

ORIGINAL

In the  
Supreme Court of Ohio

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

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO  
IN SUPPORT OF APPELLANT**

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## INTRODUCTION

Ohio's Public Records Act gives "any person" the right to access public records. R.C. 149.43(B)(1). It does not write "any person" a blank check. Yet the Fifth District's reading of the Act—that "any member of the public who makes a lawful public records request and is denied those records" is an "aggrieved" party entitled to a \$1,000-per-record forfeiture—does just that. See *Rhodes v. City of New Philadelphia* (5th Dist.) ("App. Op."), 2010-Ohio-1730 ¶ 32. This broad interpretation of the Act's penalty provision not only exposes public entities to near-limitless liability for violations of the Act, but it is at odds with the statute's text, history, and purpose.

To encourage compliance with the Public Records Act, R.C. 149.351(B) imposes a penalty on public entities that improperly destroy or remove public records. R.C. 149.351(B); see also *Rosette v. Countrywide Home Loans, Inc.*, 2005-Ohio-1736 ¶ 14. While the Act's original penalty provision left to the Attorney General the responsibility of collecting a civil forfeiture for violations of the Act, see R.C. 149.99 (1965), the General Assembly has since placed enforcement of the Act into the hands of parties "aggrieved by" the improper destruction or removal of public records, see R.C. 149.351(B). "Any person who is aggrieved by" an entity's unlawful destruction or removal of the records, the statute says, "may commence . . . [a] civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain . . . reasonable attorney's fees." R.C. 149.351(B). But permitting citizen enforcement of the Act does not deputize an unlimited class of private attorneys general to root out violations of the Act and cash in on the public entities' failings. Rather, the penalty provision contains an important—and in the decision below, overlooked—limit on who may seek a civil forfeiture: The right extends only to persons who are "aggrieved." R.C. 149.351(B).

The word “aggrieved” is key. Both its ordinary and its technical meaning demonstrate that an “aggrieved” party is someone who suffers an actual, identifiable harm as a result of the violation. A generalized interest in seeing that public entities comply with the Act is not enough. But the Fifth District, by expanding the word “aggrieved” beyond its customary meaning, authorized anyone—whether they have an interest in the specific records they request or not—to seek and receive a \$1,000-per-record award.

Timothy Rhodes sought from the City of New Philadelphia years of reel-to-reel police dispatch tapes, which the city had neither retained nor disposed of in a manner consistent with the Act. When the city could not produce the tapes, Rhodes demanded a \$4.968 *million* forfeiture: \$1,000 for each of the 4,968 tapes it improperly destroyed. While *seeking* these records was assuredly Rhodes’s right, entitlement to an award could follow only if Rhodes demonstrated that he was “aggrieved by” his failure to obtain them. R.C. 149.351(B). At trial, Rhodes indicated that he did not have an actual interest in listening to the tapes, just an interest in seeing that public entities comply with the Act. The jury therefore concluded that Rhodes did not prove that he was “aggrieved” by New Philadelphia’s violation. The jury’s common-sense conclusion was correct: Rhodes’s claim amounts only to a generalized grievance with the city’s records-retention practice. The Fifth District wrongly concluded that such grievances should be rewarded with a \$1,000-per-record forfeiture, and this Court should reverse its expansive holding.

#### **STATEMENT OF AMICUS INTEREST**

The State of Ohio has a strong interest in ensuring the proper enforcement of Ohio’s Public Records Act.

## STATEMENT OF THE CASE AND FACTS

Between 1989 and 1995, the City of New Philadelphia Police Department recorded its incoming 911 calls by continuously running two reel-to-reel tapes, a primary tape and a back up. Trial Tr. 45-46. The city owned about thirty tapes, Trial Tr. 60, each capable of recording the phone line for approximately twenty-four hours, Trial Tr. 67. The department used the tapes on a rotating basis: At midnight each day, the dispatcher removed one of the tapes and replaced it with another. Trial Tr. 72. The department retained the removed tape for approximately thirty days, after which the department would magnetically erase it and use it to record another day's worth of 911 activity. *Id.* The department carried out this thirty-day retention and disposal schedule without the review of a municipal records commission and without the formal approval of the Ohio Historical Society, both of which the Public Records Act requires. Trial Tr. 89-90; R.C. 149.39. The city eventually replaced the reel-to-reel taping system and donated its recording device and its tapes to another organization. Trial Tr. 45.

In July 2007, Timothy Rhodes submitted a request under Ohio's Public Records Act for "access to review the individual tapes for each and every day of the year for the years 1975 through 1995 inclusive." Rhodes Compl., Ex. A. Chief of Police Jeff Urban responded a few days later, explaining that the reel-to-reel tape system "was not in existence in 1975," Compl. Ex. B, that, during the time the tapes were used—1989 to 1995, Trial Tr. 46—"those tapes would have been reused every thirty days," and that the department "d[id] not have any of the tapes requested," Compl. Ex. B.

The New Philadelphia Police Department was not the only entity that Rhodes targeted. Rhodes lodged similar requests with the cities of Dover, Uhrichsville, Wooster, Medina, Solon and Gates Mills, as well as with the Tuscarawas County Sherriff's Office. Trial Tr. 29-30. Only the City of Medina had saved the outdated reel-to-reel tapes, and even it had retained only a

limited number of them. Trial Tr. 30. The other entities responded that they could not fulfill Rhodes's request and offered him information about their retention schedules. Trial Tr. 31. Rhodes then checked with the Ohio Historical Society to verify that each entity's retention schedules were properly filed and approved. Trial Tr. 42.

With New Philadelphia the only entity lacking either the tapes or a proper retention schedule, Rhodes filed suit against the city for improperly destroying the tapes, claiming entitlement to a civil forfeiture of \$1,000 per record as laid out in R.C. 149.351(B). Rhodes Compl. The city, by Rhodes' estimate, improperly destroyed 4,968 records between 1989 and 1995 and therefore owed him an award totaling \$4.968 million. Trial Tr. 26.

At Rhodes's request, the case went before a jury. Rhodes Compl. 8. On the stand, Rhodes offered conflicting explanations as to why he sought tape recordings that, if reviewed in their entirety, would require nearly fourteen years of continuous listening (seven years for the primary tapes and seven years for the back-up tapes). Rhodes first said that he wanted to see "how the departments worked and how they handled dispatch calls." Trial Tr. 32. He also wanted "to see if there were any . . . missed calls" during the nightly tape changeover. Trial Tr. 34. Rhodes later indicated, however, that his requests stemmed from "an article . . . in the paper that had something to do" with the "hiring practices" of part-time employees. Trial Tr. 40.

Other evidence suggested that these reasons were not the actual bases for Rhodes's requests. In his letter to the City of Dover, Rhodes indicated that he only wanted to request reel-to-reel tapes if the city had not disposed of them properly, writing that: "*if you don't have the approved forms and instruction*, I would like to request copies of the following public records." Trial Tr. 37 (emphasis added). The letter also said that the tapes were "very important" to Rhodes's "research of . . . records disposal." Trial Tr. 41.

Rhodes, moreover, admitted that he had no actual interest in reviewing the tapes. While his “original contention” was that he wanted to listen to the tapes, Rhodes said, he did not have the equipment necessary to do so. Trial Tr. 32. Nor did he know anyone who had the proper equipment. Trial Tr. 32. And even when Medina made its tapes available for Rhodes’s inspection, Rhodes “never listened to any dispatch tapes.” Trial Tr. 39-40.

At the close of evidence, the trial court charged the jury with two questions. First, it asked the jury whether Rhodes “prove[d] by a preponderance of the evidence that he is aggrieved by the actions of the City of New Philadelphia.” Trial Tr. 109. If yes, the trial court instructed, the jury was to proceed to the second question, which asked it to determine how many Public Records Act violations the city committed. Trial Tr. 110. The jury never reached the second question. Rather, it unanimously found that Rhodes had not shown he was “aggrieved by” the improper records disposal. Trial Tr. 114. The court entered judgment in favor of the city.

Rhodes appealed, arguing, among other claims, that the trial court erred in not finding that he was an “aggrieved party” under R.C. 149.351(B). The Fifth District agreed with Rhodes, holding that “an aggrieved party is any member of the public who makes a lawful public records request and is denied those records.” App. Op. ¶ 32. Concluding that the city had improperly destroyed 84 records (12 months of tapes every year for seven years), the court awarded Rhodes \$84,000. *Id.* at ¶ 52. This Court accepted New Philadelphia’s petition for discretionary review.

## ARGUMENT

### **Amicus Curiae State of Ohio’s Proposition of Law No. I:**

*To receive a civil forfeiture under R.C. 149.351(B) for the improper destruction of public records, a party must establish that he or she was actually “aggrieved by” the inability to access the public records.*

The Fifth District’s broad reading of R.C. 149.351(B) as entitling any person who requests improperly destroyed public records to a forfeiture is at odds with the text, history, and purpose

of the Public Records Act. The statute gives only parties “aggrieved by” violations of the Act a right to seek an award. R.C. 149.351(B). And whether one looks to the ordinary meaning of the word “aggrieved” or the technical one, the definitions point to the same conclusion: A person is “aggrieved” only if he or she suffers actual, identifiable harm. Measured by that standard, Rhodes’s claim to a forfeiture fails. At trial, Rhodes offered conflicting reasons for wanting the public records, ranging from an interest in 911 dispatch calls, to the hiring of part-time employees, to the records retention policies of the public entities. Given that conflicting testimony, the jury permissibly inferred that Rhodes was not actually aggrieved by his inability to access the records. The Fifth District’s contrary conclusion allowed Rhodes—and would allow anyone—to receive a forfeiture for little more than a generalized grievance about a public entity’s retention practices.

**A. A person is “aggrieved” by an improperly destroyed record only if he or she demonstrates actual injury.**

The Public Records Act allows “any person,” upon request, to inspect public records. R.C. 149.43(B)(1). When making a public records request, the requester need not offer “a proper purpose,” or even “any purpose,” for wanting to access the records. *State ex rel. Fant v. Enright* (1993), 66 Ohio St. 3d 186, 188. This no-questions-asked grant of access serves the important purpose of “foster[ing] openness” and “encourag[ing] the free flow of information.” *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St. 3d 168, 172.

But simply because “any person” may inspect public records irrespective of purpose does not mean that “any person” may recover a \$1,000-per-record forfeiture if the records are unavailable. In contrast to the Act’s grant of a right of inspection to “any person,” R.C. 149.43(B)(1), the Act’s penalty provision limits who may seek a forfeiture for violations of the Act to “any person *who is aggrieved by*” the violation. R.C. 149.351(B) (emphasis added).

The Act does not define “aggrieved.” Accordingly, this Court must interpret the word “aggrieved” by “giv[ing] effect to the usual, normal and customary meaning” of the term. *Kish v. City of Akron*, 2006-Ohio-1244 ¶ 19 (internal quotation marks omitted). And in keeping with the Ohio Revised Code’s rules of construction, if the Act uses “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise,” those words or phrases “shall be construed accordingly.” R.C. 1.42.

The “usual, normal and customary” meaning of the word “aggrieved” suggests that it requires a requester to show an actual injury. Black’s Law Dictionary defines aggrieved as “having been *harmed* by an infringement of legal rights.” Black’s Law Dictionary (8th ed.) 73 (emphasis added). Merriam-Webster’s Collegiate Dictionary similarly says that “aggrieved” means to “suffer[] from an infringement or denial of legal rights.” Merriam-Webster’s Dictionary (11th ed.). Bound up in the concept of being aggrieved, then, is some showing of “harm” or “suffering.” It follows that if a party cannot show that the denial of a legal right caused him harm, he cannot be classified as aggrieved.

The “technical or particular” meaning of the word aggrieved points in the same direction as its common usage. R.C. 1.42. The General Assembly commonly uses the word “aggrieved” when identifying who has standing to seek judicial relief. See, e.g., R.C. 101.90(K) (“‘Aggrieved party’ means a party entitled to resort to a remedy.”); R.C. 303.15 (“Appeals to the board of zoning appeals may be taken by any person aggrieved . . . by any decision of the administrative officer.”); R.C. 1301.01(B) (“‘Aggrieved party’ means a party entitled to resort to a remedy.”); R.C. 4112.01(A)(23) (“‘Aggrieved person’ includes . . . [a]ny person who claims to have been injured by any unlawful discriminatory practice . . . [and] [a]ny person who believes that the person will be injured by any unlawful discriminatory practice.”); R.C. 4707.30

(“‘Aggrieved party’ means a person who has sustained actual and direct losses in an auction transaction . . .”).

And consistent with those definitions, this Court, in the context of determining who has standing to seek judicial relief, has interpreted “aggrieved” to require a showing of actual harm. An “aggrieved party,” this Court has said, is someone with a “present interest in the subject matter of the litigation which has been prejudiced.” *Midwest Fireworks Mfg Co. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St. 3d 174, 177 (citation and quotation marks omitted); see also *Ohio Contract Carriers Ass’n v. Pub. Util. Comm’n* (1942), 140 Ohio St. 160, 161 at syl. (An aggrieved person is someone who has been “injuriously affect[ed].”). Demonstrating merely “[a] future, contingent, or speculative interest is not sufficient” to have aggrieved-party status. *Midwest Fireworks*, 91 Ohio St. 3d at 177.

In addition, an “aggrieved” person must demonstrate that the particular harm he suffers “is unique as compared to others within the general community” in order to seek judicial relief. *Id.* at 178. “[A] generalized grievance shared by a large class of citizens” is not sufficient. *Bd. of Trustees v. Petitioners for Incorporation of the Holiday City* (1994), 70 Ohio St. 3d 365, 372. For example, a person is not “aggrieved” by an environmental infraction occurring “120 miles away from his home” simply because he has “a great love for wildlife” and an interest in “see[ing] that the environmental laws are being enforced.” *Yost v. Jones* (4th Dist.), 2002-Ohio-119. Nor is a person “aggrieved” by the government’s failure to disclose the expenditures of the Central Intelligence Agency merely because it keeps him from “fulfill[ing] his obligations as a member of the electorate in voting for candidates seeking national office”—an interest “common to all members of the public.” *United States v. Richardson* (1974), 418 U.S. 166, 176-77. Requiring parties to show that they are aggrieved prevents litigants from seeking relief “that no

more directly and tangibly benefits [them] than it does the public at large.” *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 573-74.

Translated into the public records context, the word “aggrieved” takes on a similar meaning. “[O]nce words have acquired a settled meaning,” this Court “applie[s]” “that same meaning . . . to a subsequent statute on a similar or analogous subject.” *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460, 464. Without showing a “present interest” that has been “prejudiced,” *Midwest Fireworks*, 91 Ohio St. 3d at 177, an “injur[y],” *Ohio Contract Carriers*, 140 Ohio St. at 161, or something more than a “generalized grievance,” *Holiday City*, 70 Ohio St. 3d at 372, a public records requester is simply not aggrieved within the meaning of the statute.

Requiring requesters to demonstrate actual injury to recover an award will not impose an insurmountable burden. “Public records,” after all, “are the people’s records.” *State ex rel. Dann v. Taft*, 2006-Ohio-1825 ¶ 104. And members of the public with an actual interest in inspecting the records they request will be “aggrieved by” an entity’s violation of the Act when the inability to access improperly destroyed records injures them personally. But when, as here, a jury could conclude from the requester’s testimony that he has no real interest in inspecting the records, only an interest—shared by every single member of the public at large—in seeing that public entities comply with the Act, the requirement of showing that the requester was “aggrieved by” the violation will prevent those with no actual injury from capitalizing on the city’s missteps.

The requirement of showing aggrieved-party status also serves as an important check on what otherwise would become limitless liability. A public entity that violates the Act will typically have no way to restore an improperly destroyed record. Taking the Fifth District’s

decision to its logical conclusion, the statute would require that public entity forever to pay a \$1,000 award to “any member of the public” who asks for it, *Rhodes*, 2010-Ohio-1730 ¶ 32, regardless of whether the requester’s interest is in the record itself, or just the \$1,000 payout. To be sure, those requesting the improperly destroyed records with an actual interest in seeing them are entitled to a forfeiture, just as the statute says. But without attaching some meaning to the word “aggrieved,” and thereby placing a limit on who may recover the forfeiture, there is no way to limit the penalty public entities must pay for their failings. Cities who have committed records violations would thereby become bottomless treasure troves to any requester who comes along—a burden that no entity can bear, and that the General Assembly assuredly did not intend.

Notably, interpreting “aggrieved” as requiring an inquiry into the requester’s reason for seeking the records before receiving a forfeiture, is consistent with how this Court has interpreted another provision of the Act, R.C. 149.43(C). R.C. 149.43(C)(1) authorizes a requesting party to file a mandamus action to compel public entities to comply with public records requests and to seek, among other things, “reasonable attorney’s fees.” R.C. 149.43(C)(1). This award of attorney’s fees, however, does not flow automatically to a successful relator. See, e.g., *State ex rel. Fox v. Cuyahoga County Hosp. Sys.* (1988), 39 Ohio St. 3d 108, 112. Rather, an attorney’s fees award is “determined by the presence of a public benefit conferred by [the] relator seeking the disclosure,” and, “since the award is punitive,” an inquiry into the “reasonableness and good faith” of the public entity. *State ex rel. Beacon Journal Publ’g Co. v. Maurer* (2001), 91 Ohio St. 3d 54, 58.<sup>1</sup> Because the Act permitted inquiry

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<sup>1</sup>Since *Maurer*, the General Assembly has recharacterized the attorney’s fees award in R.C. 149.43(C) as remedial, not punitive, see 149.43(C)(2)(c); *State ex rel. Doe v. Smith*, 123 Ohio St. 3d 44, 2009-Ohio-4149 ¶¶ 20-26. But that change does not diminish the import of this Court’s earlier line of reasoning. When imposing a penalty, whether it be attorney’s fees or a forfeiture, it is appropriate to consider the intentions of both the requester and the public entity.

into both the good faith of the requester and the good faith of the public entity in the context of determining one punitive measure—attorney’s fees in mandamus cases—it follows that the Act should also permit inquiry into the intentions of the requester to determine another punitive measure—a forfeiture in a civil action.

What is more, interpreting “aggrieved” in R.C. 149.351(B) as describing someone who has suffered an actual injury is consistent with other statutes that permit citizen enforcement of state or federal law. A person is “aggrieved or adversely affected by a[n] [environmental] violation” and therefore authorized to enforce Ohio’s environmental laws, R.C. 3745.08, only if the alleged injury is personal to him, *Yost*, 2002-Ohio-119. And a person is “aggrieved by” the action of a federal agency and therefore authorized to seek relief against that agency, 5 U.S.C. § 702, only if that person has “suffered a sufficient injury-in-fact,” *NCUA v. First Nat’l Bank & Trust Co.* (1998), 522 U.S. 479, 488. See also *Lujan*, 504 U.S. 555, 572 (citizen-suit provision of the Endangered Species Act only enforceable by those suffering an actual injury); 18 U.S.C. § 1964(c) (person may enforce the Racketeer Influenced and Corrupt Organizations Act and receive treble damages only if “injured” by conduct in violation of the statute); R.C. 2923.34 (person may enforce Ohio’s equivalent of RICO and recover treble damages and a forfeiture only if “injured or threatened with injury by” a violation of the statute).

Like other citizen-suit statutes, the penalty provision of the Public Records Act is only enforceable by parties that suffer an actual injury from a violation.

**B. The history and purpose of the Public Records Act indicate that the Act should not be read as providing an automatic forfeiture to any person that requests improperly destroyed records.**

Not only does the Fifth District’s interpretation of the Act fail to assign an appropriate meaning to the word “aggrieved,” but it is inconsistent with the history and the purpose of the

Act, both of which suggest that a civil forfeiture should not follow automatically from a thwarted public records request.

1. **When the General Assembly amended the Public Records Act to permit citizen enforcement of the penalty provision, it changed the character of the civil forfeiture provision from automatic to contingent.**

The penalty associated with violations of the Act has evolved from an automatic civil forfeiture payable to the State to a citizen-enforced forfeiture payable only to parties that show they are “aggrieved by” the violation. In 1965, the General Assembly implemented a penalty provision that encouraged compliance with the Act’s mandates. “Whoever violates section 149.43 or 149.351,” the Act said, “*shall* forfeit not more than one hundred dollars for each offense to the state,” which “[t]he attorney general shall collect . . . by civil action.” Former R.C. 149.99, 131 Ohio Laws 177 (1965) (emphasis added).

The General Assembly departed from this automatic, state-enforced penalty scheme in 1985. As amended, the penalty provision allowed citizens, rather than the State, to enforce the Act and obtain a civil forfeiture. Former R.C. 149.99, 141 Ohio Laws 2775 (1985). But it couched receipt of the forfeiture in decidedly contingent terms: “Any person aggrieved by a violation of 149.351 or 149.43 of the revised code . . . may bring a civil action to compel compliance, *and may recover* a forfeiture of one thousand dollars and reasonable attorneys fees for each violation.” *Id.* (emphasis added). In permitting citizen enforcement of the Act, the General Assembly changed the formerly automatic penalty (“shall forfeit”) into a conditional one (“aggrieved” parties “may recover”). Though this 1985 statute sheds little light on the question of *who* counts as an aggrieved party, it does indicate that the General Assembly no longer intended for forfeiture to flow automatically from violations of the Act.

Today’s penalty provision differs only in form from the 1985 version. Responding to a decision by this Court holding that citizens could not seek mandamus for public records

violations, the General Assembly amended the Act to permit two types of citizen enforcement: mandamus (R.C. 149.43(C)) and a civil action (R.C. 149.351(B)). See *State ex rel. Fox v. Cuyahoga County Hosp. Sys.* (1988), 39 Ohio St. 3d 108. But in keeping with the spirit of its 1985 predecessor, the penalty provision still requires that a party show that he or she is aggrieved in order to seek a forfeiture. R.C. 149.351(B) (“Any person who is aggrieved by [a violation of the Act] . . . may commence . . . a civil action to recover a forfeiture . . . .”)

Given the earlier history of automatic, state-enforced forfeiture, the General Assembly’s move to the current scheme provides an important clue as to how the current penalty provision should be read. No longer automatic, the current penalty provision makes civil forfeiture a contingent penalty—one that may be recovered only by an “aggrieved party.” Adopting the Fifth District’s reading and allowing any person irrespective of actual injury to recover a civil forfeiture would mark a return to the automatic forfeiture scheme that the General Assembly abandoned twenty-five years ago.

**2. This Court strictly construes forfeiture statutes to avoid imposing a forfeiture.**

The purpose of the Public Records Act is to ensure ready access to public records, not to open a honey pot for anyone looking for a \$1,000-per-record forfeiture. This Court of course construes provisions of the Public Records Act liberally “to effectuate broad access to [public] records.” *Kish*, 2006-Ohio-1244, ¶ 19. (That goal of broad access is why “any person” can make a public records request. R.C. 149.43(B)). And given that the penalty provision creates a strong incentive for public entities to provide access to public records, it too should receive liberal construction. But construing a statute liberally does not mean gutting its built-in limitations. Giving meaning to the Act’s use of the word “aggrieved” by requiring some showing of actual injury will ensure that the penalty is robust yet reasonable.

Forfeitures are penalties “not favored in law or equity.” *State v. Lillock* (1982), 70 Ohio St. 2d 25-26. In the context of forfeiture statutes that penalize citizens, this Court has said that “such statutes” must be construed “[w]henever possible . . . so as to avoid a forfeiture.” *Id.* “No forfeiture may be ordered [against a person] unless the expression of the law is clear and the intent of the legislature manifest.” *Id.* The presumption disfavoring forfeitures originally arose from concerns about how forfeitures interfere with private property rights, see *id.*, but this Court has never indicated that the same concerns should not also extend to public entities. In light of this presumption disfavoring forfeitures and the need to place a reasonable limit on the penalty provision, this Court should reverse the judgment of the Fifth District.

**C. Even if “any person” who requests improperly destroyed records may recover a forfeiture, courts have authority to remit the amount requesters may receive.**

Even if the Court reads the Act as entitling “any person” who requests improperly destroyed records to a forfeiture (and it should not), courts still retain authority to order a remittitur of the amount a requester may receive. A civil forfeiture, like a punitive damages award, is a penalty, the purpose of which “is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society’s disapproval.” *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St. 3d 488, 493, 2001-Ohio-1593. Because the purpose of a forfeiture is not to compensate the requester, but to penalize the deficient public entity, courts have “inherent authority” to say when enough is enough and to “remit an excessive” penalty. *Wightman v. CONRAIL* (1999), 86 Ohio St. 3d 431, 444; see also *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113 ¶ 184 (explaining that a court may order a remittitur upon finding that “(1) unliquidated damages [were] assessed by the jury, (2) the verdict [was] not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction.”). Therefore, in the event the Court determines that any person who requests

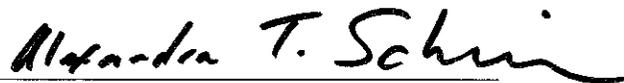
improperly destroyed public records may receive a forfeiture, it should affirm the availability of remittitur as a check against exorbitant awards.

### CONCLUSION

For these reasons, this Court should reverse the decision of the Fifth District Court of Appeals.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellant was served by U.S. mail this 29th day of November, 2010, upon the following counsel:

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