

ORIGINAL

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IN THE SUPREME COURT OF OHIO  
CASE NO.: 2010-0963

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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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**AMENDED MERITS BRIEF OF DEFENDANT/APPELLANT CITY OF NEW  
PHILADELPHIA**

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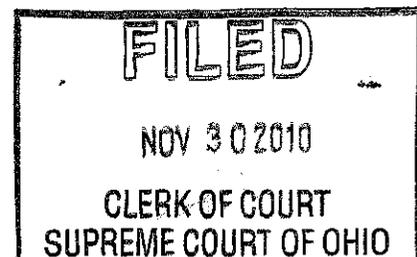
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## I. INTRODUCTION AND SUMMARY

The primary issue in this Appeal is 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 actual record or 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).

This legal issue comes before the Court in the larger context of the widespread abuse of the forfeiture provision. Litigants are using this provision to sue public entities for multi-million-dollar claims related to records they have no interest in reviewing. Cases are pouring into common pleas courts on substantially identical issues involving these reel-to-reel tapes.<sup>1</sup> Appellee-Plaintiff Timothy Rhodes’ case is part of this troubling trend. Although the Appellant-Defendant City of New Philadelphia believed that Rhodes did not want the records as a matter of law, the trial court determined that there were genuine issues of material fact about whether Rhodes really wanted the records.

After a trial, the jury unanimously did not believe that Rhodes wanted to review the content of decades-old reel-to-reel police dispatch tapes. Rhodes knew these records were routinely destroyed by virtue of dispatch tapes being recycled every 30 days as done by all departments. The jury heard that Rhodes only wanted the records if they *did not* exist; he did not

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<sup>1</sup> 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.

bother to review tapes that did exist; and he had no way to review the records. He merely wanted a forfeiture. The evidence was overwhelming that Rhodes did not really want the records and was not an “aggrieved person.” Although not disclosed to the jury, Rhodes wanted a \$4,989,000 forfeiture.

Despite the jury’s verdict, the fifth district reversed the trial court’s denial of summary judgment on the issue of liability. The court held that a person is automatically entitled to a civil forfeiture for merely requesting a destroyed public record. Notwithstanding the jury finding that Rhodes was not aggrieved, 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. (Op. at 9, Apx. 6.) In doing so, the court disregarded the express text of the forfeiture provision limiting it to a “person who is aggrieved” and overruled the wisdom of the unanimous jury that determined that Rhodes did not want to review the content of the records. Not only is it substantively and procedurally flawed, this holding creates serious constitutional and practical problems. While the fifth district was trying to protect the spirit of the Public Records Act, the City respectfully believes the court improperly opened the door to the exploitation of the Act.

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

### **A. Public Records Law and Fishing for a Recovery**

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 similar requests. 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. (Supp. p. 6, Tr. 30.)

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 another tape. The removed tape was preserved for 30 days and then the City would magnetically erase its contents. (Supp. p. 15, Tr. at 65.) 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 a similar fashion, with tapes being erased and recycled every thirty days. (Supp. p. 10, Tr. at 38.) But, as the reel-to-reel systems fell out of favor, public entities disposed 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. (Supp. p. 14, Tr. at 42.) As Rhodes also knew, the primary and 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. (Supp. p. 5, Tr. at 29.) 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.

Ohio law provided a retention schedule application and approval process for disposing of records like these reel-to-reel tapes. Records commissions are responsible for reviewing applications for one-time disposal of obsolete records, as well as records retention schedules submitted by government offices within their jurisdiction. R.C. 149.331, .38, .39, .41, .411, .412, .42. Once a commission has approved an application or schedule, it is forwarded to the Ohio Historical Society for review and identification of records (R.C. 149.39) that are of continuing

historical value. R.C. 149.31, .332, .333, .38, .39, .41, .411, .412, .42. Upon completion of that process, the Ohio Historical Society would forward the application or schedule to the Auditor of State for approval or disapproval. R.C. 149.39.

Unfortunately, at the time, the City of New Philadelphia did not have a functioning records commission and the Ohio Historical Society did not authorize the destruction of the tapes.<sup>2</sup> Had the City submitted a 30-day retention schedule of these records, it almost certainly would have been approved. The Ohio Historical Society's suggested retention period for these types of records was 30 days, as put forth in its "Schedules of Records Retention" published in its Ohio Municipal Records Manual. (See <http://www.ohiohistory.org/resource/lgr/Munimanual2.2001.pdf> at page 7, last visited November 15, 2010.)

**B. Rhodes Finds What He Was Looking For: A City that Disposed the Tapes Without Proper Authorization**

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. (Supp. p. 4, Tr. 26.) 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

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<sup>2</sup> 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. (Supp. p. 14, Tr. at 42.)

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.

**C. The Parties Ask that the Trial Court Grant Summary Judgment; The Trial Court Denies Those Requests, Finding Disputed Issues of Fact About Whether Rhodes Was a “Person Who is Aggrieved” Under R.C. 149.351.**

After engaging in discovery, the parties fully briefed the issues on summary judgment, each believing that judgment should be granted in their favor. (See T.d. 28, T.d. 36, T.d., 46, etc.) Specifically, the parties disputed whether Rhodes must actually want the records to establish that he was a “person who is aggrieved” by their destruction, or whether Rhodes was aggrieved by merely asking for the records and being denied. The trial court determined that there were genuine issues of material fact to be tried to a jury on whether Rhodes actually wanted the records at all and was thus aggrieved by a violation of R.C. 149.351(A).<sup>3</sup> (Apx. 17.)

**D. Rhodes’ \$5 Million Scheme Unravels Before a Jury**

On February 5, 2009, Rhodes pled his case to an eight-person jury in the Tuscarawas County Court of Common Pleas. Rhodes did not object to jury instructions or request judgment at a matter of law during or after trial. 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. (Supp. pp. 8-9, Tr. at 36-37.) 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

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<sup>3</sup> The trial court also determined that a jury must determine the issue of whether the back-up tapes constituted separate records, and whether the City committed any violation and, if so, how many.

...” (Supp. p. 9, *Id.* at 37.) The Ohio Historical Society did approve the City of Dover’s record retention schedules. (Supp. p. 8, *Id.* at 36.)

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. (Supp. p. 11, Tr. at 39.) 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. (Supp. pp. 11-12, Tr. 39-40.) Rhodes never did listen to any of those tapes. (*Id.*) The jury heard testimony that Rhodes did not want to review the content of those tapes:

Q: Okay. And so as we sit here today, you never listened to any dispatch tapes anywhere, correct?

A: No, sir.

Q: And you never retrieved any data from any dispatch tapes anywhere, correct?

A: Other than Medina, the information was written in boxes.

Q: But I’m talking about material that actually would be recorded on a tape itself?

A: No.

(Supp. pp. 11-12, Tr. at 39, 40; lines 25-8.)

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 (Supp. p. 7, Tr. at 32), Rhodes later testified that “he wanted to see” “hiring practices, [of] the part timers” working at public entities. (Supp. p. 12, Tr. at 40.) 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. (Supp. pp. 13-14, Tr. 41-42.) 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].” (*Id.*)

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. (Supp. p. 7, Tr. at 32.) He did not have a machine. He did not know of anyone that had a machine. (*Id.*) 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 City argued to the jury that Rhodes could have wanted the tapes for any reason, but Rhodes must actually want the records to be “aggrieved” under the Public Records Act. (Supp. pp. 2-3, Tr. at 21-22.)

**E. The Jury Does Not Believe Rhodes Wanted to Review the Content of the Records**

After hearing live witnesses, including Rhodes, a unanimous jury concluded that Rhodes was not “aggrieved” under the Ohio Public Records Act. (Apx. 31.) In opening and closing arguments, the City made clear that the reasons why Rhodes wanted the tapes – that is, “his

motive” – was not important. (Supp. p. 16, Tr. at 99, Tr. at 21-22.) It simply did not matter whether the inquiry was for uncovering corruption or exposing scandal, ensuring the chief of police was doing his job, or any other reason. Rather, the issue presented for the jury’s deliberation was whether Rhodes actually wanted to review the content of those tapes. Rhodes simply did not have any interest in reviewing the content of reel-to-reel tapes. The jury rendered a defense verdict. (Apx. 31.)

**F. The Fifth District Reverses and Disregards the Text of the Forfeiture Provision that Limits Recovery only to a “Person who is Aggrieved”**

Despite the jury verdict, the court reversed the trial court’s denial of Rhodes’ motion for summary judgment on the issue of liability. The fifth district held 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 ¶39, Apx. 12.)

This case is now before this Court on the following proposition of law.

**III. LAW AND ARGUMENT**

**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). To be an “aggrieved person” the person must actually want the requested records, not solely the forfeiture.**

**A. A person is not automatically “aggrieved” under R.C. 149.351(B)(2) by merely requesting a public record and being denied that record.**

**1. The Act requires a person to be “aggrieved” to warrant a forfeiture.**

The fifth district erroneously held that a person is automatically aggrieved merely upon making a records request and being denied those records in absence of a proper destruction schedule. (Apx. 10, Op. at ¶ 32.) The court erred. The Legislature mandated that only “aggrieved

persons” are entitled to a civil forfeiture. The fifth district judicially eliminated the Act’s requirement that a plaintiff establish he or she is “aggrieved.” R.C. 149.351(B). The fifth district’s elimination or misinterpretation of that critical language resulted in the disregard of the Legislature’s intent and creates an absurd result with serious constitutional and practical implications.

a. **A plaintiff has the burden to demonstrate aggrieved status.**

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. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811 at ¶19 (quoting *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173, 1996-Ohio-161, 661 N.E.2d 1049). 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[.]”

This Court has defined "aggrieved" in another context and has held that there must be a "present interest in the subject matter" that is more than a "remote" interest. *Ohio Contract Carriers Ass'n v. Public Util. Comm'n* (1942), 140 Ohio St.160, 161, 42 N.E.2d 758; *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 2001-Ohio-24, (reaffirming holding in *Ohio Contract Carriers*). A jury determined that Rhodes lacked any such interest – he merely wants the statutory damages.

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. This Court has required that to be aggrieved, a litigant must show that his injury is different than that compared with other people. *Midwest Fireworks*, 91 Ohio St.3d at 178, 743 N.E.2d 894. Such a "generalized grievance shared by a large class of citizens" in itself is insufficient. *Bd. of Trs. v. Petitioners for Incorporation of the Holiday City* (1994), 70 Ohio St.3d 365, 372, 1994-Ohio-405, 639 N.E.2d 42.

**b. The Legislature expressly limited recovery of a civil forfeiture to "any person who is aggrieved" not merely "any person."**

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 to a "person who is aggrieved," not merely "any person." "Aggrieved" is a word that requires the person to actually suffer a deprivation of a legal right; it has a qualitative component.

If the fifth district's interpretation is adopted, every citizen would be "aggrieved" by those acts, and therefore every member of the public would qualify to bring suit. The words "any person" would have the same meaning as "any person who is aggrieved," making the word "aggrieved" a redundancy. The Legislature, however, is "not presumed to do a vain or useless thing; and that when language is inserted in a statute it is inserted to accomplish some definite purpose," which means that "significance and effect should be accorded to every word, phrase, sentence and part thereof." *State of Ohio v. Wilson* (1997), 77 Ohio St. 3d 334, 336-337, 1997-Ohio-35, 673 N.E.2d 1347 (quotations omitted).

The fifth district effectively deleted the phrase "who is aggrieved." To do so enlarges the scope of the Act beyond that which the General Assembly enacted. The judicial branch of government "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.'" *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403, 408-09, 2005-Ohio-5410, 835 N.E.2d 692 (citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 387 N.E.2d 1222.)

**2. Ohio courts have determined that "aggrieved" requires more than merely asking for and being denied a record.**

Ohio courts recognize that a public entity does not become immediately liable for such forfeiture simply because public records have been destroyed without a proper schedule. 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. No. CA97-05-102, 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. No. C-040838, 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 cases where the issue of "aggrieved" was litigated, the litigants had existing and real reasons for wanting the records. For instance, in *Kish v. Akron*, 109 Ohio St.3d 162, this Court held that plaintiffs sued their employer for unused "comp time" and needed related records for a federal lawsuit. (*Id.* at ¶¶4-6.) The plaintiffs could not scrutinize the government's decision-making process and could not prevail in their lawsuit. (*Id.* at ¶8.) The *Kish* plaintiffs unquestionably wanted the records. In the common situation, which does not exist here, a citizen is actually going to want to review a record and naturally would be an "aggrieved person" under the Act – it will hardly be an issue.

When a litigant does not want to review a record and thus does not actually want the record, Ohio courts have found that person is not aggrieved under the Act. 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 office 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* show 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 actually

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.

**3. The fifth district's holding that all persons are "automatically" aggrieved is not only wrong but would lead to absurd results.**

The General Assembly does not intend absurd results. Consequently, this Court has expressly held that it must construe R.C. 149.43 to avoid unreasonable or absurd results. 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. 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, Rhodes and other litigants have no interest in the *content* of the records and are scouring Ohio's municipalities with mass mailings to uncover potential violations solely for financial gain.

Under the fifth district's interpretation of R.C. 149.351(B)(2), 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).

This interpretation creates an absurd result. If the fifth district's position is adopted, every citizen would be "aggrieved," and therefore every citizen would qualify for the \$1000-per-record forfeiture, despite none of them having any interest in the content of the record. So, every person could – and many would – file suits against municipalities for massive forfeitures. As this Court is aware, the present case is one of several flooding Ohio courts seeking the same reel-to-reel tapes.<sup>4</sup>

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<sup>4</sup> See footnote 1, *supra*.

To make matters worse, under the Act, an Ohio public entity has no way to correct a previously unauthorized destruction of a record, even if it inadvertently occurred more than 15 years ago – like here. While there are ways to dispose of *existing* obsolete records, 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 actually want to review the content of the records.

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, there is no question that many municipalities would face financial ruin.

The Legislature’s statutory intent is not served by allowing any person to collect multi-million-dollar forfeitures for records that person never wanted. Although well intended, the fifth district’s decision does not advance the intent or spirit of public records law. “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. The decision is inimical to the very system itself. While in the midst of one of the most severe economic downturns that has caused widespread budget woes, personnel cuts and reduction of services across the state, the fifth

district decision creates a widespread liability crisis for municipalities that is not supported by the text of the Act or the intent of the Act.

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, the person must *actually want to review the content* of the record. This case and cases like it have nothing to do with protecting public records or the requesting party's motive for wanting the records themselves. The case has to do with whether the requesting party wanted the records at all. A jury determined that Rhodes did not want those records. The evidence was quite overwhelming that Rhodes had no interest in reviewing the content of these tapes.

Indeed, the City firmly believes that the record demonstrated that Rhodes was not aggrieved as a matter of law. The City also believes that the trial court should have granted summary judgment in favor of the City. But, after the record was even more developed at trial, a unanimous jury determined that that Rhodes did not want to review the content of the records. Fundamental to our justice system is the collective wisdom of the jury that determines credibility.

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 Public Records Act generally seeks the protection of public records. But, the Legislature did not intend the statute to be a cash cow for plaintiffs with no interest in the actual record. The law does not favor forfeitures. *State, ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 1998 Ohio 313, 702 N.E.2d 81; See, also, *Rosette v. Countrywide Home Loans. Inc.*, 105 Ohio St.3d 296, 2005 Ohio 1736, 825

N.E.2d 599. Punitive damages are not generally available against municipalities under state or federal law. See, R.C. 2744.05(A); *City of Newport v. Fact Concerts Inc.* (1981), 453 U.S. 247 at 261-66. 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. Certainly, the Legislature did not intend for the forfeiture provision to reach such result.

The fifth district’s interpretation that all persons are automatically aggrieved is wrong and also raises serious constitutional problems. This Court should hold that a person is only aggrieved if that person actually wants the records, not just the forfeiture. Under the rules of statutory construction, if a statute is susceptible of two interpretations and one of the interpretations comports with the Constitution, then that reading of the statute will prevail and the court will avoid striking the statute. *E. Cleveland v. Evatt* (1945), 145 Ohio St. 493, 496, 62 N.E.2d 325. This Court should accept the City’s proposition of law and overrule the fifth district’s decision that does not comport with the United States or the Ohio Constitutions.

**i. The fifth district’s interpretation and the forfeiture provision itself raise serious constitutional problems.**

The fifth district’s interpretation not only leads to absurd results, it exemplifies why the forfeiture provision is unconstitutional.<sup>5</sup> 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 actually wanted to review the records (i.e., whether he was aggrieved) or just wanted the forfeiture.

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<sup>5</sup> The parties did not brief the issue of the constitutionality of the forfeiture provision below. But, this Court has “specifically held that ‘[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it.’” *Hill v. Urbana* (1997), 79 Ohio St.3d 130, 133, 1997-Ohio-400, 679 N.E.2d 1109, citing *In re M.D.* (1988), 38 Ohio St.3d 149, 527 N.E.2d 286, syllabus. This Court has held on numerous occasions that the waiver doctrine is discretionary.

Statutes carry a presumption of constitutionality. *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926 and the party challenging the statutes bears the burden of proving that the legislation is unconstitutional beyond a reasonable doubt. *Thompkins* at 560, 664 N.E.2d 926; *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39, 616 N.E.2d 163. To successfully bring a facial challenge to a statute, a challenger must establish that there exists no set of circumstances under which the statute would be valid. *United States v. Salerno* (1987), 481 U.S. 739, 745.

The Eighth Amendment of the United States Constitution and Section 9, Article I of the Ohio Constitution prohibit excessive fines. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8; Section 9, Article I of the Ohio Constitution (same). Justice Lanzinger observed that the forfeiture provision may violate the Eighth Amendment's prohibition against excessive fines. *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811 at ¶¶52-53 (J. Lanzinger, dissenting).

The Court has held that that R.C. 149.351(B) is an example of an explicit penalty or forfeiture rather than damages. *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 14. The United States Supreme Court has held that the Eighth Amendment's prohibition against excessive fines applies to the states and prohibits them from imposing "grossly excessive" punishments on tortfeasors. *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809. In determining whether a penalty is grossly excessive, a court is to consider three points: (1) the degree of the defendant's reprehensibility or culpability, (2) the disparity between the penalty and the harm to the victim caused by the defendant's actions, and (3) the difference between the remedy and the civil penalties authorized in other cases for comparable misconduct. *Id.* at 575, 116 S.Ct. 1589, 134 L.Ed.2d 809.

Applying the *Gore* factors, Justice Lanzinger observed that the forfeiture provision "does not distinguish between malevolent and inadvertent destruction of documents-an aggrieved party is not required to show any specific motive or intent before a violation is established." *Id.* The relators' actual damages in *Kish* were \$500 for spoliation and penalties of \$480,000 and

\$380,000. Justice Lanzinger noted that “The relationship between penalty and harm is undeniably weak.” *Id.* Predicting then what is becoming a reality under the present wave of reel-to-reel tape requests, Justice Lanzinger observed that “if this case is a harbinger, the majority's definition of “record” and its interpretation of “violation” under R.C. 149.351(B) may lead to catastrophic financial consequences for municipalities, townships, and agencies. In this case, on damages of \$1,000, a forfeiture nearly 900 times greater is authorized by the majority. In my view, common sense abhors such a result.” *Id.* at ¶52.

The Act still does not distinguish between inadvertent or malevolent destruction. Under the Act, even if a natural disaster destroyed the tapes at issue, there would be no way for a public entity to protect itself from a forfeiture action, even where the person requesting the tapes had no interest in those tapes. While the City of New Philadelphia did not have a retention schedule at the time, the City reused the reel-to-reel tapes every 30 days as did all other departments throughout the state. The use of these records was the means of their destruction. Moreover, the Ohio Historical Society generally suggested the destruction of these types of records within such a short time frame in its “Schedules of Records Retention” published in its Ohio Municipal Records Manual. (See <http://www.ohiohistory.org/resource/lgr/Munimanual2.2001.pdf>, at 7, last visited November 15, 2010.)

The relationship between the penalty and the harm is stark. The penalty will always be disproportionate because if everyone is “aggrieved” by the destruction of public records, as the fifth district has held, then the offending public entity will be subject to forfeiture suits from every citizen and subject to indefinite liability under the Act. The entity's one violation will forever threaten that entity. That's because under the present statutory structure of the Act, there is no way for a public entity that has inadvertently destroyed public records without a retention

schedule to obtain post-destruction authorization. Consequently, a public entity that has destroyed a public record in this manner will forever be subject to limitless liability. Any new requester who asks for the same records already destroyed – and even if an earlier requester was previously paid for the forfeiture – could obtain a new forfeiture award. That person could recover and so could the countless persons who follow in his exact footsteps. Consequently, the forfeiture provision creates an excessive fine that offends the Ohio and United States Constitutions.

The recoveries in cases like this are so disproportionate that they will challenge the awards given in even the most grievous personal injury cases where citizens are really aggrieved by serious injury or damages. Awarding a litigant – let alone all that will follow in the same mold for perhaps the identical records – a multiple million-dollar award is constitutionally offensive and belies common sense. Here, a jury determined that Rhodes did not want to review the content of the records. Rhodes' actual damages are nothing. The relationship between the penalty and harm is more that "undeniably weak"; it is non-existent in this case.

**4. Rhodes could not be aggrieved because he did not timely file his forfeiture action within the one-year limitations period.**

Rhodes could not be aggrieved because his claim was filed beyond the one-year limitations period.

Rhodes seeks a civil forfeiture pursuant to R.C. 149.351(B)(2). The statute of limitations for a civil forfeiture action is one year. R.C. 2305.11(A). "Generally, the statute of limitations for violations of a statute begins to run when the statute is violated." *Hughes v. City of North Olmsted*, 8<sup>th</sup> Dist. No. 70705, 1997 WL 25515, \*2 (citing *Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371). The discovery rule only applies in narrowly defined and exceptional circumstances under R.C. 2305.11(A)(e.g., medical malpractice, attorney malpractice). See

*Hughes, supra*, at \*3 (“[I]n light of the narrow application of the discovery rule, we cannot, without express legislative or judicial authority, create law where none exists.”). This certainly is not an exceptional circumstance.

This Court defined a “violation” under R.C. 149.351 as “any attempted or actual removal, mutilation, destruction, transfer of or damage to a public record that is not permitted by law.” Rhodes claims that the City violated R.C. 149.351 by recycling the reel-to-reel tapes. However, the most recent tapes Rhodes sought in his public records request were recycled in 1995, twelve years before Rhodes made his request, and outside of the statute of limitations for civil forfeiture actions. To allow Rhodes to recover a civil forfeiture for the recycling of the dispatch tapes in question—some of which would be nearly twenty years old—would not only violate the express provisions of R.C. 2305.11(A), but public policy as well.

The one-year statute of limitations is fair and in accord with good public policy. While there is no limitation on requests for mandamus, a one-year limitation on the forfeiture provision would eliminate the countless plaintiffs, like Rhodes here, who are suing public entities by using a “shotgun approach” of sending public record requests for ancient records they know have been disposed of, playing the odds that at least one of the municipalities disposed of said records prior to approving a record retention schedule, essentially turning Ohio Public Records Law into what the plaintiffs perceive as a bottomless bank of taxpayer funds for their limitless taking. Certainly, such a result was not the intention of the Generally Assembly in passing Public Records legislation, nor can it be said to comport with public policy, as such a construction of Ohio’s Public Records law would condemn political subdivisions, large and small, across the state of Ohio to financial ruin, simply for failing approve a record retention schedule.

This Court should strictly construe R.C. 2305.11(A) and find that Rhodes could not be aggrieved because his forfeiture action is untimely.

**B. The fifth district committed reversible error because the jury properly determined that Rhodes was not aggrieved and any appeal of a summary judgment ruling was moot.**

Procedurally, the fifth district erred when it reversed the trial court's denial of summary judgment to Rhodes on the issue of liability. The fifth district exclusively addressed whether the trial court erred in denying summary judgment to Rhodes on the issue of liability. (Op. at ¶14, App. 7.) That is, did the record demonstrate as a matter of law that Rhodes was aggrieved?

This Court has expressly held that, "any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615 at syllabus.

The jury determined Rhodes was not aggrieved. Rhodes' assignment of error in the fifth district was moot or otherwise harmless. In *Whittington*, the Court reasoned even if there was an error at the summary judgment stage, the greater injustice would be to the party deprived of the jury verdict because "[o]therwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser despite the victor having the greater weight of evidence." *Id.* at 157. The Court further explained that "if a motion for summary judgment is improperly denied the error is not reversible for the result becomes merged in the subsequent trial." *Id.* at 157 citing *Home Indemn. Co. v. Reynolds & Co.* (1962), 38 Ill.App.2d 187. The Court concluded that "even if an examination of the affidavits, counter-affidavits, deposition and exhibits were to lead to the conclusion that

either one or both of [the summary judgment] motions should have been granted it would avail nothing, for the error cannot be reviewed.” *Id.*

The fifth district erred because Rhodes’ assignment of error challenged the denial of summary judgment after a jury trial on the same issue. The trial court’s order denying summary judgment merged with the jury’s ultimate verdict. Rhodes’ appeal of that order was moot. Consequently, this Court could reverse on that procedural ground.

#### IV. CONCLUSION

This Court should reverse the fifth district court of appeals and re-instate the jury’s verdict in favor of the City of New Philadelphia.

Respectfully submitted,

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

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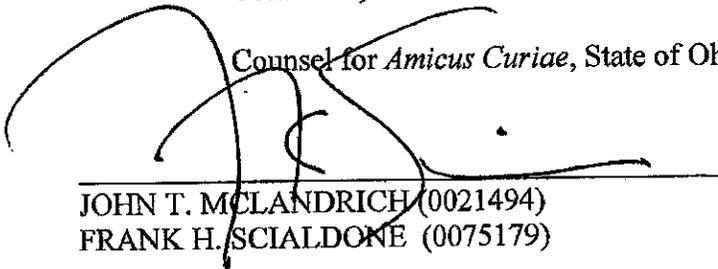
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**APPENDIX**

Notice of Appeal to the Ohio Supreme Court  
(June 1, 2010) .....Apx. 1

Judgment Entry of the Fifth District Court of Appeals  
(April 15, 2010) .....Apx. 3

Opinion of the Fifth District Court of Appeals  
(April 15, 2010) .....Apx. 4

Judgment Entry of the Tuscarawas County Common Pleas Court,  
denying summary judgment, dated September 26, 2008 .....Apx. 17

Judgment Entry of the Tuscarawas County Common Pleas Court,  
entering judgment on the jury verdict, dated February 5, 2009 .....Apx. 31

Eighth Amendment to the United States Constitution .....Apx. 33

Section 9, Article I, Ohio Constitution .....Apx. 34

Ohio R.C. 149.351 .....Apx. 35

IN THE SUPREME COURT OF OHIO  
CASE NO.

**10-0963**

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

**NOTICE OF APPEAL OF CITY OF NEW PHILADELPHIA**

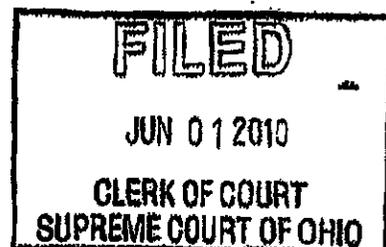
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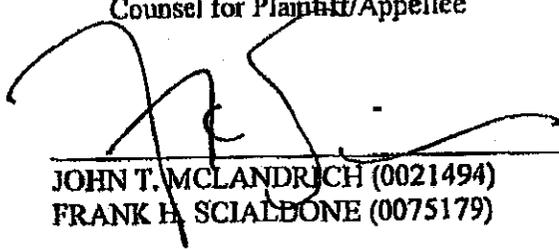
A copy of the foregoing Notice of Appeal was served June 1, 2010 by depositing same in first-class United States mail, postage prepaid, to the following:

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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

APR 15 2010

ROCKNE W. CLARKE  
Clerk of Courts

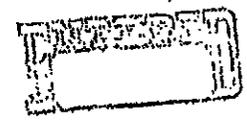
TIMOTHY T. RHODES  
Plaintiff-Appellant

-vs-

THE CITY OF NEW PHILADELPHIA  
Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2009AP020013



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.

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JUDGES

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

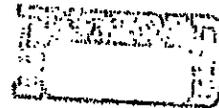
JUDGMENT:

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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Cleveland, OH 44139

*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, ¶25:

{¶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.

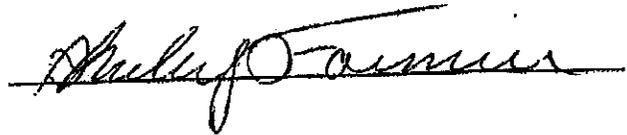
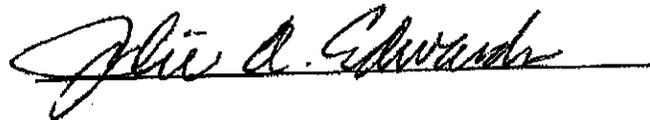
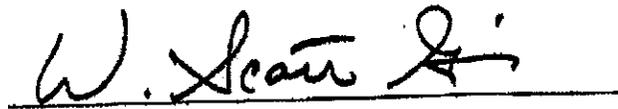
{¶59} This matter is hereby remanded to the trial court for a jury trial on the factual issue of how many records were destroyed per our definition in Assignment of Error I.

{¶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 Phillip Farmer in cursive script, written over a horizontal line.Handwritten signature of Phillip D. 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

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COURT OF COMMON PLEAS  
TUSCARAWAS COUNTY OHIO

2008 SEP 26 A 10:13

ROCKNE W. CLARKE  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
TUSCARAWAS COUNTY, OHIO  
GENERAL TRIAL DIVISION

**TIMOTHY T. RHODES,**

Plaintiff,

vs.

**THE CITY OF  
NEW PHILADELPHIA, et al.,**

Defendants.

Case Number: 2007 CV 10 0806

Judge Elizabeth Lehigh Thomakos

**JUDGMENT ENTRY**

This matter came before the Court on its non-oral docket for consideration of the following motions, listed with identifiable responsive arguments below:

<b>March 25, 2008</b>	<b>Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. 149.351</b>
04-11-2008	Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351.
04-23-2008	Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351.
<b>April 4, 2008</b>	<b>Defendants' Motion for an Enlargement of Time</b>

**in Which to Respond to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351**

- 04-07-2008 Plaintiff's Memorandum in Opposition (sic) to Defendants' Motion for an Enlargement of Time in Which to Respond to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. 149.351
- April 11, 2008** **Defendants' Rule 56(F) Motion for Additional Time in Which to Conduct Discovery Before Responding to Plaintiff's Motion for Partial Summary Judgment**
- August 22, 2008** **Plaintiff's Combined Motion for Summary Judgment**
- 09-05-2008 Defendants' Response in Opposition to Plaintiffs' Combined Motion for Summary Judgment
- 09-08-2008 Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Combined Motion for Summary Judgment
- August 25, 2008** **Defendant City of New Philadelphia's Motion for Summary Judgment**
- 09-12-2008 Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment

The Court has completed a thorough review of the Motions, the relevant law and the Court file.

**Defendants' Requests for Additional Time**

Defendants' Motion for an Enlargement of Time in Which to Respond to Plaintiff's Motion for Partial Summary Judgment requested an extension to respond until 10 business days after they received Plaintiff's answers and responses to Defendants' first set of discovery requests. Plaintiff objects to Defendants' request for additional time to respond.

Defendants' Rule 56(F) Motion for Additional Time in Which to Conduct Discovery

Before Responding to Plaintiff's Motion for Partial Summary Judgment requested that the Court allow Defendants additional time in which to complete discovery and depose Plaintiff.

The Court FINDS that the Notice of Service of Plaintiff's Responses to Defendants' Interrogatories and Requests for Production of Documents Propounded to Plaintiff Timothy T. Rhodes was filed on April 7, 2008.

The Court FINDS that the Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351 was filed on April 11, 2008.

The Court FINDS that the Discovery Cut Off date was July 23, 2008.

The Court FINDS that the Dispositive Motion deadline was on August 25, 2008.

The Court FINDS that Defendants filed a Notice of Deposition of Plaintiff Timothy T. Rhodes on July 11, 2008, which stated that Defendants would be taking Plaintiff's Deposition on July 14, 2008.

The Court FINDS that Defendants' Motion for an Enlargement of Time in Which to Respond to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351 is moot.

The Court FINDS that Defendants' Rule 56(F) Motion for Additional Time in Which to Conduct Discovery Before Responding to Plaintiff's Motion for Partial Summary Judgment is moot.

#### Motions for Summary Judgment

Under Civ. R. 56(C), a summary judgment may be granted if (1) no genuine issue exists as to any material fact; (2) the moving party is entitled to judgment as a matter of

law; and (3) "it appears that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the Motion for Summary Judgment is made, that conclusion is adverse to the non-moving party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. Likewise, Civ. R. 56(C) provides that summary judgment shall not be rendered if it appears from the evidence that there is a genuine issue of fact that remains to be litigated.

The moving party has the burden of showing that no genuine issue exists as to any material fact. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

The moving party requesting a summary judgment must inform the trial court of the basis for its motion and identify portions of the record demonstrating the lack of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party satisfies this initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts that show that there is a genuine issue for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164. If the nonmoving party does not respond in this way, summary judgment, if appropriate, shall be entered against the nonmoving party. *Vahila*, 77 Ohio St.3d at 429, 674 N.E.2d at 1171.

The Court may not weigh the evidence, assess the credibility of the parties or choose among reasonable inferences when determining whether to grant summary judgment. *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 121, 413 N.E.2d 1187. The Court must construe the evidence in a light most favorable to the nonmoving party and resolve any doubts in favor of the nonmoving party. See *Morris v. Ohio Casualty Ins. Co.*

(1988), 35 Ohio St.3d 45, 47, 517 N.E.2d 904.

Plaintiff's Complaint brings a Cause of Action for Civil Forfeiture pursuant to R.C. §149.351(B)(2). Plaintiff avers that the New Philadelphia Police Department recorded over the Police Department's daily reel-to-reel tapes (hereafter "tapes") that documented the day to day operations of the police department without first notifying the Ohio Historical Society or Ohio Auditor of State in violation of R.C. §149.39. Plaintiff avers that Defendants also violated R.C. §149.39 by failing to activate their records commission, failing to provide rules for retention and disposition of municipal records, and failing to review municipal records prior to their destruction. Plaintiff avers that by illegally disposing of or destroying the data contained on the daily tapes, Defendants are liable for a civil forfeiture of one thousand dollars for each tape's data.

Plaintiff requests summary judgment in his favor. Plaintiff avers that no genuine issues of material fact exist concerning (1) Defendants' liability for civil forfeiture pursuant to R.C. §149.351 or (2) the number of public records Defendants illegally destroyed, and he is entitled to judgment as a matter of law.

Plaintiff avers that Defendants are liable in forfeiture in the amount of one thousand dollars for each violation, the number of which is determined by each record they wrongfully destroyed. Plaintiff avers that Defendants illegally destroyed 10,238 records at the rate of two records a day from March 14, 1989 until March 19, 2003. Plaintiff avers that the discovery rule tolls the statute of limitations until the requestor discovered or should have discovered that the records had been destroyed.

Defendants request summary judgment on Plaintiff's Complaint and aver that Plaintiff's Motions for Summary Judgment should be denied. Defendants aver that Plaintiff

has failed to provide any evidence that he is an aggrieved party under R.C. §149.351(B)(2) based upon Defendants' recycling of the tapes in question. Defendant avers that Plaintiff should not be entitled to the civil forfeiture as a matter of public policy. Defendants aver that even if they are liable in this case, liability extends only to tapes disposed of from 1989 to 1995. Defendants aver that no tapes existed prior to 1989, and even if tapes had existed prior to 1989, imposing civil forfeiture liability for violations prior to 1987, when the relevant provision came into effect, would be an unconstitutional retroactive application of the law. Defendants aver that Plaintiff would not be entitled to collect a civil forfeiture for tapes created after 1995 because Plaintiff did not make a public records request for those tapes or allege to be aggrieved by Defendants' recycling of those tapes. Defendants aver that Plaintiff is also not entitled to collect a civil forfeiture for any backup tapes because both sets of tapes contained identical information, and the back up tapes were not organized in a way that added value to the information.

Defendants further aver that Plaintiff's action is barred by the one-year statute of limitations for civil forfeiture actions because all of the tapes were recycled more than one year prior to Plaintiff filing this lawsuit. Defendants aver that even if liability exists for Plaintiff's claim, liability only attaches to Defendant New Philadelphia because Defendants Mayor Brodzinski and Chief Urban had no statutory duty to maintain the tapes in question, and Plaintiff's claims against them are redundant because they are actually claims against New Philadelphia.

R.C. §149.351 provides that:

“(A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules

adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records programs established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

(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:

(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;

(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."

R.C. §149.39 provides that each municipal corporation have a records commission to provide rules for retention and disposal of its records and that records may be disposed of pursuant to that procedure if the commission complies with certain requirements.

R.C. §149.011(G) provides that "Records' includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

"[R]ecord,' 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." *Kish v. Akron*, 109 Ohio St.3d 162, 846 N.E.2d 811, 2006-Ohio-1244, ¶27. A "violation' under 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.'" *Kish*, 109 Ohio St.3d 162, 846 N.E.2d 811, 2006-Ohio-1244, ¶142.

If the information contained in public records is also kept in another format that adds value to the information contained in those records, then a new set of enhanced public records is created that must be disclosed to the public. *State ex rel. Margolius v. Cleveland* (1992), 62 Ohio St.3d 456, 460, 584 N.E.2d 665.

R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Black's Law Dictionary defines "aggrieved" as "(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Black's Law Dictionary (8 Ed. 2004) 73.

Under R.C. §149.351, "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. Cincinnati Enquirer v. Allen*, Hamilton App. No. C-040838, 2005-Ohio-4856, ¶15, quoting *State ex rel. Sensel v. Leone* (Feb. 9, 1998), 12<sup>th</sup> Dist. No. CA97-05-102, 1998 WL 54392, reversed on other grounds (1999), 85 Ohio St.3d 152, 707 N.E.2d 496. In both *State ex rel. Cincinnati Enquirer* and *State ex rel. Sensel*, the First and Twelfth

District Courts of Appeals, respectively, found that the person seeking records was not "aggrieved" pursuant to R.C. 149.351 where they were able to obtain the records from another source. *See State ex rel. Cincinnati Enquirer*, Hamilton App. No. C-040838, 2005-Ohio-4856; *See also State ex rel. Sensel*, 12<sup>th</sup> Dist. No. CA97-05-102, 1998 WL 54392.

"[T]he right to access conferred by R.C. 149.43(B) is a substantive right." *State ex rel. Beacon Journal Publishing Co. v. Waters* (1993), 67 Ohio St.3d 321, 617 N.E.2d 1110. R.C. §149.43(B)(1) provides that all public records responsive to a request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours, and, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time.

A person does not have to establish a proper purpose or any purpose for seeking public records. *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 610 N.E.2d 997; *Gilbert v. Summit County*, 104 Ohio St.3d 660, 821 N.E.2d 564, 2004-Ohio-7109, ¶10; *See also* R.C. §149.43(B)(4)&(5).

The statute of limitations for a civil suit brought pursuant to R.C. §149.351 is found in R.C. §2305.11(A), which provides that "an action upon a statute for penalty or forfeiture shall be commenced within one year after the cause of action accrued." *State ex rel. Hunter v. City of Alliance*, Stark App. No. 2001CA00101, 2002-Ohio-1130, \*2; R.C. §2305.11(A). The statute of limitations in an action brought under R.C. §149.351 is not triggered until after the party seeking the records makes a request for the public records and is notified that they will not be getting the records because they have been destroyed. *See State ex rel. Hunter*, Stark App. No. 2001CA00101, 2002-Ohio-1130, \*3.

A suit brought against an individual "in his official capacity" is essentially a suit directly against the local government unit and is to be treated as a suit against the entity. *Leach v. Shelby County Sheriff* (6th Cir. 1989), 891 F.2d 1241, 1245.

Statutes should be construed to avoid unreasonable or absurd results. *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St.3d 540, 543, 668 N.E.2d 903, citing R.C. 1.47(C) and *State ex rel. Brown v. Milton-Union Exempted Village Bd. of Edn.* (1988), 40 Ohio St.3d 21, 27, 531 N.E.2d 1297, 1303.

R.C. 1.48 provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48; *State v. Williams*, 103 Ohio St.3d 112, 814 N.E.2d 818, 2004-Ohio-4747, ¶¶7-9.

Civ. R. 56(C) provides, in pertinent part, that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed in the action*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule." (*Emphasis added.*)

If a deposition is never actually filed, it is not proper summary judgment evidence. *Cunningham v. Steubenville Orthopedics & Sports Medicine, Inc.* (2008), 175 Ohio App.3d 627, 634, 888 N.E.2d 499; *See Moore v. Tall Timbers Banquet and Conference Center*, Licking App. No. 05CA125, 2006-Ohio-3249, ¶16.

Civ. R. 32(A) provides, in pertinent part, that "[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing."

The Court **FINDS** that Defendants' Exhibit B consists of portions of Plaintiff's deposition, which is not filed in this action.

The Court **FINDS** that it may not properly consider Plaintiff's Deposition in reviewing Defendants' Motion for Summary Judgment because the complete Deposition was not filed in this case.

The Court **FINDS** that Plaintiff was notified by a letter dated July 9, 2007 from Chief of Police Jeff Urban that the requested records either never existed or were no longer in existence.

The Court **FINDS** that Plaintiff's Verified Complaint was filed on October 23, 2007.

The Court **FINDS** that Plaintiff's Verified Complaint was filed within the applicable one year statute of limitations.

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:

- Whether Plaintiff is a person who was aggrieved by a violation of R.C. §149.351(A),
- Whether the back-up tapes constituted separate records for purposes of R.C. §149.351, and
- How many violations Defendants committed, if any.

The Court **FINDS** that the evidence shows that no tapes were created prior to 1989.

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.

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.

The Court **FINDS** that Plaintiff's claims against Mayor Brodzinski and Chief Urban are duplicative of his claims against Defendant City of New Philadelphia.

The Court **FINDS**, therefore, that the issues for the jury should be limited to determining whether Plaintiff is entitled to recover a forfeiture from Defendant City of New Philadelphia only.

The Court **FINDS** that Plaintiff's **Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. 149.351** is not well taken and should be **denied**.

The Court **FINDS** that Plaintiff's **Combined Motion for Summary Judgment** is not well taken and should be **denied**.

The Court **FINDS** that Defendant City of New Philadelphia's **Motion for Summary Judgment** should be **granted, in part**, as it pertains to claims against Mayor Brodzinski and Chief Urban and limiting any recovery to a forfeiture for tapes erased between 1989 and 1995 only, and should be **denied, in part**, on all other grounds.

#### **DECISION**

It is **ORDERED** that Defendants' **Motion for an Enlargement of Time in Which to Respond to Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. §149.351** is moot.

It is ORDERED that Defendants' Rule 56(F) Motion for Additional Time in Which to Conduct Discovery Before Responding to Plaintiff's Motion for Partial Summary Judgment is moot.

It is ORDERED that Plaintiff's Motion for Partial Summary Judgment Concerning Defendants' Liability Under R.C. 149.351 is denied.

It is ORDERED that Plaintiff's Combined Motion for Summary Judgment is denied.

It is ORDERED that Defendant City of New Philadelphia's Motion for Summary Judgment is granted, in part, as it pertains to claims against Mayor Brodzinski and Chief Urban and limiting any recovery to a forfeiture for tapes erased between 1989 and 1995 only, and is denied, in part, on all other grounds.

It is ORDERED, therefore, that the issues for determination by 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.

It is further ORDERED that the issues for the jury are limited to determining whether Plaintiff is entitled to recover a forfeiture from Defendant City of New Philadelphia only.

It is ORDERED that the parties appear for a scheduled Mediation Conference on September 29, 2008 at 2:00 p.m. Failure of legal counsel and parties to attend the Mediation Conference will result in sanctions being imposed by the Court.

It is ORDERED that this lawsuit will proceed to trial with a primary Jury Trial date of January 29, 2009 at 9:00 a.m., unless settlement and resolution is accomplished at the Mediation Conference.

**IT IS SO ORDERED.**



Judge Elizabeth Lehigh Thomakos

Dated: September 25, 2008

cc: William Walker, Esq.  
John T. McLandrich, Esq. & Roland J. De Monte, Esq.  
Michael C. Johnson, Esq.  
Court Administrator  
Mediation Department

FILED  
COURT OF COMMON PLEAS  
TUSCARAWAS COUNTY OHIO

2009 FEB -5 P 4: 21

ROCKNE W. CLARKE  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
TUSCARAWAS COUNTY, OHIO  
GENERAL TRIAL DIVISION

TIMOTHY RHODES

Plaintiff,

vs.

THE CITY OF NEW PHILADELPHIA,

et al.

Defendants.

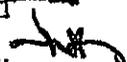
Case Number: 2007 CV 10 0806

Judge Elizabeth Lehigh Thomakos

JUDGMENT ENTRY

This matter came on for Jury Trial on February 5, 2009. The Plaintiff, Timothy Rhodes, was present in Court represented by Attorneys William E. Walker, Jr., and Craig T. Conley. The Defendant, The City of New Philadelphia was present in Court by its representative, Chief Jeff Urban of the New Philadelphia Police Department, and represented by Attorney John T. McLandrich.

The case was tried to a Jury of eight persons who were duly impaneled and sworn. The Court notes that the alternate juror was needed to fill a seat on the jury.

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Counsel submitted written stipulations of certain facts in this case, which were presented to the jury along with the Court's instructions.

The issues placed before the members of the Jury related to the Plaintiff's claim for recovery, pursuant to Ohio Revised Code § 149.351.

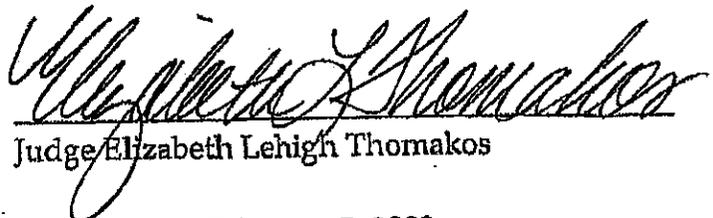
On February 5, 2009, the Jury responded unanimously to the Interrogatory No. 1 and the corresponding form of Verdict for Defendant, rendering a verdict for the Defendant.

It is therefore **ORDERED** that judgment be and is hereby rendered in favor of the Defendant, the City of New Philadelphia.

It is further **ORDERED** that the Plaintiff, Timothy T. Rhodes, shall pay the court costs of this action.

The Clerk of Courts shall close this file and remove it from the Court's pending docket.

IT IS SO ORDERED.

  
Judge Elizabeth Lehigh Thomakos

Dated: February 5, 2009

cc: Craig T. Conley, Esq.  
William E. Walker, Esq.  
John T. McLandrich, Esq.  
Court Administrator  
Mediation

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U.S.C.A. Const. Amend. VIII

Page 1

**C**

United States Code Annotated Currentness  
Constitution of the United States

▣ Annotated

▣ Amendment VIII. Excessive Bail, Fines, Punishments

→ Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

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OH Const. Art. I, § 9

Page 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness  
 Constitution of the State of Ohio (Refs & Annos)  
 Article I. Bill of Rights (Refs & Annos)  
 → O Const I Sec. 9 Bail; cruel and unusual punishments

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

CREDIT(S)

(1997 HJR 5, am. eff. 1-1-98; 1851 constitutional convention, adopted eff. 9-1-1851)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 11/17/10 and filed with the Secretary of State by 11/17/10.

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R.C. § 149.351

Page 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 149. Documents, Reports, and Records (Refs &amp; Annos)

State Records

→ 149.351 Disposal and transfer of records in accordance with law; action for injunctive relief for forfeiture

(A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records programs established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

(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:

(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;

(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.

CREDIT(S)

(1992 S 351, eff. 7-1-92; 1987 S 275; 1985 H 238; 131 v H 631)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 11/17/10 and filed with the Secretary of State by 11/17/10.

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