

IN THE SUPREME COURT OF OHIO

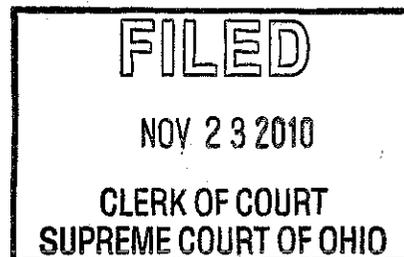
TIMOTHY T. RHODES	:	Case No. 2010-0963
	:	
Plaintiff - Appellee,	:	On Appeal from the
	:	Fifth District Court of Appeals
v.	:	Tuscarawas County, Ohio
	:	
THE CITY OF NEW	:	Court of Appeals
PHILADELPHIA	:	Case No. 2009AP020013
	:	
Defendant - Appellant.	:	
	:	

**BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE DEFENDANT
THE CITY OF NEW PHILADELPHIA**

STEPHEN L. BYRON (#0055657) (COUNSEL OF RECORD)
REBECCA K. SCHALTENBRAND (#0064817)
Schottenstein, Zox & Dunn Co., L.P.A.
4230 State Route 306, Suite 240
Willoughby, OH 44094
Phone: (440) 951-2303
Fax: (216) 621-5341
E-mail: sbyron@szd.com

STEPHEN J. SMITH (#0001344)
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
Phone: (614) 462-2700
Fax: (614) 462-5135
E-mail: ssmith@szd.com

**COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE**



JOHN T. MCLANDRICH (#0021494)
FRANK H. SCIALDONE (#0075179)
100 Franklin's Row
34305 Solon Road
Solon, OH 44139
Phone: (216) 248-7906

COUNSEL FOR DEFENDANT-APPELLANT
CITY OF NEW PHILADELPHIA

WILLIAM E. WALKER, JR. (#0038703)
124 North Ave NE
Massillon, OH 44646
Phone: (330) 327-1437

CRAIG T. CONLEY (#0021585)
220 Market Ave South, Suite 604
Canton, OH 44702-2180
Phone: (330) 453-1900

COUNSEL FOR PLAINTIFF-APPELLEE
TIMOTHY T. RHODES

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	3
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT	4
<u>Proposition of Law No. 1:</u> 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.	4
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Page

Cases

Kish v. Akron, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811	4, 6
Ostrander v. Preece (1935), 129 Ohio St. 625, 196 N.E. 670.....	7
Rhodes v. New Philadelphia, 2010-Ohio-1730	1, 2
State ex rel. Edwin Davila v. The City of East Liverpool, Columbiana County Common Pleas Case No. 09-CV-238	2
State ex rel. Cincinnati Post v. Cincinnati, 76 Ohio St.3d 540, (1996),	8
State ex rel. Edward Todd v. The City of Canfield, Mahoning County Common Pleas Case No. 2009CV2107	2
State ex rel. Edwin Davila v. The City of Bellefontaine, Logan County Common Pleas Case No. CV090703	2
State ex rel. Edwin Davila v. The City of Bucyrus, Crawford County Common Pleas Case No. 09CV0303	2
State ex rel. Edwin Davila v. The City of Martins Ferry, Belmont County Common Pleas Case No. 09CV274.....	2
State ex rel. Edwin Davila v. The City of Willard, Huron County Common Pleas Case No. CVH 2009 0565	2
State ex rel. Pennington v. Gundler, 75 Ohio St.3d 171, 661 N.E.2d 1049 (1996).....	4
State ex rel. Perrea v. Cincinnati Public Schools, 123 Ohio St.3d 410, 916 N.E. 2d 1049	8
State ex rel. Sensel v. Leone (Feb. 9, 1998), 12th App. Dist., 1998 WL 54392.....	5
State ex rel. The Cincinnati Enquirer v. Allen (Sept. 16, 2005), 1st App. Dist., 2005 WL 2249110, 2005-Ohio-4865.....	5, 10
State v. S.R., 63 Ohio St.3d 590, 594, 589 N.E.2d 1319 (1992)	4

Statutes

R.C. Section 149.351	1, 2
R.C. Section 149.351(B)(2)	3, 4, 7, 9
R.C. Section 149.43(B).....	1
R.C. Section 149.43(C).....	1
R.C. Section 149.43(E)(1) and (2)	7, 8

Other Authorities

Black's Law Dictionary (8th ed. 2004)	5
Merriam-Webster's Dictionary	5

Rules

Civ. R. 56.	8
------------------	---

INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of New Philadelphia, urges this Court to reverse the decision of the Fifth District Court of Appeals (“Fifth District”) in *Rhodes v. New Philadelphia*, 2010-Ohio-1730.

Ohio law authorizes “any person who is aggrieved” by the destruction of public records to commence a civil action for injunctive relief and/or a civil action to recover a forfeiture in the amount of \$1,000 for each violation. R.C. Section 149.351. The Fifth District has incorrectly held, as a matter of law, that any person who merely requests records that have been destroyed has been “aggrieved” by the destruction of the records. This interpretation of the statute confuses the right of a person, regardless of motive or purpose, to inspect and copy a public record, with the statutory requirement that only a person “who is aggrieved” by the destruction of the public records may recover a civil forfeiture penalty if the public records were improperly destroyed. This interpretation of the statute will have disastrous financial consequences to municipalities and other public offices, thereby yielding unreasonable and absurd results.

R.C. Section 149.43(B) gives any person the right to make a public record request without stating a reason, and the person who is “allegedly aggrieved” by the failure to produce the record has the ability to enforce that right via a mandamus action. R.C. Section 149.43(C)

By contrast, R.C. Section 149.351 provides that the civil forfeiture penalty is available to “[a]ny person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a [public] record ***.” (Emphasis added.) The Fifth District concluded that “an aggrieved party is any member of the

public who makes a lawful public records request and is denied those records.” *Rhodes, supra*, at ¶32.

The flaw in this analysis is that it doesn’t require the party to be “aggrieved” by the unlawful destruction, etc., of the public record. It merely requires a party to prove that a request was made and the records had been unlawfully destroyed. What should be required is proof that the destruction of the specific record actually harmed the party making the request, causing the party to actually be “aggrieved” by the destruction, as provided in the statute. When a person is seeking a civil forfeiture for the unlawful destruction of a record, that person must demonstrate a loss or injury that resulted from the document’s destruction that is different than that harm that is suffered by the public, generally.

Numerous cases have been filed around the State of Ohio by a few individuals who are seeking extraordinarily large damages from municipalities for alleged violations of R.C. Section 149.351.¹ The demands aggregate to tens of millions of dollars, and the payment of such forfeitures to private individuals will provide no benefit to the public whatsoever. In actuality, as established as a fact in this case (as found by the jury in the trial of this matter) the requesting party has no real interest in the requested documents;

¹ *State ex rel. Edwin Davila v. The City of East Liverpool*, Columbiana County Common Pleas Case No. 09-CV-238 (seeking \$2,191,000 forfeiture for alleged destruction of reel-to-reel tapes); *State ex rel. Edward Todd v. The City of Canfield*, Mahoning County Common Pleas 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*, Logan County Common Pleas Case No. CV09070361 (seeking forfeiture damages for the alleged destruction of reel-to-reel tapes from approximately 1991 until December 2007); *State ex rel. Edwin Davila v. The City of Willard*, Huron County Common Pleas Case No. CVH 2009 0565 (seeking approximately \$6.57 million for the alleged destruction of reel-to-reel recordings); *State ex rel. Edwin Davila v. The City of Bucyrus*, Crawford County Common Pleas Case No. 09CV0303 (seeking forfeiture damages in the amount of \$1,000 for each daily “911 style” reel-to-reel audio tape recordings, primary and backup, that were allegedly destroyed in violation of law); and *State ex rel. Edwin Davila v. The City of Martins Ferry*, Belmont County Common Pleas Case No. 09CV274 (seeking forfeiture damages of \$1,000 for each daily reel-to-reel tape recordation, primary and backup, that was allegedly destroyed in violation of law).

he merely wishes to profit from the fact that certain records were destroyed years ago, as a matter of routine. The Fifth District improperly set this jury verdict aside. If this decision is upheld, unreasonable and absurd results will occur all over the State of Ohio.

This Court, for the reasons stated herein, should reverse the decision of the Fifth District and hold that a person seeking a civil forfeiture for the unlawful destruction of a record must demonstrate that the requestor has been “aggrieved,” i.e. has suffered a loss or injury that resulted from the destruction of the public record that is different than the loss or injury suffered, generally, by the public when a public record is improperly destroyed.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages. The Ohio Municipal League and its members have an interest in ensuring that only persons who are found to be an aggrieved party are entitled to the civil forfeiture penalties set forth in R.C. 149.351(B)(2).

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief filed by the City of New Philadelphia. It is important to note that the jury found that Plaintiff was not aggrieved by the destruction of the records that were requested.

ARGUMENT

Proposition of Law No. 1: 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.

R.C. 149.351(B)(2)

R.C. 149.351(B)(2) 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, ***.

(Emphasis added.)

By the plain language of the statute, only a person who is “aggrieved” by the improper destruction, mutilation, etc., of a public record can recover a civil forfeiture under the statute.

Who Is “Aggrieved?”

The Public Records Act does not define the term “aggrieved,” nor does the Ohio Revised Code define the term elsewhere. This Court, however, has concluded that in interpreting definitions within the Public Records Act, it “must be faithful to the language of and legislative intent behind the statute.” *Kish* at ¶19 (quoting *State v. S.R.*, 63 Ohio St.3d 590, 594, 589 N.E.2d 1319 (1992)). In determining legislative intent, this Court has stated “we give effect to the ‘usual, normal and customary meaning’ of a statute’s words.” *Id.* (quoting *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 661 N.E.2d 1049 (1996)).

Black's Law Dictionary (8th ed. 2004) defines "aggrieved" as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Merriam-Webster's Dictionary provides one definition of "aggrieved" as "suffering from an infringement or denial of legal rights."

The First District and the Twelfth District have considered the definition of "aggrieved." In *State ex rel. The Cincinnati Enquirer v. Allen* (Sept. 16, 2005), 1st App. Dist., 2005 WL 2249110, 2005-Ohio-4865, the Cincinnati Enquirer filed a writ of mandamus seeking certain documents related to a potential sexual harassment lawsuit. In evaluating the writ, the Court opined on whether or not the Cincinnati Enquirer was "aggrieved" by the alleged violation of the Public Records Act. Citing an earlier case from the Twelfth District, the First District 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." *Id.* at *3 (citing *State ex rel. Sensel v. Leone* (Feb. 9, 1998), 12th App. Dist., 1998 WL 54392 (*reversed on other grounds*)).

According to these courts, and the Fifth District, an aggrieved person is someone who has had the right to scrutinize and evaluate a governmental decision infringed by the destruction of the public record. This is every person. If a public record has been destroyed, no one can review the decision making that might be represented by that public record, in the absence of other evidence that may exist (further discussed below). By the breadth of this interpretation, the concept of "aggrieved" has been made meaningless.

The League proposes there is more to being "aggrieved" than discovering that a public record has been destroyed. Whether or not a person is an "aggrieved person" is a

question of fact; an evaluation of the relationship between the person and the public record is required.

In *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, the plaintiffs were aggrieved by the fact that employment records, the plaintiffs' time sheets for work performed on behalf of the City of Akron, were destroyed. These public records were evidence in a Fair Labor Standards Act case that the plaintiffs had brought. The plaintiffs in *Kish* were directly harmed by the destruction of compensatory time records, which were necessary to establish violations of the Fair Labor Standards Act.

One could envision a newspaper reporter investigating misconduct of a governmental official, the evidence of which (contained in a public record) has been destroyed. In such an instance, the reporter is "aggrieved" by the destruction of the record.

Another example might be a record that has been destroyed that documented a defect in a roadway that resulted in an automobile crash. In such an instance, the person (a victim in the crash) who needed that record may have been aggrieved by the destruction of the record.

The League proposes that whether a person is "aggrieved" by the unlawful removal, destruction or mutilation of a public record is a question to be determined by the trier of fact.² There must be some harm to the person other than the unlawful destruction of the record.

In this case, the jury concluded that Plaintiff was not an aggrieved person and, therefore, not entitled to the civil forfeiture penalty. The Plaintiff was merely seeking to

profit from the destruction of records that occurred, as a matter of routine, over a decade ago. It is respectfully submitted that a court should permit such a factual finding to stand as the finding is consistent with what is required by the Ohio Revised Code.

Legislative Intent of the Statute

The plain language of R.C. 149.351(B)(2) requires a person to be “aggrieved” in order to recover civil forfeiture penalties. If the General Assembly intended for the civil forfeiture penalties to apply to any person who has merely been denied a public record because it was improperly destroyed, the General Assembly would have stated: “any person who makes a lawful public records request and is denied those records because of the removal, destruction, mutilation, or transfer of, or other damage to or other disposition of a record in violation of division (A) of this section may commence a civil action to recover a forfeiture in the amount of one thousand dollars for each violation.” The General Assembly did not do so, and the statute authorizes civil forfeiture penalties only to “[a]ny person who is aggrieved.” A court of appeals cannot ignore a statutory requirement and substitute its judgment for that of the General Assembly. *Ostrander v. Preece* (1935), 129 Ohio St. 625, 196 N.E. 670 (finding that the judiciary cannot substitute its judgment for that of the legislature unless there is a clear and palpable abuse of power).

Recent Amendments to the Public Records Act

The General Assembly has frequently amended the Public Records Act. In 2006, the General Assembly enacted subsections (E)(1) and (2) of R.C. 149.43 requiring: 1) elected officials or their appropriate designees to attend public records training; 2) public

² It is also possible, on a properly presented and supported motion for summary judgment, that there is no evidence in a case that would create a genuine issue of material fact to be decided by a jury. In such a case,

offices to adopt a public records policy; and 3) distribution of the public records policy to the records custodian or records manager of the public office and acknowledgement of receipt of the public records policy. R.C. 149.43(E)(1) and (2). These requirements, as stated in the statute, are “[t]o ensure that all employees of public offices are appropriately educated about a public office’s obligations” and, thereby, reduce the risk that public records are processed in a manner that is contrary to the Public Records Act. R.C. 149.43(E)(1). These requirements, effective in March of 2007, reflect an understanding on the part of the General Assembly that the obligations of the Public Records Act must be communicated to public office employees at all levels, from the elected official to the records manager or the records custodian. At the time the “reel-to-reel” tapes, requested by Plaintiff in this case, were destroyed, the law did not require and, generally, public offices did not communicate the mandates of records retention to employees at all levels of the public office. Furthermore, it was the practice of safety departments, based upon the then existing technology and resources, to tape over “reel-to-reel” tapes. Thus, while the records were unlawfully destroyed, there was no intention to violate the law. Punishing the taxpayers of today for the actions of appointed officials that occurred dozens of years ago is not justice.

Unreasonable or Absurd Results

Ohio statutes should be construed in a manner to avoid unreasonable or absurd results. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996), citing R.C. 1.47(C). This Court recently applied this rule to the Public Records Act, in *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410, 916 N.E. 2d 1049, and held that ordering disclosure of student exams undermines the ability of a school system to

summary judgment would be appropriate under Civ. R. 56.

evaluate students and “[s]uch a result is not in line with the policy behind the Public Records Act.”

Requiring a public office to pay millions of dollars civil forfeiture damages to a person that is really not harmed by the destruction of a public record is absurd. Equally important, it is inconsistent with the policy behind the Public Records Act, which requires payment only if a person is “aggrieved” by the destruction of the record.

Furthermore, there is no statutory prohibition against a public office paying civil forfeitures for the same request made by several different persons. A finding that the plaintiff in this case, a person who is not aggrieved as a matter of fact (as found by a jury), is entitled to the civil forfeiture penalties in R.C. 149.351(B)(2) will invite others to file identical requests. In fact, the plaintiff, in his Memorandum in Response to Memoranda in Support of Jurisdiction, argues “it follows that every member of the public is ‘aggrieved’ when public officials violate our State’s Public Records Act.” *Plaintiff-Appellee Timothy T. Rhodes’ Memorandum In Response to Memoranda In Support of Jurisdiction*, page 6. A public office, therefore, can be liable for an indefinite amount of money to an indefinite number of plaintiffs for destruction of the same records, without such persons having to prove anything other than that a document was unlawfully destroyed. Never-ending liability is an unreasonable and absurd result that should not be countenanced by this Court.

This never-ending liability, and the forfeiture penalties associated therewith, will create fiscal havoc for all public offices. Individuals need only discover that a record was improperly destroyed and make a request for the record; after the request is denied, the requestor bring a civil action for forfeiture against the public office. Once one person

collects a recovery, the road is paved for future plaintiffs to recover similar windfalls. This practice would flood the courts with forfeiture actions and require public offices to expend millions of dollars in penalties and legal fees. Tax-payer dollars will be expended for the benefit of a few individuals, who were not required to prove they were aggrieved, all to the detriment of the general public.

Municipalities and other public offices, in these challenging economic times, are forced to consider tax increases, personnel layoffs, and reductions in services. Personnel costs, especially public safety personnel costs, are a large percentage of the operating budgets of municipal corporations. The imposition of unlimited liability, therefore, will force municipal corporations throughout Ohio to implement reductions in public safety services and personnel. This result is not in the best interest of Ohio citizens.

**A Person Is Not Aggrieved If the Requested Records
Are Available in Another Form**

As indicated above, numerous cases are pending throughout the State of Ohio seeking multimillion dollar forfeiture damages for the alleged destruction of “reel-to-reel” tapes. In some instances, the information contained on the “reel-to-reel” tapes is available in another format. For example, a police department may maintain a simultaneous radio log that contains the information recorded on the “reel-to-reel” tapes.

Under these circumstances, a party would not be “aggrieved” by the destruction of the tapes as the requestor has access to the requested information in another format. See *State ex rel. The Cincinnati Enquirer v. Allen*, 2005 WL 2249110 (Ohio App. 1 Dist.), 2005-Ohio-4856. (Finding that the Enquirer was not aggrieved by the public office’s inability to provide a copy of an internal sexual harassment complaint when it

received a copy of the complaint from another source; the Enquirer's right to scrutinize the governmental response was not infringed upon.)

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to reverse the judgment of the Fifth District Court of Appeals.

Respectfully submitted,



Stephen J. Smith (#0001344)
ssmith@szd.com
SCHOTTENSTEIN, ZOX & DUNN Co.,
LPA
250 West Street
Columbus, OH 43215
Phone: (614) 462-2700
Fax: (614) 462-5135

*Counsel for Amicus Curiae
The Ohio Municipal League*

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae The Ohio Municipal League In Support of the Defendant The City of New Philadelphia* has been sent via regular U.S. mail, postage pre-paid this 23 day of November, 2010 to:

John T. McLandrich
Frank H. Scialdone
100 Franklin's Row
34305 Solon Road
Solon, OH 44139

William E. Walker, Jr.
124 North Ave. NE
Massillon, OH 44646

Craig T. Conley
220 Market Ave. South, Suite 604
Canton, OH 44702-2180


Stephen J. Smith (#0001344)