

IN THE SUPREME COURT OF OHIO

CHARLES SNODGRASS,

Appellant,

-vs.-

CITY OF MAYFIELD HEIGHTS, et al.,

Appellees.

08-2227

On Appeal from the Cuyahoga
County Court of Appeals, Eighth
Appellate District

Court of Appeals Case No. 90643

COPY

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, CHARLES SNODGRASS

WARNER MENDENHALL, #0070165
JACQUENETTE S. CORGAN, #0072778
The Law Offices of Warner Mendenhall, Inc.
190 N. Union St., Ste. 201
Akron, OH 44304
330-535-9160; 330-762-9743 fax
warnermendenhall@hotmail.com
j.corgan@justice.com

Counsel for Appellant

LEONARD F. CARR
L. BRYAN CARR
The Carr Law Firm
1392 S.O.M. Center Rd.
Mayfield Heights, OH 44124
440-473-2277; 440-473-0166 fax
bryan@carrlawfirm.net

Counsel for Appellees

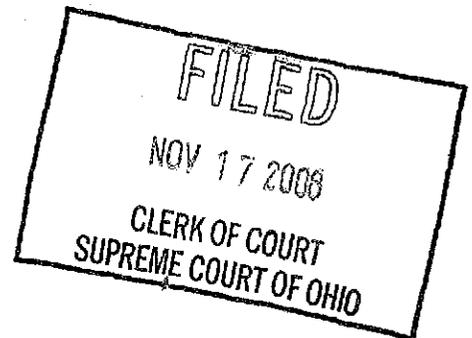


TABLE OF CONTENTS

	Page
Explanation of Why This Case is of Public or Great General Interest	1.
Statement of the Case and Facts	3.
Propositions of Law	6.
Argument in Support of Propositions of Law	7.
<u>Proposition of Law No. 1: A record need not have been created by a public official or have been created at the direction of a public official or public agency in order for that record to be a “public record” pursuant to Ohio’s Public Records Act.</u>	7.
<u>Proposition of Law No. 2: When there is evidence that a public record has existed, the inability of a public entity to produce that record upon request is prima facie evidence of a violation of R.C. § 149.351(A).</u>	10.
<u>Proposition of Law No. 3: A public records requester is “aggrieved” for the purposes of R.C. § 149.351(B) by any violation of R.C. § 149.351(A).</u>	12.
Conclusion	14.
Certificate of Service	15.
Appendix – Opinion and Judgment Entry of the Cuyahoga County Court of Appeals, and Unreported Cases	16.

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC
OR GREAT GENERAL INTEREST**

“A fundamental premise of American democratic theory is that government exists to serve the people,” this court wrote in *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, 34 Media L.Rep. 2264, ¶ 15. “In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government’s work and decisions. *** As Thomas Jefferson wrote, ““The way to prevent [errors of] the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right.””” *Kish*, id., citations omitted.

In this case, the quintessential “John Q. Taxpayer,” Appellant Charles B. Snodgrass, requested records from the Mayfield Heights Police Department that Snodgrass and other Mayfield Heights auxiliary police officers had generated. Specifically, Snodgrass, who was a Mayfield Heights auxiliary officer, requested Auxiliary Unit daily logs, time cards, special events assignment sheets and monthly schedules from Mayfield Heights Police Chief Joseph Donnelly. Snodgrass’ request was rebuffed, first by the Department, but then by the Cuyahoga County Common Pleas Court and the Eighth District Court of Appeals.

Kish said that statutes such as the federal Freedom of Information Act and Ohio’s Public Records Act “reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor.” *Kish*, supra at ¶

17.¹ Nevertheless, the Cuyahoga County Common Pleas Court² and, in turn, the Eighth District Court of Appeals departed from this court's precedents to decide that the records Snodgrass sought were not "public records" under the Ohio Public Records Act, that the records could not have been destroyed, and that Snodgrass was not "aggrieved" because the courts decided Snodgrass didn't really need the records. In particular, the Eighth District decided:

- That the documents Snodgrass requested were not "public records" because they were created by the auxiliary officers in order to aid in scheduling, and not at Mayfield Heights' direction;
- That because Mayfield Heights did not admit destroying records, Snodgrass had not presented evidence that documents had been destroyed, even though Snodgrass created many of the records himself and presented evidence that large groups of records were missing from the documents Mayfield Heights managed to produce; and
- That because the court believed the documents would not aid Snodgrass in proving a grievance he brought against the police department, he was not "aggrieved" by Mayfield Heights' failure to produce the records.

If allowed to stand, this case would gut the Ohio Public Records Act, thereby stripping Ohioans of one of their most important entitlements.

¹ Citations to *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623, 640 N.E.2d 174; *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155 at 157, 684 N.E.2d 1239; and *Dayton Newspapers, Inc. v. Dayton* (1976), 45 Ohio St.2d 107, 109, 74 O.O.2d 209, 341 N.E.2d 576, omitted.

² The Common Pleas Court granted Mayfield Heights' Motion for Summary Judgment without opinion.

STATEMENT OF THE CASE AND FACTS

Like other police departments in many Ohio communities, the City of Mayfield Heights Police Department maintains an Auxiliary Unit that is a division of the regular police force. The unit is made up of volunteer officers who are under the direct command of Mayfield Heights Police Chief Joseph Donnelly, and under the direction and control of Mayfield Heights' city safety director. Donnelly is responsible for the auxiliary unit, but delegated direct administrative responsibility for the unit to the Unit Coordinator, Sergeant Greg Michel. Nevertheless, Donnelly is responsible for the Department's records.

Mayfield Heights authorizes Donnelly to hire up to 40 auxiliary members, and the city pays auxiliary members \$600 per year for a uniform allowance (so long as they donate at least 15 hours of service per month), and covers auxiliary members under Mayfield Heights' workers compensation plan. Auxiliary Unit members are also eligible to work paying jobs through the Unit, depending upon how many hours they donate to the Department.

In order to keep track of Auxiliary Unit members' schedules, operations, donated hours, and even the number of miles unit members drove City vehicles, Michel mandated that unit members fill out the following forms:

- Daily Activity Logs, through which the City could track which vehicles unit members used, where it went, and who was driving;
- Daily Fact Sheets; and
- Time cards, which the City created and used to track the unit members' required minimum donation time, and as the basis for each auxiliary officer's "Monthly report."

Depending upon their assignments, auxiliary unit members were required to complete a daily activity log, fact sheet and time sheet when they completed their assignments and turn them over to the police dispatcher, and later, to the City Auditor.

Snodgrass joined the Auxiliary Unit in 1999, and a year later, was sworn in as the unit's Records Lieutenant. In that role, Snodgrass was required to prepare and coordinate the unit members' regular monthly schedule, and to maintain a roster of unit members. He completed daily activity logs, daily fact sheets and time cards, and saw other officers complete the forms, and used these forms to create the unit's regular assignment sheets. Plus, these forms were instrumental in coordinating assignments with the Police Department's regular officers for special events.

On April 3, 2006, Snodgrass submitted to Donnelly a written request for specific records dating from February 1, 2002, through September 30, 2003, and attached examples of the documents he sought. Mayfield Heights Assistant Law Director L. Bryan Carr sent Snodgrass a letter on April 12, 2006, informing Snodgrass that while the City was compiling documents responsive to Snodgrass' request, some of the documents may have been destroyed.

On April 28, 2006, the City produced 1,260 documents to Snodgrass. They included the following:

- Approximately 1,100 documents related to Auxiliary Unit members' personnel files;
- Twenty-two monthly calendars;
- One Hundred Thirty-one Auxiliary Unit Daily Activity Logs'; and
- Mayfield Heights' Records Retention Policy.

There were notable omissions, however. Despite Snodgrass' specific requests for these records:

- The City did not produce any Daily Fact Sheets;
- The City did not produce any auxiliary officer's time cards;
- The City did not produce any summaries of officers' time sheets, compiled into monthly or yearly reports; and
- The Daily Activity Logs from February 2002 through August 2002 were missing.

On January 18, 2007, Snodgrass filed a complaint under the Ohio Public Records Act in Cuyahoga County Common Pleas Court, seeking production of the missing documents, or, in the alternative, a forfeiture of \$1,000 for each document that was lost or destroyed. After Snodgrass filed the suit, Mayfield Heights produced additional documents, consisting of two Daily Activity Logs from April 2002, two additional personnel files, and additional documents that were not responsive to Snodgrass' request.

Mayfield Heights moved for summary judgment in September 2007, arguing that Snodgrass' claims were barred by the statute of limitations; that he had no evidence that records were destroyed or even existed; that the Auxiliary Unit was not a public office because it consisted of volunteers; Snodgrass was not "aggrieved" under the Public Records Act because the records he sought would not have supported a grievance he brought against the City; and that the records were not "public." The Common Pleas Court granted summary judgment without comment or opinion. On October 2, 2008, the Eighth District Court of Appeals reversed the decision as to the statute of limitations, but otherwise affirmed.

PROPOSITIONS OF LAW

1. A record need not have been created by a public official or have been created at the direction of a public official or public agency in order for that record to be a "public record" pursuant to Ohio's Public Records Act.
2. When there is evidence that a public record has existed, the inability of a public entity to produce that record upon request is prima facie evidence of a violation of R.C. § 149.351(A).
3. A public records requester is "aggrieved" for the purposes of R.C. § 149.351(B) by any violation of R.C. § 149.351(A).

**ARGUMENT IN SUPPORT
OF PROPOSITIONS OF LAW**

Proposition of Law No. 1: A record need not have been created by a public official or have been created at the direction of a public official or public agency in order for that record to be a “public record” pursuant to Ohio’s Public Records Act.

Statutory definitions. Ohio Rev. Code Chapter 149 defines “public record” in at least two, yet consistent, ways. Section 149.011(G) defines the term as including “any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.”

Revised Code § 149.43(A)(1) states that “‘Public record’ means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code.”³ This definition is to be construed liberally in favor of broad access and to resolve any doubt in favor of disclosure of records. See, e.g., *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 13, citing *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 29.

³ The section goes on to list exceptions to the term “public record.” See R.C. § 149.43(A)(1)(a) through (z).

A “public office” is, in turn, also defined at R.C. § 149.011(A) as follows: “Public office’ includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.”⁴ It should be beyond cavil that a municipal police department’s auxiliary unit is a “public office,” even if the auxiliary officers are volunteers; R.C. § 737.051 authorizes their creation, and R.C. § 2744.01(C)(2)(a) specifies that the provision of police services is a governmental function.

Judicial gloss. When it comes to the Public Records Act, the court has further said that a record “may be a single document within a larger file of documents as well as a compilation of documents, and can be any document, regardless of physical form or characteristic, whether in draft, compiled, raw, or refined form, that is created *or received or used* by a public office or official in the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” *Kish*, supra at ¶ 2, emphasis added.

So long as a governmental body relies upon the record; “uses [it] to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office”; or “could rely⁵ [upon it],” it is a “public record.” See *Kish*, supra at ¶¶ 12, 20.

⁴ Even if a police department’s auxiliary unit were considered a “private entity,” the courts apply the functional-equivalency test to decide whether the entity is a public institution under R.C. § 149.011(A) and thus a public office for public records purposes. The functional-equivalency test looks at 1) whether the entity performs a governmental function; 2) the level of government funding; 3) the extent of governmental involvement or regulation; and 4) whether the entity was created by the government or to avoid the requirements of the Public Record Act. See *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, 34 Media L.Rep. 2473, at ¶ 25. Briefly, Mayfield Heights Police Department’s auxiliary unit would be defined as a public office under this test.

⁵ Just as in *Kish*, the case of *State ex rel. Beacon Journal Publ’g Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 697 N.E.2d 640, is inapposite to this case. In *Whitmore*, the court found that letters that had been sent to then-Summit County Common Pleas Court Judge Beth Whitmore

Furthermore, even an electronic transmission can become a “record” subject to disclosure under the Act if it is a document, device or item that is created, received by, or comes under the jurisdiction of a public office, and the “record” serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. See *Jones*, supra at ¶ 20; see also *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, at ¶ 19.

Other examples include:

- Compensatory time sheets created by individual city employees for the purpose of calculating their “comp time” - *Kish*, supra;
- E-mail messages, text messages and correspondence of a state representative - *Jones*, supra at ¶ 20;
- Materials that an independent contractor created and maintained at the request of a public office regarding firefighters’ promotional testing - *Carr*, supra at ¶ 37;
- Attendance records of students who attended computer training, certain employee records and complaints directed against teachers at a private company hired by the Lucas County Department of Job and Family Services - *State ex rel. Parker v. Lucas County Dept. Of Job and Family Services*, 176 Ohio App.3d 715, 2008-Ohio-3274, 893 N.E.2d 558;
- Pleadings created and filed by private parties in a court case - *State ex rel. Miami Valley Broadcasting Co. v. Davis*, 158 Ohio App.3d 98, 2004-Ohio-3860, 814 N.E.2d 88, 36 Media L. Rep. 1249;
- A regional wastewater treatment authority’s plant operation logs, safety equipment purchase records, collection system logs, contract bidding records, and board of trustee minutes - *State ex rel. Russell v. Thomas*, 85 Ohio St.3d 83, 1999-Ohio-435, 706 N.E.2d 1251;
- Settlement agreements - *State ex rel. Kinsley v. Berea Board of Education* (1990), 64 Ohio App.3d 659, 582 N.E.2d 653; and

regarding her impending sentence of a criminal defendant were not public records subject to disclosure to the *Akron Beacon Journal*, because Judge Whitmore did not rely upon the letters when she made her sentencing decision. See *Whitmore*, supra; see also *Kish*, supra at ¶ 23. Here, the City relied upon the documents for several purposes.

- Police recruitment materials, including investigatory reports and police psychologists' reports, generated by outside officials - *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 1995-Ohio-248, 647 N.E.2d 1374, 23 Media L.Rep. 2229.

In this case, the evidence was that the Mayfield Heights Police Department (and, indeed, the keepers of Mayfield Heights' municipal purse) relied upon the records Snodgrass requested in order to determine how auxiliary officers would be used to supplement the city's regular officers, how the auxiliary unit members were using the city's vehicles, whom to pay the uniform allowance, and to whom "paying" assignments might be made. Under both the Act itself and under *Kish*, these records should have been "public records" that must be preserved.

Proposition of Law No. 2: When there is evidence that a public record has existed, the inability of a public entity to produce that record upon request is prima facie evidence of a violation of R.C. § 149.351(A).

The *Kish* court said that "the right of access to governmental records is a hollow one if records are not preserved for review," and that R.C. § 149.351's prohibition against (and forfeiture for) public records destruction serve to ensure records preservation. See *Kish*, supra at ¶ 18. Revised Code § 149.351 provides that public records shall not be "removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law," and that any person who is "aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record [in violation of the statute] or other damage to or disposition of such a record" may sue for injunctive relief to compel compliance with the law, and/or a \$1,000 forfeiture for every violation. See R.C. § 149.351(A) and (B).

Nobody who requests public records ought to have to rely on a public office's willingness to admit to unlawfully destroying public records; this is like asking a prosecutor to rely solely upon a suspect's willingness to incriminate himself. In cases like these, where a public office has a records retention policy in place, and the requested documents fall into the category of records that should have been preserved under that policy, the fact that a public office does not produce the records, and offers no reason (such as an exception to the Act) for withholding the records, ought to be *prima facie* evidence of a violation.⁶

This case illustrates the need for such a rule. Not only did Mayfield Heights fail to produce records when Snodgrass requested them, but the city also failed to produce the same records after they were demanded in discovery. These records weren't requested once, but *twice*, and *twice* Mayfield Heights was unable to produce them. Furthermore, there was evidence in the record that the documents existed and had been in Mayfield Heights' possession. Snodgrass, one must remember, was the auxiliary unit's records officer, and testified that he and other officers created the records and submitted them to city officials.

The fact that the records Mayfield Heights claims didn't exist were bracketed by other documents is evidence that *all* of the requested documents existed. For example, Mayfield Heights initially provided Snodgrass with Daily Activity Logs dated before February 2002 and after August 2002, but none from February 2002-August 2002. Once the lawsuit began, the City coughed up the Daily Activity Logs from April 2002 – but no more. Donnelly testified that since records existed before April 21, 2002, and after September 24,

⁶ Placing the burden of rebutting this presumption upon the public office would not be onerous and would comport with the purposes of the Ohio Public Records Act, which already places upon public offices the burden of proving that a record is exempt from disclosure. See *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564.

2002, similar records were likely created during the months in between. At a minimum, Snodgrass' suit should have survived summary judgment on this point. Just as Ohio Evid.R. 804(7) states that evidence that a matter is not included among records of regularly conducted activity is, itself, evidence of the nonoccurrence or nonexistence of a matter, then the absence of a record of a block of records among records of a similar type should be *prima facie* evidence of the destruction of that record. This should be especially true when the record has been requested more than once.

Proposition of Law No. 3: A public records requester is "aggrieved" for the purposes of R.C. § 149.351(B) by any violation of R.C. § 149.351(A).

One would think that the question of when a person is "aggrieved" by a violation of the Ohio Public Record Act was settled in 1992, with *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St.3d 509, 1992-Ohio-2, 597 N.E.2d 120. In that case, Ann Fenley filed a mandamus action against the Society to compel it to mail her a death certificate "at cost," rather than for the \$7 fee the Society charged to mail documents. The court held that Fenley was an "aggrieved person" under R.C. § 149.43(C) because she was not given a copy of the death certificate she requested in accordance with the cost and access requirements in R.C. § 149.43(B). See *Fenley*, 64 Ohio St.3d at 510. This was true even though an Ohio Historical Society member eventually donated the \$7 mailing fee, and Fenley eventually received the death certificate she requested; the fact of the matter was that the Society denied Fenley the record unless she paid a fee that did not comport to R.C. § 149.43(B). See *Fenley*, *id.*

The Fifth District Court of Appeals has more explicitly held that destruction of documents, in and of itself, renders a requester "aggrieved" under R.C. § 149.351. See

Hunter v. City of Alliance, Stark App. No. 2001CA00101, 2002-Ohio-1130, *2, 2002 WL 391692. So did the Eighth District Court of Appeals in 1989, in *Schregardus v. Croucher* (1989), 56 Ohio App.3d 174, 175, 565 N.E.2d 880.

Nevertheless, the Eighth District held in this case that Snodgrass was not “aggrieved” by Mayfield Heights’ failure to produce records because the court believed the records would not have helped Snodgrass in a grievance he’d filed. The purpose of the Public Records Act, however, is not to further individuals’ private interests, but to further everyone’s interest in democracy. “The Public Records Act reflects the state’s policy that ‘open government serves the public interest and our democratic system.’” *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13, quoting *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20.

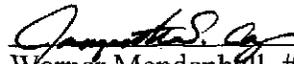
A person’s motive for requesting documents ought to be irrelevant to whether the person is “aggrieved” under R.C. § 149.43(C), just as it is irrelevant to any other Public Records Act analysis. A requestor’s reason for asking for documents is not relevant to whether a person may obtain documents under the Public Records Act. See *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 610 N.E.2d 997; see also *Kish*, supra at ¶ 41, FN 5 (fact that destroyed time records were material to requesters’ federal Fair Labor Standards Act overtime lawsuit was not dispositive in the public records case).⁷ Also, a public official’s or agency’s reason for creating the documents is not relevant to whether a violation of the Act took place. See *Kish*, supra at ¶ 39.

⁷ C.f. *Clinton v. Metrohealth Systems*, unreported, Cuyahoga App. No. 86886, 2006-Ohio-3582, 2006 WL 1918146, which would be overruled by a ruling in favor of Snodgrass in this case; and *State ex rel. The Cincinnati Enquirer v. Allen*, unreported, Hamilton App. No. C-040838, 2005-Ohio-4856, 2005 WL 2249110.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant asks that the Court accept jurisdiction so that these important issues will be reviewed on the merits.

Respectfully submitted,



Warner Mendenhall, #0070165

Jacquenette S. Corgan, #0072778

The Law Offices of Warner Mendenhall, Inc.

190 N. Union St., Ste. 201

Akron, OH 44304

330-535-9160; fax 330-762-9743

warnermendenhall@hotmail.com

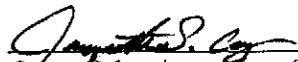
j.corgan@justice.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail on this 14th day of November, 2008, to the following:

Leonard F. Carr
L. Bryan Carr
The Carr Law Firm
1392 S.O.M. Center Rd.
Mayfield Heights, OH 44124
Counsel for Appellees



One of the Attorneys for Appellant

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90643

CHARLES SNODGRASS

PLAINTIFF-APPELLANT

vs.

CITY OF MAYFIELD HEIGHTS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-613149

BEFORE: Blackmon, J., Sweeney, A.J., and McMonagle, J.

RELEASED: October 2, 2008

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Daniel J. Leffler
Jacquenette S. Corgan
Warner Mendenhall
Law Offices of Warner Mendenhall, L.P.A.
Union Point
190 N. Union Street, Suite 201
Akron, Ohio 44304

ATTORNEYS FOR APPELLEES

Leonard F. Carr
L. Bryan Carr
The Carr Law Firm
1392 S.O.M. Center Road
Mayfield Heights, Ohio 44124

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

OCT - 2 2008

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.**

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

Appellant Charles Barkley Snodgrass appeals the trial court's granting summary judgment in favor of the City of Mayfield Heights, Ohio and the Mayor of Mayfield Heights, Gregory S. Constable (hereinafter jointly referred to as "City"). He assigns the following error for our review:

"I. The trial court committed reversible error when, in the face of contrary authority and genuine issues of material fact, it granted summary judgment to Mayfield Heights in Snodgrass's case of illegal document destruction under the Ohio Public Records Act."

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

Factual Background

The City of Mayfield Heights has an auxiliary police unit to assist officers in such activities as helping maintain crowd control at parades and the City fairs, watching homes of people on vacation, and supplying extra security at parks and other areas where the public gather. The auxiliary officers were not paid. In order to help the unit keep track of the scheduling of the volunteer officers, the volunteers filled out various forms that were generated internally by the unit. The forms were then used to create monthly schedules. The City

did not direct the unit to create the forms and the forms were not listed with the City records custodian as a public record.

Snodgrass became a volunteer auxiliary police officer with the City in 1999. In January 2002, Snodgrass became aware that auxiliary officer Gary Warner, had assigned paid side jobs to auxiliary officers who volunteered less time than he did. Paid side jobs consisted of instances when businesses in the City needed assistance in either directing traffic or maintaining security for temporary projects. When a business needed assistance, it called the auxiliary unit to request help. Gary Warner would then locate a volunteer who was available for the job. There was no policy in effect that side jobs were to be assigned according to the amount of hours volunteered.

According to Snodgrass, the assignment of paid side jobs created a conflict within the unit because members would not volunteer for events so that they could work the paid side jobs. Snodgrass was also not assigned as many side jobs as the members who volunteered less hours. Snodgrass emailed various complaints regarding this problem to various people within the police department, to no avail. In May 2004, Snodgrass was dismissed from the unit.

Two years after he was dismissed, Snodgrass was still upset that paid side jobs were not, according to him, assigned in a fair manner. As a result, on

April 3, 2006, he submitted a public records request to Mayfield Heights Police Chief, Joseph Donnelly, for the following documents: (1) City of Mayfield Heights Public Records Retention Policies for the years 2002 and 2003, (2) Mayfield Heights Auxiliary Unit Daily Activity Logs from 2-1-2002 through 9-30-2003, (3) Mayfield Heights Auxiliary Unit time cards from 2-1-2002 through 9-30-2003, (4) Mayfield Heights Auxiliary Unit Special Events Assignment Sheets from 2-1-2002 through 9-30-2003, (5) Mayfield Heights Auxiliary Unit monthly schedules from 2-1-2002 through 9-30-2003, and (6) all employment records or files for Mayfield Heights Auxiliary Unit Officers serving anytime between 2-1-2002 and 9-30-2003.

On April 12, 2006, Assistant City Law Director, L. Bryan Carr, replied to the request by letter stating that the City was in the process of compiling the records requested, but cautioned that some of the documents "may have been" destroyed due to their age. The City eventually produced 1,254 documents consisting of 1,100 documents related to the personal files of Auxiliary Officers, 22 monthly calendars, 131 Auxiliary Unit Daily Activity Logs, and a copy of the City's records retention policy.

The City failed to produce any daily facts sheets or time cards for the Auxiliary Unit, and also failed to produce the daily logs from February 2002

through August 2002. These are the documents that are the subject of the instant appeal.

On January 18, 2007, Snodgrass filed a public records complaint claiming the City failed to produce requested public records and also claimed public records were destroyed. He requested a forfeiture of \$1,000 for each document destroyed. The City filed an answer to the complaint and a counterclaim, claiming the suit constituted frivolous conduct.¹

On September 4, 2007, the City filed a motion for summary judgment, arguing the statute of limitations had run on Snodgrass's claim; he had no evidence that records were destroyed or ever existed; the Auxiliary Unit was not a public office because it consisted of volunteers; Snodgrass was not "aggrieved" because the requested documents would not have supported his claim regarding the assignment of side work; and the records did not constitute public records. On October 10, 2007, the trial court granted the motion without opinion.

Public Records

In his sole assigned error, Snodgrass contends the trial court erred in granting summary judgment in favor of the City because the statute of

¹The counterclaim is still pending; however, the trial court added a clause that there was "no just cause for delay" to the order granting summary judgment. Therefore, we have jurisdiction over this appeal.

limitations had not expired; the City failed to produce all the requested documents; the Auxiliary Unit is a public office, thus the documents were public records; and, he was aggrieved by the City's failure to produce all the requested records.

Standard of Review

We review an appeal from summary judgment under a de novo standard of review.² Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.³ Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion which is adverse to the non-moving party.⁴

The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.⁵ If the movant

²*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

³*Id.* at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

⁴*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

⁵*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.⁶

Legal Analysis

Snodgrass's action was brought pursuant to R.C. 149.351, which provides in pertinent part:

“(A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions * * *.

“(B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) of this section, or by threat of such removal, destruction, mutilation, transfer, or other damage to or disposition of such a record, may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:

“(1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;

“(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an

⁶Id. at 293.

award of reasonable attorney's fees incurred by the person in the civil action.”

At the outset, we conclude the statute of limitations did not expire on Snodgrass's public records claim. It is undisputed that a one-year statute of limitations applies to a public records claim and that the discovery rule applies to such claims.⁷ The only dispute in the instant case is when Snodgrass should have discovered there was a problem with recovering some of the documents.

In arguing the statute of limitations had expired, the City relies on a letter Snodgrass wrote to Lieutenant Ondercin in March of 2004. In the letter, Snodgrass stated that he believed the Auxiliary Unit was engaged in faulty documentation, and that Gary Warner, the Auxiliary officer in charge of scheduling paid side jobs, was unfairly assigning the jobs. He concluded his letter by requesting that Lt. Ondercin “ask Mr. Warner for his records to prove this issue.”

Although Snodgrass referred to “records” in this letter, he did not request the documents for himself, but directed Lt. Ondercin to request the documents from Warner for Ondercin to review; nor did he state specifically which

⁷*State ex rel. Hunter v. Alliance*, 5th Dist. No. 2001CA00101, 2002-Ohio-1130; *State ex rel. Delmonte v. Woodmere*, Cuyahoga App. No. 83293, 2004-Ohio-2340.

documents Ondercin should request. Therefore, the statute of limitations did not commence to run at the time the letter was sent.

We do agree, however, that Snodgrass failed to provide evidence that documents were in fact destroyed. His destruction claim is based solely on a statement contained in a letter from the law director, which cautioned "furthermore, you are requesting documents going back to 2002-2003, which *may have been* destroyed. The Police Department will let me know shortly." The City never stated that the documents were in fact destroyed. Therefore, Snodgrass's case was based on an unsupported allegation as he has no evidence that any particular record was destroyed. A plaintiff cannot rest upon mere allegations to support his or her claim in opposing a motion for summary judgment.⁸

Snodgrass relies heavily on the Supreme Court case of *Kish v. Akron*.⁹ However, in that case, there was evidence the requested records were destroyed because the respondents admitted to destroying the records. We have no such evidence in the instant case.

Mayfield Heights Police Chief Donnelly testified in his deposition that he was not aware of any documents that were destroyed, but believed the problem

⁸*Gockel v. Eble* (1994), 98 Ohio App.3d 281; *Buckeye Union Ins. Co. v. Consol. Stores Corp.* (1990), 68 Ohio App.3d 19.

⁹109 Ohio St.3d 162, 2006-Ohio-1244.

was the documents simply did not exist.¹⁰ Lisa Benedetti, the Records Commission Secretary, stated in her affidavit that “no forms generated by, kept by or retained by the Auxiliary Unit have ever been destroyed.”¹¹

Moreover, Snodgrass admitted in his deposition that some of the documents he requested may not exist because the Auxiliary Unit was run “informally, sloppily, and inconsistently.”¹² He also stated that he did not know whether the time cards and daily logs, or any other forms were filled out by the other Auxiliary members.¹³ Snodgrass submitted an affidavit contradicting his deposition testimony; however, an affidavit contradicting former deposition testimony without sufficient explanation of the conflict may not create an issue of fact and must be disregarded.¹⁴ Therefore, without evidence the records were destroyed, Snodgrass’s claim for destruction of public records fails. Additionally, the City cannot be ordered to produce documents that do not exist.

Further, Snodgrass has failed to show how he was aggrieved by the City’s failure to produce the requested records. His grievance with the City concerned

¹⁰Donnelly Depo. 74-75, 100, 124.

¹¹Benedetti Aff. ¶ 8.

¹²Snodgrass Depo. 127.

¹³Snodgrass Depo. 60, 64.

¹⁴*Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455.

the fact Auxiliary members who volunteered less time than him, received paid side jobs. However, Snodgrass admitted that there was no policy in existence linking paid side jobs to the number of hours volunteered. Therefore, these documents that allegedly documented the volunteer hours expended by members would not aid Snodgrass.

Snodgrass, relying on *Kish v. Akron*,¹⁵ maintains that taxpayers are "aggrieved" in general when records they are entitled to review are destroyed. However, in *Kish*, the issue dealt with records kept and generated by elected officials, not a group consisting of unpaid volunteers as in the instant case.

Additionally, the requested documents were created by the group of auxiliary volunteers and not the City. Snodgrass admitted that the City did not direct that the unit create the documents. He admitted the documents were of a temporary nature and used solely for the convenience of the auxiliary unit in creating a schedule for the various volunteers.¹⁶ Accordingly, Snodgrass's assigned error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

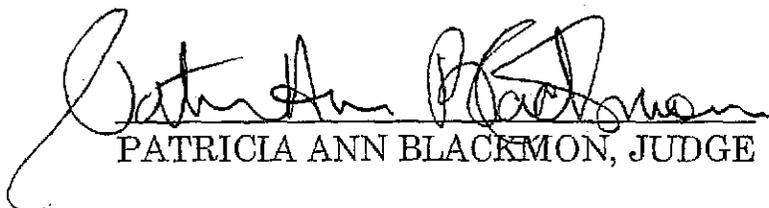
¹⁵Supra.

¹⁶Snodgrass Depo. 114-116.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, JUDGE

JAMES J. SWEENEY, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR