

ORIGINAL

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES : CASE NO. 2010-0963
Appellee : On Appeal from the Fifth
District Court of Appeals
vs. : Tuscarawas County, Ohio
THE CITY OF NEW PHILADELPHIA : Court of Appeals
Appellant : Case No. 2009 AP 02 0013

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I. INTRODUCTION AND STATEMENT OF FACTS

The seminal issue now before this Court involves the definition of "aggrieved" as used in O.R.C. 149.351(B), which Code Subsection provides that:

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 action allegedly was violated or is threatened to be violated: (emphasis supplied)

(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.

Here, there is no question that Appellant City of New Philadelphia, in contravention of O.R.C. 149.351(A), systematically engaged for decades in the unlawful destruction of a multitude of "records", as that term is defined in O.R.C. 149.011(G).

There also is no question here that Appellee's O.R.C. 149.43(B) request for those records was denied because all of same had been unlawfully destroyed by Appellant.

In fact, at trial, Appellant's Chief of Police (and Appellant's custodian of the subject records) acknowledged his awareness of Appellee's request for the subject records and testified that none of those records were available to Appellant

because all had been destroyed, with the data thereon lost forever.
(Trial transcript ["Tr."] at pages 44-49; Supp. pages 3-8.)

Importantly, that records custodian also testified that the destruction of those records was not done in compliance with law.
(Tr. at page 49; Supp. page 8.)

Similarly, Appellant's Law Director¹ (a statutory member of Appellant's O.R.C. 149.39 Records Commission) testified that, prior to commencement of the herein underlying litigation, Appellant's Records Commission had been "dormant", had met only once (at a bar across the street from the Courthouse), had never provided statutorily required rules for retention and disposal of municipal records and had never received a request to destroy the subject records. (Tr. at pages 77-88; Supp. pages 13-24.)

Indeed, Appellant's Law Director, while acknowledging his awareness of the statutory duty to promulgate such rules, testified that doing so ". . . was not a high priority within the city . . . [because] there were other matters that had higher priorities . . .". (Tr. at page 85; Supp. page 21.)

In short, Appellant has, by and through its own trial testimony, demonstrated gross indifference to compliance with law and admitted the unlawful destruction of the entirety of the municipal records requested by Appellee, who was thereby denied his O.R.C. 149.43(B) right to inspect and/or to obtain copies of same.

¹Appellant's Law Director had held that elected position continuously since January 1, 1988. (Tr. at page 75; Supp. page 12.)

Notwithstanding those irrefutable facts of record, Appellant argues that Appellee was not a person "aggrieved" under O.R.C. 149.351(B) because he did not have a "proper" reason to request the subject records in the first place.

The Fifth District Court of Appeals, as explained below, appropriately rejected that "situationally convenient" argument.

II. STATEMENT OF THE CASE

By and through his October 23, 2007 Verified Complaint, Appellee, based upon the aforesaid irrefutable facts of record, presented a claim for relief under O.R.C. 149.351(B)(2).

By and through its January 14, 2008 Answer, Appellant admitted most of the material allegations in that Complaint.

Following discovery, Appellee moved for summary judgment, which was denied by the Trial Court on September 26, 2008, after which the action below was tried before a jury on February 5, 2009, with the jury finding that Plaintiff/Appellee had not been "aggrieved" and entering a verdict for Defendant/Appellant.

Appellee timely appealed to the Fifth District Court of Appeals, which reversed and remanded on April 15, 2010, finding that Appellant was an "aggrieved" person under O.R.C. 149.351(B)(2).

In that regard, contrary to Appellant's assertion, that Court did not hold that every person who requests destroyed records is "**automatically** entitled to a [O.R.C. 149.351(B)(2) civil] forfei-

ture". (emphasis supplied)

Instead, the Fifth District appropriately held (at Opinion ¶ 39) that a member of the public "becomes aggrieved because he/she cannot exercise a statutorily defined right."

Here, had the subject municipal records been lawfully destroyed before Appellant requested same, he would not have had that "statutorily defined right" to exercise in the first place and therefore would not have been "aggrieved"; i.e., Appellee would not have had O.R.C. 149.351(B) standing to have commenced his civil forfeiture action in the first place.

Appellant, faced with a (not-yet-determined) civil forfeiture penalty for its unlawful destruction of records, has appealed to this Court, seeking a more financially "friendly" definition of "aggrieved" than that made by the Fifth District.

III. ARGUMENT

Appellee's Proposition of Law No. I:

A person requesting records pursuant to O.R.C. 149.43 becomes "aggrieved" under O.R.C. 149.351(B) when a public office, as the result of an unlawful destruction or disposition of a record, denies him or her access to same.

A Citizen's Purpose In Requesting Records Is Not Relevant To Enforcement Of His Or Her Statutory Right Of Access To Such Records

In *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 1993-Ohio-188, this Court, in construing O.R.C. 149.43, held that "'Any person' means any person, regardless of purpose. [citations omitted] Therefore, a person seeking public records is

not required to establish a proper purpose or any purpose . . .".

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

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

For instance, in *Fant, supra*, this Court held (in its Syllabus) that "A person may inspect and copy a 'public record', as defined in R.C. 149.43(A), irrespective of his or her purpose for doing so"; in *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn.* (2002), 97 Ohio St.3d 58, 2002-Ohio-531, this Court held (at ¶ 45) that a requesting party's purpose behind making a public records request to "inspect and copy public records is irrelevant"; in *Gilbert v. Summit County* (2004), 104 Ohio St.3d 660, 2004-Ohio-7108, this Court held (at ¶ 10) that ". . . as a matter of policy if the intent to use public records in

litigation were relevant to their availability, the burden on government entities to ensure that requested records were not in any way connected to ongoing or potential litigation would be exceedingly onerous"; and in *Morgan v. City of New Lexington* (2006), 112 Ohio St.3d 33, 2006-Ohio-6365, this Court held (at ¶ 54) that "There is no condition based on the moral quality of the person requesting the [public] record. Nor is the purpose of the requester relevant to the propriety of the request".

In fact, Appellant's records custodian and Law Director testified at trial that a person requesting records does not have to give a reason and that access to the requested records could not be denied because of a "suspicious motive". (Tr. at pages 51, 53, 54 and 88; Supp. pages 9, 10, 11 and 24.)

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

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

Appellant and *Amicae* would turn that rule on its head and give

those trustees of the people's records the unbridled discretion to determine who is and who is not "entitled" to those records.

In short, Appellant and *Amicae* now seek to have this Court "attach some strings" to the statutory term "aggrieved" through judicial "insertion" of additional language into O.R.C. 149.351(B).

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

In sum, Appellant and *Amicae*, while ostensibly "touting" legislative intent, are herein essentially seeking, for financial purposes, a "redefinition" or "adjustment" of the O.R.C. 149.351(B) term "aggrieved" to dissuade, if not outright prohibit, Appellee and other similarly situated citizens (all of whom have been empowered by the General Assembly to act as our great State's public records "police") from pursuing civil forfeiture actions against governmental entities which have violated Ohio's Public Records Act.²

In other words, Appellant and *Amicae* would have this Court condition assessment of a civil forfeiture penalty under O.R.C. 149.351(B)(2) on some undefined extraneous "test", leaving an

²This Court has already rejected Appellant's and *Amicae's* "fiscal peril" argument as irrelevant to judicial construction of Ohio's Public Records Act. (See *Kish v. City of Akron* (2006), 109 Ohio St.3d 162, 2006-Ohio-1244 at ¶ 43.)

offending governmental entity, contrary to the plain intent of the General Assembly, with no reason or incentive to comply with Ohio's Public Records Act.

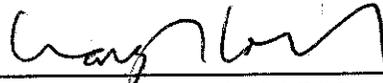
IV. CONCLUSION

For the reasons set forth hereinabove, it is respectfully suggested that this Court should affirm the Appellate Court decision now *sub judice* and find this Appellee to be "aggrieved" under O.R.C. 149.351(B).

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was served, by regular U.S. Mail this 30th day of December, 2010, upon all counsel herein at their respective addresses of record.



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