiddish* 93 (1968). *See also Marks v. Commissioner*, 947 F.2d 983, 986 (D.C.Cir.1991) (adopting a “chutzpah doctrine” to reject claim by fugitives from prosecution that the government had made inadequate efforts to notify them about a tax delinquency).

⁵ In truth, the “tens of thousands of dollars” figure is wholly the product of Respondent’s imagination, pulled from thin air without any factual or evidentiary basis at all. The actual cost of recovery, as set out in the supplemental affidavit of Matthew Zuccarell, would be on the order of \$1,200 or less for each of the three computers in question. (*Supplemental*) *Zuccarell Affidavit* ¶ 15.

of law, each of which is addressed exclusively to, and relies exclusively on, the provisions of the Act. *Brief of Relator*, pp. i-ii, 11-21:

First, Respondent must take the steps necessary to recover the unlawfully deleted e-mails in order to fulfill its obligation under the Act to maintain public records and to do so in a manner that facilitates public access. R.C. 149.43(B)(2) (former R.C. 149.43(B)(1)). (Proposition of Law No. 1.)

Second, Respondent should be ordered to comply in the future with the Act's requirement that records be made "*promptly*" available for inspection and copying as required by R.C. 149.43(B)(1). (Proposition of Law No. 2.)

Third, Relator is entitled to an award of its attorney fees, whether the standard governing such an award is supplied by former R.C. 149.43(C) or by current R.C. 149.43(C)(2)(b). (Proposition of Law No. 3.)

In between complaining irrelevantly about Relator's journalistic motives and arguing extensively about the Open Meetings Act, Respondent does attempt, at least in part, to address the actual merits of Relator's propositions.⁶ These arguments are addressed in the sections that follow.

⁶ Under long-settled principles, of course, Relator's motive or purpose in demanding inspection of public records has no bearing on Relator's right of inspection. *Gilbert v. Summit County*, 104 Ohio St. 3d 660, 2004-Ohio-7108, at ¶ 10. Likewise, the prospect that the e-mails in question will disclose a violation of the Open Meetings Act is material to whether Relator's action involves a "public benefit" under this Court's attorney-fee jurisprudence. But, as Relator pointed out in its merits brief, the question whether Respondent has in fact violated the Meetings Act is not before the Court in this proceeding. *Brief of Relator*, pp. 10-11.

Proposition of Law No. 1

When a public office unlawfully destroys public records but the contents of the records can be recovered or restored, the public office's obligation to maintain the records includes an obligation, enforceable in mandamus, to take the necessary steps to restore the records and to make them available for inspection and copying upon request under the Public Records Act. R.C. 149.43, *construed*; *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St. 3d 37, 1998-Ohio-597, *followed*.

Under the Act, each public office is required to permit inspection and copying of public records within its control. R.C. 149.43(B)(1). As an express corollary requirement, the Act requires that the office organize and maintain its records "[t]o facilitate broader access" and "in a manner that they can be made available for inspection and copying." R.C. 149.43(B)(2) (former R.C. 149.43(B)(1)).

In this case, Respondent's member Commissioner Nutter has acknowledged that he deleted *every* e-mail he received – his entire inbox – between January 1 and July 19, 2007. Commissioner Bridinger has acknowledged deleting *every* e-mail he sent and *every* e-mail he received – both his entire inbox and his entire sent-mail folder – from the time he took office in January 2006, until the late summer or early fall of 2007. Commissioner Bridinger further said that he had recently begun to save e-mails having to do with county business.⁷

The Commissioners' deletions may have rendered some of the e-mails wholly unrecoverable and inaccessible. As Relator acknowledged in its merits brief, to the extent that recovery is not

⁷ *Complaint* ¶¶ 15 & 17. As noted above, the factual statements of the Complaint are attested to on personal knowledge in the affidavit of Steven D. Eder. *Eder Affidavit* ¶ 3. Respondent's various suggestions that there is no evidence the deletions actually happened and no evidence that the Commissioners admitted the deletions (*Respondent's Brief*, pp. 11, 14) are therefore simply inexplicable.

possible, a writ of mandamus commanding recovery of such documents would be inappropriate, and that would be true whether or not the deletions were unlawful. *Brief of Relator*, p. 14.⁸

But the uncontradicted evidence before the Court is that it is more likely than not that at least some of the deleted messages can be retrieved through standard forensic-recovery techniques.⁹ To the extent that this is the case, and to the extent that the messages are public records, Respondent is under a continuing duty to maintain them and to do so in a manner that facilitates public access for the purpose of inspection and copying. R.C. 149.43(B)(2) (former R.C. 149.43(B)(1)). Respondent's duty is discharged and its failure to produce the records is excused only if the deletions were in accord with applicable records-retention rules adopted pursuant to R.C. 149.38. *See State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St. 3d 37, 42-43, 1998-Ohio-597; R.C. 149.351.

The deletion of e-mails is, of course, the opposite of maintenance. In the aftermath of such deletion, compliance with the duty to maintain requires that the custodian of the records undertake recovery as a means of obeying the command of the Act that records be maintained – and that they be maintained in a manner that facilitates public inspection. Thus, to the extent that recovery is possible, the obvious and time-honored remedy is a writ commanding Respondent to bring itself into compliance with the Act by undertaking the recovery.

Respondent advances essentially three lines of argument in an effort to avoid this ineluctable conclusion.¹⁰ First, Respondent contends, it is under no obligation to recover the deleted e-mails

⁸ *State ex rel. Burgess v. Crabbe* (1926), 114 Ohio St. 517, 522 (mandamus does not lie “if performance of the act prayed for is impossible”).

⁹ (*Supplemental*) *Zuccarell Affidavit* ¶ 17.

¹⁰ Notably absent from Respondent's arguments is any claim that the deleted e-mails are not “public records” subject to the Act. Respondent's unwillingness to make such a claim is

(continued...)

because the deletions were, in Respondent's view, authorized by the County's records-retention policy. *Respondent's Brief*, pp. 11, 14. Second, even if the deletions were improper, Respondent says, there is no proof that the deleted messages were the only extant copies, and Relator has failed to prove that the deleted messages are not duplicated by undeleted messages already produced from other e-mail accounts. *Id.*, pp. 11, 14-15. Third, Respondent claims that recovery of the deleted e-mails would be unduly onerous and expensive, and that if recovery is ordered it should be at Relator's expense. *Id.* pp. 12-13, 15.¹¹

These contentions are meritless.

(1) The deletions were unlawful.

Respondent's contention that the deletion of the e-mails was authorized by the county's records-retention policy is refuted by the policy itself. The county has in fact had two such policies during the times in question. The more recent, approved by the Auditor of State in October, 2006, accompanies the affidavits of Tanya Hemmer and Dave Murray. A copy of the earlier policy, in force from its adoption in 2002 until it was superseded by the 2006 policy, is attached to the supplemental affidavit of Dave Murray. Both policies are set forth on the "Form RC-2"

¹⁰(...continued)

understandable in view of the large number of e-mails deleted. It may well be that some of the e-mails involved wholly personal communications or are otherwise outside the scope of the Act. But it would be simply incredible to suggest that a county commissioner's entire e-mail correspondence on his official e-mail account for a period of six months to a year-and-a-half involved *no* communications documenting the official business of the Board of Commissioners.

¹¹ Respondent makes a variety of stray additional assertions, the significance of which is unclear. Among these, for example, is Respondent's false and inexplicable suggestion (addressed in note 7, *supra*) that there is no proof the deleted e-mails ever existed or were in fact deleted.

Similarly unfathomable is the contention that Relator's demand for the records is based on nothing more than "conjecture and assumption" about Respondent's potential non-compliance with the Open Meetings Act. *Respondent's Brief*, p. 12. The reasons for which a person requests inspection of public records is, of course, immaterial to his right of inspection. *Gilbert v. Summit County*, note 6, *supra*, 2004-Ohio-7108, at ¶ 10.

promulgated by the Ohio Historical Society in its statutory role as the archives administration for the state and its political subdivisions. R.C. 149.30.

The 2006 policy's provisions as to the "Retention Period" for e-mail are:

Retain Email that has a significant Administrative, Fiscal, Legal, or Historic Value. Maintain according to content. (Refer to RC-2) Erase Email that has no significant value (RC-3 not required.) [Page 4, Schedule number 06-40]

The "RC-3" referred to in the policy is the form promulgated by the Historical Society for giving the Society notice of an intention to dispose of records, so that the Society can exercise its statutory authority to preserve the records. *See* R.C. 149.38.¹²

By its terms, then, the 2006 policy establishes retention periods and disposal requirements for e-mail records that vary depending on the content of each e-mail record ("Maintain according to content").¹³ The retention and disposal requirements that apply to each record are to be determined by how the content of the record is classified under the substantive categories set forth in the RC-2 form ("Refer to RC-2"). An e-mail record can be "erase[d]" without notice to the Historical Society only if it has *no* significant value of any kind, as determined not by the impulse of the deleter but by the standards of the policy. All other e-mails must be retained according to the schedule applicable

¹² The forms promulgated by the Historical Society for use by local governments, and instructions for their use, are available at: <http://www.ohiohistory.org/resource/lgr/forms.html>.

¹³ This is perfectly sensible, of course, because the term "e-mail" describes only a medium, not a separate class of records. *See* Ohio Electronic Records Committee, *Managing Electronic Mail* (<http://www.ohiojunction.net/erc/email/emailguidelines.html>) ("E-mail itself is not considered a record series or category. It is a means of transmission of messages or information. Like paper or microfilm, e-mail is the medium by which this type of record is transmitted. Just as an agency cannot schedule all paper or microfilm records together under a single retention period, an agency cannot simply schedule e-mail as a record series. Rather, retention or disposition of e-mail messages must be related to the information they contain or the purpose they serve.")

to each specific e-mail's content, and prior notice must be given to the Historical Society (via the RC-3 form) *before* any such e-mails are disposed of.¹⁴

These same rules applied even more obviously under the 2002 policy, which made no separate mention of e-mail at all. Under that policy, as under the express provisions of the 2006 policy, the applicable retention periods and disposal authority necessarily were determined by, and varied according to, the specific content of each e-mail.

These provisions of the county's record-retention rules utterly demolish Respondent's contention that each commissioner has the unbridled and unreviewable power to decide which e-mails are worth keeping and which aren't. *See Respondent's Brief*, p. 14.¹⁵ Merely by way of illustration, consider these examples: Under the policy adopted by the Respondents, and filed with and approved by the requisite state agencies, any e-mail that qualifies as "General Correspondence" can be

¹⁴ These provisions of the retention policy are in accord with the guidance given to local governments by the Historical Society itself. *See* Ohio Historical Society/State Archives, *Common Questions About Electronic Mail* § 3 (<http://www.ohiohistory.org/resource/lgr/LGRemailQA.html>) ("Retain e-mail records in accordance with your office's file plan and the records disposition schedules. The exact length of time will vary depending on the activity that the message documents."). *Cf. Managing Electronic Mail*, note 13, *supra* (detailing various appropriate retention periods for e-mails varying with the character and content of each message).

¹⁵ *See also Hemmer Affidavit* ¶4 (asserting that the county's retention policy "indicates" that e-mails "may be destroyed after they are no longer administratively necessary" and that the determination is to be made "by the individual user of the computer"). It is more than moderately disturbing that the clerk of the Respondent Board could so blithely offer testimony directly contradicted by the express terms of a policy that she is charged in part with administering and a copy of which is attached to the very affidavit in which the testimony is given.

The inaccuracy of the Hemmer Affidavit is not entirely surprising in view of the generally loose approach to factual accuracy that seems to characterize the testimony of Seneca County officialdom. Relator's merits brief noted the serious discrepancies between the commissioners' sworn testimony in the *Cook* litigation and their earlier statements to reporter Kendall Cable. *Brief of Relator*, p. 4. In this case, in what appears to be a misdirected effort to attack Ms. Cable's credibility, Commissioner Nutter's affidavit swears – inaccurately – that she was the campaign manager for Commissioner Sauber's opponent during the 2004 election. As described in Ms. Cable's own supplemental affidavit, she provided some editorial consulting to Mr. Sauber's opponent, but she was never a campaign manager.

disposed of as lacking administrative value (without preserving a copy in some form) only after it has been retained for “1 - 5 years.” *2006 Policy*, p. 3 (sched. no. 06-35). Similarly, “Meeting Notices” are subject to a non-discretionary 1-year retention period, *id.*, p. 5 (sched. no. 06-57), and e-mailed “Receipts” are required to be held for two years. *Id.*, p. 6 (sched. no. 06-71). A commissioner’s blithe act of deletion of such emails is plainly and starkly in violation of the governing law.

Thus, the “value” of an email, as that term is used in the policy, is measured not by the sudden impulse of the individual commissioner, but by the express standards of the policy. So understood, the respondent’s arguments are clearly wrong. To be sure, there may well have been e-mails deleted by Respondent’s members that were lacking any value under the policy, and that were properly deleted within the policies’ terms. But it surpasses belief to suggest that the *entire* e-mail correspondence of two county commissioners for six months and a year and a half, respectively, included nothing that fell within the categories for which the policies set minimum retention periods.

In any event, the governing policies plainly did not give the commissioners the absolute and unreviewable discretion that Respondent claims they had. The Revised Code conditions the lawful destruction of government records on compliance with the terms of approved retention plans. R.C. 149.351(A). To the extent that compliance is in question, the burden of showing compliance properly rests on the official who seeks its benefit. *Cf. State ex rel. National Broadcasting Co., Inc. v. City of Cleveland* (1988), 38 Ohio St. 3d 79, 82-83 (cataloging the bases for imposing on public offices the burden of proving grounds for the avoidance of obligations under the Act). Respondent has plainly failed to meet that burden here.

(2) Respondent has failed to prove that copies of the deleted e-mails were otherwise made available to Relator.

Respondent contends that, even if its deletion of the e-mails in question was unauthorized by the retention policy, Relator “lacks proof” that copies of the same e-mails were not supplied to

Relator among the undeleted e-mails that Respondent produced from other e-mail accounts. The very statement of this cynical proposition may be enough to refute it. It takes a great deal of temerity, to say the least, to render e-mails inaccessible to a citizen and then demand that the citizen prove the deleted copies were the only copies. As a final-exam question in an introductory philosophy class, this formulation might be tolerable. But as a legal argument, it sorely fails.

In any event, Respondent's claim mistakes the proper location of the burden of proof on this question. As this Court has held, the burden is on the public office to show that it has produced a requested record. *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041, at ¶ 9. If Respondent contends that the deleted e-mails are merely duplicates of other records that have already have been disclosed, it was required to support that claim with evidence. There is no such evidence, and Respondent's claim cannot stand.

(3) Respondent's exaggerated policy contentions are misplaced.

Respondent is equally mistaken in its policy-based claims that recovery of the deleted e-mails would be too onerous and expensive, and that Relator should be made to bear the cost of recovery. *See Respondent's Brief*, pp. 12, 14-15. In the face of a clear legal mandate, resort to public policy as a justification for unlawful conduct is not uncommon, although when advanced by public officials, it is a bit unseemly.

Respondent's claims are mistaken, first, as a matter of law: "No pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the respondent to evade the public's right to inspect and obtain a copy of public records within a reasonable time." *State ex rel. Beacon Journal Publishing Co. v. Andrews* (1976), 48 Ohio St.2d 283, 289.¹⁶

¹⁶ Nor can the cost properly be shifted to a member of the public who seeks to enforce an office's obligation to maintain records for inspection. Respondent's argument that R.C. 149.43(B)
(continued...)

The claims are likewise mistaken as a matter of fact. Respondent asserts that recovery of the deleted e-mails would require the expenditure of “tens of thousands of dollars.” *Respondent’s Brief*, p. 11. Respondent cites no evidence in support of this factual claim. That is not surprising since there is no evidence to support it: indeed, the number appears to be entirely imaginary.¹⁷ In fact, there is undisputed evidence on this point. As set forth in the supplemental affidavit of Matthew Zuccarell, the actual cost of recovery would be on the order of \$1,200 or less for each of the three computers in question. (*Supplemental*) *Zuccarell Affidavit* ¶ 15.

And, finally, Respondent’s claims are mistaken as a matter of policy. Respondent’s vision of legions of “newspapers and militiamen” demanding copies of hard drives is silly on its face. Relator has not suggested that it is entitled to copies of the commissioners’ hard drives. It is entitled, rather, to inspect documents the deleted residues of which are located on the hard drives. Nor does Relator contend that it is entitled to have possession of or access to the hard drives for purposes of recovering those documents. To the contrary, the obligation to recover the documents is Respondent’s. And Relator has not suggested that recovery of deleted documents is required as a matter of course. The obligation to undertake recovery arises, rather, only when the documents were unlawfully deleted in the first place, as they were in this case.

Nothing in Respondent’s merits brief justifies the Board’s unlawful conduct to date or suffices to evade its obligation to maintain its records – including any unlawfully deleted but

¹⁶(...continued)

permits imposition of the recovery cost on Relator betrays a fundamental confusion about the obligations Respondent has under the Act. R.C. 149.43(B) permits a public office to recoup some portions of the cost of providing requested *copies* of records. Nothing in the Act authorizes an office to charge anyone for carrying out its obligations to maintain records and to hold them in a manner that facilitates public inspection.

¹⁷ As to Respondent’s general looseness with matters of factual accuracy, see note 15, *supra*.

recoverable e-mails – in a manner that facilitates public inspection of those records. Relator is plainly entitled to a writ of mandamus commanding Respondent to carry out that obligation by undertaking the recovery of the deleted e-mails at issue here.

Proposition of Law No. 2

When a public office, without lawful excuse, delays the production of public records for inspection and copying under the Public Records Act, R.C. 149.43, producing the records only after the filing of a mandamus action to compel production, and when that behavior is part of a pattern of non-responsiveness to public-records requests, a writ of mandamus will issue to compel future compliance by the office with the Act's requirement that records be made "*promptly*" available for inspection. R.C. 149.43, construed, *State ex rel. Consumer News Service, Inc. v. Worthington City Bd. of Ed.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, and *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 1998-Ohio-444, applied and followed.

As described in Relator's merits brief, Respondent's post-filing production of 700 pages of e-mails has mooted Relator's prayer for a writ commanding that those records be produced. *Brief of Relator*, p. 17. Relator's claim is not moot, however, to the extent that the prayer seeks both attorney fees (Proposition of Law No. 3, *infra*) and a writ commanding Respondent's future compliance with its obligation to make records "*promptly*" available for inspection and copying. R.C. 149.43(B)(1).

Respondent argues that such a writ is not warranted because its behavior in this case does not manifest a pattern of non-compliance with its obligations under the Records Act. *Respondent's Brief*, pp. 16-18. Relator's contention in this regard depends entirely, however, on a careful recitation of the facts that serves principally to mask Respondent's failure to take its obligation of promptness seriously.

Thus, for example, Respondent's proposition of law and its argument repeatedly suggest that it had offered to make the belatedly produced e-mails available within 48 hours after the (belated) discovery of their existence. It is true, as Respondent says, that such a 48-hour promise was made.

But the promise was a hollow one. As Respondent itself quietly acknowledges, the belated e-mails were not made available until a full week had passed after the promise had been made. *Troutman Affidavit*, ¶¶ 14 (48-hour promise made on September 10) & 16 (actual production of the records on September 17). And that belated production took place, in any event, a full six weeks after Relator's original request for the records.

And, of course, Respondent glosses over the fatal facts: Relator had long ago requested the emails in question and had not received them. Only when Relator learned of the existence of the emails, and asked specifically why they had not been produced, did Respondent undertake the conduct that it now tries to characterize as on-the-ball compliance. This position is eerily consistent with their position on the deleted emails: We won't produce emails for your inspection until you get them from another source, prove to us they exist, and then ask us why we didn't produce them in the first place. As an approach to public-records compliance, that position falls a little short.

Under the current version of the Act, Respondent's unkept promise of production would itself be the basis of a mandatory award of attorney fees. R.C. 149.43(C)(2)(b)(ii). As that statutory provision suggests, a public office cannot be regarded as fulfilling its obligations under the Act unless, at a minimum, it provides access to records when it says it will.

Moreover, Respondent acknowledges that the belatedly produced records, which had been supposedly overlooked due to their location in a "hidden archive," were in fact discovered *within fifteen to thirty minutes* after Relator communicated its knowledge that not all records had been produced. *Troutman Affidavit*, ¶ 14. The ease and speed with which the missing records were un-overlooked demonstrates, if nothing else, the gross deficiencies in Respondent's earlier "efforts" to identify and produce records responsive to Relator's requests.

Respondent's lack of seriousness about its disclosure obligations is, of course, perfectly in harmony with its lawless claims to an unreviewable power to destroy public records at will, as described under Proposition of Law No. 1, *supra*. Indeed, in deciding whether Respondent's behavior evidences a pattern of disregard for the responsibilities imposed by the Act, this Court can and should properly take into account, not only the fact of Respondent's wholesale unlawful destruction of public records, but also its unwillingness even now to accept as binding the statutory requirements regarding retention and disposition of public records.

Respondent's behavior, taken as a whole, makes it eminently appropriate for this Court to issue a writ commanding future compliance with Respondent's obligations under the Act. Such a writ should issue.

Proposition of Law No. 3

A court may award attorney fees pursuant to R.C. 149.43 where (1) a person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person's request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and (4) the person receives the requested public records only after the mandamus action is filed, even though the claim for a writ of mandamus is thereby rendered moot in whole or in part. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus, 1996-Ohio-161, *approved and followed*.

As described in Relator's merits brief, an award of attorney fees is required in this case whether the award is governed by the current version of R.C. 149.43 or by its predecessor. Respondent vigorously argues that the current version of the statute cannot properly be applied to this case, which was filed before the most recent amendment went into effect. Notably, Respondent makes no argument that, if the current version does apply, Respondent still cannot be held liable for

Relator's fees.¹⁸ On the merits of a fee award, rather, Respondent devotes its entire energy to claiming that an award would be inappropriate because Respondent's behavior was reasonable.¹⁹

Respondent's argument for the supposed "reasonableness" of its behavior depends first on Respondent's willingness to wholly ignore its wrongful destruction of public records as described under Proposition of Law No. 1, *supra*. As to the grievously belated production of the e-mails that were finally turned over only after the filing of the present action, and after Relator had discovered their existence and demonstrated it to Respondent, the argument under Proposition of Law No. 2, *supra*, makes clear Respondent's pattern of carelessness about its Records-Act obligations.

This Court has had occasion in the past to note the important role that fee awards play in overcoming the tendency of some records custodians to passively resist the full performance of their obligations. *See, e.g., State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus, 1996-Ohio-161. Respondent's brief in this case makes unmistakably plain Respondent's view that Relator has no business "interject[ing] itself" into Respondent's affairs. Respondent's behavior, both as to the deleted e-mails and as to the belatedly produced records, is precisely the behavior one would expect from a public office that regards public scrutiny with such hostility. This is, in short, the very sort of case in which a fee award would accomplish one of the principal purposes for which such awards exist.

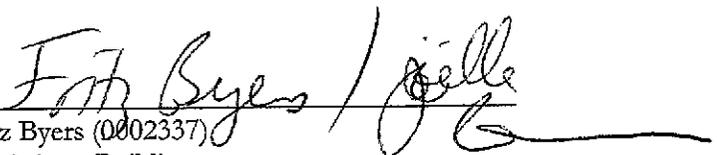
The Court's decree must include an award of Relator's attorney fees.

¹⁸ This is hardly surprising since, as noted above, Respondent's failure to keep its 48-hour promise would *require* an award of fees under the current version of R.C. 149.43.

¹⁹ Respondent suggests in passing that an award would be inappropriate because the present action has produced no "public benefit" as required by this Court's pre-amendment jurisprudence. *Respondent's Brief*, p. 32. As Respondent offers absolutely no explanation or argument on the point, Relator assumes that the public-benefit test is effectively conceded.

CONCLUSION

For the foregoing reasons, this Court must issue a writ of mandamus commanding Respondent to take the steps necessary to recover the unlawfully deleted e-mail records, to report to this Court regarding the steps Respondent has taken and their efficacy, to promptly produce for inspection and copying in the future any requested e-mails that constitute public records, and to pay Relator's costs including a reasonable attorney's fee.

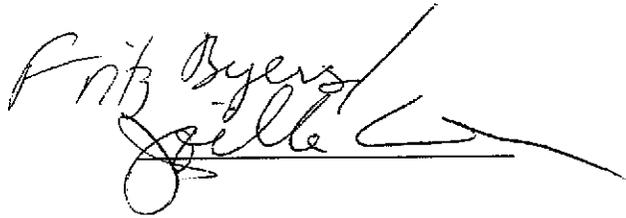

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing Brief of Relator was served by email and by ordinary U.S. Mail, postage prepaid, on the following counsel of record this 19th day of October, 2007:

Mark Landes
Mark H. Troutman
ISAAC, BRANT, LEDMAN & TEETOR
250 East Broad Street
Columbus, OH 43215

A handwritten signature in black ink, appearing to read "Fritz Byers". The signature is written in a cursive style with a long horizontal stroke extending to the right.