ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *EX REL.* THE CINCINNATI ENQUIRER a division of Gannett Satellite Information Network, Inc.,	:	**Case No. 09-0696**
Relator/Plaintiff-Appellant,	:	**ON APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS, FIRST APPELLATE DISTRICT**
vs.	:	
MARY RONAN, Superintendent Cincinnati Public Schools,	:	
Respondents/Defendant-Appellee.	:	**Court of Appeals Case No. C-0900155**

MERIT BRIEF OF RELATOR/PLAINTIFF-APPELLANT THE CINCINNATI ENQUIRER

John C. Greiner (0005551)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

Counsel for The Cincinnati Enquirer

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 357-9398
Fax: (513) 381-0205
E-mail: stepaniak@taftlaw.com

Counsel for the Respondents

RECEIVED
JUN 26 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUN 26 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

STATEMENT OF FACTS 1

ARGUMENT 2

PROPOSITION OF LAW NO. 1.

This case is not moot because the controversy is capable of repetition, yet evading review 2

PROPOSITION OF LAW NO. 2.

The Enquirer was entitled to have its request for attorney's fees considered by the Court of Appeals 3

PROPOSITION OF LAW NO. 3.

The records are public records and mandamus is the appropriate remedy for a violation of R.C. § 149.43 5

PROPOSITION OF LAW NO. 4

The Enquirer is entitled to recover its attorney's fees 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

SUPPLEMENT (1-30)

Complaint for Writ of Mandamus 1
(March 5, 2009)

Affidavit of Ben Fischer 4
(March 5, 2009)

Answer of Respondent Mary Ronan 13
(April 2, 2009)

Respondent's Memorandum in Opposition to Relator's Complaint for Writ of Mandamus 16
(April 2, 2009)

Entry Dismissing Complaint for Writ of Mandamus.....27
(April 8, 2009)

Notice of Appeal of Relator/Plaintiff-Appellant The Cincinnati Enquirer.....28
(April 16, 2009)

TABLE OF AUTHORITIES

CASES

Kish v. Akron, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811 7

State ex rel. Beacon Journal Publishing Co. v. Whitmore (1998), 83 Ohio St.3d 61, 697 N.E.2d 640 6

State ex rel. Cincinnati Enquirer v. Heath, 121 Ohio St.3d 165, 2009-Ohio-590, 902 N.E.2d 976 ..... 2, 3

State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82 ..... 2-3, 5, 7-8

State ex rel. Dayton Newspapers v. Dayton Board of Education (2000), 140 Ohio App.3d 243, 747 N.E.2d 255 2

State ex rel. Gannett Satellite Information Network, Inc. v. Shirey (1997), 78 Ohio St.3d 400, 678 N.E.2d 557 3-5

State ex rel. Gibbs v. Concord Township Trustees, 152 Ohio App.3d 387, 2003-Ohio-1586, 787 N.E.2d 1248 2

State ex rel. Lucas Cty. Bd. Of Commrs. v. Ohio Environmental Protection Agency (2000), 88 Ohio St.3d 166, 172, 724 N.E.2d 411 7

State ex rel. Pennington v. Gundler (1996), 75 Ohio St.3d 171, 661 N.E.2d 1049 3-5

State ex rel. Plain Dealer Publishing Co. v. City of Cleveland (1996), 75 Ohio St.3d 31, 661 N.E.2d 187 5

State ex rel. Wadd v. City of Cleveland, 81 Ohio St.3d 50, 1998-Ohio-44, 689 N.E.2d 25 ..... 2, 7-8

State ex rel. WBNS 10 TV v. Franklin Cty. Sheriff's Office (2003), 151 Ohio App.3d 437, 784 N.E.2d 207 4

STATUTES

R.C. § 149.011(g) 5

R.C. § 149.43 ..... 3, 5-6, 8

R.C. § 149.43(C)(2)(b) 8

R.C. § 149.43(C)(2)(b)(i) & (ii) 9

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

On February 5, 2009, Ben Fischer, a reporter for The Cincinnati Enquirer ("The Enquirer"), made a public records request to the Cincinnati Public Schools ("CPS"). That request asked for:

> "All documents submitted by prospective candidates for the open superintendent position from December 11, 2008 to today. This includes, but is not limited to, information worksheets, resumes, reference letters, and any correspondence from any person inquiring about the job, or any correspondence from district employees or board members to potential candidates regarding the position"

("the Records"). See Affidavit of Ben Fischer (Supp. p. 4).

The CPS had leased a post office box and directed candidates to submit all resumes to that P.O. Box. See Affidavit of Janet Walsh (Supp. p. 25). The CPS arbitrarily decided <u>not</u> to open the P.O. Box until March 16. The CPS refused to produce the Records until on or after that date. See Affidavit of Ben Fischer (Supp. p. 4).

The Enquirer filed its mandamus complaint on March 5, 2009 (Supp. p. 1). The CPS released copies of the Records on March 12, 2009. See Affidavit of Janet Walsh (Supp. p. 25). The CPS filed its answer on April 2, 2009 (Supp. p. 13).

In its answer to the mandamus complaint, the CPS admitted that it leased the P.O. Box, and that applicants submitted resumes there. The CPS also admitted that, despite The Enquirer's February 5 public records request, the CPS did not open the P.O. Box until March 16. See Answer of CPS (Supp. p. 13).

On April 8, 2009 the First District Court of Appeals *sua sponte* dismissed the mandamus action as moot (Supp. p. 27). The Enquirer filed its Notice of Appeal on April 16, 2009 (Supp. p. 28).

II. ARGUMENT

PROPOSITION OF LAW NO. 1.

THIS CASE IS NOT MOOT BECAUSE THE CONTROVERSY IS CAPABLE OF REPETITION, YET EVADING REVIEW.

The First District Court found that The Enquirer's mandamus action became moot once the CPS produced the Records. But even though the CPS produced the Records, this case is not moot because the controversy is "capable of repetition, yet evading review."

Ohio Courts have applied the "capable of repetition, yet evading review" standard in a number of public records cases.[1] As these cases demonstrate, the doctrine applies where a public body produces records after the mandamus action is filed, particularly where the public body is likely to assert the basis for refusal again in future cases.

Where the dispute concerns the timelines of production, the doctrine is particularly apt.[2] The Ohio Supreme Court has noted: "When records are available for public inspection and copying is often as important as what records are available."[3]

If the CPS (and other public bodies) are permitted to delay production of public records until they are "used," the situation presented here will certainly occur again. There is no question that this issue is capable of repetition.

In addition, the primary evil with the CPS position is the fact that it allows CPS to improperly control the timing of the production of the Records. This means that the issue may very well evade review. A public body that arbitrarily decides when to "use" the particular record can produce the record whenever it desires. If this case is moot, then virtually any case

---

[1] See *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, 902 N.E.2d 976; *State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82; *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 1998-Ohio-44, 689 N.E.2d 25; *State ex rel. Gibbs v. Concord Township Trustees*, 152 Ohio App.3d 387, 2003-Ohio-1586, 787 N.E.2d 1248; *State ex rel. Dayton Newspapers v. Dayton Board of Education* (2000), 140 Ohio App.3d 243, 747 N.E.2d 255.

[2] *State ex rel. Consumer News Service*, 97 Ohio St.3d at ¶ 34; *State ex rel. Wadd*, 81 Ohio St.3d at 51.

[3] *Id.*

like it would also be rendered moot. This case presents a classic version of the "capable of repetition, yet evading review" scenario.

The Ohio Supreme Court also has noted that where a public body has demonstrated a "historical lack of diligence in complying with public records requests," the "capable of repetition, yet evading review" doctrine applies.[4]

The Enquirer alleges in its mandamus complaint that the CPS has demonstrated a "continuing pattern and practice ... to delay production of public records and otherwise to frustrate the letter and spirit of Ohio's Sunshine Laws." The First District Court's precipitous dismissal of the action prevents The Enquirer from conducting discovery on this issue. The court erred by deeming the action moot.

PROPOSITION OF LAW NO. 2.

THE ENQUIRER WAS ENTITLED TO HAVE ITS REQUEST FOR ATTORNEY'S FEES CONSIDERED BY THE COURT OF APPEALS.

Even if this court decides that The Enquirer's claims are moot, The Enquirer is still entitled to recover its attorney's fees. The Enquirer here has satisfied all the criteria necessary to recover fees as set forth by the Supreme Court in *State ex rel. Pennington v. Gundler*.[5] The Enquirer: (1) made a proper request for public records pursuant to R.C. 149.43; (2) the Records were not turned over in response to that request; (3) The Enquirer was therefore forced to file a mandamus action to obtain the Records; and (4) The Enquirer received the Records only after the mandamus action was filed.[6]

By dismissing this matter in its entirety, the First District Court, in essence, found that because The Enquirer's underlying claims were moot, The Enquirer's request for attorney's fees

---

[4] *State ex rel Consumer News Service*, 97 Ohio St.3d at ¶ 32.
[5] (1996), 75 Ohio St.3d 171, 661 N.E.2d 1049.
[6] *Id.* See also *State ex rel. Cincinnati Enquirer, 121 Ohio St.3d* at ¶ 18; *State ex rel. Gannett Satellite Information Network, Inc. v. Shirey* (1997), 78 Ohio St.3d 400, 678 N.E.2d 557.

was also moot. But even if The Enquirer's claims are moot (and they are not), that finding does not preclude an award of attorney's fees.[7]

In *State ex rel. Gannet Satellite Information Network, Inc. v. Shirey*, relator Gannett brought an original mandamus action seeking the release of certain records regarding applicants for a safety-director position.[8] The Supreme Court of Ohio found that Gannett's claims regarding the records were moot following the release of those records.[9] As in this case, the records were released after the mandamus action was filed, but before the Supreme Court had ruled on the underlying substantive issue. Nevertheless, the Court went on to award Gannett attorney's fees after applying the factors set out in *Pennington* and determining that Gannett made a proper records request.[10]

As in *Shirey*, the First District Court in this case was required to make a determination as to whether The Enquirer was entitled to attorney's fees after applying the *Pennington* factors requiring it to determine whether The Enquirer's records request was proper. It could not simply declare The Enquirer's fee request moot.

If this court were to adopt the rationale of the First District Court, then any public body could hold onto public records in the face of a request for those records and release them only after a mandamus action is filed, but before the propriety of denying the records request had been litigated. According to the First District Court, there would be no way to award attorney's fees in that scenario. Thus, there would be no consequences for the public body's failing to turn over the records. That cannot be the law. Rather, courts must apply the *Pennington* factors and

---

[7] *State ex rel. WBNS 10 TV v. Franklin Cty. Sheriff's Office* (2003), 151 Ohio App.3d 437, 784 N.E.2d 207; *State ex rel. Gannett Satellite Information Network, Inc. v. Shirey* (1997), 78 Ohio St.3d 400, 678 N.E.2d 557.
[8] *Id.* at 400.
[9] *Id.* at 402.
[10] *Id.* at 404.

determine whether a records request was proper and whether attorney's fees are appropriate. The First District Court erred by failing to do so.

PROPOSITION OF LAW NO. 3.

THE RECORDS ARE PUBLIC RECORDS AND MANDAMUS IS THE APPROPRIATE REMEDY FOR A VIOLATION OF R.C. § 149.43.

The First District Court blatantly erred by failing to apply the *Pennington* factors. And it is clear that had the court properly considered *Pennington,* it would have awarded attorney's fees.

R.C. § 149.011(g) provides that "records" include: "any document, device, or item ... created or received by or coming under the jurisdiction of any public office ... which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

Resumes of candidates for a public office are unquestionably public records.[11]

The CPS solicited resumes for the superintendent position. It directed candidates to deliver those resumes to a dedicated Post Office Box that it leased and controlled. The CPS received resumes at that P.O. Box. The resumes that the CPS received in response to its direct solicitation "document the activities" of the CPS. Because the resumes were received in response to a direct solicitation by the public office, their very receipt documents the activities of the CPS. And that is the case whether they are ultimately "used" or not. The resumes thus should have been produced on request. The CPS had no right to delay production of the Records, and in doing so, it violated the Public Records Act.

[11] *State ex rel. Consumer News Service, Inc. v. Worthington City Bd. Of Educ.* (2002), 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82; *State ex rel. Gannett Satellite Info. Network v. Shirey* (1997), 78 Ohio St.3d 400, 678 N.E.2d 557; *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (1996), 75 Ohio St.3d 31, 661 N.E.2d 187.

The CPS also violated the Public Records Act by its willful delay in producing the Records. R.C. § 149.43 clearly states that:

> "all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours" and that "upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time."

This case presents a very basic question. When a public body receives a records request, can it willfully refuse to look for responsive records in the exact location where the public body has directed those records be delivered?

The very question compels the answer. And the answer is no. Only in the alternate reality where the CPS apparently resides could such a scenario be permitted.

Besides being nonsensical, the CPS position is an open invitation to mischief. Apparently, under the CPS's logic, a requestor in The Enquirer's position must simply take the word of the public body when it says it has not reviewed the resumes. There is no way to avoid the blind faith element that the CPS position requires.

On the other hand, if the court adopts The Enquirer's sensible argument, there is no opportunity for such mischief. The public records are produced upon receipt – as the law requires – and not upon "use."

The CPS cites to *State ex rel. Beacon Journal Publishing Co. v. Whitmore*[12] to defend its actions. But the *Whitmore* case has absolutely no application here. That case involved a category of records – **unsolicited** presentence correspondence – that in no instances played a part in the judge's sentencing decision. The Supreme Court reached its conclusion in *Whitmore* not because the judge had not yet looked at the letters at the time of the request, but rather because

[12] (1998), 83 Ohio St.3d 61, 697 N.E.2d 640.

the judge had not solicited the letters and was **never** going to consider them in reaching the sentencing decision.

Here, the CPS conceded that at all times it intended to use the resumes in its decision-making process. The CPS is saying that a document that is by definition a public record, and which is unquestionably in the control of the CPS, is not a public record "yet." This argument is refuted not only by common sense, but also by *Kish v. Akron.*[13] There, the Supreme Court noted that "any material upon which a public office *could* rely in such determinations" constitutes a public record (emphasis in the original).

Also, as noted above, the presentence letters in *Whitmore* were unsolicited. That scenario is materially different from the facts here. Because the CPS solicited the resumes and directed that they be delivered to the specified P.O. Box, the very receipt of the resumes documents the activities of the CPS. That was not the case in *Whitmore*, and the CPS's reliance on that precedent is misplaced.

If the CPS is right, a public body would not need to obtain a P.O. Box to accomplish its scheme. It could simply designate a file cabinet and willfully ignore the contents solely to avoid responding to a legitimate public records request. This is not and cannot be the law. The Public Records Act does not exist so that public bodies can devise ways to frustrate it.

The Ohio Supreme Court has held repeatedly, "'*When* records are available for public inspection and copying is often as important as *what* records are available.'" (Emphasis sic.)[14]

---

[13] (2006), 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811.

[14] *State ex rel. Consumer News Service, Inc. v. Worthington School Board* (2002), 97 Ohio St.3d 58, 64, 776 N.E.2d 82, *State ex rel. Lucas Cty. Bd. Of Commrs. v. Ohio Environmental Protection Agency* (2000), 88 Ohio St.3d 166, 172, 724 N.E.2d 411, quoting *State ex rel. Wadd v. Cleveland* (1988), 81 Ohio St.3d 50, 52, 689 N.E.2d 25.

Although the word "promptly" is not defined by applicable statute, its customary meaning is "'without delay and with reasonable speed." And this meaning "'depends largely on the facts in each case.'"[15]

Recent Supreme Court cases on the subject of timeliness have shown little tolerance for delays. In the *Consumer News Services* case, the Ohio Supreme Court awarded mandamus relief in response to a delay of four business days.[16]

In *Wadd*,[17] the relator requested a writ of mandamus on a comparable timeliness claim, and under the facts of that case, the Supreme Court granted the writ to compel the City of Cleveland and certain city officials to prepare and provide access to motor vehicle accident reports within eight days after accidents occur.

These precedents make it clear that a public body cannot delay production of records by arbitrarily deciding when it will look at them.

PROPOSITION OF LAW NO. 4.

THE ENQUIRER IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES.

The Enquirer is entitled to its attorney's fees for bringing this action. As detailed above, The Enquirer satisfied all the criteria necessary to recover fees: The Enquirer (1) made a proper request for public records pursuant to R.C. § 149.43; (2) the Records were not turned over in response to that request; (3) The Enquirer was therefore forced to file a mandamus action to obtain the Records; and (4) The Enquirer received the Records only after the mandamus action was filed.[18]

---

[15] *Wadd*, 81 Ohio St.3d at 53, 689 N.E.2d 25, quoting Black's Law Dictionary (6th Ed. 1990) 1214.
[16] *Consumer News Serv.*, 97 Ohio St.3d at 66-67.
[17] 81 Ohio St.3d 50, 689 N.E.2d 25.
[18] R.C. § 149.43(C)(2)(b) provides in pertinent part: "[T]he court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section."

When a court is faced with a request for attorneys' fees under the Public Records Act, it may reduce the request, or not award any fees, based on two criteria:

> (i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct ... a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct ... did not constitute a failure to comply with an obligation in accordance with division (B) of this section;
>
> (ii) That, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct ... would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.[19]

As to criteria (i), there is no way that the CPS could have believed that its conduct did <u>not</u> violate the Public Records Act. Public records must be made available promptly. When a public body knowingly sets an arbitrary future date as the time when it will produce the requested records it is not acting promptly. And when a public body willfully refuses to look in a location where it has directed the requested records be sent, its noncompliance is willful.

As to criteria (ii), there is, similarly, no way that the CPS could reasonably believe that its conduct served any underlying public policy. The public policy underlying the Public Records Act is, as clearly stated in the statute, prompt production of requested records. The CPS intentionally frustrated this policy. When a public body undertakes conduct to intentionally frustrate public policy, it cannot reasonably believe that such conduct advances that policy.

The true fact here is that this conduct is part of a continuing pattern by the CPS to avoid and/or frustrate the spirit of the Public Records Act. The CPS's conduct in this area has been as consistent as it is disgraceful. It is truly sad when a public body charged with educating young people teaches disrespect for the law through its actions.

---

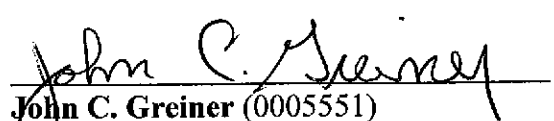
[19] R.C. § 149.43(C)(2)(b)(i) & (ii).

And ironically, if the CPS were as interested in complying with the law as it is in skirting it, it could have avoided this controversy entirely. Had the CPS really wanted to consider all of the superintendent resumes at once, it could simply have directed the applicants not to submit resumes until a certain date. Between Federal Express, fax machines and e-mail, such a plan would have been easily accomplished. This way, the CPS would not have **received** any resumes until the designated date. In this way, it could have accomplished its stated goal and satisfied the Public Records Act. Its failure to do so constitutes a willful violation of the Public Records Act.

III. CONCLUSION

For the reasons set forth above, this court should reverse the judgment of the First District Court of Appeals and find that The Enquirer's claims are not moot and that The Enquirer is entitled to attorney's fees or remand this case back to the Appellate Court to make that determination.

Respectfully submitted,



John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

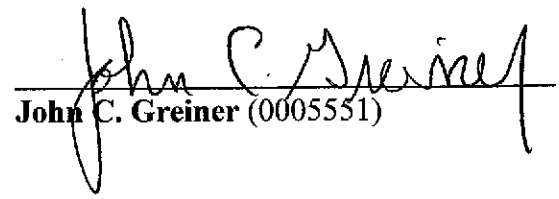
Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 25th day of June, 2009, upon the following:

Mark J. Stepaniak, Esq.
Ryan M. Martin, Esq.
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957



John C. Greiner (0005551)

2131858.1

SUPPLEMENT

FILED
MAR - 5 2009
PATRICIA M. CLANCY
CLERK OF COURTS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, ex rel. THE CINCINNATI ENQUIRER, a division of Gannett Satellite Information Network, Inc. **312 Elm Street** **Cincinnati, OH 45202** Relator, vs. **MARY RONAN, Superintendent** **Cincinnati Public Schools** **2651 Burnet Avenue** **Cincinnati, OH 45219** Respondent.	:	Case No. [redacted] C090155 **COMPLAINT FOR WRIT OF MANDAMUS** **D82435660 INI**

Relator The Cincinnati Enquirer, a division of Gannett Satellite Information Network, Inc., ("The Enquirer") for its Complaint for Writ of Mandamus herein, states as follows:

1. Relator operates and does business as The Cincinnati Enquirer, a newspaper of general circulation in Cincinnati, Hamilton County, Ohio.

2. Respondent Mary Ronan ("Ronan") is the Superintendent of the Cincinnati Public Schools ("CPS").

3. Ronan's official duties include responsibility for the custody and maintenance of certain records pertaining to matters in which the CPS is involved ("the Records").

4. The CPS is a "public office" as defined at R.C. §149.011(A). Records maintained by the CPS are "public records" pursuant to R.C. §149.43(A)(1).

5. On February 5, 2009, Ben Fischer, a reporter for The Enquirer, made a public records request to the CPS. That request asked for:

FILED
2009 MAR -5 A 11:45
PATRICIA M. CLANCY
CLERK OF COURTS
HAMILTON COUNTY OH

ORIG, COMP, PARTIES, SUMMONS
( ) CERT MAIL ( ) SHERIFF ( ) WAVE
( ) PROCESS SERVER ( ) NONE
CLERKS FEES
SECURITY FOR COST
DEPOSITED BY 5551
FILING CODE A 109

> "All documents submitted by prospective candidates for the open superintendent position from December 11, 2008 to today. This includes, but is not limited to, information worksheets, resumes, reference letters, and any correspondence from any person inquiring about the job, or any correspondence from district employees or board members to potential candidates regarding the position"

("the Records").

6. Upon information and belief, the CPS has obtained a post office box and directed candidates to submit all Records to that P.O. Box.

7. The CPS has arbitrarily decided not to open the P.O. Box until March 16. The CPS refuses to produce the records until on or after that date.

8. The Enquirer has a clear legal right to inspect and copy the Records and the CPS has a clear legal duty to promptly make the Records available to The Enquirer for inspection and copying.

9. The failure by CPS to produce the Records in their entirety is consistent with the continuing pattern and practice of the CPS to delay production of public records and otherwise to frustrate the letter and spirit of Ohio's Sunshine Laws.

10. The Enquirer has no adequate alternative remedy in the ordinary course of the law.

11. The CPS has no valid excuse for refusing to permit The Enquirer and the public to inspect and copy the Records in their entirety, and no valid excuse for failing to comply with Ohio law by promptly making the Records available for inspection.

WHEREFORE, The Enquirer seeks a Peremptory Writ of Mandamus or, in the alternative, an Alternative Writ of Mandamus commanding the CPS to make available the Records for inspection and copying in accordance with R.C. §149.43(B), to produce public records in the future in accordance with R.C. §149.43(B), for statutory damages as provided by

R.C. §149.43(C)(1), and for any other relief deemed just and proper by the court, including but not limited to an award of attorneys fees.

Respectfully submitted,

John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

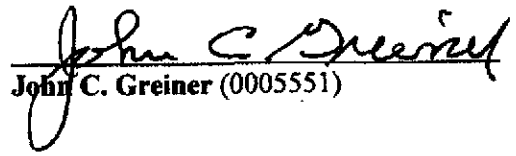
Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a Summons along with a copy of this Complaint to the Cincinnati Public Schools identified in the caption on page one via U.S. Certified Mail, return receipt requested.



John C. Greiner (0005551)

2000522.1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, ex rel. THE CINCINNATI ENQUIRER, a division of Gannett Satellite Information Network, Inc. **312 Elm Street** **Cincinnati, OH 45202** Relator, vs. **MARY RONAN, Superintendent** **Cincinnati Public Schools** **2651 Burnet Avenue** **Cincinnati, OH 45219** Respondent.	:	Case No. C090155 **AFFIDAVIT OF BEN FISCHER**

FILED
COURT OF APPEALS
MAR - 5 2009
CLERK OF COURTS
HAMILTON COUNTY

AFFIANT, after being duly sworn cautioned and sworn, states as follows:

1. My name is Ben Fischer. I make this affidavit on the basis of my personal knowledge.

2. At all times relevant to this proceeding, I have been employed as a reporter with The Cincinnati Enquirer ("The Enquirer").

3. On February 5, 2009, I made a formal records request to the CPS. That request asked for resumes and related documents submitted by, or relating to, candidates for the position of superintendent of the Cincinnati Public Schools ("the Records"). A true and correct copy of that Request is attached as Exhibit A.

FILED
2009 MAR -5 A 11:47
CLERK OF COURTS
HAMILTON COUNTY, OHIO

4. Attached hereto as Exhibit B is a true and correct copy of the response by the CPS to the Request.

D82436285

5. On February 23, 2009, I made a follow up request for the Records. A true and correct copy of that follow up Request is attached as Exhibit C.

6. On February 26, counsel for The Enquirer delivered a letter to the CPS outlining The Enquirer's legal position, and reiterating its demand for the Records. A true and correct copy of that letter is attached as Exhibit D.

7. On March 3, counsel for the CPS made it clear that CPS would not comply with the Request. A true and correct copy of the response by CPS is attached as Exhibit E.

8. The delay by CPS in responding to the Records request reflects a pattern and practice of delay on the part of CPS in responding to public records requests.

FURTHER AFFIANT SAYETH NAUGHT.

Ben Fischer

STATE OF OHIO)
) **ss.**
COUNTY OF HAMILTON)

Sworn to and subscribed before me, a Notary Public, this 5th day of March, 2009.

NOTARY PUBLIC STATE OF OHIO

PAMELA W. LANE
Notary Public, State of Ohio
My Commission Expires
February 13, 2010

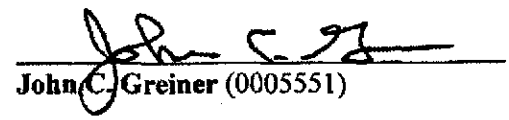
Notary Public

My Commission Expires

2000540.1

CERTIFICATE OF SERVICE

The Relator requests that the Clerk serve a copy of this Affidavit along with the Complaint for Writ of Mandamus.



John C. Greiner (0005551)

Ben Fischer
The Cincinnati Enqurier
312 Elm Street
Cincinnati, OH 45202
February 5, 2008

VIA HAND DELIVERY

Janet Walsh
Chief Officer, Public Affairs
Cincinnati Public Schools
2651 Burnet Ave.
Cincinnati, OH 45219

Dear Janet:

Pursuant to the Ohio Open Records Act, R.C. 149.93, I am writing to request the following information from Cincinnati Public Schools:

All documents submitted by prospective candidates for the open superintendent position from December 11, 2008 to today. This includes, but is not limited to, information worksheets, resumes, reference letters, and any correspondence from any person inquiring about the job, or any correspondence from district employees or board members to potential candidates regarding the position.

I plan to use this information for a news story, and therefore, ask for your prompt response to this request and immediate access to this information. Because this information will be used to inform the public, I ask that you waive any copying fees.

If any part of my request is denied, please notify me in writing, citing the specific policies and/or statutes that allow you to deny my request. Where exemptions to the act are discretionary, I ask that you make the records available even if they might qualify for withholding under the law. Also, if a particular part of the record I am requesting becomes available before other parts of it, please fulfill my request in part and continue to collect the remainder. Also, I will accept the record in the format that is most readily available, and delivered to me via the fasted method available.

This request is being hand-delivered pursuant to Ohio Revised Code Section 149.43(C)(1). Please contact me at 513-768-8509 if you have questions about this request.

Sincerely,

Ben Fischer

EDUCATION CENTER • P.O. BOX 5381 • CINCINNATI, OH 45201-5381 • PH: 513-363-0000 • TDD: 513-363-0124

February 17, 2009

Ben Fischer
The Cincinnati Enquirer
312 Elm Street, 19th Floor
Cincinnati, Ohio 45220

Re: Open Records Act Requests

Dear Ben:

Enclosed please find copies of all public records responsive to your request dated February 5, 2009. Additionally, delivered to the District offices at 2651 Burnet Avenue, Cincinnati, Ohio 45219 on February 6, 2009 was a letter, apparently from you, addressed to Cincinnati Public Schools, but directed to P. O. Box 198008. It appears this correspondence was sent to a post office box "return receipt requested" which apparently is ineffective. In any event, the postal worker did not deposit your letter in any P. O. Box, but instead delivered it to the District offices. We do not know if your letter is responsive to your own request, but if you want a copy of what you sent to us, let me know.

At this time, we are unaware of any correspondence that has been successfully sent to P. O. Box 198008. The P. O. Box has not been checked. Accordingly, its contents, if any, are not public records. The contents (if any) of the P.O. Box have not been utilized to carry out the duties and responsibilities of the District and would not at this time serve to document the organization, functions, policies, decisions, procedures, operations or other activities of the District. See State ex rel Beacon Journal Publishing Co. v. Whitmore, 83 Ohio St. 3d 61 (1998) and other cases to that effect.

However, once the contents, if any, of the P. O. Box are emptied and utilized by the District on or about March 15, 2009, all public records contained therein will be made available to you and others for inspection and/or copying after completion of the legally required redaction process.

Sincerely,

Janet L. Walsh
Director, Public Affairs

LOCATION: 2651 BURNET AVENUE · CINCINNATI, OHIO 45219

Ben Fischer
The Cincinnati Enqurier
312 Elm Street
Cincinnati, OH 45202
February 23, 2009

VIA HAND DELIVERY

Janet Walsh
Chief Officer, Public Affairs
Cincinnati Public Schools
2651 Burnet Ave.
Cincinnati, OH 45219

Dear Janet:

Pursuant to the Ohio Open Records Act, R.C. 149.93, I am writing to request the following information from Cincinnati Public Schools:

All documents submitted by prospective candidates for the open superintendent position from February 5, 2009 to today. This includes, but is not limited to, information worksheets, resumes, reference letters, and any correspondence from any person inquiring about the job, or any correspondence from district employees or board members to potential candidates regarding the position.

I plan to use this information for a news story, and therefore, ask for your prompt response to this request and immediate access to this information. Because this information will be used to inform the public, I ask that you waive any copying fees.

If any part of my request is denied, please notify me in writing, citing the specific policies and/or statutes that allow you to deny my request. Where exemptions to the act are discretionary, I ask that you make the records available even if they might qualify for withholding under the law. Also, if a particular part of the record I am requesting becomes available before other parts of it, please fulfill my request in part and continue to collect the remainder. Also, I will accept the record in the format that is most readily available, and delivered to me via the fasted method available.

This request is being hand-delivered pursuant to Ohio Revised Code Section 149.43(C)(1). Please contact me at 513-768-8509 if you have questions about this request.

Sincerely,

Ben Fischer

GRAYDON HEAD

LEGAL COUNSEL | SINCE 1871

John C. Greiner
Direct (513) 629-2734
jgreiner@graydon.com

February 26, 2009

Cynthia L. Dillon, Esq.
CINCINNATI PUBLIC SCHOOLS
2651 Burnet Avenue
Cincinnati, OH 45219

Re: Enquirer / CPS Records Request

Dear Cynthia:

I have reviewed Janet Walsh's February 17 letter to Ben Fischer setting forth the CPS's rationale for its plan to direct superintendent resumes to a designated PO Box, and its assertion that the contents of that box are not public records. To be polite, I will say only Janet's analysis is inaccurate. On behalf of The Cincinnati Enquirer, please be advised that we demand that copies of any resumes submitted for the Superintendent position currently in the PO Box be provided to The Enquirer by Wednesday March 4. If you refuse to provide the resumes by that date, we will file a mandamus action.

If you intend to stand by Janet's position, please advise as soon as possible, so that we can file the necessary papers promptly.

Very truly yours,

GRAYDON HEAD & RITCHEY LLP

John C. Greiner

JCG | pl

1991374.1

10 EXHIBIT D

Taft/

Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800 / Cincinnati, OH 45202-3957 / Tel: 513.381.2838 / Fax: 513.381.0205 / www.taftlaw.com
Cincinnati / Cleveland / Columbus / Dayton / Indianapolis / Northern Kentucky / Phoenix / Beijing

MARK J. STEPANIAK
513.357.9388
stepaniak@taftlaw.com

March 3, 2009

VIA TELECOPY

John C. Greiner
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157

Re: Enquirer/CPS Records Request

Dear Jack:

As you probably know, Cynthia has been consumed with certain real estate matters recently. Accordingly, she has asked me to respond to your letter mailed on February 26, 2009 concerning Janet Walsh's February 17, 2009 letter to Ben Fischer. As we understand it, CPS has neither checked nor opened the P.O. Box because it has determined to review all submissions at one time in order to maximize the number of qualified responses. In that regard, while CPS admittedly can access the P.O. Box, it has not done so. It does not know whether anyone has responded to its advertisements (other than Ben Fischer) and certainly has not used the contents at this point to further the public's business.

Further, as you may know from talking to Ben, CPS plans to empty the contents of the P. O. Box, if any, on Monday, March 16, the first business day after the submission deadline. A list of the applicants will be prepared and provided to Ben and others on that date. Resumes and other public records will be available the next day after they are reviewed for redaction as required by law.

In your letter to Cynthia you state, politely, that Janet Walsh's analysis is inaccurate but you don't say in what way. If you have legal authority for your conclusion

11354858.1

that mail addressed to the District is a public record before it has been opened or otherwise used in any fashion by the public body, please share it with us. If the issue is clear the District can be convinced.

Very truly yours,

Mark

Mark J. Stepaniak

MJS:srs

11354058.1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, ex rel. THE CINCINNATI ENQUIRER, a division of Gannett Satellite Information Network, Inc. Relator, v. MARY RONAN, Superintendent Cincinnati Public Schools, Respondent.	: : : : : : : : : : :	Case No. C0900155 **ANSWER OF RESPONDENT MARY RONAN**

For her answer to the complaint of Relator The Cincinnati Enquirer ("Relator"), Respondent Mary Ronan ("Respondent") states as follows:

1. Respondent admits the allegations contained in Paragraph 1 of the Complaint.

2. Respondent admits the allegations contained in Paragraph 2 of the Complaint.

3. Respondent admits that she is responsible for the custody and maintenance of records defined as "public records" under R.C. 149.43. Respondent denies the remaining allegations in Paragraph 3 of the Complaint.

4. Respondent admits that Cincinnati Public Schools ("CPS") is a "public office" as defined by R.C. 149.011(A). Respondent denies the remaining allegations in Paragraph 4 of the Complaint.

5. Respondent admits the allegations in Paragraph 5 of the Complaint.

6. Respondent admits that it has obtained a post office box but denies the remaining allegations in Paragraph 6 of the Complaint.

7. Respondent denies the allegations in Paragraph 7 of the Complaint.

8. Respondent denies the allegations in Paragraph 8 of the Complaint.

9. Respondent denies the allegations in Paragraph 9 of the Complaint.

10. Respondent denies the allegations in Paragraph 10 of the Complaint.

11. Respondent denies the allegations in Paragraph 11 of the Complaint.

12. Respondent denies that Relator is entitled to any judgment against it or to any of the damages it seeks. Respondent states that CPS has produced documents Relator requested without objection to the production and no pattern or practice of delay exists. Relator's Complaint is moot. Respondent denies all of the remaining allegations in the "Wherefore" Paragraph of the Complaint.

13. Respondent denies each and every allegation not specifically admitted herein.

FIRST DEFENSE

The Complaint is moot and fails to state a claim upon which relief can be granted.

Respondent reserves the right to add any defenses learned as a result of discovery.

WHEREFORE, Respondent Mary Ronan respectfully requests that the Court grant judgment in her favor, dismissing Relator's Complaint with prejudice and at its cost and awarding appropriate defense costs, fees and other relief.

Respectfully submitted,

/s/ Mark J. Stepaniak

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 381-2838
Facsimile: (513) 381-0205
stepaniak@taftlaw.com

Attorneys for Respondent Mary Ronan

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, Answer of Respondent Mary Ronan, was served via regular U.S. Mail upon John C. Greiner, Graydon Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202-3157, this 2d day of April, 2009.

/s/ Mark J. Stepaniak

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 381-2838
Facsimile: (513) 381-0205
stepaniak@taftlaw.com

Attorneys for Respondent Mary Ronan

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, ex rel. THE CINCINNATI ENQUIRER, a division of Gannett Satellite Information Network, Inc. Relator, v. MARY RONAN, Superintendent Cincinnati Public Schools, Respondent.	:	Case No. C0900155 **RESPONDENT'S MEMORANDUM IN OPPOSITION TO RELATOR'S COMPLAINT FOR WRIT OF MANDAMUS**

I. INTRODUCTION

Relator the Cincinnati Enquirer's ("Enquirer") complaint for writ of mandamus against Respondent Superintendent Mary Ronan ("Ronan") should be dismissed.

This case is moot. Cincinnati Public Schools ("CPS") produced all documents subject to the Enquirer's February 5, 2009, public records request. The sufficiency of its production has not been challenged. A writ is not warranted under these circumstances because the Enquirer cannot show that CPS has exhibited a historical lack of diligence in complying with public records requests. The Enquirer's bald assertion that CPS has demonstrated a "continuing pattern and practice" of delaying production of public records is meritless on its face. The Enquirer failed to plead or produce any facts to support such a conclusion.

Aside from being moot, the Enquirer's assertion that CPS unreasonably delayed production in this case is also meritless. Its argument that any materials contained in the relevant post office box were automatically records the instant they were delivered because CPS *could have* used them has been specifically rejected by the Ohio Supreme Court.

ELECTRONICALLY FILED 04/02/2009 14:00 / MEMO / C 0900155 / CONFIRMATION NUMBER 55534

Litigation of this matter is unnecessary and a waste of judicial and public resources. The complaint should be summarily dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED.

Ohio law provides that "a writ of mandamus will not issue to compel the general observance of laws in the future." *State ex rel. Kirk v. Burcham*, 82 Ohio St.3d 407, 409, 1998-Ohio-224, 696 N.E.2d 582, 584. Subsequent cases carved out a narrow exception to this rule when relators prove that a public entity has exhibited a "historical lack of diligence in complying with public records requests." *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Educ.* (2002), 97 Ohio St.3d 58, 63, 2002-Ohio-5311 at ¶ 32, 776 N.E.2d 82, 88.

The Enquirer cannot meet this burden.

A. The Complaint Is Moot.

CPS produced documents responsive to the Enquirer's February 5, 2009, public records request, and the Enquirer has not objected to this production. (Walsh Aff. ¶¶ 6-7) The Enquirer's complaint is therefore moot. A writ of mandamus should not be issued.

B. The Enquirer Has Shown No Continuing Pattern Or Practice Of Delay.

The Enquirer cannot meet its burden of establishing that CPS has exhibited a "historical lack of diligence in complying with public records requests." *Consumer News Servs.*, 97 Ohio St.3d at 63, 2002-Ohio-5311 at ¶ 32, 776 N.E.2d at 88. The timing of CPS's production of the documents responsive to the Enquirer's February 5, 2009, public records request was reasonable under the circumstances. And even assuming the production took too long from the Enquirer's perspective, Ben Fischer's affidavit does not prove that CPS has historically lacked diligence in responding to public records requests. Although the Enquirer makes a general citation to *Consumer News Services* in its Memorandum in Support of Complaint for Writ of Mandamus, it failed to argue that the case is applicable here. The Enquirer also failed to plead facts in its

complaint to support the conclusion that CPS has historically lacked diligence in complying with public records requests or produce any evidence of such conduct. The complaint therefore remains moot and should be dismissed.

C. **CPS Produced The Requested Records Within One Day Of Their Use.**

In addition to being moot, the Enquirer's complaint should be dismissed because CPS complied with R.C. 149.43 in its response to the Enquirer's February 5, 2009, public records request. R.C. 149.011(G) defines a "record" as "any devise, or item...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.**" (emphasis added) To be a "record," a document must therefore both (1) be created or received by a public office or agency and (2) serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. The Ohio Supreme Court holds that if an item is not a "record" it cannot be a "public record" and need not be copied or made available for inspection pursuant to a request made under the Public Records Act. *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 1993-Ohio-188, 610 N.E.2d 997, 999.

Not every scrap of paper in the possession of a public entity is a "record" or "public record." *State ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 64, 1998-Ohio-180, 697 N.E.2d 640, 642 ("...R.C. 149.43 and 149.011(G) do not define 'public record' as any piece of paper received by a public office that *might* be used by that office.") (emphasis in original). In *Whitmore*, the Ohio Supreme Court determined that documents are not records under R.C. 149.011(G) until they are somehow used by a public office or agency. The case involved a common pleas judge who received letters from the public attempting to influence

ELECTRONICALLY FILED 04/02/2009 14:00 / MEMO / C 0900155 / CONFIRMATION NUMBER 55534

her sentencing decision in a criminal case. The letters were not made part of the pre-sentencing investigation report. *Id.* at 61, 640. Judge Whitmore testified she did not rely on any of the letters in making her sentencing decision but probably reviewed them. *Id.* at 61-62, 640-41. Rather than disposing of the letters, the Judge sent them to the probation department and produced them to the Supreme Court for in camera inspection. *Id.* at 62, 641. Finding that the letters were not public records, the Court held:

> While it is uncontroverted that Judge Whitmore **received** the letters and placed them in her files, we hold that, for the following reasons, the letters were not 'records' for the purposes of R.C. 149.011(G) and 149.43 **because they do not serve to document Judge Whitmore's sentencing decision or any other activity of her office.**
>
> Judge Whitmore did not **use** the letters in her decision to sentence Lewis. The R.C. 149.011(G) definition of 'records' has been construed to encompass 'anything a government unit utilizes to carry out its duties and responsibilities....'

Id. at 63, 641 (citing *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 39, 550 N.E.2d 464, 466) (emphasis added).

Later in the decision, the Court specifically rejected the Enquirer's argument in the case sub judice that documents are records under R.C. 149.011(G) if they *could* be used by a public office:

> Here, although Judge Whitmore did not discard the letters, she never utilized the letters in her sentencing decision. Therefore, the letters are not subject to disclosure because they do not serve to document the organization, functions, policies, decisions, procedures, operations or other activities of Judge Whitmore's office. (Citation omitted) By so holding, **we reject Relators' contention that a document is a 'record' under R.C. 149.011(G) if the public office 'could use' the document to carry out its duties and responsibilities.**

Id. at 63, 642 (emphasis added). The Court went even further by quoting favorably a federal Freedom of Information Act decision providing that "agency possession and power to

disseminate a document are still insufficient by themselves to make it an 'agency record.'...Agencies must use or rely on the document to perform agency business, and integrate it into their files, before it may be deemed an 'agency record.'" *Id.* at 64, 642 (citing *Tax Analysts v. United States Dept. of Justice* (D.C. Cir. 1998), 845 F.2d 1060, 1068).

Under this clear precedent, CPS did not violate R.C. 149.43 in responding to the Enquirer's February 5, 2009, public records request. Documents delivered to the post office box before March 16, 2009 -- if any -- were not records until they served to document the organization or activities of the District. Like the letters in *Whitmore*, CPS never used the documents produced in any decision regarding the District's superintendent search prior to March 16. No one at CPS had even seen the documents. (Walsh Aff. ¶ 4) CPS provided the Enquirer with the names of applicants for the superintendent position and properly redacted copies of all requested documents the day after CPS became aware of and used the materials in question.

The Enquirer's attempt to distinguish *Whitmore* by arguing that the Judge was never going to consider the letters in reaching her sentencing decision is not supported by the facts. There is no doubt that Judge Whitmore *could have* used the letters in her possession during sentencing because she testified that "if information in a letter might lead to something she wanted to rely upon in a sentencing decision, she would ask the probation department to verify the information." *Whitmore*, 83 Ohio St.3d at 62, 697 N.E.2d at 641. Thus, Judge Whitmore *could have* used the letters if they contained information she wanted the probation department to investigate, but the mere possibility of such use was held insufficient to convert the letters into "records." Rather, it was their nonuse that was determinative.

If the Enquirer's position in this matter were correct, the letters would have become records **"the minute"** they came into the Judge's possession. (Memorandum in Support of Complaint for Writ of Mandamus, p. 2) Under the Enquirer's theory, whether the Judge actually utilized the letters in the sentencing decision would have been irrelevant.[1] If the Enquirer's position is upheld, the *Whitmore* decision will have little force, and every piece of paper crossing a trial judge's desk will automatically become a public record subject to disclosure under R.C. 149.43.

Moreover, prior to March 16, 2009, CPS could have decided to hire a superintendent without conducting a search or change the way the search was conducted. In such event, any materials inside the post office box (like the letters in *Whitmore*) would have never been used. The reasoning in *Whitmore*, which controls this case, establishes that CPS produced materials relevant to the Enquirer's public records request as soon as they met the definition of a "record" under Ohio law.

The Enquirer's reliance on *Kish v. City of Akron* (2006), 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, is misplaced. In *Kish*, the Ohio Supreme Court affirmed *Whitmore*'s holding that documents must be utilized in some way by a public office to transform them into public records covered by R.C. 149.011(G):

> And notwithstanding petitioner's suggestions to the contrary, petitioner's vision of a record is not reflected in Ohio's well-established precedent. For example, the petitioner's reliance on *State ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 697 N.E.2d 640, is inapposite, for in that case, we concluded that letters sent from members of the public to a trial judge in an effort to influence her sentencing decision were not public records, **because the judge did not rely upon the letters. Here, however, there is no question that the documents**

[1] The Enquirer is, in essence, asking this Court to rule that materials that <u>could be</u> used by a public office are records when they are received but that such materials could later <u>lose</u> their status as records if they are never actually used by the public entity. This argument is meritless and unsupported by Ohio law.

> **submitted to the division were relied upon. They were used to calculate the tally and make decisions about the use of comp time.** Whitmore does not buttress petitioner's position. (Emphasis added)

Although the facts in *Kish* are inapposite to this case, the Court's holding supports CPS's position. Once the contents of the post office box "were relied upon," they were produced within one day.

Upholding Ohio Supreme Court precedent (and CPS's position) in this case would also not thwart the purpose of R.C. 149.43 or raise any public policy concerns. R.C. 149.43 was passed by the Ohio Legislature to "ensure that government performs effectively and properly" and so the public could be "informed and therefore able to scrutinize the government's work and decisions." *Kish*, 109 Ohio St.3d at 165, 2006-Ohio-1244 at ¶15, 846 N.E.2d at 816. These concerns were not jeopardized by CPS's actions in this case.

Prior to March 16, 2009, no CPS official was aware of the contents of the post office box. (Walsh Aff. ¶ 4) At that time, the documents related to the Enquirer's February 5, 2009, request could never have played a role in decisions made by CPS officials or the operation of the District. The public would have gained no insight into the effectiveness of the District's operation or CPS's "work and decisions" through the production of the unknown contents of the post office box. The day after the first CPS employee became aware of the materials inside the box (at which point they began to document the organization or functions of the District), CPS produced all documents responsive to the Enquirer's request. (Walsh Aff. ¶¶ 6)

CPS's conduct did not thwart the purposes of R.C. 149.43, and the Enquirer's assertion to the contrary in its complaint is disingenuous. Under the facts and circumstances of this case, the Enquirer could not be concerned about the transparency of government. CPS provided complete

responses to the newspaper's request the day after the District became aware of, looked at, or used the documents in question. The Enquirer's complaint should be dismissed.

III. CONCLUSION

For each and all of the foregoing reasons, Respondent respectfully requests that Relator's petition for a peremptory or alternative writ of mandamus be dismissed.

Respectfully submitted,

/s/ Mark J. Stepaniak

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 381-2838
Facsimile: (513) 381-0205
stepaniak@taftlaw.com

Attorneys for Respondent Mary Ronan

CERTIFICATE OF SERVICE

I hereby certify that the foregoing, Respondent's Memorandum in Opposition to Relator's Complaint for Writ of Mandamus, was served via regular U.S. Mail upon John C. Greiner, Graydon Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202-3157, this 2d day of April, 2009.

/s/ Mark J. Stepaniak

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 381-2838
Facsimile: (513) 381-0205
stepaniak@taftlaw.com

Attorneys for Respondent Mary Ronan

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, ex rel. THE CINCINNATI ENQUIRER, a division of Gannett Satellite Information Network, Inc. Relator, v. MARY RONAN, Superintendent Cincinnati Public Schools, Respondent.	:	Case No. C080163 **AFFIDAVIT OF JANET WALSH**

State of Ohio)
) SS:
County of Hamilton)

Janet Walsh, being first duly cautioned and sworn, states of her personal knowledge as follows:

1. My name is Janet Walsh. At all times relevant to this proceedings, I have been employed by Cincinnati Public Schools ("CPS") as Director of Public Affairs.

2. As Director of Public Affairs, I receive public records requests from entities such as the Cincinnati Enquirer ("Enquirer") among other duties.

3. As part of my officials duties, I have been involved with the production of documents responsive to public records requests related to CPS's ongoing superintendent search.

4. Applicants for the superintendent position submitted materials to a post office box leased by CPS. On March 16, 2009, CPS officials opened the post office box for the first time and reviewed the materials inside. Prior to March 16, 2009, no CPS official opened or looked into the post office box. No one at CPS was aware of the contents of the box prior to March 16.

5. On February 5, 2009, I received the following public records request from Ben Fischer, a reporter at the Enquirer:

> Pursuant to the Ohio Open Records Act, R.C. 149.43, I am writing to request the following information from Cincinnati Public Schools:
>
> All documents submitted by prospective candidates for the open superintendent position from December 11, 2008 to today. This includes, but is not limited to, information worksheets, resumes, reference letters, and any correspondence from any person inquiring about the job, or any correspondence from district employees or board members to potential candidates regarding the position.

6. After becoming aware of the contents of the post office box on March 16, 2009, CPS personnel properly redacted documents responsive to the Enquirer's public records request. The documents were produced to the Enquirer on March 17, 2009.

7. The Enquirer has not challenged the adequacy of CPS's response to its February 5, 2009 public records request.

Further affiant sayeth naught.

Janet L. Walsh

Janet Walsh

Sworn to and subscribed before me this 1st day of April, 2009.

Pamula Thomas

PAMULA R. THOMAS
Notary Public, State of Ohio
My Commission Expires
June 19, 2012

11373773.1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, EX REL., THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Relator,

vs

MARY RONAN, SUPERINTENDENT

Respondent.

APPEAL NO. C-090155

ENTERED
APR - 8 2009

ENTRY DISMISSING COMPLAINT FOR WRIT OF MANDAMUS

This cause came on to be considered upon the petition for a writ of mandamus and the respondent's answer and memorandum in opposition to the petition.

The Court finds that complaint is moot, and the Court *sua sponte* dismisses the complaint for writ of mandamus.

D82908623

To The Clerk:

Enter upon the Journal of the Court on APR - 8 2009 **per order of the Court.**

By: _____ **(Copies sent to all counsel)**
Presiding Judge

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *EX REL.* THE CINCINNATI ENQUIRER a division of Gannett Satellite Information Network, Inc.,	:	Case No. 09-0696
Relator/Plaintiff-Appellant,	:	**ON APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS, FIRST APPELLATE DISTRICT**
vs.	:	
MARY RONAN, Superintendent *Cincinnati Public Schools,*	:	
Respondents/Defendant-Appellees.	:	**Court of Appeals Case No. C-090155**

NOTICE OF APPEAL OF RELATOR/PLAINTIFF-APPELLANT THE CINCINNATI ENQUIRER

John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Counsel for the Respondents
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 357-9398
Fax: (513) 381-0205
E-mail: stepaniak@taftlaw.com

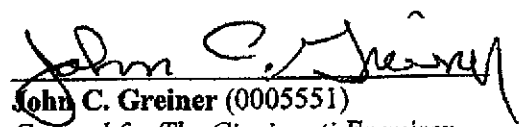
RECEIVED
APR 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
APR 16 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF PETITIONER/PLAINTIFF-APPELLANT

Relator/Plaintiff-Appellant The Cincinnati Enquirer hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in *State, ex rel. The Cincinnati Enquirer v. Mary Ronan, Superintendent,* Court of Appeals Case No. C-090155 on April 8, 2009. This case originated in the First District Court of Appeals. A copy of the Opinion and Entry of the Court of Appeals is attached hereto.

Respectfully submitted,



John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

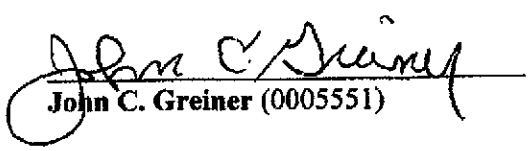
Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 13 day of April, 2009, upon the following:

Mark J. Stepaniak, Esq.
Ryan M. Martin, Esq.
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957



John C. Greiner (0005551)

2044453.1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE, EX REL., THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Relator,

vs

MARY RONAN, SUPERINTENDENT,

Respondent.

APPEAL NO. C-090155

ENTRY DISMISSING COMPLAINT FOR WRIT OF MANDAMUS

This cause came on to be considered upon the petition for a writ of mandamus and the respondent's answer and memorandum in opposition to the petition.

The Court finds that complaint is moot, and the Court *sua sponte* dismisses the complaint for writ of mandamus.

To The Clerk:

Enter upon the Journal of the Court on APR - 8 2009 **per order of the Court.**

By: _____ **(Copies sent to all counsel)**
Presiding Judge