

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES : CASE NO. 10-0963  
Plaintiff-Appellee : On Appeal from the Fifth  
District Court of Appeals  
vs. : Tuscarawas County, Ohio  
THE CITY OF NEW PHILADELPHIA : Court of Appeals  
Case No. 2009 AP 02 0013  
Defendant-Appellant :

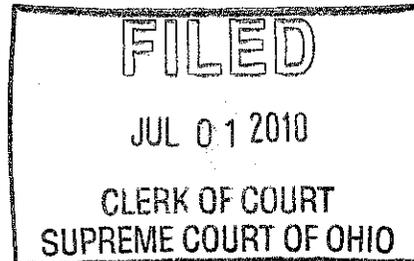
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**PLAINTIFF-APPELLEE TIMOTHY T. RHODES'**  
**MEMORANDUM IN RESPONSE TO MEMORANDA IN SUPPORT OF JURISDICTION**

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MEMORANDUM IN RESPONSE

**I. APPELLEE'S EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

At the outset, the matter *sub judice* obviously does not involve "a substantial constitutional question", noting that citizens, not political subdivisions, have constitutional rights.

Indeed, neither Appellant nor *Amicus Curiae* ("Amicus") have posited such a proposition to this Court.

Accordingly, Appellee will herein address only the unfounded assertion that "this case is of public or great general interest".

In that regard, neither Appellant's nor Amicus' arguments present anything "new under the sun"; i.e., their respective Propositions of Law address matters already well established by this Court's prior jurisprudence.

Further, it is most noteworthy that neither Appellant nor Amicus have given this Court any reason to "bypass" the doctrine of *stare decisis*.

Stated succinctly, the arguments in support of jurisdiction "boil down to" fiscal concerns about the statutory civil forfeiture consequences resulting from violation of Ohio's Public Records Act.

This Court has already addressed and refused to entertain the legitimacy of such concerns in *Kish v. City of Akron* (2006), 109 Ohio St.3d 162, 2006-Ohio-1244, wherein this Court (at ¶ 43) stated:

. . . we are cognizant of petitioner's suggestion that

broad construction of the terms "record" and "violation" may portend fiscal peril for Ohio municipalities. The risk identified by petitioner is predicated, of course, on occurrences like the instant one - a wholesale destruction of hundreds of records that were mandated by law to be preserved. Such events, we hope, are rare in government operations. If not, it is a problem of the offenders' own making, for the Public Records Act is not a new creature imposing unforeseen obligations. Rather, it is an embodiment of certain privileges and concomitant obligations of governing in a democracy. In any event, the petitioner's argument is not one for this court to entertain.

In short, although the instant Appellant and other similarly situated political subdivisions may well have good cause to be concerned, after-the-fact, about the financial consequences of having previously violated Ohio's Public Records Act, such concerns do not "translate" into a matter "of public or great general interest".

Additionally, it is respectfully suggested this matter is not, in any event, yet "ripe" for review, noting that the Court below reversed and remanded.

**II. APPELLEE'S ARGUMENT IN SUPPORT OF HIS POSITION REGARDING APPELLANT'S AND AMICUS' RESPECTIVE SOLE PROPOSITIONS OF LAW.**

Appellant urges this Court's adoption of the Proposition of Law that: "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. 149.35(B)(2)".

With reference to the first sentence of that Proposition of Law, the Fifth District Court of Appeals, in the Opinion now sub

judice, did not hold that the mere request for a public record "automatically" entitles the requesting party to a civil forfeiture award.

Instead, that Court, in reliance upon this Court's prior jurisprudence, held (at ¶ 32) that ". . . an aggrieved party is any member of the public who makes a lawful public records request and is denied those records".

That holding is consistent with this Court's unambiguous pronouncement in *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 1993-Ohio-188, that "'Any person' means any person, regardless of purpose. [citations omitted] Therefore, a person seeking public records is not required to establish a proper purpose or any purpose . . .".

Appellant now seeks to have this Court judicially redefine the O.R.C. 149.351(B) term "aggrieved" to mean that a citizen whose public records request was unlawfully denied is not "aggrieved" unless he or she had an "acceptable" reason to request those records in the first place. And, of course, Appellant would have the governmental entity involved/custodian of those records make the determination as to the "acceptability" of that reason.

This Court has repeatedly and consistently rejected such a "situationally convenient" and "ambulatory" standard, which equates to having the "fox guard the hen house" and an attendant denial of the public's well established right to access and review public

records.

For instance, in *Fant, supra*, this Court held (in its Syllabus) that "A person may inspect and copy a 'public record', as defined in R.C. 149.43(A), irrespective of his or her purpose for doing so"; in *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn.* (2002), 97 Ohio St.3d 58, 2002-Ohio-531, this Court held (at ¶ 45) that a requesting party's purpose behind making a public records request to "inspect and copy public records is irrelevant"; in *Gilbert v. Summit County* (2004), 104 Ohio St.3d 660, 2004-Ohio-7108, this Court held (at ¶ 10) that ". . . as a matter of policy if the intent to use public records in litigation were relevant to their availability, the burden on government entities to ensure that requested records were not in any way connected to ongoing or potential litigation would be exceedingly onerous"; and in *Morgan v. City of New Lexington* (2006), 112 Ohio St.3d 33, 2006-Ohio-6365, this Court held (at ¶ 54) that "There is no condition based on the moral quality of the person requesting the [public] record. Nor is the purpose of the requester relevant to the propriety of the request".

"Bottom line", it is simply ludicrous and clearly not consistent with either the spirit or the "black letter" intent of Ohio's Public Records Act to permit the governmental entity/ records custodian involved to unilaterally and arbitrarily determine whether or not a person requesting public records has a

"proper" reason or purpose for doing so.

Indeed, "The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people". (*Dayton Newspapers, Inc. v. Dayton* (1976), 45 Ohio St.2d 107, 109.)

Appellant would turn that rule on its head and give those trustees of the people's records the unbridled discretion to determine who is and who is not "entitled" to those records.

Amicus urges this Court's adoption of the Proposition of Law that: "In order to pursue a claim for civil penalties under R.C. 149.351(B)(2) a person must establish that he or she has been 'aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a (public) record' in some manner different than the general public".

In short, Amicus, unlike Appellant, apparently does not now seek to have this Court redefine the O.R.C. 149.351(B) term "aggrieved", but instead seeks to have this Court "attach some strings" to that term through judicial "insertion" of additional language to that Code Section.

Stated simply, had the General Assembly intended to add such "qualifying" language it would have done so. Because it did not, this Court may not now do so via judicial "*fiat*". (See, e.g., *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495.)

Further, and in any event, because "public records are the

people's records", it follows that every member of the public is "aggrieved" when public officials violate our State's Public Records Act. (Reference, e.g., *Fant, supra.*)

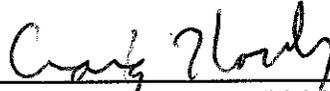
### III. CONCLUSION

For the reasons set forth hereinabove, this Court should decline jurisdiction, as this Appeal presents nothing new or unusual meriting this Court's "revisiting" of well established propositions of law.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum was served, by regular U.S. Mail this 1<sup>st</sup> day of July, 2010, upon all counsel of record at their respective addresses.



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