

ORIGINAL

IN THE SUPREME COURT OF OHIO

TIMOTHY T. RHODES

Plaintiff/Appellee

vs.

THE CITY OF NEW PHILADELPHIA

Defendant/Appellant.

Case No. 10-0963

On Appeal from the Fifth District
Court of Appeals for Tuscarawas
County, Ohio.

Court of Appeals Case No. 2009-
AP-02-0013

**MERIT BRIEF OF *AMICUS CURIAE* EDWIN DAVILA
IN SUPPORT OF APPELLEE**

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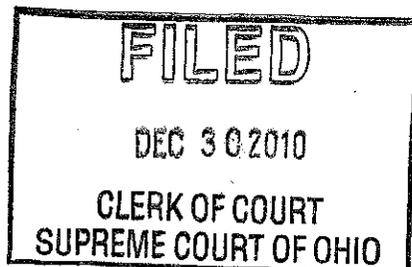
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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Edwin Davila (“Davila”) is an individual and a citizen of Ohio who currently is involved in litigation wherein he is seeking access to municipal records. Davila is loosely associated with other individuals who gathered to contest the imposition of a county sales tax in Stark County. The sales tax was being implemented to fund a county-wide 911 emergency dispatch system.¹

Davila and his associates did not believe the dispatch system was necessary. And, to support their argument they constructed and implemented a random sampling survey to test their hypothesis. To conduct this survey, Davila and his associates went to various communities throughout the state that were similar to the communities in Stark County to study if and why they had “upgraded and re-equipped” to newer systems.

While conducting this survey Davila ran into bureaucratic resistance. In some cases, city officials would not respond to the public records requests and in other cases officials destroyed records. Davila suspects that some of that destruction may have been done to prevent him from gaining access to records.

Thus, Davila’s interest in the case at bar is to point out that some public offices may destroy records rather than permit access to them – especially when unfavorable information is contained therein. Davila fears that if different standards apply to access and destruction, misguided officials may destroy records to prevent their release. In that situation, a requester could be left without a remedy to enforce his right of access because officials may claim that he

¹ Amici has cited to some of these cases but misrepresented their character. These cases all seek mandamus relief as their “State ex rel.” denomination indicates. Although, Davila did plead unlawful destruction in the alternative, as of yet there has been no independent findings that any records were unlawfully destroyed.

had no right of access to be protected. Hence, mandamus could not be used to compel production of a record that does not exist, and a court could not conduct an *in camera* review. Therefore, unlawful destruction might be encouraged rather than discouraged because there would be no means to enforce the Public Records Act thus making the record retention provisions moot.

II. INTRODUCTION

This case involves the public records special statutory proceeding for forfeiture as set forth in R.C. 149.351(B)(2). Under that statute, “[a]ny person who is aggrieved” has standing to commence an action for injunctive relief and/or forfeiture. The primary issue presented here, is how and when a person becomes aggrieved and thus has standing to commence the special statutory proceeding for forfeiture pursuant to R.C. 149.351(B)(2).

R.C. 149.351 is part of what is commonly known as the “sunshine laws”. The purpose of these laws is to let the sunshine in to expose government actions to the light of day. In other words, Ohio’s sunshine laws promote good faith and foster citizen trust in our government by providing for transparency and accountability. It has been said, that public records are one of the few portals through which the people can watch their government. This appeal concerns the sole statutory provision that keeps that portal open by preventing and deterring the unlawful destruction of our records.

R.C. 149.351 protects our records by providing injunctive relief to prevent threatened destruction; and forfeiture to deter future destruction. Initially, only the Attorney General could bring public record forfeiture actions to deter unlawful destruction. Under that statutory scheme the money forfeited flowed to the state. Apparently, that statutory framework proved ineffective, because the General Assembly revisited the issue time and time again for over

twenty years. ² During that time, the legislature weighed and balanced the competing interests involved and promulgated several versions of the “records retention law” – before reaching a consensus on the current statutory framework.³

Now, the Attorney General no longer has authority to protect our records by seeking injunctive relief and/or forfeiture.⁴ Instead, the General Assembly empowered the people to act as the “*public records police*”. And, to incentivize the people to undertake this arduous policing task, the legislature decided that the forfeiture should no longer flow to the state, but be awarded to the person who commenced the action. In making this change, Ohio seems to recognize what other governments have long understood – that benefits to society often spring from an individual’s self-interest.

Over two hundred years ago Adam Smith observed that it is the self-interest of individuals that yield the societal benefits in our economic system: “It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard for their own interest.” THE WEALTH OF NATIONS (1776) 1.2, Adam Smith.

More recently, George Bernard Shaw also commented on the principal of employing the self-interest of individuals to promote a public service when he discussed the economic principle driving capitalism. Shaw noted that: “Capitalism . . . was adopted as an economic principle on the express ground that it provides selfish motives for doing good, and that human beings will do nothing except for selfish motives.” THE INTELLIGENT WOMAN’S GUIDE TO SOCIALISM, CAPITALISM, AND FASCISM (1928) 66, George Bernard Shaw.

² ~~Rhodes~~ ^{Davita}, after diligently searching a number of databases, was not able to find a single case wherein the Attorney General brought an action to enforce a requester’s right of access to public records.

³ Earlier versions of the forfeiture statute (R.C. 149.351) are attached in the appendix.

⁴ However, the Attorney General now does have a statutory duty to provide training to state and local public officials pursuant to R.C. 149.43.

In the end, the General Assembly after almost twenty years of trial and error has chosen to not only foster, but to fuel citizen self-interest in policing their own government. Certainly, the legislature could have opted to create a whole level of bureaucracy to enforce the Public Records Act. It goes without saying; such a state-wide enforcement effort would require enormous resources on a continuous basis. However, the legislature has found an ingenious way to avoid burdening the taxpayer – make the spoliators fund the enforcement effort. In effect, the legislature has shifted the costs of staffing and infrastructure from the taxpayer to the spoliator who – through forfeiture – fuels the self-interest of citizens to act as the “public records police”.

At the outset, it must be noted that R.C. 149.351 stands related to other subsections in R.C. Chapter 149 and is *in pari materia* with them. Therefore, these statutes must be read and construed together. *State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 134 Ohio St. 150 at 158 (1938).

The term “aggrieved” is also used within the Act for purposes of mandamus.⁵ In that context, this Court has found that a person is “aggrieved” when they have been denied their statutory right of access by a public office’s failure to make a requested public record available for inspection.⁶ In fact, R.C. 149.43(B)(4) expressly states that “no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester’s identity or the intended use of the requested public record.”

⁵ R.C. 149.43(C)(1).

⁶ *Morgan v. City of Lexington* (2006), 112 Ohio St.3d 33; 2006-Ohio-6365.

Hence, in examining the term “aggrieved” this Court may consider sections upon the same or similar subjects in order to determine the legislative intent. In that regard, R.C. 1.49 (D) provides in pertinent part:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters . . . the common law or former statutory provisions, including laws upon the same or similar subjects

Thus, in considering the term “aggrieved” this Court should read and construe the statutes within the Public Records Act together to effectuate the legislative intent of “letting the sunshine in”.

III. STATEMENT OF THE CASE

Plaintiff/Appellee herein (“Rhodes”) filed his Verified Complaint below on October 23, 2007 in which he asserted one claim for forfeiture pursuant to R.C. 149.351(B)(2). In short, Rhodes alleged that Defendant/Appellant herein (“the City”) had unlawfully destroyed the data that had been stored on daily “911-type” audio tapes that he had requested pursuant to Ohio’s Public Records Act.

The City filed its Answer on January 14, 2008. In sum, the City admitted most of the material allegations contained in the Complaint; including admissions that it no longer had the requested records.

On September 26, 2008, the Trial Court denied Rhodes’ March 25, 2008 and August 22, 2008 Motions for Summary Judgment.

The action below was subsequently tried before a jury on February 05, 2009 the result of which was a defense verdict.

Rhodes brought a timely appeal before the Tuscarawas County Fifth District Court of Appeals. On April 15, 2010, that Court Reversed and Remanded the Trial Court's decision. The Fifth District found that the City did not challenge Rhodes' assertion that R.C. 149.351 was violated. [App. Op. page 5.] The Court then framed the sole issue on appeal as to whether or not Rhodes was an "aggrieved" party as defined by statute. [App. Op. ¶24.]

The Fifth District found that an "aggrieved" party is any member of the public who makes a lawful public records request and is denied those records. [App. Op. ¶32.] The Court then observed that the public records law gives access to any member of the "public" regardless of the lack of purpose or "blackness" of motive. [App. Op. ¶38.]⁷ The Court added that as a member of the public, a requester does not have to give a reason for requesting access to records. "Once denied, John Q. Public becomes aggrieved because he/she cannot exercise a statutorily defined right." [App. Op. ¶39.]

The Fifth District after noting that its finding was in accord with a recent Franklin County Court of Appeals decision for the Tenth District then reversed and remanded the Trial Court's judgment.

The City then filed the instant notice of appeal to this Court on June 01, 2010.

⁷ See by analogy, *State ex rel. Fant v. Enright*, 1993-Ohio-188, 66 Ohio St.3d 186 (Ohio 1993) wherein it is stated at page 188:

"Any person' means any person, regardless of purpose. *State ex rel. Clark v. Toledo* (1990), 54 Ohio St.3d 55, 57. See, also, 1990 Ohio Atty. Gen. Ops. No. 90-050, at 2-210. (Therefore, a person seeking public records is not required to establish a proper purpose or any purpose; rather, "[a] governmental body refusing to release records has the burden of proving that the records are excepted from disclosure by R.C. 149.43.") *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79, paragraph two of the syllabus. ("So holding, we harmonize Ohio law with the federal and most state freedom-of-information acts.") See Annotation, Who Has Standing to Seek Access to Agency Information Under Freedom of Information Act (1987), 82 A.L.R. Fed. 248, 259, Section 3; 2 Braverman & Chetwynd, Information Law (1985 and 1990 Supp.) 905, Section 24-3.2."

IV. STATEMENT OF FACTS

A. Rhodes public records request for access was denied because the records no longer existed.

Rhodes wrote to the New Philadelphia Police Department on July 06, 2007 and requested access to certain departmental records. [Tr 26 and Reference Verified Complaint Ex. A.] Police Chief Urban responded in writing and advised Rhodes that the police department no longer had possession of the records Rhodes was seeking. [Tr 44-45 and Reference Verified Complaint Ex. B.]

Rhodes then wrote the Mayor seeking access to meeting minutes from the New Philadelphia Records Commission. Law Director Michael Johnson responded for the mayor and advised Rhodes that the city's record commission "**has been dormant and not active.**" Johnson added that the city could not provide Rhodes with meeting minutes because there was no meetings and hence no minutes.⁸ [Tr 77 and Plaintiff's Ex. 2.]

Johnson's letter of August 10, 2007 was not accurate. Later, during discovery the City provided Rhodes with meeting minutes for one meeting that was held in 1996 at bar across the street from the courthouse. [Tr 77 – 81 and Plaintiff's Exh. 1.]

B. The City unlawfully destroyed the records Rhodes requested.

In short, at trial the City admitted most of the material allegations contained in Rhodes Verified Complaint, including that it no longer had the requested records. [Tr 49.] Law Director Johnson testified that at the time Rhodes made his public records request, the City did not have

⁸ R.C. 149.39 requires city records commissions to "meet at least once every six months".

And, the Open Meetings Act (R.C. 121.22) requires public bodies to make minutes of their meetings. In fact, in *State ex rel. Long v. Cardington*, 92 Ohio St.3d 54, 61 (2001), this Court held that the preparation, filing and maintenance of public body's minutes is mandatory.

a policy for disposing of records. [Tr 87.] And, Johnson testified that the police department did not obtain approval from the City's Record Commission before it destroyed the recordings. [Tr 88 – 89.]

C. The City was deliberately indifferent to the dictates of the Public Records Act because they had more important things to do.

Law Director Johnson testified that he has continuously held the position of Law Director for the City of New Philadelphia since 1988. [Tr 75.] In fact, Director Johnson testified that the City's Record Commission did not meet regularly because it was dormant and inactive prior to Rhodes commencing the instant forfeiture action. [Tr 77.]

Director Johnson testified that he was only aware of one records commission meeting being held. That meeting was held at a bar across the street from the courthouse. [Tr 77-85.] And, the minutes from that meeting reflect that the meeting's purpose was for an informal general discussion concerning organizational ideas. [Plaintiff's Ex. 1.] Director Johnson could not find any minutes to indicate that any other records commission meetings were held until Rhodes filed the instant action. [Tr 84.]

Director Johnson testified that as the law director he was aware that by statute he was a member of the city's record commission. [Tr 84.] And, Director Johnson testified that he also was aware that one of the record commission's statutory duties was to provide rules for the retention and disposal of municipal records. [Tr 84.] Nonetheless, Director Johnson testified that during his nineteen year tenure as law director no such rules were enacted by the city's records commission. [Tr 85.]

When questioned about the City's deliberate indifference concerning the duties imposed upon public officials by the Public Records Act, Director Johnson in essence said that they had

more important things to do. As a matter of fact, Director Johnson, after acknowledging that the City knew it was required to enact rules for municipal record retention and disposal, testified that **“it was not a, high priority within the city . . . there were other matters that had higher priorities”** [Tr 85.]

Incredibly, although Law Director Johnson agreed that it was improper for the police department to destroy its records without following the law and that it was something that should not have been done – Johnson still didn’t think it was unlawful. [Tr 89.] Johnson explained that unlawful meant criminal and since it is not criminal to destroy records in violation of the law, it is not unlawful. [Tr 90.]

IV. ARGUMENT

Plaintiff/Appellee’s Proposition of Law No. 1:

A party is aggrieved and thereby has “standing” to commence an action pursuant to R.C. 149.351 for forfeiture and/or injunctive relief whenever unlawful disposition of a record prevents or threatens to prevent a requester from exercising his or her right of access.

At the threshold of every civil action is the question of standing which asks if a litigant is entitled to have a court determine the merits of his case. *State ex rel. Ralkers, Inc. v. Liquor Control Comm*, 2004-Ohio-6606 at ¶35. This is a question of law that a court must decide. See, *Cleveland Elec. Illuminating Co., v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523.

Before this Court is a dispute concerning when a party becomes aggrieved and thereby is entitled to commence a civil action pursuant to R.C. 149.351(B). Davila argues that Rhodes became aggrieved and therefore was entitled to have a court determine the merits of his case when the City’s unlawful record destruction prevented Rhodes from exercising his statutory right of access to those records.

By statutory pronouncement, an “aggrieved” person has standing to commence a civil action pursuant to R.C. 149.351(B). Put simply, that statute provides:

Any person who is aggrieved by the **actual** or **threatened** unlawful disposal of records **may commence** a civil action for injunctive relief and/or forfeiture.

The term “aggrieved” is not defined in the Public Records Act. Thus, this appeal asks the Court to resolve the dispute over the meaning of the term “aggrieved” and thereby state when a person has standing to invoke the “prevent and deter provisions” of R.C. 149.351.

It is important to note that in its amicus brief, the Ohio Municipal League agrees with the Fifth District Court of Appeals’ definition that a person is aggrieved for purposes of mandamus when a public official fails to produce requested records. Yet, the League wants this Court to adopt a different interpretation in forfeiture actions that will create an internal inconsistency within the statute.⁹

A. The legislature uses the term “aggrieved” to convey standing to “commence” a R.C. 149.351(B) action upon a requester who’s right of access has been unlawfully diminished by actual or threatened record destruction.

The ultimate purpose of statutory construction is to determine and give effect to the intent of the legislature. *Castleberry v. Evatt* (1946), 147 Ohio St. 30, paragraph one of the syllabus. Broadly speaking, courts often determine legislative intent when examining ambiguous statutes by considering three things; (1) the legislative history; (2) similar laws on the same or similar subjects; and (3) the objective versus the consequences of a particular construction. In fact, the General Assembly has codified these three matters along with some other indicia of legislative intent at R.C. 1.49.

⁹ This internal inconsistency is discussed in greater detail *infra* on page 12.

1. Legislative History.

The legislative history of R.C. 149.351 was discussed above in the introduction. Suffice it to say, that for whatever reason the General Assembly felt it had to revisit the records retention law (R.C. 149.351) time and time again for over twenty years. However, the present version of the law has remained intact since 1985 – even though the R.C. 149.43 was completely revamped in 2007. Apparently, the legislature at long last is satisfied now that the people have been empowered to act as the “public records police” and their desire to do so has been fueled by the forfeiture imposed upon spoliators.

2. Similar statutes on similar subjects.

Statutes dealing with the same subject matter are commonly referred to as statutes *in pari materia*. The principle that statutes *in pari materia* should be construed together is a variation of the principle that all parts of a statute should also be construed together.¹⁰ Hence, experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency.

In fact, this Court has long observed that "legislation should always be considered *in pari materia* with previous and subsequent legislative enactments," and that "prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of each" to ascertain and effectuate the legislative intent. *Warner v. Ohio Edison Co.*, 152 Ohio St. 303 (Syllabus) (1949).

¹⁰ 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (6th Ed.) 173 Section 51.01.

At the outset, it must be noted that R.C. 149.351 stands related to R.C. 149.43 and is *in pari materia* therewith, because they both reflect Ohio's policy that open government serves the public interest and the democratic system. Hence, those statutes must be read and construed together.

Next, we find that this Court has already defined the term “aggrieved” as used in R.C. 149.43 to describe the circumstance where a public office fails to make a requested record available for inspection in a timely fashion. *Morgan v. City of New Lexington*, 112 Ohio St.3d 33, at ¶54; 2006-Ohio-6365 (2006); *State ex rel. Consumer News Services, Inc. v. Worthington City Bd. of Edc’n*, 97 Ohio St.3d 58, 66 (2002) (“A person may inspect and copy a ‘public record’ . . . irrespective of his or her purpose for doing so.”); quoting *State ex rel. Fant v. Enright*, 66 Ohio St. 3d 186 (1993). Accordingly, a requester is aggrieved for purposes of mandamus where a public office refuses to make available properly requested records thus preventing the requester from exercising his or her right of access. As a matter of fact, failure to provide access to properly requested records is even considered a “*breach of public duty*”; that has been held to constitute nonfeasance justifying dismissal.¹¹

A requester should likewise be considered “aggrieved” for purposes of R.C. 149.351 where a public office denies a Requester the ability to exercise his right of access because the requested records have been unlawfully destroyed. Unlawful destruction is also a “*breach of public duty*” because public offices are required to organize and maintain public records “in a manner that they can be made available for inspection and copying” in response to public

¹¹ *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 321 (“Nonfeasance is the omission of an act which a person ought to do, and Stroh did not observe the public records laws. The duty to disclose these records, whether generated by the city charter or statute, is not subject to any requirement of intent, such that Stroh was relieved of compliance to the extent he believed himself to be acting lawfully.”)(Internal citations omitted.)

records requests.¹² And, municipalities lack authority to dispose of records unless they comply with R.C. 149.39.¹³

The City argues that “aggrieved” has different meanings as used in R.C. 149.43 and R.C. 149.351 because the violations and remedies are different under each of those sections. However, the General Assembly removed all questions concerning the issue of whether a requester’s purpose was relevant when it amended R.C. 149.43(B)(4) effective September 29, 2007. Now, that statute provides in pertinent part:

[N]o public office or person responsible for public records may limit or condition the availability by requiring disclosure of the requester’s identity or the intended use of the requested public record. Any requirement that the requester disclose the requester’s identity or the intended use of the requested public record constitutes a denial of the request.

Incredibly, the Attorney General has argued in his *Amicus Curiae* brief a position that is completely contrary to his earlier official pronouncements.¹⁴ Curiously, the Attorney General now proclaims a requester must not only reveal his purpose but must demonstrate a particular harm that is unique as compared to others within the general community.¹⁵ The Attorney General is incorrect for several reasons.

First, as discussed above, Davila believes Rhodes had a substantive right of access that could not be abridged. When Rhodes’ right of access was diminished due to unlawful destruction he was as a matter of law aggrieved. Moreover, Rhodes’ status was by that fact,

¹² R.C. 149.43(B)(2).

¹³ Again, contrary to his current position, the Attorney General has pronounced that “. . . *in the absence of a law or retention schedules permitting disposal of particular records, an office lacks the required authority to dispose of those records, and must maintain them until proper authority is obtained.*” OHIO SUNSHINE LAWS: AN OPEN GOVERNMENT RESOURCE MANUAL 2010 (2010) page 49, (“The Yellow Book”) Ohio Attorney General Richard Cordray and Ohio Auditor of State Mary Taylor, CPA.

¹⁴ Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellant, filed November 29, 2010, starting at page 6.

¹⁵ *Id* at page 8.

unique and separate from others within the general community who had not asked for the records.

Second, the Attorney General's argument is internally inconsistent. It's doubtful that the Attorney General would impose the precondition of demonstrating injury to convey "standing" if the requester was seeking injunctive relief to prevent imminent unlawful destruction of records. And, if that precondition was not imposed, then the term "aggrieved" would mean two different things within the same statute. Tellingly, no authority was offered to support such a disjointed method of statutory construction.

What is more, R.C. 149.351 provides that any person who is aggrieved by "**threat**" of unlawful disposal may commence a civil action for injunctive relief and/or forfeiture. This means that a "threatened" disposal is not an "actual" disposal. Thus, the records subject to the "threat" must by definition still exist and be available for inspection. In light of the fact that each word in a statute is significant and has meaning; it is hard to understand how anyone could demonstrate injury – as urged by the Attorney General – when records still exist and are accessible. Apparently, being aggrieved by "*threatened*" unlawful destruction means something other than what the Attorney General asserts.

Third, it has been repeatedly asserted – even by the Attorney General himself – that the motivation and even the identity of a person seeking public records are irrelevant to the duty of a public office under R.C. 149.43 to provide access to the records. 2007 Op. Att'y Gen. No. 2007-026 at fn. 2; *State ex rel. Fant v. Enright*, 66 Ohio St. 3d 186, 188, 610 N.E.2d 997 (1993) ("[a]ny person' means any person, regardless of purpose. . . . a person seeking public records is not required to establish a proper purpose or any purpose"). *See also* 2006 Op. Att'y Gen. No. 2006-038 (and cases cited therein); 1990 Op. Att'y Gen. No. 90-050 at 2-210 ("Ohio common

law has long recognized that the public nature of public records does not require a person requesting access to such records to have a direct personal interest in the information. . . . The intended use of the information is not a permissible reason to withhold public records absent an applicable restrictive statutory provision").

Finally, a right without a remedy is worthless. If there is no means to enforce a right in a court of law, that right for all practical purposes does not exist. The question remains, if requesters have unfettered rights of access; then how can enforcement of that right be constrained by an analysis of their purpose? Accordingly, this Court should consider R.C. 149.43 and R.C. 149.351 as being *in pari materia* and should ~~be~~ construe the term "aggrieved" to be consistent with how that term is used throughout the Public Records Act. Such a statutory construction is the only interpretation that will foster the legislative intent of transparency and accountability.

3. Statutory objective versus the consequences of a particular construction.

The objective of the Public Records Act is to promote good will between government and the governed by fostering a transparent and accountable government. It is for this reason, that this Court has set a liberal standard for interpreting public records statutes so as to effectuate broad access to records. *Kish v. City of Akron*, 109 Ohio St.3d 162, 167, 2006-Ohio-1244 (2006).

With that standard in mind, we must next consider the nature of a requester's right of access to public records. This Court has consistently held that the right to access conferred by R.C. 149.43(B) is a "substantive right" that cannot be abridged. *State ex rel. Beacon Journal Publishing Co. v. Waters*, 67 Ohio St.3d 321, 323 (1993); citing to *State ex rel. Clark v. Toledo*

(1990), 54 Ohio St.3d 55, 56-57; *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79; *Krause v. State*, 31 Ohio St.2d 132, 144-145 (1972) (“The word ‘substantive’ refers to common law, statutory and constitutionally recognized rights.”).

Thus, Rhodes possessed a substantive right to access public records that was unlawfully diminished when the City destroyed the records he sought. Liberally construing the “**prevent and deter provisions**” of R.C. 149.351 leads to one conclusion; Rhodes was undoubtedly aggrieved and had standing to commence the forfeiture action to deter future unlawful destruction by likeminded spoliators. After all, deterring unlawful destruction preserves and effectuates future broad access. Again, this interpretation advances the legislative intent of transparency and accountability.

Nonetheless, others have argued that a requester’s purpose should be put on trial instead of acts of unlawful destruction. Such stilted interpretation would not only run counter to this Court’s jurisprudence concerning liberal construction to effectuate broad access; but it would defeat the legislative intent by encouraging rather than discouraging unlawful destruction.

In that circumstance, it is almost a certainty that inquires would be sidetracked on collateral issues of whether an articulated purpose was valid or spurious. Thus, instead of focusing on the alleged unlawful acts of destruction; a requester’s “articulated purpose” and hence his credibility would be put on trial. Undoubtedly, that circumstance would “chill” rather than “fuel” citizen self-interest in “policing the public records”.

As a matter of fact, arguments that this Court should precondition standing upon a showing that a requester actually wants to see the records he or she requested would be problematic at best. Perhaps Judge Farmer said it best when she asked the City’s counsel during oral argument below, “*how on earth could we develop a test to gauge what is in a person’s*

mind?” Notably, it was a question that even the advocate of that proposition could not answer.¹⁶

B. Imposing a burden on one class of requesters that is not imposed upon another class of requesters to invoke judicial process would violate equal protection and be unconstitutional.

There are two variations of aggrieved public records requesters. First, there are those who are aggrieved by being unlawfully denied access to “existing” records. And, there are those who are aggrieved by being denied access to “unlawfully destroyed” records. Imposing a burden on one class requesters to invoke judicial process that is not imposed upon the other class would constitute a violation of the equal protection clause of both the State and Federal Constitutions.

The Fourteenth Amendment to the Constitution of the United States declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Courts have repeatedly referred to the Ohio Bill of Rights, as well as the provisions of the Fourteenth Amendment to the Constitution of the United States, as guaranteeing equal protection. *State ex. rel. Schwartz v. Ferris* (1895), 53 Ohio St. 314, 41 N.E. 579.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Roth v. Pub. Emp. Retirement Bd.* (1975), 44 Ohio App.2d 155; 17 Ohio Jurisprudence 3d (1980), Constitutional Law, Section

¹⁶ Other inappropriate arguments have also been asserted. More noteworthy here is the contention that a city would have to pay a forfeiture over and over again for the same violation and thereby face financial ruin. This contention ignores the clear statutory language of R.C. 149.351(B)(2) which provides that a forfeiture would be assessed “for each violation”. Thus, once forfeiture was assessed for a specific violation no other forfeitures could be assessed for that same violation.

628. In this context, the Eighth District Court of Appeals for Cuyahoga County just recently dealt with a situation that is similar to the instant matter before this Court.

In *City of Cleveland Parking Violations Bur. v. Barnes*, 2010-Ohio-6164, the City of Cleveland employed both stationary and mobile automated traffic enforcement cameras to enforce the City's speed limits. The city's ordinances authorized the use of these systems and imposed "civil" penalties for speeders. However, the ordinance required that signs be posted warning motorists of the presence of the cameras. A speeder was ticketed by a mobile camera where there were no posted signs. An appeal followed.

The *Barnes Court* found that the city's ordinance required signs to be posted at the fixed camera locations, and that "mobile speed units shall be [in] plainly marked vehicles". *Id.* at ¶25. During the appeal, the City of Cleveland argued that the ordinance's only requirement was that mobile units shall be plainly marked vehicle and that there was no requirement for the posting of signs. The *Barnes Court* disagreed, because in its view such a finding would create two classes of citizens similarly situated yet treated unequally; i.e. those motorists that received notice via posted signs that they were approaching an automated camera monitoring point, and those motorists who did not receive the same notice.

Likewise, here there are only two classes of people that can be unlawfully denied access to public records. There are those who are aggrieved by being unlawfully denied access to existing records. And, there are those who are aggrieved by being denied access to unlawfully destroyed records. Imposing a burden of demonstrating harm on one class of requesters that is not imposed on the other class would create two classes of citizens who while similarly situated must yet satisfy different burdens to obtain relief. Thus, these unequal burdens on similarly

situated citizens who each enjoy the same substantive right of access would violate equal protection and be unconstitutional.

C. There are no constitutional or statutory provisions available to shield the City from imposition of a statutory forfeiture.

1. R.C. 2744.05 does not apply to forfeiture because by its very terms it is limited to damages for injury, death or loss to person or property.

In *Kish v. City of Akron*, 109 Ohio St.3d 162, 167, 2004-Ohio-1244 (2006), this Court declined to apply the limitation set forth in R.C. 2744.05 and asked the parties to brief the other issues certified to the Court by the United States Court of Appeals for the Sixth Circuit. By doing so, the *Kish Court* in effect rejected the proposition that R.C. 2744.05 applied to forfeiture actions brought under R.C. 149.351.

Nevertheless, the concept that R.C. 2744.05 should apply to forfeitures runs contrary to the notion that an action brought on the relation of the sovereign caused the sovereign to have immunity from such liability. It is a *non-sequiter*.

By its express terms, R.C. 2744.05 places limitations only upon matters involving the recovery of “damages” for injury, death, or loss to person or property. In other words, damages sounding in tort. Nowhere is there a limitation placed upon forfeiture awards.

In fact, the language used in R.C. 149.351 clearly relates to the assessment of forfeiture in the amount of \$1,000 dollars for each violation and does not relate to injury, death or loss to person or property as used in R.C. Chapter 2744.

Moreover, R.C. 149.351 constitutes a legislative waiver of any provision of R.C. 2744.05 to the contrary due to a basic principle of statutory construction. That principle states that whenever there is a conflict between statutes, general provisions must always give way to specific provisions. In pertinent part, R.C. 1.51 states:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

Accordingly, the general provision found in R.C. 2744.05 concerning damage limits for injuries sounding in tort, must give way to the special statutory provision found in R.C. 149.351 that pertains to forfeiture awards for violations of the records retention law.

2. Forfeiture pursuant to R.C. 149.351 does not violate the Eighth Amendment's prohibition against excessive fines.

Some have argued that forfeiture pursuant to R.C. 149.351 violates the Eighth Amendment's prohibition against excessive fines and ~~there~~ is unconstitutional. This argument is flawed for several reasons.

At the outset, the Eighth Amendment applies only to criminal cases. *Ingraham v. Wright* (1977), 430 U.S. 651. It does not apply to civil penalties such as forfeiture. Furthermore, penalties assessed upon government entities under the Records Retention Law do not trigger the federal constitutional protection afforded to a criminal defendant. *United States v. Ward* (1980), 448 U.S. 242, rehearing denied in 448 U.S. 916.

Just where proponents of this argument would have us draw the line as a spoliator's accountability is not known; but presumably they would not object if they were held accountable for only a small portion of their violations. Even so, municipalities are not in a position to challenge the constitutionality of R.C. 149.351 forfeiture, because the very purpose of due process prevents governments from using due process to shield themselves from the consequences of their unlawful conduct.

The U.S. Supreme Court has observed that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539,

558 (1974). On the other hand, it is a general rule in Ohio that municipalities are subject to control by the state; and the state may impose duties and responsibilities upon them **as arms or agencies of the state**. *Cincinnati v. Gamble*, 138 Ohio St. 220 (1941) syllabus. In light of the fact that municipalities are political subdivisions of the state, it is readily apparent that due process arguments cannot be used to protect government from itself. Accordingly, Respondents cannot use due process to evade the consequences of their unlawful conduct.

We do not know if those who would object to forfeiture would hold governments liable if the amount was small. However, R.C. 149.351 assesses a forfeiture of one-thousand dollars for each violation. This amount is not excessive and it does not violate any prohibitions against excessive fines. It is unfortunate when city leaders place their towns in peril by deliberate indifference to the law and thereby amass numerous violations over the years. But, it is a problem of their own making. And, perhaps they cannot be expected to learn any different until they recognize that the law applies to government as well as to the governed.

It has been said that "[h]ope springs eternal in the human breast".¹⁷ It is the hope of evading consequences for unlawful destruction that Justice Sweeny referred to when he wrote: "The longer we keep giving encouragement (by not imposing sanctions) to those who choose to ignore the public records law, the more we will see violations of the law." *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 175-178.

Unfortunately, municipalities exhibit an all too common contemptuous attitude toward the public records act.¹⁸ And, in this case that attitude was on display during the testimony below by Law Director Johnson. At trial, Law Director Johnson rationalized the City's failure

¹⁷ Pope, Essay on Man.

¹⁸ This has been repeatedly reported in annual state-wide surveys conducted by newspapers across the state. A-2

to perform its duty as mandated by the Public Records Act when he said in essence “we have more important things to do”. [Tr at 85.]

The public records act does not require herculean efforts to comply with its mandates. To the contrary, forms are provided, instructions are posted to the web, and classes are given free of charge. All that is needed is a basic desire to comply with the law. Sadly, this was not even attempted below.

Nonetheless, the City and its supporters now seek to have this Court re-write the law so the focus will not be on those who violate the law; but instead question the motives of the individual who exposed violations of the law.

3. For purposes of the Public Records Act, the discovery rule tolls the statute of limitations until the requestor discovered, or should have discovered that the records had been destroyed.

Rhodes requested access to records on July 6, 2007. He was denied access several days later when the police chief informed him that the records no longer existed. Rhodes’ commenced the action below on October 23, 2007. Thus, Rhodes brought his action well within the one year statute of limitations for R.C. 149.351; since he filed suit within just four months of becoming aggrieved.

The City argues that the statute of limitations period began to run while the unlawful acts of destruction were undiscovered. Nonetheless, it has been held for purposes of the Public Records Act, that the “discovery rule” applies and tolls that period until a requestor discovered, or should have discovered that the records had been destroyed. *State ex rel. Hunter v. Alliance*, 2002-Ohio-1130 (5th Dist. March 11, 2002).

The *Hunter Court* found that the purpose of the Ohio Public Records Act is to allow citizens access to public records, thereby exposing government activity to public scrutiny. It

also found that this scrutiny is essential to the proper working of a democracy. And, if a party's opportunity to bring a forfeiture action under R.C. 149.351 passes before a person could discover the wrongful act, the deterrent effect of the statute would be lost. The Court therefore followed the discovery rule used in medical malpractice cases and held that the statute of limitations does not begin to run until a requestor discovered, or should have discovered, that public records were illegally destroyed.

Below, Rhodes did not discover nor could he have discovered that the City had unlawfully destroyed the records he sought until Rhodes requested access to them. The City destroyed the records at issue out-of-sight while behind closed doors. It necessarily follows therefore that the discovery rule tolled the statute of limitations and the City's arguments to the contrary should be ignored.

V. CONCLUSION

The General Assembly's imposition of a mandatory duty upon public offices to provide access to records requesters is intended to utilize the efforts of those individual requesters to benefit the community as a whole. Hence, it is a requester who becomes aggrieved and therefore has standing to commence a R.C. 149.351 action which in turn enforces the Public Records Act's provisions. It is precisely for this reason that it is not within the province of a public office to determine for the requester when a requester's purpose in obtaining records would be adequate to convey standing to commence an enforcement action.

Indeed, a requester's purpose in requesting access to records is irrelevant. "A person may inspect and copy a 'public record' . . . irrespective of his or her purpose for doing so." *State ex rel. Consumer News Services, Inc. v. Worthington City Bd. of Edc'n*, 97 Ohio St.3d 58, 66 (2002); quoting *State ex rel. Fant v. Enright*, 66 Ohio St. 3d 186 (1993).

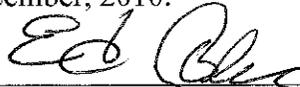
Hence, the preservation of self-interested access to public records, therefore, not only fosters, but fuels the government-monitoring legislative purpose of R.C. 149.351. “Aggrieved” therefore necessarily means those persons who sought information, but whose right of access to that information was diminished because of actual or threatened unlawful destruction. See, *State ex rel. Williams v. City of Cleveland*, 64 Ohio St.3d 544, 545 (1992) (Construing “aggrieved” in the context of those persons entitled to sue for access to existing public records as those who requested public records, but could not get them because officials denied their requests.).

In sum, it is the self-interested requests of individuals seeking access that is the mechanism the legislature chose to “police and enforce” the provisions of the Public Records Act. The societal benefit provided by the Public Records Act is achieved by the perceived omnipresence of public records requesters/enforcers. The fact remains, if despoiling municipalities could shape and define a “proper request” they could restrict the effectiveness of R.C. 149.351; which is after all, the only statute that can prevent and deter the unlawful destruction of our records.

In the final analysis, courts should not add to or take from the powers and duties created by legislative enactment. As a matter of fact, this Court has already held that the General Assembly is the “ultimate arbiter” of public policy concerning public records issues. *Plain Dealer Publishing Co. v. City of Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807 at ¶54 (2005). So, considering that the General Assembly has already weighed and balanced the broader issues involved concerning the enforcement of the Public Records Act; the myriad of issues raised by Appellant and Amici would be more properly considered if raised before the legislature.

Respectfully submitted and dated this 30th day
of December, 2010.

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CERTIFICATE OF SERVICE

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APPENDIX

The Columbus Dispatch

Editorial: Let it be

No restrictions should be put on access to public records

Friday, August 13, 2010 02:50 AM

The Columbus Dispatch

Some people think that Edwin Davila and Timothy Rhodes are litigation entrepreneurs who are mining for gold in Ohio's public-records laws. The pair have filed lawsuits and won cash judgments against cities in which officials have illegally destroyed public records.

For example, Davila recently won a \$1.4 million judgment against Bucyrus because it recorded over tapes containing public records dating back to 1994, a move not sanctioned by state law or city ordinance.

Ohio's 5th District Court of Appeals recently ruled in favor of Rhodes, restoring to him \$84,000 in damages stemming from New Philadelphia's unauthorized destruction of 84 police tapes. Four other cities are facing similar lawsuits.

Municipal officials are not happy at the prospect that such lawsuits might become a growth industry, and some think the plaintiffs are motivated by nothing more than greed.

Under Ohio's public-records laws, members of the public are entitled to see public records without providing a reason. And anyone illegally denied a record can sue without having to prove harm.

Governments found guilty can be penalized \$1,000 for every record denied to a requester.

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Editorial: Let it be | The Columbus Dispatch

In the case of Rhodes and New Philadelphia, the court said, "The public-records law gives access to any member of the 'public' regardless of the lack of purpose or 'blackness' of motive."

John Gotherman, an attorney for the Ohio Municipal League, doesn't like that: "You have these predators and profiteers out there. They really don't have any interest in it other than making money." He would like to scrutinize the motives of those seeking public records and would require them to show they have a "legitimate" interest in the records.

Gotherman should be careful of what he wishes for. If it became common practice to bar lawsuits born of base motives, some lawyers might starve.

One can sympathize with municipalities suddenly hit with such lawsuits, particularly ones that might not even know they were in violation of the law or that have limited resources and training to comply effectively.

But there is a good reason for the law and a good reason why those requesting public records do not have to justify the request. To monitor the performance of its government, the public must have access to government records. Without this, corruption, misfeasance, malfeasance and nonfeasance can be covered up and rendered unprovable. As periodic statewide surveys by Ohio's newspapers have shown, public officials across the state routinely violate the law by denying access to records. Some claim that public records aren't public. Others demand to know why the requester is seeking them.

To change the law to allow government officials to demand proof of "legitimacy" would gut the law and the public's right to know. More officials and bureaucrats would routinely reject records requests, as some already do, knowing that most people lack the time and the money to fight it out in court.

Significant penalties for withholding or illegally destroying records are necessary to deter such misbehavior.

Davila and Rhodes deny that they are opportunists. But even if they are, the bottom line is that they would have no opportunities to exploit if public officials complied with the law.

Recommend

June 15, 2004 Tuesday LENGTH 118 lines CITY EDITION

ACCESS MUST IMPROVE, STATE LAWMAKERS SAY; Results of recent audit show much secrecy prevails

BYLINE: Joanne Huist Smith Josmith@DaytonDailyNews.com

SECTION: NEWS; Pg. A1

LENGTH: 1094 words

Outrage. Disappointment.Concern.

Ohio legislators, state officials and government watchdog groups, dismayed by an audit of access to public records in Ohio, say the results merit action.

Auditors requesting information from local governments, police and school districts recently were denied unconditional and prompt access to routine records nearly half of the time.

"It would be my hope that the public becomes outraged," said House Judiciary Chairman Scott Oelslager, R-Canton. "These are the people's records. These records were paid for with tax dollars."

The audit by the Ohio Coalition for Open Government took place mostly on April 21. More than 90 people from 43 newspapers, The Associated Press, two radio stations and two colleges asked to see public records in all of Ohio's 88 counties. The coalition was established by the Ohio Newspaper Association, a trade organization that represents 83 daily and 163 weekly newspapers.

Ohio Attorney General Jim Petro said that while many county and local governments operate with minimal resources, their obligation to respond to residents' requests for public information does not disappear because of size or staffing.

"The records requested in this audit are clearly public in nature and, when available, should have been provided in a timely manner," Petro said. "I am a firm believer that our democracy thrives, in part, because of the openness of government."

The records sought included minutes from the most recent county commissioners' meeting. In each county seat, auditors asked for the mayor's or city council president's expense report, the school superintendent's and police chief's salaries and the school treasurer's most recent telephone bill. Auditors also asked for police incident reports from the most recent shift available and to get one copy.

In 4 percent of the 491 requests, local government or school officials claimed the document sought was not a public record. **Auditors were denied the records in a timely manner almost 16 percent of the time.**

"These results are pathetic, especially when the records requested are non-controversial, definitely open public records," Oelslager said.

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Oelslager, an advocate for open government, worked with Common Cause of Ohio in 1993 to develop legislation expanding the state's open records law. He wanted to make it easier and less costly for Ohio residents to obtain public records.

The bill neared passage but died in the Senate after interest groups and former Gov. George Voinovich's administration expressed concerns about the cost of the changes and the "undue burden" they could place on state agencies.

"All we can do is keep the efforts up," Oelslager said. "A key to our democracy is the public's right to be informed."

State Rep. Jon Husted, R-Kettering, said the audit results were disappointing but not surprising. Like the Ohio Coalition for Open Government auditors, Husted said he does not identify himself when seeking public records. He tries to experience the request process the same as other taxpayers.

"We all need to remember we do work for the public and the things we work on are public information," Husted said.

Some public employees are afraid their bosses will disapprove if they give out public information, Husted said. Others believe that if they don't respond to the initial request, the person seeking information will just go away, he said.

"Everybody needs to do a better job of informing front-line staff in respect to what the law is," he said.

Republican state Sen. **Jeff Jacobson** of Butler Twp. said **Ohio's public records' law too often comes down to "one person trying to enforce the law against an entire bureaucracy saying 'no.' "**

"You can write all the laws you want, but if you're not the one wanting the information you don't know how the law is being carried out," he said. "We need to ask what, if any, tools people need to do that, that they don't have now?"

Dwight Crum, spokesman for House Speaker Larry Householder, R-Glenford, said the audit results were unacceptable.

"We want to review the report and talk to local government groups about the findings," Crum said.

Democratic House Minority Leader Chris Redfern, D-Catawba Island, said organizations such as the **Ohio Municipal League** and the County Commissioners Association of Ohio need to better educate their members on the law.

The bottom line for Ellis Jacobs of Dayton-based Advocates for Basic Legal Equality, is that **access to public records can absolutely make a difference in the lives of Ohio residents and it's the law.**

Access to public records gave residents of Jefferson Twp. in Montgomery County the information they needed to thwart the Army's plan to ship neutralized VX nerve agent to a treatment plant in their neighborhood, Jacobs said. Now, that neighborhood, which he represents, battles to force that same hazardous wastewater treatment plant, Perma-Fix Inc., 300 West End Ave., to stop foul odors wafting from its smokestacks.

Jacobs said the city of Moraine also recently tried to charge a \$150 processing fee for a public records request regarding displacement of two trailer parks in the city. The law says public agencies can charge only for the cost of producing copies.

"The average citizen, who doesn't know the law, could have been deterred by that," Jacobs said. "We ignored the letter and went out and got the documents."

Access to public records is a critical check for residents to gauge what the government is doing, he said.

* When government offices fail to provide access to open records, that creates "a big problem," Jacobs said, "**It's basically dereliction of a very important duty.**" *

Catherine Turcer, legislative liaison for Ohio Citizen Action - one of the state's largest environmental organizations - said the audit findings were better than she would have expected. She said the Franklin County Board of Elections told her in March 2003 that a request for campaign contributions to appeals court judges from a 2002 election would have to wait six weeks, until after the May primary.

"I was appalled: Six weeks," Turcer said. "This was not a complicated report. It wasn't available on a Web site. It wasn't available anywhere else."
Contact Joanne Huist Smith at 225-2362./

LAST OF THREE PARTS

- * Sunday: Confusion obscures public records.
- * Monday: Officials flunk test.
- * Today: Records help people thwart Army. MORE INSIDE, A6
- * Training for public clerks.
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