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IN THE SUPREME COURT OF OHIO

CASE NO.: 10-0963

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Appeal from the Court of Appeals  
Fifth Appellate District  
Tuscarawas County, Ohio  
Case No. 2009 AP 02 0013

TIMOTHY T. RHODES

Plaintiff-Appellee

v.

CITY OF NEW PHILADELPHIA, et al.

Defendant-Appellant

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**DEFENDANT/APPELLANT CITY OF NEW PHILADELPHIA'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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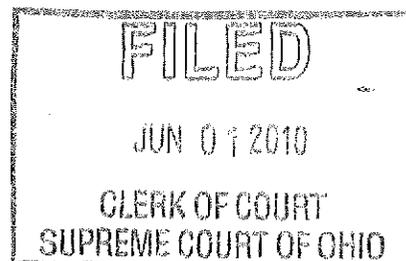
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**TABLE OF CONTENTS**

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

II. STATEMENT OF THE CASE AND FACTS .....4

    A. The jury unanimously did not believe Rhodes really wanted to review the content of the tapes ..... 6

    B. The fifth district reversed by determining that Rhodes was automatically aggrieved as a matter of law when he requested the destroyed record..... 8

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....9

    Proposition of Law I: A person who requests destroyed records is not automatically entitled to a forfeiture. A person must establish that he or she is an “aggrieved person” under the Public Records Act to be entitled to a forfeiture under R.C. 149.351(B)(2).....9

    A. Determining “aggrieved person” under the forfeiture provision of the Public Records Act is a factual determination and therefore subject to impeachment..... 9

    B. Ohio’s Public Records Act cannot be construed to reach absurd results..... 11

    C. A civil forfeiture under the Public Records Act is limited to \$250,000 under R.C. § 2744.05(C)(1)..... 12

IV. CONCLUSION.....13

CERTIFICATE OF SERVICE .....14

APPENDIX.....15

**I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents the legal issue of whether a person is automatically entitled to a civil forfeiture for merely requesting a destroyed public record, even if that person had no interest in the content of the destroyed record and only wanted the \$1,000-per-record forfeiture under R.C. 149.351(B)(2). The Ohio Legislature determined only a “person who is aggrieved” by the destruction of a public record is entitled to a forfeiture under the Ohio Public Records Act. R.C. 149.351(B)(2). Using this forfeiture provision, litigants are suing public entities for multi-million-dollar claims related to records they have no interest in reviewing. The fifth district held that a person need only request what he knows to be a destroyed public document to be aggrieved. The fifth district’s holding creates an absurd result that the Act does not support. The fifth district’s decision authorizes the recovery of massive forfeitures for records that the plaintiff does not want, but merely seeks to collect the \$1,000-per-record forfeiture fee. This issue poses significant and widespread liability issues for public entities.

In the present case, a jury unanimously did not believe that Plaintiff Timothy Rhodes wanted to review the content of decades-old reel-to-reel police dispatch tapes. The jury heard that Rhodes only wanted the records if they *did not* exist; he did not bother to review tapes that did exist; and he had no way to review the records. He merely wanted a \$4,989,000 forfeiture. The evidence was overwhelming that Rhodes did not really want the records and was not an “aggrieved person.” Rhodes knew these records are routinely destroyed by virtue of dispatch tapes being recycled every 30 days as done by all departments.

Yet, the fifth district held that “an aggrieved party is any member of the public who makes a lawful public records request and is denied those records” (Op. at 7, Apx. A-7.) The

fifth district ruled that the trial court should have granted judgment as a matter of law on the issue of aggrieved in favor of Rhodes and vacated the jury verdict. (*Id.* at 9, Apx. A-9.)

Under the express terms of R.C. 149.351(B)(2), Rhodes was not automatically entitled to a penalty. He had to establish that he was aggrieved. The fifth district effectively eliminated this requirement. And, the fifth district set the stage for multimillion-dollar recoveries in this case and in several cases that are currently pending in Ohio courts. Further, it invited a flood of new cases seeking the same.

This Court should exercise jurisdiction.

**First**, the fact pattern posed by this case is common and will recur. Cases are already pouring into common pleas courts on substantially identical issues. See e.g.s, *State ex rel, Edwin Davila v. The City of East Liverpool et al*, Columbiana County C.P. Case No. 09-CV-238 (seeking **\$2,191,000** for alleged destruction of reel-to-reel tapes); *State ex rel, Edward Todd v. The City of Canfield et al*, Mahoning County C.P. Case No. 2009CV2107(seeking **multi-million dollar** forfeiture for municipality's alleged destruction of reel-to-reel tapes); *State ex rel Edwin Davila v. The City of Bellefontaine et al*, Logan County C.P. Case No. CV09070361(seeking between **\$11.7 million to \$100,117,000 million**); *State ex rel Edwin Davila v. The City of Willard*, Huron County C.P. Case No. CVH 2009 0565. Appellant is aware of these cases, but believes there are many more. While the first wave of suits has focused on reel-to-reel tapes, these suits and the issue in this case are certainly not limited to this medium. Defining what constitutes "aggrieved" would affect similar requests for records in any form.

**Second**, the issue surpasses any narrow interest of the parties and has statewide importance. Public entities across the state are being subjected to multi-million-dollar claims for liability for the decades-old destruction of similar materials. If the fifth district's decision is

allowed to stand, it is reasonable to assume that countless opportunistic litigants will file similar actions. This burgeoning industry of suing public entities for reel-to-reel tapes (or other similar media) is of widespread concern because of the devastating financial impact it will have on financially strained cities and villages across Ohio.

And, under the Public Records Act, there is no way to obtain post-destruction authorization of records. That is, an entity cannot avoid being the target of such suit after the destruction occurred – even if it occurred decades ago and the requester does not really want to review the content of the records. To make matters worse, there is no end to liability. Any new requester who asks for records already destroyed – and even if an earlier requester was previously paid for the forfeiture – could obtain a new forfeiture award. Under the fifth district’s opinion, the door to limitless liability is open and a fact finder could not judge the credibility of the requester to determine if he really wanted to review the records (i.e., whether he was aggrieved) or just wanted the forfeiture. That person could recover and so could the countless persons who follow in his exact footsteps. Consequently, there is potentially limitless liability. With no post-destruction fix, this loophole will be to public entities what *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116 was to the insurance industry. The fifth district’s interpretation serves only to hurt public entities that would ultimately be straddled with numerous million-dollar awards that could result in cutting public services, laying off police and firefighters, and creating other unnecessary hardships. The Legislature limited the forfeiture award only to those who were “aggrieved persons.” The Act should not be subverted to expose public entities to ruinous liability.

**Third**, the Fifth District’s decision was legally wrong and contravenes the Legislature’s intent under the express language of the Act. The Ohio Legislature deliberately chose the phrase

“person who is aggrieved” to allow a person to obtain the \$1000 per record forfeiture when a record has been improperly destroyed. The City firmly believes that at minimum, under the text of statute, a mere request for destroyed public records does not automatically entitle a requester to a forfeiture. The Legislature could have easily made that the law. But, the Legislature consciously used the term “aggrieved person.” The proper interpretation of the law allows for an aggrieved party to recover a forfeiture, but that party has to be “aggrieved” under the Act. Merely requesting destroyed records does not necessarily meet the standard of aggrieved.

Finally, all agree that protecting access to public records is critically important. No one disputes that a person can request public records for any reason, even if there is, in the words of the fifth district, “blackness of motive.” But, this case has nothing to do with protecting public records or the requesting party’s motive per se. The City’s position is that the Ohio Legislature intended that a person seeking a forfeiture must actually want to review the *content* of the record to be aggrieved by its destruction. Here, litigants who have no interest in the *content* of the records are scouring Ohio’s municipalities with mass mailings to uncover potential violations for financial gain. The fifth district’s holding creates an absurd result that the Act does not support.

This case presents an issue of critical importance to Ohio’s public entities. The fifth district’s decision was wrong and creates an injustice to these and future litigants. Review by this Honorable Court will provide guidance to all Ohio courts. Therefore, this matter is of great general or public interest warranting this Court’s review.

## **II. STATEMENT OF THE CASE AND FACTS**

In July of 2007, Rhodes made a public records request to the City of New Philadelphia. He wanted reel-to-reel tapes that recorded police dispatches that dated back to the 1970s. Rhodes targeted numerous small public entities with a similar request. Those entities included the City

of Dover, the City of Uhrichsville, the Tuscarawas County Sheriff's Office, the City of Wooster, the City of Medina, the City of Solon, and the Village of Gates Mills.

Not surprisingly, the City of New Philadelphia and the others no longer used the antiquated reel-to-reel system. When the tapes were in use, the City's reel-to-reel machine operated 24 hours a day with two tapes recording simultaneously, one functioning as a back-up. Each day, one tape was removed from the machine and replaced with the oldest tape. The removed tape was preserved for 30 days and then the City would magnetically erase its contents. Because the tapes were expensive, the tapes would be re-used. At the time these systems were in vogue, public entities throughout Ohio used them in the same fashion, with tapes being erased and recycled every thirty days. But, as the reel-to-reel systems fell out of favor, public entities disposed of the machines and the tapes.

As Rhodes knew, under the Ohio Public Records Act, a public entity that destroyed public records without the Ohio Historical Society's authorization could potentially be liable for \$1,000 per record destroyed. As Rhodes also knew, the primary (and allegedly back-up reel-to-reel tapes) that had been recycled would quickly add up to thousands of records. With regard to the City of New Philadelphia alone, Rhodes figured the number of primary and back-up tapes recycled or otherwise destroyed numbered 4,968. Multiplying 4,968 by \$1,000, Rhodes concluded that the value of the destroyed records to him would be "\$4,989,000.00" in the form of a civil forfeiture.

With regard to the other public entities that were targeted, those entities had the Ohio Historical Society's approval and properly disposed the tapes. But, Rhodes still had a keen interest in double-checking whether each of those public entities that provided their records retention schedules were actually filed with and approved by the Ohio Historical Society.

Unfortunately, at the time, the City of New Philadelphia did not have a records commission and the Ohio Historical Society did not authorize the destruction of the tapes.

On July 9, 2007, the City of New Philadelphia informed Rhodes that it no longer had the tapes. The City donated the machine and about 30 reel-to-reel tapes years before Rhodes' request. Learning of the City of New Philadelphia's disposition of the tapes, Rhodes found what he was looking for: A public entity that did not have the old records and, most importantly, did not have an approved records retention policy and the Ohio Historical Society's authorization. The City explained to Rhodes that it did not use a reel-to-reel taping system in the '70s and that the City used the reel-to-reel system from March 14, 1989 to December 31, 1995. On October 23, 2007, Rhodes sued the City and alleged that he was entitled to a civil forfeiture of \$4,989,000.00 for the destruction of public records during that time period.

**A. The jury unanimously did not believe Rhodes really wanted to review the content of the tapes**

On February 5, 2009, Rhodes pled his case to an eight-person jury in the Tuscarawas County Court of Common Pleas. Throughout the trial, the jury heard extensive testimony that Rhodes did not want to review the content of these tapes.

Telling of his lack of interest in the tapes, Rhodes only wanted to review the tapes if the municipality did not have the tapes. The jury heard that Rhodes on November 13, 2007 wrote to the City of Dover to find out whether the Ohio Historical Society approved that city's record retention schedule. In his letter, he stated "if you don't have the approved forms and instruction, I would like to request copies of the following public records ..." The Ohio Historical Society did approve the City of Dover's record retention schedules.

And when a municipality actually had the records he wanted, Rhodes did not want to review them. The City of Medina did, in fact, have some of the tapes Rhodes purportedly

wanted. The City of Medina also had a properly approved record retention and destruction schedule. Notwithstanding the availability of the tapes, Rhodes had no interest in purchasing or listening to those tapes. Rhodes never did listen to any of those tapes. The jury heard testimony that Rhodes did not want to review the content of those tapes.

Rhodes' explanation about why he wanted the records vacillated before the jury. While he first explained that he was "looking to see how the departments worked and how they handled dispatch calls" for public entities, Rhodes later testified that "he wanted to see" "hiring practices, [of] the part timers" working at public entities. The jury also heard Rhodes' explanation contained in his letter to one of the entities that he was really researching records disposal, not how departments handled dispatch calls. His public records request stated "as these records are very important to the timeline of the Dover Police Department's use of audio tapes in my research of your records disposal, I must request a right to view them [emphasis added]."

While claiming his "original contention" was to listen to the decade-old tapes, Rhodes told the jury he did not have any way to listen to those tapes. He did not have a machine. He did not know of anyone that had a machine. Even if he had a reel-to-reel machine, Rhodes tried to obtain thousands of hours of un-indexed tape from numerous municipalities that he could not possibly ever review. Just narrowing Rhodes' initial request to the City of New Philadelphia involved 20 years of reel-to-reel tapes. The reel-to-reel tapes Rhodes had requested were 24 hours in length. If Rhodes were to listen to one tape 8 hours a day, it would take Rhodes 3 days to finish reviewing a single tape. Accordingly, if Rhodes had received a reel-to-reel tape for every day the City had employed the use of such a tape to record dispatch calls during the time period designated in Rhodes' public records requests—which would cover approximately 7 years (1989 to 1995)—it would take Rhodes approximately 21 years to review each of the reel-to-reel

tapes, and approximately 42 years if Rhodes reviewed the backup tapes used on New Philadelphia Police Department's reel-to-reel tape recording system. Rhodes' claim becomes even more absurd if one imagines Rhodes having received 20 years (1975 to 1995) of reel-to-reel dispatch tapes from each of the seven political subdivisions Rhodes sent public records requests to.

The jury also heard that while he had no interest in reviewing the content of the tapes, Rhodes had an enthusiastic interest in determining whether the public entities that provided their records retention schedules were actually filed with the Ohio Historical Society. When asked why he wanted the retention schedules, Rhodes' explanation to the jury was confusing and unintelligible. The City argued to the jury that Rhodes could have the tapes for any reason, but Rhodes must actually want the records to be "aggrieved" under the Public Records Act.

After hearing live witnesses, including Rhodes, a unanimous jury concluded that Rhodes was not "aggrieved" under the Ohio Public Records Act. Rhodes simply did not have any interest in reviewing the content of reel-to-reel tapes. The jury rendered a defense verdict. There was no objection to the "aggrieved party" jury instruction.

**B. The fifth district reversed by determining that Rhodes was automatically aggrieved as a matter of law when he requested the destroyed record.**

The fifth district held that "aggrieved-party" status is satisfied by simply making a public-records request and being denied the records. (Op. at 7, Apx. A-7.) In doing so, the fifth district disregarded the express text of the forfeiture provision and overruled the wisdom of the unanimous jury that determined that Rhodes did not want to review the content of the records. While the fifth district was trying to protect the spirit of the Public Records Act, Appellant New

Philadelphia respectfully believes the court improperly opened the door to the exploitation of the Public Records Act, the very Act that the fifth district was trying to protect.

This Court should review this case.

### III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law I: A person who requests destroyed records is not automatically entitled to a forfeiture. A person must establish that he or she is an “aggrieved person” under the Public Records Act to be entitled to a forfeiture under R.C. 149.351(B)(2).**

**A. Determining “aggrieved person” under the forfeiture provision of the Public Records Act is a factual determination and therefore subject to impeachment.**

The Ohio Public Records Act makes clear that a person must be “aggrieved” to be entitled to a civil forfeiture. The Act provides:

(B) Any **person who is aggrieved** by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) of this section, ... may commence ... :

(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action [emphasis added].

R.C. § 149.351(B)(2).

Of course, a person who is not “aggrieved” cannot recover a forfeiture.

The Ohio Public Records Act does not define “aggrieved.” But, when interpreting a statute’s terms, this Court must give “effect to the ‘usual, normal, customary meaning’ of the term being interpreted.” Kish v. Akron (2006), 109 Ohio St.3d 162, 167, quoting State ex rel. Pennington v. Gundler (1996), 75 Ohio St.3d 171, 173. Webster’s New International Dictionary (1986) 41, defines aggrieved, in relevant part, as “having a grievance, specif. suffering from an infringement or denial of legal rights.” Similarly, Black’s Law Dictionary (1991) 6th Ed.,

defines aggrieved as “having suffered loss or injury,” and separately defines aggrieved party as “one whose legal right is invaded by an act complained of[.]”

The Legislature chose the word “aggrieved.” In doing so, the Legislature limited the recovery to those persons who actually wanted to review the record, but could not do so because a public entity improperly destroyed the record. If Rhodes did not want to review the content of the tapes, it is impossible to conclude that he suffered from an “infringement of his legal rights” or that he “suffered loss or injury.” A public entity does not become immediately liable for such forfeiture simply because public records have been destroyed. The Legislature knew how to expand the Act’s forfeiture provision if it chose to do so. It did not draft the Act with overly broad language providing that the “destruction of records entitles a person to a forfeiture.” Rather, the Legislature limited recovery in a forfeiture action to a “person who is aggrieved.” “Aggrieved” is a word that requires the person to actually suffer a deprivation of a legal right.

Ohio courts have held that a person is “‘aggrieved’ where the improper disposition of a record infringes upon a person’s legal right to scrutinize and evaluate a governmental decision.” State ex rel. Sensel v. Leone (12<sup>th</sup> Dist. 1998), 1998 WL 54392 at \*6, *reversed on other grounds* (1999), 85 Ohio St.3d 152; State ex rel. Cincinnati Inquirer v. Allen (1<sup>st</sup> Dist. 2005), 2005 WL 2249110, 2005-Ohio-4856. Here, the jury determined that Rhodes did not want to review the content of the reel-to-reel tapes. So, Rhodes’ legal right to scrutinize and evaluate the City’s conduct was not infringed.

In Leone, the appellate court held that where a relator obtained copies of documents from some other source besides the public entity — which improperly destroyed the public records — the relator was not “aggrieved” by the defendant’s destruction of the documents. Similarly, in Allen, the appellate court held that because the relator received a copy of the record that he had

requested from the Hamilton County Prosecutor's Office—which the prosecutor's office had improperly destroyed—the relator was not “aggrieved” by the Prosecutor's Office's destroying the record. Consequently, the court held that the relator was not entitled to the civil forfeiture award under the Ohio Public Records Act. Allen, at \*3.

Allen and Leone demonstrate that a person's mere public records request of a destroyed record does not demonstrate that the person making that request is “aggrieved” and entitled to a forfeiture. Indeed, Rhodes was no more “aggrieved” by requesting a record he did not want to review, than the relators in Allen and Leone were aggrieved by requesting records they did not want to review because they already had those records. Rhodes was not aggrieved by the City's recycling of the reel-to-reel tapes in question.

**B. Ohio's Public Records Act cannot be construed to reach absurd results.**

Setting aside its legal error in interpreting the language of the forfeiture provision, the fifth district created an absurd result. Under the fifth district's decision, a person can knowingly request destroyed documents that he has no interest in reviewing and receive a \$1000-per-record forfeiture amounting to millions of dollars. Under the Act, the public entity has no way to correct a previously unauthorized destruction of a record, even if it occurred more than 20 years ago. So, another person, who also has no interest in the record, could make the same request and receive another multi-million-dollar award. Certainly, the Legislature did not intend for the forfeiture provision to reach such result. The fifth district's decision does not advance the intent or spirit of public records law – the requester does not want to review the content of the record, which had been destroyed decades ago.

The General Assembly could not have intended such an absurd result. See *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899

N.E.2d 961, ¶ 31 (court construes R.C. 149.43 to avoid unreasonable or absurd results). “In construing a statute, a court's paramount concern is the legislative intent in enacting the statute.” *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. In order to determine the legislative intent, a court must first look to the statute's language. *Shover v. Cordis* (1991), 61 Ohio St.3d 213, 218, 574 N.E.2d 457, overruled on other grounds (1998), 81 Ohio St.3d 506, 692 N.E.2d 581. “Words used in a statute are to be taken in their usual, normal and customary meaning.” *Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173, 661 N.E.2d 1049 (citing R.C. 1.42). Further, unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. *Id.* (citing *State v. Waddell* (1995), 71 Ohio St.3d 630, 631, 646 N.E.2d 821).

**C. A civil forfeiture under the Public Records Act is limited to \$250,000 under R.C. § 2744.05(C)(1).**

Rhodes claimed that he was aggrieved by the destruction of 20 years of dispatch tapes contained on reel-to-reels. But, Rhodes did not experience an actual loss because he was not aggrieved. Notwithstanding, Rhodes could only be entitled to a forfeiture in an amount limited to \$250,000.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

...

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

R.C. 2744.09(C)(1).

**IV. CONCLUSION**

This Honorable Court should accept jurisdiction.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular

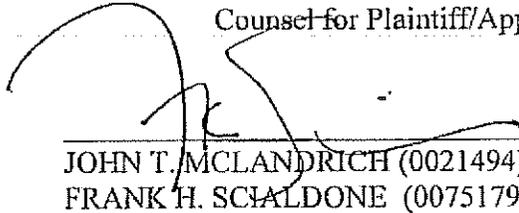
U.S. Mail, postage prepaid, June 1, 2010 to the following:

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APPENDIX

Fifth District Court of Appeals Opinion dated April 15, 2010

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TIMOTHY T. RHODES  
Plaintiff-Appellant

JUDGES:  
Hon. Julie A. Edwards, P.J.  
Hon. W. Scott Gwin, J.  
Hon. Sheila G. Farmer, J.

-vs-

THE CITY OF NEW PHILADELPHIA  
Defendant-Appellee

Case No. 2009AP020013

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 2007CV100806

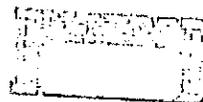
JUDGMENT:

Reversed and Remanded

**FILED**  
5th District Court of Appeals  
Tuscarawas Co., Ohio

DATE OF JUDGMENT ENTRY: APR 15 2010

ROCKNE W. CLARKE  
Clerk of Courts



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*Farmer, J.*

{¶1} On July 6, 2007, appellant, Timothy Rhodes, requested from appellee, The City of New Philadelphia, all daily public recordings for each and every day of the year for the years 1975 through 1995. On July 9, 2007, appellee responded that it did not have the requested recordings.

{¶2} On October 23, 2007, appellant filed a civil forfeiture complaint against appellee and others not a part of this appeal, alleging it had unlawfully destroyed information that was subject to Ohio's Public Records Act. All parties filed motions for summary judgment. By judgment entry filed September 26, 2008, the trial court denied appellant's motions.

{¶3} On October 16, 2008, appellant filed a motion for reconsideration. By judgment entry filed November 6, 2008, the trial court denied the motion.

{¶4} A jury trial commenced on February 5, 2009. The jury found in favor of appellee.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED IN NOT GRANTING A SUMMARY JUDGMENT TO PLAINTIFF/APPELLANT AND/OR IN NOT GRANTING HIS SUBSEQUENT MOTION FOR RECONSIDERATION."

II

{¶7} "THE TRIAL COURT ERRED IN OVERRULING CERTAIN OF PLAINTIFF'S/APPELLANT'S OBJECTIONS AT TRIAL."

III

{¶8} "THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BEFORE IT."

I

{¶9} Appellant claims the trial court erred in denying his motions for summary judgment and subsequent motion for reconsideration. We agree in part.

{¶10} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶11} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶12} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶13} Although appellant argues the trial court erred in denying his motion for reconsideration, there is no provision in the Rules of Civil Procedure for such a motion. *Pitts v. Ohio Department of Transportation* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus.

{¶14} We shall address the issues raised by appellant's motions for summary judgment. After an extensive analysis of all the motions for summary judgment, the trial court entered the following findings:

{¶15} "The Court **FINDS** that genuine issues of material fact remain as to the existence and number of violations committed by Defendants, including but not limited to, the following:

{¶16} "Whether Plaintiff is a person who was aggrieved by a violation of R.C. §149.351(A).

{¶17} "Whether the back-up tapes constituted separate records for purposes of R.C. §149.351, and

{¶18} "How many violations Defendants committed, if any.

{¶19} "The Court **FINDS** that the evidence shows that no tapes were created prior to 1989.

{¶20} "The Court **FINDS** that Plaintiff's Verified Complaint did not seek relief for any tapes erased after 1995, and Plaintiff's public records request did not include any tapes created after 1995, and, therefore, he has not been aggrieved by any violations that may have occurred between 1996 and 2003.

{¶21} "The Court **FINDS**, therefore, that the issues for the jury should be limited to determining whether any violations occurred between 1989 and 1995 and, if so, how

many violations occurred during that time period only." Judgment Entry filed September 26, 2008.

{¶22} Appellant argues the trial court erred in not determining that appellant was an "aggrieved party" under R.C. 149.351(B). Appellant further argues the trial court erred in failing to determine that back-up tapes constituted "separate records" for R.C.149.351 purposes. Lastly, appellant argues the trial court should have determined there were 4,968 violations of R.C.149.351 and should have rendered judgment in the amount of \$4,968,000.00.

{¶23} We note appellant does not challenge the trial court's dismissal of the claims against Mayor Brodzinski and Chief Urban, and does not challenge the trial court's determination that the issue was limited to violations occurring between 1989 and 1995.

{¶24} Appellee did not challenge appellant's assertion that R.C. 149.351 was violated, and concurred with appellant's Statement of Facts contained in his March 25, 2008 motion for summary Judgment at pages 1 through 2, save for the inflammatory argumentative language. See, Defendants' Response in Opposition filed April 11, 2008 at page 3. The sole issue argued contra to appellant's motion for summary judgment that is germane to the matter sub judice is whether or not appellant was an "aggrieved" party as defined by statute. *Id.* at pages 5-6.

{¶25} It is appellant's position that he is an aggrieved party under R.C. 149.351(B) which states the following:

{¶26} "(B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A)

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

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

{¶28} "(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action."

{¶29} Appellant argues the denial of access to the requested public records under the statute entitled him to the award provided for in subsection (B) regardless of his purpose or motive in making the request. Appellant did not explain in his motions for summary judgment the reason for the records request or argue that he was aggrieved by the denial. It is appellant's position because he asked for the records, regardless of purpose, and can establish that R.C. 149.351 was violated, he was entitled to \$1,000.00 for each record destroyed.

{¶30} As we review the motions for summary judgment, the trial court's decision, and the arguments within this assignment of error, we find two issues need to be resolved. First, whether appellant was "aggrieved" and secondly, what records and how many were destroyed.

{¶31} Whether a person is aggrieved is viewed in light of the statute and its plain and unambiguous meaning. The trial court found the issue of being aggrieved was a factual issue to be determined by a jury.

{¶32} We find an aggrieved party is any member of the public who makes a lawful public records request and is denied those records. This decision is based on the interpretation of the statute as discussed in *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶14-16:

{¶33} "In answering these questions related to statutory definitions within Ohio's records laws,\*\*\*we first 'must look at the purpose and meaning behind keeping records.' *White v. Clinton Cty. Bd. of Commrs.* (1996), 76 Ohio St.3d 416, 419, 667 N.E.2d 1223.

{¶34} " 'In a democratic nation\*\*\*it is not difficult to understand the societal interest in keeping governmental records open.' *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 81, 526 N.E.2d 786. A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions. See, e.g., *Barr v. Matteo* (1959), 360 U.S. 564, 577, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (Black, J., concurring); Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective* (2003), 59 N.Y.U. Ann. Surv. Am. L. 247, fn.1, citing letter to W.T. Barry (Aug. 4, 1822), in 9 *The Writings of James Madison* (Hunt Ed.1910) 103. As Thomas Jefferson wrote, ' "The way to prevent [errors of] the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our

governments being the opinion of the people, the very first object should be to keep that right\*\*\*." ' Id., quoting letter to Edward Carrington (Jan. 16, 1787), in 11 *The Papers of Thomas Jefferson* (Boyd Ed.1955) 49.

{¶35} "Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. See, e.g., *State ex rel. Gannett Satellite Information Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264, 685 N.E.2d 1223; *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155, 157, 684 N.E.2d 1239. Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions, *White*, 76 Ohio St.3d at 420, 667 N.E.2d 1223, promote cherished rights such as freedom of speech and press, *State ex rel. Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St.2d 457, 467, 75 O.O.2d 511, 351 N.E.2d 127, and 'foster openness and\*\*\*encourage the free flow of information where it is not prohibited by law.' *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St.3d 168, 172, 680 N.E.2d 956."

{¶36} As further explained by our brethren from the Tenth District in *Walker vs. Ohio State Univ. Bd. of Trustees*, Franklin App. No. 09AP-748, 2010-Ohio-373, ¶125:

{¶37} "In *Kish*, the Ohio Supreme Court addressed the purpose of R.C. 149.351, concluding R.C. 149.351 'proscribes the destruction, mutilation, removal, transfer, or disposal of or damage to *public records*' and concluded the legislature's intent in promulgating the statute was to protect and preserve 'public records.' (Emphasis added.) *Kish* at ¶18, 36. Under its normal and customary meaning, an 'aggrieved'

person is defined as one 'having legal rights that are adversely affected; having been harmed by an infringement of legal rights.' Black's Law Dictionary (9 ed.2009) 77."

{¶38} The public records law gives access to any member of the "public" regardless of the lack of purpose or "blackness" of motive.

{¶39} In his motion for summary judgment, appellant does not give a reason for his request and under the theory adopted by the Supreme Court of Ohio, as a member of the public, he does not have to give a reason. Once denied, John Q. Public becomes aggrieved because he/she cannot exercise a statutorily defined right.

{¶40} As to whether appellant was an aggrieved party, we find there was no genuine issue of material fact and that portion of the motion should have been granted.

{¶41} The second issue is whether the trial court was correct in not determining the exact number of documents destroyed. We find all of the motions for summary judgment do not advocate that the trial court should determine an exact number as a matter of law. In fact, the motions are devoid of any explanation as to how the calls are recorded and in what sequence the calls are erased.

{¶42} Appellant's Exhibit A, attached to his October 23, 2007 verified complaint, stated his public records request included the following:

{¶43} "Reel-to-Reel Tapes. I understand the reel-to-reel tapes recorded the events at your department in 24 hour increments. That is, that they were usually changed once a day (probably around midnight each day). Accordingly, there should be at least one tape for each day of the year. In that regard, I am hereby requesting access to review the individual tapes for each and every day of the year for the years 1975 through 1995 inclusive."

{¶44} Also attached as Exhibit B and admitted by appellee is the police chief's response to the request:

{¶45} "I have received your letter and request for recordings. The machine that you are inquiring about was not in existence in 1975 and later those tapes would have been reused every thirty days. At the present time, the machine that ran them has been out of use for the last five years and was donated to the county mental health agency along with the left over tapes (31 or 32 tapes). The police department does not have any of the tapes requested or information that you are requesting."

{¶46} From a reading of the verified complaint, we do not find 4,968 missing records. As the chief's letter demonstrated, as relied upon by appellant, the reel-to-reel tapes were destroyed every thirty days.

{¶47} As explained by the *Kish* court in ¶18 and 27, a record may be a single sheet of paper or a compilation of documents:

{¶48} " 'Records' is defined in R.C. 149.011(G) as 'any document, device, or item, regardless of physical form or characteristic,\*\*\*created or received by or coming under the jurisdiction of any public office of the state\*\*\*which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' The penalty portion of the Public Records Act builds upon that definition. See R.C. 149.43(A)(1).

{¶49} "We advise the federal appeals court that 'record,' as used in R.C. 149.351 and defined in R.C. 149.011, may be a single document within a larger file of documents as well as a compilation of documents and can be any document, regardless of physical form or characteristic, whether in draft, compiled, raw, or refined

form, that is created or received or used by a public office or official in the organization, functions, policies, decisions, procedures, operations, or other activities of the office. In this case, each comp-time form at issue is a record pursuant to Ohio law."

{¶50} Specifically, the *Kish* court at ¶42 explained what constitutes a "violation" of the public records law:

{¶51} "Rather than agreeing with the strained and illogical definition posed by petitioner, we agree with amici curiae and respondents that the General Assembly intended the definition of 'violation' to be simple and direct. We conclude, and advise the federal appeals court, that 'violation,' as used in R.C. 149.351(B), means 'any attempted or actual removal, mutilation, destruction, or transfer of or damage to a public record that is not permitted by law.' "

{¶52} Using this definition and the chief's letter, the requested records were the actual reel-to-reel tape recordings of the calls within a thirty day period. By admission, these tapes were recycled and the public records were destroyed every thirty days. By multiplication, there were twelve records destroyed each year times the number of years, seven, (1989-1995), which equals 84 acts in violation of the public records law or a penalty of \$84,000.00.

{¶53} We find the "public records" in this case to be the reel-to-reel tapes and not each voice entry or calendar day entry on the tapes.

{¶54} Appellant also argues back-up tapes constitute part of the record. We find such argument to be without merit. It would be similar to stating that a carbon copy of an original document is the same as an original or in modern day parlance, a computer back-up is a separate record from the actual computer file.

{¶55} We are aware that appellant and/or appellee may take exception to our counting of the months and years. We agree there is room for a factual dispute. We therefore find the trial court was correct in determining the factual issue of the number of records destroyed was within the province of the trier of fact. As to the number of records destroyed using the definitions cited supra, we find there exists triable facts.

{¶56} Assignment of Error I is granted.

II, III

{¶57} Appellant claims the trial court erred in ruling on objections made during the trial and the jury's verdict was against the manifest weight of the evidence.

{¶58} Based upon our decision in Assignment of Error I and the fact that the jury's verdict only addressed the issue of appellant being an aggrieved party, we find these assignments to be moot.

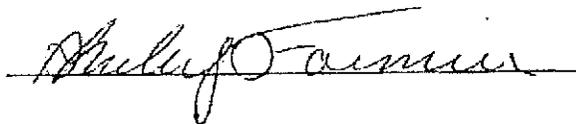
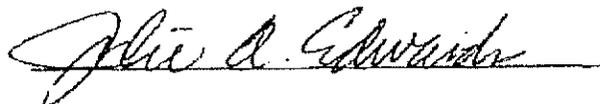
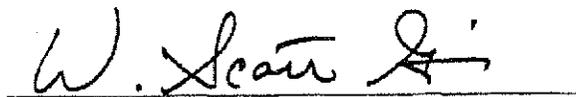
{¶59} This matter is hereby remanded to the trial court for a jury trial on the factual issue of how many records were destroyed per our definition in Assignment of Error I.

{¶60} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio  
is hereby reversed.

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

Handwritten signature of Shuley Farmer in cursive script, written over a horizontal line.Handwritten signature of John A. Edwards in cursive script, written over a horizontal line.Handwritten signature of W. Scott Gwin in cursive script, written over a horizontal line.

JUDGES

SGF/sg 0302

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TIMOTHY T. RHODES

Plaintiff-Appellant

-vs-

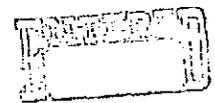
THE CITY OF NEW PHILADELPHIA

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2009AP020013

**FILED**  
5th District Court of Appeals  
Tuscarawas Co., Ohio  
APR 15 2010  
ROCKNE W. CLARKE  
Clerk of Courts



For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

*Shirley J. Townsend*

*John A. Edwards*

*W. Scott Di*

JUDGES