

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
<u>PROPOSITION OF LAW 1:</u> The Court of Appeals Correctly Determined That This Case Is Moot.....	1
<u>PROPOSITION OF LAW 2:</u> The Court of Appeals Implicitly Rejected The Enquirer’s Request For Attorney’s Fees.....	4
<u>PROPOSITION OF LAW 3:</u> The First District Did Not Abuse Its Discretion In Failing To Award Attorney’s Fees In This Case Because Cincinnati Public Schools Complied With The Ohio Public Records Act.....	5
<u>PROPOSITION OF LAW 4:</u> Even If A Violation Of The Ohio Public Records Act Occurred In This Case, The Enquirer Is Not Entitled To Recover Attorney’s Fees.....	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15
SUPPLEMENT (1-5)	
Enquirer’s Memorandum in Support of Complaint for Writ of Mandamus	1
(March 5, 2009) (Omitted in the Enquirer’s submission to the Court)	

TABLE OF AUTHORITIES

PAGE

CASES

Int'l Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C. (2008), 116 Ohio St.3d 355, 2007-Ohio-6439, 879 N.E.2d 187..... 4, 5

Jones v. McAlarney Pools, Spas & Billiards, Inc. (March 19, 2008), Washington App. No. 07CA34, unreported, 2008-Ohio-1365 at ¶ 12, 2008 WL 757522 at *3..... 5

Kish v. City of Akron (2006), 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811..... 8-10

Knight v. Colazzo (Dec. 17, 2008), Summit App. No. 24110, unreported, 2008-Ohio-6613 at ¶¶ 8-9, 2008 WL 5244640 at *2..... 5

Olander v. French (1997), 79 Ohio St.3d 176, 680 N.E.2d 962..... 5

Soter v. Soter (April 1, 2005), Montgomery App. No. 20403, unreported, 2005-Ohio-1594, 2005 WL 742498..... 4

State ex rel. Beacon Journal Publishing Co. v. Whitmore (1998), 83 Ohio St.3d 61, 697 N.E.2d 640..... 2, 6-10

State ex rel. Calvary v. City of Upper Arlington (2000), 89 Ohio St.3d 229, 2000-Ohio-142, 729 N.E.2d 1182..... 2

State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ. (2003), 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629..... 3

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

State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. Of Educ. (2002), 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82..... 3

State ex rel. Dayton Newspapers et al. v. Dayton Bd. Of Educ. (2d Dist. 2000), 140 Ohio App.3d 243, 747 N.E.2d 255..... 12

State ex rel. Fant v. Enright (1993), 66 Ohio St.3d 186, 1993-Ohio-188, 610 N.E.2d 997..... 5

<i>State ex rel. Gannett Satellite Info. Network v. Shirey</i> (1997), 78 Ohio St.3d 400, 678 N.E.2d 557.....	2
<i>State ex rel. Gibbs v. Concord Twp.</i> (11th Dist. 2003), 152 Ohio App.3d 387, 2003-Ohio-1586, 787 N.E.2d 1248.....	5, 13
<i>State ex rel. Kirk v. Burcham</i> (1998), 82 Ohio St.3d 407, 1998-Ohio-224, 696 N.E.2d 582.....	1
<i>State ex rel. Mazzaro v. Ferguson</i> (1990), 49 Ohio St.3d 37, 550 N.E.2d 464.....	6
<i>State ex rel. Pennington v. Gundler</i> (1996), 75 Ohio St.3d 171, 661 N.E.2d 1049.....	12
<i>State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. Of Commrs.</i> (2008), 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961.....	1
<i>State ex rel. WBNS 10 TV, Inc. v. Franklin Co. Sheriff's Office,</i> (10th Dist. 2003), 151 Ohio App.3d 437, 2003-Ohio-409, 784 N.E.2d 207.....	2
<i>State ex rel. Wadd v. City of Cleveland</i> (1998), 81 Ohio St.3d 50, 1998-Ohio-444, 689 N.E.2d 25.....	5, 12
<i>Swinehart v. Swinehart</i> (Nov. 14, 2007), Ashland App. No. 06-COA-020, 2007-Ohio-6174 at ¶ 26, 2007 WL 4105634 at *4.....	4
<i>Tate v. Adena Regional Med. Ctr.</i> (4th Dist. 2003), 155 Ohio App.3d 524, 2003-Ohio-7042, 801 N.E.2d 930.....	4
<i>Tax Analysts v. United States Dept. of Justice</i> (D.C. Cir. 1998), 845 F.2d 1060.....	7

STATUTES

R.C. 149.011(G).....	5-9
R.C. § 149.43.....	5, 6, 7, 9, 11, 12
R.C. 149.43(B).....	12

INTRODUCTION

The First District Court of Appeals correctly determined that this case is moot. Cincinnati Public Schools (“CPS”) produced all documents subject to The Cincinnati Enquirer’s (“Enquirer”) February 5, 2009 public records request. The sufficiency of its production has not been challenged. Additionally, this case does not present the type of “exceptional circumstances” sufficient to create a controversy appropriate for judicial review. 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 wrongfully withheld production in this case is also meritless. Its argument that any materials contained in the relevant post office box were instantly public records the moment they were delivered because CPS *could have* used them has been specifically rejected by this Court. The First District therefore did not err in implicitly rejecting the Enquirer’s request for attorney’s fees.

ARGUMENT

PROPOSITION OF LAW 1: THE COURT OF APPEALS CORRECTLY DETERMINED THAT THIS CASE IS MOOT.

The Enquirer’s complaint for a writ of mandamus is moot. Ohio law provides that “a writ of mandamus will not issue to compel the general observance of laws in the future.”¹ “[I]n general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot.”² Ohio cases have carved out a narrow exception to this rule when

¹ *State ex rel. Kirk v. Burcham* (1998), 82 Ohio St.3d 407, 409, 1998-Ohio-224, 696 N.E.2d 582.

² *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.* (2008), 120 Ohio St.3d 372, 384, 2008-Ohio-6253, 899 N.E.2d 961 (citation omitted).

important issues in an otherwise mooted case are “capable of repetition, yet evading review.”³ But this exception applies only in the “exceptional circumstance” in which (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.⁴ Neither of these requirements is present here.

The challenged issue in this case – whether materials become “records” when they are constructively received by a public entity, regardless of whether the materials are looked at or otherwise used – is not one that is inherently too short to be litigated in court.⁵ In fact, this Court has already addressed the issue and found that “records” are “anything a governmental unit *utilizes* to carry out the duties and responsibilities.”⁶

Notwithstanding this Court’s prior decisions, the issue presented in this case will additionally not evade review because it can be fully addressed in the context of reviewing the First District’s implicit denial of the Enquirer’s request for attorney fees. In *Calvary v. City of Upper Arlington*,⁷ this Court held that a taxpayer’s mandamus action was mooted by her delayed receipt of public records because the court could “address the issues raised by Calvary in the context of her request for attorney fees.”⁸ The same is true in this case.

³ *State ex rel. Cincinnati Enquirer v. Heath* (2009), 121 Ohio St.3d 165, 166, 2009-Ohio-590, 902 N.E.2d 976.

⁴ *Id.* at 167, citing *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182.

⁵ *State ex rel. WBNS 10 TV, Inc. v. Franklin Co. Sheriff’s Office* (10th Dist. 2003), 151 Ohio App.3d 437, 442, 2003-Ohio-409, 784 N.E.2d 207 (holding that mandamus complaint was moot when records were received because issue could be reviewed by Ohio courts in the future).

⁶ *State ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 63, 697 N.E.2d 640 (emphasis added).

⁷ (2000), 89 Ohio St.3d 229, 2000-Ohio-142, 729 N.E.2d 1182.

⁸ *Id.* at 231. See also *State ex rel. Gannett Satellite Info. Network v. Shirey* (1997), 78 Ohio St.3d 400, 402, 678 N.E.2d 557 (holding that issue presented in mandamus case was not “capable of repetition, yet evading review” because the court could “address some of the issues raised in the context of Gannett’s request for attorney fees”).

The Enquirer additionally lacks a reasonable expectation that it will be subject to the same action in the future. In its merit brief, the Enquirer affirmatively recommends a method by which CPS could conduct future superintendent searches:

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....In this way, [CPS] could have accomplished its stated goal and satisfied the Public Records Act.⁹

Although CPS refutes the Enquirer's assertion that it violated the Public Records Act, it is reasonable to conclude that CPS would likely conduct future superintendent searches in accordance with a procedure the Enquirer has specifically validated to this Court. The Enquirer therefore lacks any reasonable expectation that it will be subject to the same action by CPS in the future. Its mandamus 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. And, although the Enquirer made the conclusory assertion in its complaint and merit brief that CPS has demonstrated a continuing pattern of "disgracefully" frustrating the spirit of the Public Records Act,¹⁰ it failed to plead or produce facts to support its assertion. The Enquirer's merit brief to the First District (CPS Supp. at 1-5) and Ben Fischer's affidavit (Supp. at 4-5) are void of any evidence that CPS has historically lacked diligence in complying with the Ohio Public Records Act.¹¹ In fact, the only mandamus action involving CPS and the Enquirer that has been ruled upon by an Ohio court this decade resulted in the Enquirer **losing** before this Court in 2003.¹²

⁹ Merit Brief of Relator/Plaintiff-Appellant The Cincinnati Enquirer at 10 (emphasis in original).

¹⁰ *Id.* at 9.

¹¹ *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Educ.* (2002), 97 Ohio St.3d 58, 63, 2002-Ohio-5311, 776 N.E.2d 82.

¹² *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.* (2003), 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629.

This case does not present the “exceptional circumstances” required to apply the “capable of repetition, yet evading review” exception. The First District did not err in dismissing the Enquirer’s complaint as moot.

PROPOSITION OF LAW 2: THE COURT OF APPEALS IMPLICITLY REJECTED THE ENQUIRER’S REQUEST FOR ATTORNEY’S FEES.

The Enquirer’s assertion that “[b]y 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 was also moot” is incorrect.¹³ The First District implicitly rejected the Enquirer’s request for attorney’s fees by dismissing the complaint without granting a monetary award. Ohio courts presume that a lower court’s “silence on the issue of attorney and expert fees is an implicit denial of the Appellant’s request.”¹⁴ Thus, “[i]f a trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled.”¹⁵ In *Soter v. Soter*,¹⁶ a trial court failed to explicitly address a party’s request for attorney’s fees when it ruled on a procedural motion. The Second District Court of Appeals determined that “by overruling [the party’s] objections and ‘dismissing’ his motion, the trial court implicitly rejected his request for attorney’s fees.”¹⁷

The same is true in this case. By dismissing the Enquirer’s complaint without awarding attorney’s fees, which are not mandatory, the First District impliedly rejected the Enquirer’s request.¹⁸

¹³ Merit Brief of Relator/Plaintiff-Appellant The Cincinnati Enquirer at 4.

¹⁴ *Swinehart v. Swinehart* (Nov. 14, 2007), Ashland App. No. 06-COA-020, 2007-Ohio-6174 at ¶ 26, 2007 WL 4105634 at *4. See also *Tate v. Adena Regional Med. Ctr.* (4th Dist. 2003), 155 Ohio App.3d 524, 530, 2003-Ohio-7042, 801 N.E.2d 930 (“[A] motion not expressly ruled on is deemed overruled.”).

¹⁵ *Id.* at ¶ 26, *4.

¹⁶ (April 1, 2005), Montgomery App. No. 20403, unreported, 2005-Ohio-1594, 2005 WL 742498.

¹⁷ *Id.* at ¶ 23, *5.

¹⁸ This Court has recently concluded that a lower court did not implicitly deny a party’s request for attorney’s fees by not addressing the party’s request in its order when the statute at issue mandated an award of attorney’s fees for the prevailing party. *Int’l Brotherhood Of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C.* (2008),

PROPOSITION OF LAW 3: THE FIRST DISTRICT DID NOT ABUSE ITS DISCRETION IN FAILING TO AWARD ATTORNEY’S FEES IN THIS CASE BECAUSE CINCINNATI PUBLIC SCHOOLS COMPLIED WITH THE OHIO PUBLIC RECORDS ACT.

The Ohio Public Records Act allows courts to use their discretion in awarding attorney’s fees.¹⁹ Thus, “[t]he determination of the trial court to grant or deny attorney fees will not be reversed absent an abuse of discretion.”²⁰ The First District did not abuse its discretion in failing to award attorney’s fees in this case because CPS complied with R.C. 149.43 with respect to the Enquirer’s February 5, 2009 public records request.

Revised Code 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.**”²¹ 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. This Court has held 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.²²

116 Ohio St.3d 355, 2007-Ohio-6439, 879 N.E.2d 187 (regarding Ohio’s Prevailing Wage Law). But other courts have determined that the rationale in *Vaughn* does not apply in cases where attorney’s fees are not mandatory. *See Knight v. Colazzo* (Dec. 17, 2008), Summit App. No. 24110, unreported, 2008-Ohio-6613 at ¶¶ 8-9, 2008 WL 5244640 at *2; *Jones v. McAlarney Pools, Spas & Billiards, Inc.* (March 19, 2008), Washington App. No. 07CA34, unreported, 2008-Ohio-1365 at ¶ 12, 2008 WL 757522 at *3. Here, an award of attorney’s fees under the Ohio Public Records Act is not mandatory. *State ex rel. Wadd v. City of Cleveland* (1998), 81 Ohio St.3d 50, 54, 1998-Ohio-444, 689 N.E.2d 25.

¹⁹ *Olander v. French* (1997), 79 Ohio St.3d 176, 179, 680 N.E.2d 962.

²⁰ *State ex rel. Gibbs v. Concord Twp.* (11th Dist. 2003), 152 Ohio App.3d 387, 396, 2003-Ohio-1586, 787 N.E.2d 1248, *citing Olander*, 79 Ohio St.3d at 179-80.

²¹ Emphasis added.

²² *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 1993-Ohio-188, 610 N.E.2d 997.

Not every scrap of paper in the possession of a public entity is a “record” or “public record.”²³ In *Whitmore*, this Court determined that documents are not records under R.C. 149.43 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 her sentencing decision in a criminal case. The letters were not made part of the pre-sentencing investigation report.²⁴ Judge Whitmore testified she did not rely on any of the letters in making her sentencing decision but probably reviewed them.²⁵ Rather than disposing of the letters, Judge Whitmore sent them to the probation department and produced them to this Court for in camera inspection.²⁶ Finding that the letters were not public records, this 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....’**²⁷

Later in the decision, this 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

²³ *State ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 64, 1998-Ohio-180, 697 N.E.2d 640 (“...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).

²⁴ *Id.* at 61.

²⁵ *Id.* at 61-62.

²⁶ *Id.* at 62.

²⁷ *Id.* at 63, citing *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 39, 550 N.E.2d 464 (emphasis added).

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.²⁸

This 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.'"²⁹

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. (Supp. at 25-26) CPS provided the Enquirer with the names of applicants and properly redacted copies of all requested documents the day after CPS became aware of and used the materials in question. (*Id.*)

The Enquirer's attempt to distinguish *Whitmore* by arguing that the Judge never solicited and was never going to consider the letters in reaching her sentencing decision is unavailing. The Enquirer fails to cite any part of the *Whitmore* decision – because there is none – to support its assertion that this Court found that the sentencing letters were not public records "because the judge had not solicited the letters and was **never** going to consider them in reaching the

²⁸ *Id.* (emphasis added).

²⁹ *Id.* at 64, citing *Tax Analysts v. United States Dept. of Justice* (D.C. Cir. 1998), 845 F.2d 1060, 1068.

sentencing decision.”³⁰ 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.”³¹ 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. Additionally, Judge Whitmore **received, read and sent** the pre-sentencing letters to the probation department, yet this Court determined that the letters did not document any process or procedure of the Judge’s office.³²

The Enquirer’s incomplete representation of *Kish v. City of Akron*³³ should be given no force. In its merit brief, the Enquirer wholly ignored the section of the *Kish* opinion in which this 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 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.³⁴

³⁰ Merit Brief of Relator/Plaintiff/Appellant The Cincinnati Enquirer at 6-7 (emphasis in original).

³¹ *Whitmore*, 83 Ohio St.3d at 62.

³² *Id.* at 63.

³³ (2006), 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811.

³⁴ *Id.* at 168 (emphasis added).

Notably, the time records in *Kish* were utilized by the city of Akron's Plans and Permits Division well **before** any public records request was made.³⁵ Thus, although the facts in *Kish* are inapposite to this case, the *Kish* decision supports CPS's position. Once the contents of the post office box were "relied upon," they were produced within one day.³⁶

Neither *Whitmore* nor *Kish* turned on whether the requested materials were solicited. Instead, the use or non-use of the documents was determinative of whether they served to "document the organization, functions, policies, decisions, procedures, operations, or other activities" of the public entity under R.C. 149.011(G). The Enquirer's solicitation argument finds no support in this Court's precedent, and for good reason. In this case, for example, CPS could have changed the way its search was conducted prior to March 16, 2009, and hired a superintendent without reviewing the application materials inside the post office box. In such event, these documents (like the letters in *Whitmore*) would have **never** been used. Using the Enquirer's logic, these documents would still be public records even if they were never utilized (or even seen) by CPS. This is not the law in Ohio. The reasoning in *Whitmore* and *Kish*, which controls this case, establishes that the First District did not abuse its discretion in failing to award attorney's fees because CPS produced materials responsive to the Enquirer's public records request as soon as they met the definition of "record" under Ohio law.³⁷

Upholding this Court's 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. Revised Code 149.43 was passed by the Ohio Legislature to "ensure that government performs effectively and properly"

³⁵ *Id.* at 163.

³⁶ *See id.*

³⁷ For these reasons, the "basic question" posed by the Enquirer in its merit brief ("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?") completely misses the point. The question wrongly presumes that the materials sought are "records" under Ohio law.

and so the public could be “informed and therefore able to scrutinize the government's work and decisions.”³⁸ 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. (Supp. at 25-26) 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 school district. The public would have gained no insight into the effectiveness of CPS’s operations or “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 and functions of the District), CPS produced all documents responsive to the Enquirer’s request. (Supp. at 25-26)

The Enquirer’s argument that applying the *Whitmore* ruling to this case would be “an open invitation to mischief” because individuals or entities requesting public records would have to “take the word of the public body” when it states that a document has never been used and does not document a function or decision of the body is meritless.³⁹ First, public records seekers must currently “take the word” of public bodies representing that they do not possess requested documents. Using the Enquirer’s logic, a public body would be unable to make such an assertion absent an independent audit of the body’s records repository. This is not required by Ohio law. Second, it would be impossible for a public body to wrongly indicate that a document has never been used or otherwise reviewed in the vast majority of circumstances. For example, CPS could not have told the Enquirer that it had not used or reviewed resumes for the superintendent position after its selection process commenced and District officials began interviewing candidates.

³⁸ *Kish*, 109 Ohio St.3d at 165.

³⁹ See Merit Brief of Relator/Plaintiff The Cincinnati Enquirer at 6.

CPS's conduct did not thwart the purposes of R.C. 149.43, and the Enquirer's assertions to the contrary are disingenuous. The procedure utilized by CPS was not some irrational scheme to do the people's work behind closed doors. CPS provided complete responses to the newspaper's request – delayed only long enough for the District to perform its statutorily required duty to redact the information prohibited by law from being released – the day after the District became aware of, looked at, or used the documents in question.

CPS's rationale is also obvious. Knowing full well that an applicant's interest in a new job at CPS suggests some dissatisfaction with their current situation, an applicant has to think twice before submitting a resume to a public entity. And, of course, a qualified applicant would think more than twice before submitting an application if earlier applicants are disclosed who may be perceived to be better qualified than the potential applicant. When every applicant and every resume is a public record and a "news event," accessing them simultaneously and releasing them at one time is not only rational, it is legal and serves the public's interest in maximizing the number of qualified applicants for important government positions.

The "people's right to know" is always invoked in cases like this. But the Enquirer's untenable position here is that the people had a right to know the identities of job applicants even before CPS. No nefarious purpose was served by CPS's actions, and given the statutory definition of a "public record," it is equally clear that no law was violated by pursuing this process under these facts. The First district did not err in finding this case moot or in failing to award the Enquirer its attorney's fees.

PROPOSITION OF LAW 4: EVEN IF A VIOLATION OF THE OHIO PUBLIC RECORDS ACT OCCURRED IN THIS CASE, THE ENQUIRER IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES.

Even if the Court finds that CPS violated R.C. 149.43 in this case, the First District still did not abuse its discretion or otherwise err in failing to award the Enquirer its attorney's fees. This Court applies a four-part test to determine whether attorney's fees should issue in a mandamus case:

(1) [A] person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person's request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and (4) the person receives the requested public records only after the mandamus action is filed, thereby rendering the claim for a writ of mandamus moot.⁴⁰

Because attorney's fees awards in mandamus cases are considered punitive,⁴¹ Ohio courts also "consider the reasonableness of the government's failure to comply with the public records request and the degree to which the public will benefit from release of the records in question" when determining whether to award such fees.⁴²

In *State ex rel. Wadd v. City of Cleveland*,⁴³ this Court denied a relator's request for attorney's fees after finding that a public entity failed to promptly prepare and provide access to motor vehicle accident reports based on the entity's reasonable conduct and the marginal public benefit resulting from the case:

First, respondents had a reasonable basis to believe that they were complying with R.C. 149.43(B) in the absence of settled law on the issues raised here....Second, although Wadd's mandamus action has resulted in some public benefit, the degree of the public benefit is questionable, since even by the time he filed this mandamus

⁴⁰ *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 174, 661 N.E.2d 1049.

⁴¹ *State ex rel. Dayton Newspapers et al. v. Dayton Bd. of Educ.* (2d Dist. 2000), 140 Ohio App.3d 243, 250, 747 N.E.2d 255.

⁴² *State ex rel. Wadd v. City of Cleveland* (1998), 81 Ohio St.3d 50, 54, 1998-Ohio-444, 689 N.E.2d 25.

⁴³ *Id.*

action, he conceded that respondents had already achieved some success in reducing the original thirteen- to twenty-four-day delay in providing access to accident reports.⁴⁴

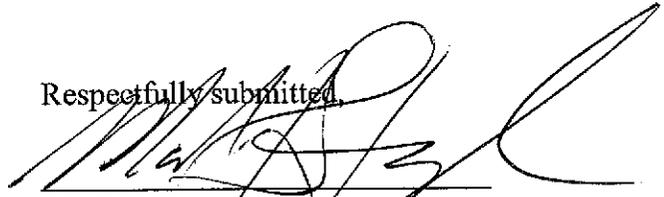
These same factors favor the denial of the Enquirer's request for attorney's fees here. First, this Court's holdings in both *Whitmore* and *Kish* gave CPS more than a "reasonable basis" to believe that the procedure it utilized in this case was lawful. Second, even if the Enquirer were successful, this mandamus action has resulted in no real public benefit. As stated above, the identities of all applicants for the superintendent position were revealed to the public within hours of being revealed to CPS itself, and resumes were produced within 24 hours. (Supp. at 25-26) The public had ample time to research, review and comment upon the qualifications of all the candidates and to let their sentiments be known before the selection process even got underway. Moreover, the Enquirer's specific endorsement of an alternative method CPS could have used for the submission of applications in its merit brief proves that there is no public benefit to this case. The Enquirer's admission demonstrates that this lawsuit is not really about "the people's right to know." Instead, it is about the Enquirer's right to know before CPS. Because the only interest the Enquirer is seeking to protect in this case is its own, an award of attorney's fees should not issue in this case.

⁴⁴ *Id.* at 55; see also *State ex rel. Gibbs v. Concord Twp. Trustees* (11th Dist. 2003), 152 Ohio App.3d 387, 397, 2003-Ohio-1586, 787 N.E.2d 1248.

CONCLUSION

For each and all of the foregoing reasons, the First District Court of Appeals did not err in finding the Enquirer's mandamus complaint moot and in failing to award attorney's fees in this case. Respondent/Appellee Mary Ronan respectfully requests that this Court uphold the First District and dismiss the Enquirer's appeal.

Respectfully submitted,



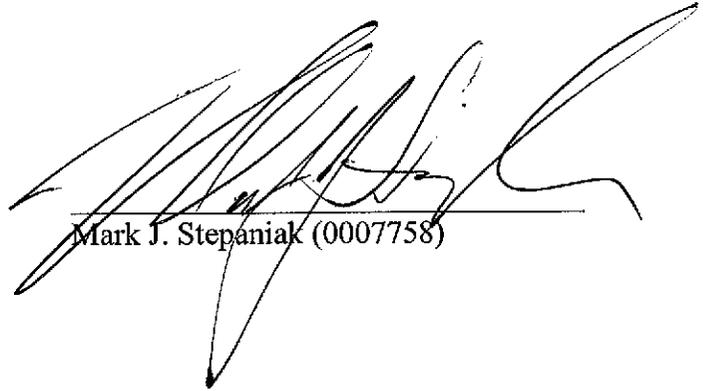
Mark J. Stepaniak (0007758)
Ryan M. Martin (0082385)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
Phone: (513) 381-2838
Facsimile: (513) 381-0205
stepaniak@taftlaw.com
martinr@taftlaw.com

Attorneys for Respondent Mary Ronan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merits Brief of Respondent Mary Ronan has been served upon the following via Regular U.S. Mail, postage prepaid, this 24th day of July, 2009:

John C. Greiner
GRAYDON HEAD & RITCHEY
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157



Mark J. Stepaniak (0007758)

SUPPLEMENT

**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.

**MEMORANDUM IN SUPPORT
OF COMPLAINT FOR WRIT OF
MANDAMUS**

I. STATEMENT OF FACTS

On February 5, 2009, Ben Fischer, a reporter for The Enquirer, made a public records request to the 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, Exhibit A.

The CPS has obtained a post office box and directed candidates to submit all resume records to that P.O. Box. Upon information and belief, 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. See Affidavit of Ben Fischer, Exhibit B.

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 for inspection and copying.

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

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

CPS have 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.

II. ARGUMENT

The Public Records Act, R.C. §149.43 ("PRA") 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."

The Records are unquestionably public records. Thus, the failure by CPS to produce the Records constitutes a blatant violation of the PRA. The Enquirer is entitled to a preemptory writ of mandamus to compel CPS to comply with the PRA and produce the Records.

Resumes of candidates for a public office are public records. *State, ex rel. Consumer News Services, 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. R.C. §149.011(G) defines a "record" as any document ... received by ... any public office" Resumes are thus public records **the minute** they are received by the public office, not, as, the CPS contends, whenever its staff gets around to looking at them.

The CPS cites to *State, ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St.3d 61, 697 N.E.2d 640 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 the judge was **never** going to consider them in reaching the sentencing decision. In other words, it wasn’t a timing issue.

Here, the Board concedes that it **will** use the resumes in its decision making process. Thus, the CPS argument is totally a timing issue. 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* (2006), 109 Ohio St.3d 162, 2006 Ohio 1244, 846 N.E.2d 811. 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).

If the CPS is right, a public body would not need to obtain a P.O. Box to accomplish this 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 PRA 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.) *State ex rel. Consumer news Services, 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* (1998), 81 Ohio St.3d 50,52, 689 N.E.2d 25.

Where a public body displays a “historical lack of diligence in complying with public records requests”, the issue of timeliness of the responses is not rendered moot by a tardy production of records because it is capable of repetition yet evading review. *Consumer News Serv.* 97 Ohio St.3d at 63 - 64, 776 N.E.2d 82, quoting *Wadd*, 81 Ohio St.3d at 52, 689 N.E.2d 25. Such a case presents issues outside the general rule that mandamus will not issue to compel the general observance of laws in the future. *Id.*

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.” *Wadd*, 81 Ohio St.3d at 53, 689 N.E.2d 25, quoting Black’s Law Dictionary (6th Ed. 1990) 1214.

With respect to the duty to provide copies within a reasonable period of time, *Atwell v. State* (1973), 35 Ohio App.2d 221, 230, 64 O.O.2d 342, 301 N.E.2d 709, indicates that what is a “reasonable period of time” to determine whether to take or refuse a chemical test in a DWI case will depend on” all the facts and circumstances in each case.”

Recent Supreme Court cases on the subject of timeliness have show 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. *Consumer News Serv.*, 97 Ohio St.3d 58, 66-67. 776 N.E.2d 82.

In *Wadd*, 81 Ohio St.3d 50, 689 N.E.2d 25, 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.

In addition, given that the public will benefit from the CPS complying with the PRA (as a mandamus writ would require) and given that there is no good faith basis for the actions of the CPS, this court should award statutory damages and attorney fees to The Enquirer.

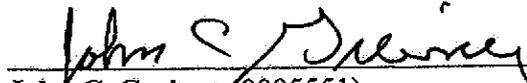
III. CONCLUSION

Based on the foregoing, this court should award The Enquirer a preemptory writ of mandamus requiring the CPS to fully comply with the Request, along with a writ of mandamus to compel the CPS going forward to provide access to requested public records in accordance with R.C. §149.43(B)(1). In addition, this court should award statutory damages and attorney fees to The Enquirer.

Respectfully submitted,

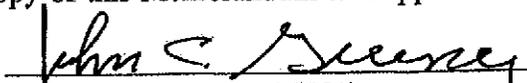
Of Counsel:

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


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

CERTIFICATE OF SERVICE

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


John C. Greiner (0005551)