

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *EX REL.* THE CINCINNATI  
ENQUIRER a division of Gannett  
Satellite Information Network, Inc.,

Relator/Plaintiff-Appellant,

vs.

MARY RONAN, Superintendent  
Cincinnati Public Schools,

Respondents/Defendant-  
Appellee.

Case No. 09-0696

ON APPEAL FROM THE  
HAMILTON COUNTY  
COURT OF APPEALS,  
FIRST APPELLATE DISTRICT

Court of Appeals  
Case No. C-0900155

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REPLY BRIEF OF RELATOR/PLAINTIFF-APPELLANT  
THE CINCINNATI ENQUIRER

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## **I. STATEMENT OF FACTS AND PROCEDURAL POSTURE**

The pertinent facts and procedural posture have been thoroughly set forth in the Merit Brief of The Cincinnati Enquirer (“The Enquirer”) and the opposition brief of the Cincinnati Public Schools (“CPS”).

## **II. ARGUMENT**

### **PROPOSITION OF LAW NO. 1.**

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

The CPS position on the question of mootness is muddled. On the one hand, it contends that the situation presented in this case is capable of both repetition **and** review. On the other hand, however, it contends that in fact, this matter will not recur, because, having seen the light, the CPS will never, ever violate the Public Records Act again. In any event, this court should not give credence to any part of this muddled argument because it fails in its entirety.

The Enquirer (and by extension the public) is a victim of the CPS scheme to avoid the Public Records Act. By utilizing this scheme, the CPS is able to control the timing of the release of records. This in itself violates the Public Records Act. But, because it can manipulate the timing of the release of the records, the CPS can avoid accountability simply by releasing the records before a court can rule.

If this arbitrary release of the records makes the case moot, then the CPS can utilize this scheme at will, and frustrate the letter and spirit of the Public Records Act. Thus, by the very nature of the scheme, the situation presented here is capable of repetition, but evading review. Ohio Courts have applied the “capable of repetition, yet evading review” standard in a number of

public records cases.<sup>1</sup> 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 same basis for refusal again in future cases.

Where the dispute concerns the timelines of production, the doctrine is particularly apt.<sup>2</sup> The Ohio Supreme Court has noted: “When records are available for public inspection and copying is often as important as what records are available.”<sup>3</sup>

The other part of the CPS argument is that, thanks to The Enquirer’s merit brief, it now understands how to conduct a superintendent search lawfully and will not violate the Public Records Act in the future. Thus, the CPS assures this court that because it will, going forward, abide by the law, the scenario presented here is not capable of repetition. Even if the court were to accept the CPS promise to rehabilitate, this is no reason not to address the fact that the CPS violated the Public Records Act in **this** case. The best way to ensure compliance going forward is to discipline a violation when it occurs.

And of course, there is no reason why this court should accept the empty promises of the CPS. The Ohio Supreme Court 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.<sup>4</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> *State ex rel. Consumer News Service*, 97 Ohio St.3d at ¶ 34; *State ex rel. Wadd*, 81 Ohio St.3d at 51.

<sup>3</sup> *Id.* (emphasis in original)

<sup>4</sup> *State ex rel. Consumer News Service*, 97 Ohio St.3d at ¶ 32.

dismissal of the action prevents The Enquirer from conducting discovery and presenting proof 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.**

The CPS correctly concedes that the court can address the underlying Public Records Act violation in the course of its decision on The Enquirer's demand for attorney's fees. But the CPS cynically and incorrectly contends that, in dismissing the case for mootness, the First District Court implicitly rejected The Enquirer's request for attorney's fees.

This contention is completely illogical. By dismissing the case for mootness, the First District precluded itself from considering the attorney fee request. A court cannot award attorney's fees under the Public Records Act unless it considers the underlying merits of the claim. By summarily dismissing the case for mootness, and thereby not considering the merits of The Enquirer's underlying claim, the First District Court could not have performed the analysis required to decide if it should award attorney's fees. This constitutes reversible error.

In the recent case of *State ex rel. The Cincinnati Enquirer v. Heath*,<sup>5</sup> the Supreme Court addressed a situation almost identical to the one here. The appellate court had dismissed the underlying mandamus suit because the records had been produced before a decision on the underlying action. Because the court deemed the matter moot, it did not address the claim for attorney's fees. The Ohio Supreme Court reversed that decision, noting that: "a claim for attorney fees in a public-records mandamus action is not rendered moot by the provision of the requested records after the case has been filed. ... Because the court of appeals did not address

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<sup>5</sup> 121 Ohio St.3d 165, 902 N.E.2d 976 Ohio, 2009.

the merits of these claims, a remand for the introduction of additional evidence and argument is appropriate.”<sup>6</sup>

The CPS cites several cases where the court’s silence on the attorney’s fees demand was deemed a denial of the demand. But none of those cases involved the Public Records Act, and more importantly, none of them involved a situation where the court found the underlying claim moot. *Heath* is the applicable precedent, and it mandates reversal.

**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 CPS contends that a record, received by a public body, following a solicitation for that record by the public body, is not a public record until the public body “utilizes” it. Here, the CPS states that it did not utilize the resumes until it opened the designated P.O. Box where the CPS had directed candidates to deliver them.

The CPS argument ignores the plain language of the Public Records Act, and ignores the directive that the Public Records Act is to be interpreted liberally in favor of disclosure.<sup>7</sup>

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.”

While the CPS focuses on a word – “utilize” – that does **not** appear in the Public Records Act, it ignores the words that actually **do** appear in the Act. The operative inquiry is whether the

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<sup>6</sup> *Id.*

<sup>7</sup> *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116; *State ex rel. Warren Newspapers, Inc. v. Huson* (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177.

resumes of candidates “document ... the “procedures, operations, or other activities of the [CPS].” And the resumes here unquestionably do.

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. Because the resumes were received in response to a direct solicitation by the CPS, 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 resumes, and in doing so, it violated the Public Records Act.

Apparently lacking any better precedent, the CPS continues to cite to *State ex rel. Beacon Journal Publishing Co. v. Whitmore*<sup>8</sup> to defend its actions. But *Whitmore* 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 had not solicited the letters and was **never** going to consider them in reaching the sentencing decision. The CPS seeks to minimize the two features that distinguish *Whitmore* – the fact that the CPS solicited the resumes and the fact that the CPS fully intended to review them – but there is no escaping the import of these facts. *Whitmore* has no application here.<sup>9</sup>

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

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<sup>8</sup> (1998), 83 Ohio St.3d 61, 697 N.E.2d 640.

<sup>9</sup> See also *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, which CPS unsuccessfully attempts to distinguish because of the timing of the records request in that case. That factor is not determinative.

“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. The CPS simply does not address this point in its brief.

The CPS also tries to minimize the concern that its position would create tremendous difficulty in holding public bodies accountable to comply with the dictates of the Public Records Act. But if the CPS position were the law, a public body could avoid its duties to produce records by simply asserting it had not “utilized” them. Inserting the concept of “utilization” into the definition of a public record – and applying it even to records that the public body solicits – would narrow significantly the scope of the Public Records Act. If the definition is to be so limited, that task is better left to the Ohio General Assembly.

The CPS position is particularly ill suited to the collection of resumes. It is certainly possible that a public body could settle on a candidate before it reviews all the resumes it receives. Thus, under the CPS standard, the public would not see the resumes received, because presumably, the resumes that were not reviewed were not “utilized.” In a public hiring, however, it is as important to know who did **not** get the job, as it is to know who **did**. Only in reviewing the resumes of passed over candidates can the public assure itself that the process was performed fairly and competently. The CPS model would allow a public body to escape that scrutiny. That result is untenable, but inevitable if the court permits the CPS and other public bodies to utilize this scheme.

## **PROPOSITION OF LAW NO. 4.**

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

The CPS contends that The Enquirer is not entitled to its attorney's fees because the CPS had a "reasonable basis" for believing that its P.O. Box scheme was permitted by the Public Records Act and because the public has not benefitted from this mandamus action. Both contentions are erroneous.

The CPS proactively concocted a scheme to frustrate the Public Records Act. There was no reason for its actions other than that. Simply citing a tortured interpretation of the *Whitmore* case does not make the CPS actions "reasonable", nor does it cloak those evasive actions in good faith. If this court denies The Enquirer's request for attorney's fees, it will not be protecting a good faith actor, it will be rewarding a scofflaw.

The CPS contends that The Enquirer's action will not benefit the public because it produced the records already. But The Enquirer asks this court to tell the CPS and any other public body that the Public Records Act is supposed to be obeyed, not manipulated. Such a ruling will benefit the public significantly because it will reiterate again the critical importance of the public's right to know and the need to respect the law. The fact that the CPS misses that point is further evidence that the CPS simply doesn't get it. An attorney fee award may help get its attention.

### **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,

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**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 12th day of August, 2009, upon the following:

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