

ORIGINAL

IN THE SUPREME COURT OF OHIO

GERALD O. STROTHERS, JR.,)	
)	Case No.: 11-1483
Appellant/Cross-Appellee,)	
)	
v.)	
)	
MAYOR OF EAST CLEVELAND, OHIO)	On Appeal from the Cuyahoga County
GARY NORTON, JR.,)	Court of Appeals, Eighth Appellate
)	District
Appellee/Cross-Appellant.)	

REPLY BRIEF IN OPPOSITION TO
 APPELLANT/CROSS-APPELLEE GERALD O. STROTHERS, JR.'s
 MERIT BRIEF AND MERIT BRIEF OF APPELLEE/CROSS-APPELLANT
 MAYOR OF EAST CLEVELAND, OHIO
 GARY NORTON, JR.,

Gerald O. Strothers, Jr., (*pro se*) (COUNSEL OF RECORD)
 14019 Northfield Avenue
 East Cleveland, Ohio 44112

COUNSEL FOR APPELLANT/CROSS-APPELLEE,
 GERALD O. STROTHERS, JR.,

Ronald K. Riley (0018857) (COUNSEL OF RECORD)
 Director of Law
 City of East Cleveland
 14340 Euclid Avenue
 East Cleveland, Ohio 44112

COUNSEL FOR APPELLEE/CROSS-APPELLANT,
 MAYOR OF E. CLEVE. OH. GARY NORTON, JR.,

RECEIVED
 DEC 23 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 DEC 23 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
INTRODUCTION.....	2
ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW.....	3
Appellant Strothers’ Proposition of Law No. I:.....	3
This Court Should Deny Appellant Strothers’ Proposition of Law No. I, as the Record Contravenes Appellant’s Assertion That “ <i>The Appeals Court Ruled That 45 Days Was A Reasonable Amount of Time To Make Records Available.</i> ”.....	3
Appellant Strothers’ Proposition of Law No. II:.....	4
This Court Must Deny Appellant Strothers’ Second Proposition of Law, As the Assertion That “ <i>The Appeals Court Ruled That A Request for Public Records Must Be Made Via Affidavit</i> ” Stands Unfounded.	4
Appellant Strothers’ Proposition of Law No. III:.....	8
This Court Must Deny Appellant Strothers’ Third Proposition of Law That “ <i>The Appeals Court Granted \$1,000.000 Statutory Damages But Denied Writ and Appellant is Still Waiting to Review, Inspect and Copy Records Requested</i> ”.....	8
APPELLEE MAYOR NORTON’S ARGUMENT.....	10
Proposition of Law No. I:.....	10
The Lower Court’s Judgment Should Be Vacated as Appellant Strothers Does Not Meet the Requisites of An Aggrieved Party; and, Therefore Lacked Standing to Commence An Action in Mandamus Under R.C. 149.43(C)(1).	10
A. While Appellant Strothers Attempts To “ <i>Put The Toothpaste Back in The Tube</i> ”- His Objectives Remain Manifest - Appellant Strothers Had No Interest in Accessing the Requested Public Records.	
14	
(i) The Commencement of an Action in Public Records Mandamus Just Three Business Days After Receipt of a Request for Public Records Could Not Be Considered Under Any Circumstance, A Failure to Provide the Records Within a Reasonable Period of Time.....	15
(ii) Appellant Strothers’ Attempt to Impede the Production of Documents Through The Submission of a Second and “Punishing” Voluminous Public Records Request Should be Viewed As A Detraction from His Claiming He Was “Allegedly Aggrieved” Under R.C. 149.43(C).....	18

(iii) Appellant Strothers' Attempt to Thwart the Production of Documents through His "Failure" to Inspect the Requested Documents or To Receipt for Same When Delivered Constitutes a Waiver of Any Enforceable Legal Right Under R.C. 149.43(B) And Denies Him Standing As "Allegedly Aggrieved" Under R.C. 149.43(C).20

Proposition of Law No. II:24

The Lower Court's Finding that Appellee Strothers was Entitled to Statutory Damages Was Fundamentally Flawed Through the Erroneous Application of Case Law.24

CONCLUSION30

APPENDIX1

A. NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT, MAYOR OF EAST CLEVELAND, OHIO GARY NORTON, JR.1

B. JOURNAL ENTRY OF THE EIGHTH DISTRICT COURT OF APPEALS (JULY 26, 2011).1

C. OHIO REVISED CODE SECTION 149.43.....1

TABLE OF AUTHORITIES

Cases

Beerman v. City of Kettering, 14 Ohio Misc. 149, 237 N.E.2d 644 (Ohio Com.Pl. 1965).....28

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 11407

Cuyahoga Cty. Bd. of Commrs. v. State of Ohio, 112 Ohio.St.3d 59, ¶ 6, 2006-Ohio-6499, ¶ 2321

Darby v. A-Best Products Co., 2004-Ohio-3720, at ¶ 15, 102 Ohio St.3d 410, 811 N.E.2d 1117 (Ohio 2004)8

Dawson v. Astrocosmos Metallurgical, Inc., 2002-Ohio-6998, C.A. 02CA0025, 02-LW-5469 (9th) (OHCA9)7

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, P 728

H.R.Rep. No. 876, 93d Cong., 2d Sess. 6, 1974 U.S.Code Cong.....35

Hoover v. Sumlin (1984), 12 Ohio St.3d 1.....7

Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Voinovich, 100 Ohio App.3d 372, 375, 654 N.E.2d 139 (Ohio App. 10 Dist. 1995).....14

Kish v. Akron, 109 Ohio.St.3d 162, 2006-Ohio-1244, ¶35.....13

Ohio Trucking Association v. Stickrath, 2011-Ohio-4361, 10AP-673 (OHCA10)25

<i>Perry Edn. Assn. v. Perry Local Edn. Assn.</i> (1983), 460 U.S. 37, 45-46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804-805	17
R.C. § 149.43(B)(1).....	32, 34
<i>Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.</i> (1986), 28 Ohio St.3d 317, 321	25
<i>Rhodes v. City of New Philadelphia</i> , 2011-Ohio-3279, 129 Ohio St.3d 304, 310, ___ N.E.2d ___ (Ohio 2011)	16
<i>Rhodes v. City of New Philadelphia</i> , 2011-Ohio-3279, 2010-0963 (OHSC)	15, 16, 17
<i>Slater v. Motorists Mutual Insurance Co.</i> (1962), 174 Ohio.St. 148, 187 N.E.2d 45	20
<i>State ex rel. Bardwell v. Cuyahoga County Bd. of Commissioners</i> , 2010-Ohio-5073, 127 Ohio St.3d 202, ___ N.E.2d ___ (Ohio 2010).....	17, 20, 21
<i>State ex rel. Bardwell v. Rocky River Police Dept.</i> , 2009-Ohio-727, 91022 (OHCA8)]	5
<i>State ex rel. Dann v. Taft</i> , 2006-Ohio-1825, 109 Ohio St.3d 364, 848 N.E.2d 472 (Ohio 2006) at ¶ 101 ...	28
<i>State ex rel. Findlay Publishing Co. v. Schroeder</i> (1996), 76 Ohio St.3d 580, 581, 669 N.E.2d 835, 837	11
<i>State ex rel. Gannett Satellite Info. Network v. Shirey</i> , 1997-Ohio-206, 78 Ohio St.3d 400, 678 N.E.2d 557 (Ohio 1997).....	11
<i>State ex rel. Mancini v. Ohio Bur. of Motor Vehicles</i> , 1994-Ohio-224, 69 Ohio St.3d 486, 633 N.E.2d 1126 (Ohio 1994).....	12
<i>State ex rel. Patton v. Rhodes</i> , 2011-Ohio-3093, ¶ 15, 2011-0183 (OHSC).....	31
<i>State ex rel. Patton v. Rhodes</i> , 2011-Ohio-3093, 2011-0183 (OHSC).....	31
<i>State ex rel. Pennington v. Gundler</i> (1996), 75 Ohio St.3d 171, 172-173, 661 N.E.2d 1049, 1050-1051....	11
<i>State ex rel. Pennington v. Gundler</i> , 1996-Ohio-161, 75 Ohio St.3d 171, 661 N.E.2d 1049 (Ohio 1996) Page 176-7.....	15
<i>State ex rel. Petty v. Wurst</i> (1989), 49 Ohio App.3d 59, 60, 550 N.E.2d 214, 215-216.....	14
<i>State ex rel. Polcyn v. Burkhart</i> (1973), 33 Ohio St.2d 7, 62 O.O.2d 202, 292 N.E.2d 883.....	26
<i>State ex rel. Striker v. Cline</i> , 2010-Ohio-3592, 09CA107 (OHCA5)	29
<i>State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner</i> , 2008-Ohio-2824, 118 Ohio St.3d 515, 890 N.E.2d 888 (Ohio 2008) at ¶ 83.....	27
<i>State ex rel. The Miami Student v. Miami Univ.</i> (1997), 79 Ohio St. 3d 168, 171, 680 N.E.2d 956	28

<i>State ex rel. The Warren Newspapers, Inc. v. Hutson</i> , 1994-Ohio-5, 70 Ohio St.3d 619, 640 N.E.2d 174 (Ohio 1994).....	33, 34
<i>State ex rel. Wadd v. City of Cleveland</i> , 1998-Ohio-444, 81 Ohio St.3d 50, 52, 689 N.E.2d 25 (Ohio 1998)	35
<i>State ex rel. Wadd v. Cleveland</i> , 81 Ohio St.3d 50, 53, 689 N.E.2d 25.....	19, 20
<i>State v. Steffen</i> , 1994-Ohio-111, 70 Ohio St.3d 399, 407, 639 N.E.2d 67 (Ohio 1994).....	26
<i>State, ex rel. Zauderer, v. Joseph</i> , 62 Ohio App.3d 752, 577 N.E.2d 444 (Ohio App. 10 Dist. 1989).....	9
<i>Suriano v. NAACP</i> , 2006-Ohio-6131, No. 05 JE 30 (OHCA7) at ¶ 86.....	8
<i>Walker v. The Ohio State University Board of Trustees</i> , 2010-Ohio-373, 09AP-748 (OHCA10) (citations omitted.).....	13
<i>Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.</i> (1991), 60 Ohio St.3d 120, 573 N.E.2d 622 ...	8

Statutes

R.C. § 149.43.....	3, 5, 9, 11, 13, 14, 16, 17, 26, 27, 30
R.C. § 149.43(B).....	4, 9, 11, 16, 25, 30
R.C. § 149.43(B)(1).....	4
R.C. § 149.43(B)(7).....	4
R.C. § 149.43(C).....	3, 5, 11, 13, 14, 17, 30
R.C. § 149.99.....	14
R.C. § 2731.01.....	11
R.C. §1.47(C);.....	26
R.C. 149.43(C).....	i, ii, 12, 14, 19, 22, 23, 25

Other Authorities

Black’s Law Dictionary (9th Ed.2009) 77	15
<i>Merriam-Webster’s Collegiate Dictionary</i> 610 (10th ed. 2003).....	29
Moyer, interpreting Ohio’s Sunshine Law: a Judicial Perspective (2003), 59 N.Y.U. Ann.Surv. Am.Law 247, 248.....	28

Constitutional Provisions

STATEMENT OF THE CASE AND FACTS

This case arises subsequent to Appellant/Cross-Appellee Gerald O. Strothers, Jr.,'s ("Appellant Strothers") request to inspect public records relative to the conditions of the East Cleveland Municipal Jail.

The pertinent facts disclose the December 3, 2010 receipt by Brenda Blanks of Appellant Strothers' certified letter requesting access "to review, inspect and/or copy public records." Despite Appellant Strothers' own admission that his request was voluminous, just (3) three business days later, on December 9, 2010 Appellant Strothers filed with the Court of Appeals his Petition for Writ of Mandamus and for an award of statutory damages. (See East Cleveland Law Department Receipt attached hereto as Exhibit A).¹

Records responsive to Appellant Strothers' request were transmitted to Appellant Strothers primarily on December 21, 2010 via hand-delivery; on January 13, and 25, 2011 through regular U.S. mail postage prepaid; and the attempt to deliver those records on January 18, 2011 via certified U.S. mail postage prepaid was rejected by Appellant Strothers.

In a December 21, 2010 letter to the mayor and city council, Appellant Strothers submitted a second request for public records regarding East Cleveland's use of traffic cameras.

On December 27, 2010, Appellee Mayor Norton filed a "response" in which he argued that he had not been provided a reasonable opportunity to respond to the request for records. Appellee Mayor Norton further identified Appellant Strothers' conduct: (i) in failing to keep his promises to review the requested records, and (ii) refusing to accept delivery of an installment of the records via certified U.S. mail, postage prepaid on January 18, 2011; as being a significant

¹ Brenda Blanks is identified as the public records designee for Appellee/Cross-Appellant Mayor Norton.

impediment to the prompt response to Appellant Strothers' request for records.

Also on December 27, 2010, Appellant Strothers filed a motion for summary judgment in which he attempted to extend the scope of the proceedings to include his December 21, 2010 public records request.

The facts further demonstrate that although Appellant Strothers received some of the requested documents via regular U.S. mail accompanied with an invoice for copying and postage fees, to date Appellant Strothers has failed to remit payment.

On July 26, 2011, the Eighth District Court of Appeals denied Appellant Strothers' request for relief in mandamus as moot; and, rendered judgment in Appellant Strothers' favor as to his claim for statutory damages.

On August 30, 2011 Appellant Strothers filed with the Ohio Supreme Court his Notice of Appeal. On September 12, 2011 Appellant Strothers filed with the Ohio Supreme Court his Merit Brief. Subsequently, on September 14, 2011, and in apparent compliance with S.Ct.Prac.R. 6.2(A)(2), Appellant Strothers would file an Amended First Merit Brief.

INTRODUCTION

Now Comes Appellee Mayor Norton and in opposition to Appellant Strothers' Merit Brief urges this Court to deny Appellant Strothers the requested relief as his assertions are unfounded, lack a basis in law and, in fact, are unsupported by law.

Appellee Mayor Norton further seeks this Court's grant of extraordinary relief urging that the Eighth District Court of Appeals' Judgment be vacated, and that a new Order be entered dismissing Appellant Strothers' action in mandamus for lack of standing.

As more fully set forth hereinafter, warrant for such extraordinary relief is proper in that:

- (i) Appellant Strothers lacked standing as he was not an "*aggrieved*" party under R.C. § 149.43(C)(1);
- (ii) Appellant Strothers waived any legally enforceable right under R.C. §

149.43(B)(1) by his failure to timely inspect or accept receipt for records responsive to his public records request; and (iii) any legally enforceable right that Appellant Strothers may have possessed was waived by his failure under R.C. § 149.43(B)(7) to remit payment for copying and mailing charges incumbent in processing his public records request.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

Appellant Strothers' Proposition of Law No. I:

This Court Should Deny Appellant Strothers' Proposition of Law No. I, as the Record Contravenes Appellant's Assertion That "*The Appeals Court Ruled That 45 Days Was A Reasonable Amount of Time To Make Records Available.*"

In his first Proposition of Law, Appellant Strothers bitterly complains that, through the lower court's ruling that "*...45 days was a reasonable amount of time to make records available*" the lower court was "*...starting a pattern where Public Offices could delay ... even make excuses for holidays and even the end of the year.*" (See Amended Merit Brief of Appellant Gerald O. Strothers, Jr., at p. 4-5.)

A cursory review of the record, however, demonstrates that Appellant Strothers has so badly misinterpreted the Eighth District Court of Appeals' ruling, that this Court must outright deny Appellant Strothers' First Proposition of Law as having no basis in fact.

Irrefutably contravening Appellant Strothers' assertions, the record establishes that in rendering judgment in Appellant's favor, the Eighth District Court of Appeals found that,

The record in this case, therefore, reflects that **the mayor did not fully respond to the public records request by Strothers for at least seven weeks** after receipt of the request and more than a month after Strothers commenced this action.

The language of R.C. § 149.43(C)(1) is clear and [*State ex rel. Bardwell v. Rocky River Police Dept.*, 2009-Ohio-727, 91022 (OHCA8)] exemplifies that we must enter judgment for Strothers in the amount of \$1,000 for statutory damages."

See Journal Entry and Opinion No. 96147 at pp. 5-6. (Emphasis added).

As the foregoing language incontestably refutes Appellant Strothers' contentions, it is urged that the only plausible explanation for his misstep, is Appellant Strothers' failure to appreciate the proper distinction afforded a dissenting opinion.

In this regard, the record finds that, Eighth District Court of Appeals Justice Melody J. Stewart, (concurring in part and dissenting in part) and in setting forth an adroit dissertation on the issue of promptness urged that,

“We might also acknowledge that Strothers made his records request toward the end of the year and approaching **the Christmas and New Year holidays** when it could reasonably be presumed that offices were understaffed. But despite acknowledging that he requested a large number of documents, Strothers filed this complaint in mandamus just eight days after the city received his request. These facts make Strothers less a good-faith victim of delay ... and more an opportunist seeking to manipulate the statutory damages provision of the public records law. Given the circumstances described, **I would find that the city's production of all requested documents within 47 days was certainly accomplished within a reasonable period of time.**”

See Journal Entry and Opinion No. 96147 at p. 8. (Stewart, Melody J., dissenting). (Emphasis added).

From just a cursory reading it is obvious that Appellant Strothers has badly misinterpreted the lower court's ruling and has misconstrued the dissenting opinion as controlling. Based on the foregoing study, this Court is therefore respectfully urged to deny Appellant Strothers' first proposition of law as having no basis in fact.

**Appellant Strothers' Proposition of Law No. II:
This Court Must Deny Appellant Strothers' Second Proposition of Law, As the Assertion That “The Appeals Court Ruled That A Request for Public Records Must Be Made Via Affidavit” Stands Unfounded.**

Appellant Strothers' second proposition of law, urging a two-pronged argument, that: (i) the Appeals Court improperly ruled that a request for public records must be made via affidavit; and (ii) his public records request as submitted before the lower court had not been addressed;

must also be denied. In support of his second proposition of law, Appellant Strothers states that,

“[t]he Eighth District Court of Appeals ruled that since Strothers had not provided an affidavit that his additional requests for public records were not valid. Following months of delay, Mr. Strothers decided to audit the city in reference to the receipts received from Traffic Cam tickets. Strothers also made his request verbally at the City Council Meetings, in writing and even through the Mandamus action.

See Amended Merit Brief of Appellant Gerald O. Strothers, Jr., at p. 6. (Emphasis added).

It is urged that Appellant Strothers has either improperly interpreted the lower court’s Opinion, or is nebulously attempting to assert that he made a request for public records, “...through the Mandamus action.” Nevertheless, this Court should deny Appellant Strothers’ second Proposition of Law as being both factually and legally unfounded.

Relative to his contention regarding the necessity of an affidavit, the appeals court found that:

“...Strothers attempts to expand the scope of this action to include records regarding East Cleveland’s use of traffic cameras. He requested these records in a December 21, 2010 letter to the mayor and members of the city council. Although this letter is attached to his motion for summary judgment, **Strothers has not moved to amend his complaint** to include this additional request for records, which occurred after the filing of this action on December 9, 2010. See Civ.R. 15. As a consequence, we hold that the scope of this action is limited to the request for records in the December 1, 2010 letter.” ... We note, however, that **none of these representations is made in an affidavit** or other material of evidentiary quality.

See Journal Entry and Opinion No. 96147 at p. 2. (Emphasis added).

It stands certain that the lower court properly construed Appellant Strothers’ attempt “*to expand the scope of this action to include records regarding East Cleveland’s use of traffic cameras*” as a motion to amend; and, in comport with the Ohio Rules of Civil procedure and case law, the lower court properly exercised its discretion in denying Appellant Strothers’ motion to amend.

In review of a court's denial of a motion to amend, it is incumbent to recognize that, "the language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Dawson v. Astrocosmos Metallurgical, Inc.*, 2002-Ohio-6998, C.A. 02CA0025, 02-LW-5469 (9th) (OHCA9) citing *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6.

This Court has ruled that it would not reverse a decision to deny a motion to amend unless the trial court had abused its discretion. *Id.* at 6. An abuse of discretion is more than an error of law or judgment; a finding of abuse of discretion is a finding that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

Under the foregoing standard, it is urged that the lower court's attitude was neither: unreasonable, arbitrary nor unconscionable. Instead, based upon the proper disposition of the below-described factors it is realized that the lower court's ruling effaced the proper exercise of discretion.

As initially noted by the lower court, Appellant Strothers failed to seek leave of the court to file his motion to amend. As relevant here, Civ.R. 15 clearly provides, that "...a party may amend his pleading only by leave of court or by written consent of the adverse party." See Civ.R. 15(A).

In addition, it is urged that the incorporation of such motion to amend within a dispositive motion was an act in bad faith. *Suriano v. NAACP*, 2006-Ohio-6131, No. 05 JE 30 (OHCA7) at ¶ 86. ("The motion itself was presented in a cursory manner, in nine lines at the end of a response to Appellee's motion for summary judgment.")

Moreover, disposition of this issue is properly premised upon the record's disclosure that

responsive to Appellant Strothers' December 21, 2011 request, records were timely supplied. (See Exhibits B and C). In *Wilmington Steel Products, Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 573 N.E.2d 622, the Ohio Supreme Court held that a trial court "...does not abuse its discretion by refusing to allow amendment of a complaint to add new claims against existing parties where a plaintiff is unable to make a prima facie showing of support for the new matters sought to be pleaded." *Darby v. A-Best Products Co.*, 2004-Ohio-3720, at ¶ 15, 102 Ohio St.3d 410, 811 N.E.2d 1117 (Ohio 2004) (italics in the original) *ref. Wilmington*, 60 Ohio St.3d at syllabus.

In turning to the second prong of Appellant Strothers' argument it is urged that should Appellant Strothers endeavor to assert that he made a new request for public records before the lower court, any such request should be viewed as invalid and unenforceable under the Ohio Public Records Act.

R.C. § 149.43(C) requires that in order to evince a clear lawful and enforceable right, a request for public records must meet the requisites set forth under R.C. § 149.43(B) (see discussion *infra* at p. 26-27). Intrinsic to the validity of any such request is that notice be properly afforded the "*public office or person responsible for public records.*" The Tenth District Court of Appeals, in denying a writ for mandamus as being indefinite, held that,

"A 'request,' unlike a demand, is the expression of a desire made to some person for something to be granted or done. Black's Law Dictionary (5 Ed.1979) 1172. It presupposes that the person to whom the request is made **has the authority to deny or to grant the request.**"

See State, ex rel. Zauderer, v. Joseph, 62 Ohio App.3d 752, 577 N.E.2d 444 (Ohio App. 10 Dist. 1989). (Emphasis added).

Any "request" made by Appellant Strothers before the lower court, cannot rise to the status of a lawful and enforceable request, in the absence of notice to the "*public office or the*

person responsible for the public record.” It is thus urged that the lack of notice renders any such request incapable of being acted upon and certainly unsuitable for mandamus.

Based on the foregoing study, it is urged that as there exists no factual basis supportive of Appellant Strothers’ contention that the “*Appeals Court ruled that a request for public records must be made via an Affidavit*” nor any lawful basis for the contention that a lawful and enforceable request was made “*...through the Mandamus action*” this Court should deny Appellant Strothers’ second Proposition of Law, as unsupported in law and in fact.

**Appellant Strothers’ Proposition of Law No. III:
This Court Must Deny Appellant Strothers’ Third Proposition of Law That “*The Appeals Court Granted \$1,000.000 Statutory Damages But Denied Writ and Appellant is Still Waiting to Review, Inspect and Copy Records Requested*”.**

In culmination of Appellant Strothers’ arguments; and, as specified in his third proposition of law; it becomes apparent that Appellant Strothers seeks the vacationing of the lower court’s Order that denied relief in mandamus as moot.

However, under his third Proposition of Law—a bare five-sentence argument - Appellant Strothers fails to provide any support for his contention that the lower court improperly denied relief in mandamus. However, in sifting through Appellant Strothers’ Amended Merit Brief, it is observed that Appellant Strothers injudiciously urges that,

“[w]hen the Eighth District Court of Appeals denied this writ but awarded statutory damages that in itself was a contradiction that could not have made sense to even a novice in Ohio’s public records laws.”

See Amended Merit Brief of Appellant Gerald O. Strothers, Jr., at p. 4. (Emphasis added).

Appellant Strothers fails to bear in mind the proper comport of the lower court’s language where it ruled, “we deny the request for relief in mandamus as moot.” See Journal Entry and Opinion No. 96147 at p. 1. (Emphasis added)

In disposition of this issue, it is observed that the Ohio General Assembly has defined

mandamus as a writ, "... issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. § 2731.01.

It is urged that when this definition is read in conjunction with R.C. § 149.43(C)(1) which provides that a relator, "...may commence a mandamus action to obtain a judgment that orders [compliance] with division (B) of this section [and] that includes an order fixing statutory damages...." (See R.C. § 149.43(C)(1), see also discussion *infra* at 10-11); it becomes certain that an action in mandamus under R.C. § 149.43(C)(1) provides for disposition of two separate issues: (i) relief in mandamus (*i.e.*, an Order compelling compliance with R.C. § 149.43(B)); and (ii) recovery of statutory damages.

Here, the lower court clearly set forth that it was denying the relief in mandamus as moot. "Generally, provision of the requested records to the relator in a mandamus action brought under R.C. § 149.43 renders the mandamus claim moot." *State ex rel. Gannett Satellite Info. Network v. Shirey*, 1997-Ohio-206, 78 Ohio St.3d 400, 678 N.E.2d 557 (Ohio 1997) citing *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581, 669 N.E.2d 835, 837 (relator's mandamus action is moot as to records it had been provided); *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 172-173, 661 N.E.2d 1049, 1050-1051 (person requesting records receives them only after mandamus action is filed, thereby ... rendering mandamus claim moot); *State ex rel. Mancini v. Ohio Bur. of Motor Vehicles*, 1994-Ohio-224, 69 Ohio St.3d 486, 633 N.E.2d 1126 (Ohio 1994).

It is thus urged as manifest that there exists no contradiction in the lower court's denial of relief in mandamus as moot; and the subsequent award of statutory damages.

Based on the foregoing observations finding that Appellant Strothers has failed to set

forth any argument supportive of his contention that denial of the writ was improper, it is respectfully urged that the Ohio Supreme Court deny Appellant Strothers' Third Proposition of Law.

APPELLEE MAYOR NORTON'S ARGUMENT

Proposition of Law No. I:

The Lower Court's Judgment Should Be Vacated as Appellant Strothers Does Not Meet the Requisites of An Aggrieved Party; and, Therefore Lacked Standing to Commence An Action in Mandamus Under R.C. 149.43(C)(1).

Appellee Mayor Norton urges this Court to enter an Order vacating the Eighth District Court of Appeals' Judgment and to issue an Order dismissing Appellant Strothers' action in mandamus for lack of standing. In support of such extraordinary relief, Appellee Mayor Norton urges this Court to find that as Appellant Strothers' request for public records access was merely a pretext to obtain statutory damages; Appellant Strothers lacked standing to commence an action in mandamus.

The key question presented here is whether the evidenced objective of a public records requestor to obtain statutory damages abrogates that party's standing to commence an action in mandamus?

Under R.C. § 149.43(C) the Ohio General Assembly has set forth the requisites of standing to commence an action in mandamus. R.C. § 149.43(C) provides in pertinent part:

"If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section ... and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section."

R.C. § 149.43(C)(1) (Emphasis added).

In discerning the legislative intent of R.C. § 149.43(C)(1) it is observed that as, "...the Ohio Public Records Act does not define the term 'aggrieved' as used in the act, the term is interpreted 'by looking at the purpose of the specific statute, being faithful to the General Assembly's intent in promulgating it, and by giving effect to the 'usual, normal and customary meaning' of the term being interpreted.'" *Walker v. The Ohio State University Board of Trustees*, 2010-Ohio-373, 09AP-748 (OHCA10) (citations omitted.) *Kish v. Akron*, 109 Ohio.St.3d 162, 2006-Ohio-1244, ¶35.

This Court has held, that "R.C. 149.43(C) provides that a person allegedly aggrieved by the failure of a governmental unit or person responsible to promptly prepare a public record and to make it available may commence an action in mandamus." *Internatl. Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Voinovich*, 100 Ohio App.3d 372, 375, 654 N.E.2d 139 (Ohio App. 10 Dist. 1995) ref. *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108, 109, 529 N.E.2d 443, 444-445; *State ex rel. Petty v. Wurst* (1989), 49 Ohio App.3d 59, 60, 550 N.E.2d 214, 215-216.

It is further observed that in enacting R.C. 149.43(C) the Ohio General Assembly repealed R.C. § 149.99, which had provided a civil action to compel compliance with; and a penalty for the violation of R.C. § 149.43. Significantly, in enacting R.C. § 149.43(C) the Ohio General Assembly specifically provided:

"This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for the necessity is that, unless the effect of the recent decision of the Ohio Supreme Court in *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Assn.* (1987), 32 Ohio St.3d 323 [sic, 327] [512 N.E.2d 1176], is immediately superseded and a civil action for a writ of mandamus available in all courts with original jurisdiction reestablished as the remedy to enforce the Public Records Law, members of the general public could be denied access to public records in

violation of the Public Records ... Law, and have no recourse other than to pursue an inadequate, statutorily prescribed remedy in the court of common pleas of injunctive relief, a forfeiture of \$1,000, and a reasonable attorney's fees award. Therefore, this action shall go into immediate effect." (Emphasis sic.)

State ex rel. Pennington v. Gundler, 1996-Ohio-161, 75 Ohio St.3d 171, 661 N.E.2d 1049 (Ohio 1996) Page 176-7 (Douglas, Resnick and Francis E. Sweeney, Sr., JJ., concur in part and dissent in part. Francis E. Sweeney, Sr., Justice, concurring in part and dissenting in part) citing *State ex rel. Fox v. Cuyahoga County Hosp. System*, 39 Ohio St.3d 108, 529 N.E.2d 443 (Ohio 1988) dissent citing Section 5 of Am.Sub.S.B. No. 275, effective October 15, 1987, 142 Ohio Laws, Part I, 1153.

Continuing in statutory interpretation it is observed that when given its usual, normal and customary meaning, the term "aggrieved" is commonly defined as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights." *Rhodes v. City of New Philadelphia*, 2011-Ohio-3279, 2010-0963 (OHSC) citing Black's Law Dictionary (9th Ed.2009) 77.

Additionally, in a recent public records case involving the destruction of a public record, the study of the use of the word "*aggrieved*" found that where the evidence proved antonymic to the "presumption that a request for public records is made in order to access the records." *Rhodes v. City of New Philadelphia*, 2011-Ohio-3279, 129 Ohio St.3d 304, 310, ___ N.E.2d ___ (Ohio 2011); this Court held, "... that **a party is not aggrieved by the destruction of a record when the party's objective in requesting the record is not to obtain the record** but to seek a forfeiture for the wrongful destruction of the record." *Rhodes*, 2011-Ohio-3279 at 1. (Emphasis added).

In reaching its conclusion the *Rhodes* Court examined R.C. § 149.43(B) and concluded that the "expansiveness of the phrase 'any person' as utilized in the statute "manifest[ed] the

General Assembly's intent to jealously protect the right of the people to access public records."

See *Rhodes* 2011-Ohio-3279 at ¶¶ 20-22. Furthering its examination the *Rhodes* Court found that,

"The same choice is not reflected in R.C. 149.351, as the General Assembly did not make the enforcement mechanism of forfeiture available to "any person." Forfeiture is available only to a person who has been "aggrieved" by the public office's violation ... and we conclude that the General Assembly did not intend to impose a forfeiture when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to prove the nonexistence of the records."

Rhodes at ¶ 23.

The reasoning utilized by the *Rhodes* Court is wholly applicable here and this Court is therefore urged to conclude, "...that the General Assembly did not intend to [authorize a person to commence a mandamus action] when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to [detract from the prompt production of] the records." See *Rhodes v. City of New Philadelphia*, 2011-Ohio-3279, at ¶ 23.

The significance of such construction is paramount in the resolution of this matter. This is because although the Ohio General Assembly has not authorized courts to consider "reasonable, good faith efforts" or the public interest in determining entitlement to statutory damages;² such issues may be properly raised to impeach Appellant Strothers' claim of "aggrievement."

As more fully set forth hereinafter, upon an examination of the statements, actions and inactions of Appellant Strothers, his objective in requesting public record access is clearly

² "R.C. § 149.43(C)(1) clearly states that statutory damages serve as 'compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed.'" (Emphasis added.) See *State ex rel. Bardwell v. Cuyahoga County Bd. of Commissioners*, 2010-Ohio-5073, 127 Ohio St.3d 202, ___ N.E.2d ___ (Ohio 2010) citing *Perry Edn. Assn. v. Perry Local Edn. Assn.* (1983), 460 U.S. 37, 45-46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804-805.

revealed as being a subterfuge to attain statutory damages; and thus, this Court should conclude that Appellant Strothers was not “aggrieved” and therefore, lacked standing to commence an action in mandamus.

A. While Appellant Strothers Attempts To “Put The Toothpaste Back in The Tube”- His Objectives Remain Manifest - Appellant Strothers Had No Interest in Accessing the Requested Public Records.

Appellant Strothers has asserted before this Court that his objective, in requesting public records access, was in support of his campaign to “...conduct a citizen’s audit of the records in East Cleveland Ohio city hall.” See Amended Merit Brief of Appellant Gerald O. Strothers, Jr., at p. 3. “The requested records when finally made public might just help end the horrific conditions at the East Cleveland Ohio jail.” *Id.* at p. 7.

However, the record before the lower court demonstrates that Appellant Strothers’ assertions are merely an effort to “*put the toothpaste back in the tube.*” In disputation of his assertions, the evidence reveals Appellant Strothers’ open hostility towards the elected officials of the City of East Cleveland emanating from his November, 2010 arrest on drug charges.³ The record shows the commencement of his action in mandamus just three business days after the East Cleveland Public Records designee had received Appellant Strothers’ public records request and

³ Indeed, despite Appellant Strothers’ attempt to characterize himself as a morally and civically responsible individual, where he would state:

“Ladies and Gentlemen let me state for the record that my last drink or use of any drug was March 15, 1984 and I have been straight and sober since that date. Up to November 9, 2010 I had no criminal record, no parking tickets, not even an overdue library book. As one of our fine detectives put it I was caught in the wrong place at the wrong time.”

See Appellant Strothers’ December 7, 2010 letter attached as Relator Exhibit Two to Appellant Strothers’ Petition for Writ of Mandamus. Attached hereto as Exhibit D.

However, in disputation of his claim it is observed that Appellant Strothers has recently been arrested again on charges of possessing criminal tools and procuring for prostitute (pimping). See East Cleveland Police Uniform Incident/Offense Report No. 11-04935 attached hereto as Exhibit E.

the submission of a “punishing” second public records request. But, perhaps most egregiously, evidence demonstrates that Appellant Strothers failed to make promised inspection of requested records and indeed, refused to accept service of those records when proffered.

As more fully set forth hereinafter, these actions of Appellant Strothers are properly characterized as acts in bad faith that deny Appellant Strothers standing as an aggrieved party under R.C. 149.43(C)(1).

B. The Impediments Orchestrated by Appellant Strothers Were Acts in Bad Faith Which Deny Appellant Strothers Standing As An “Aggrieved” Party Under R.C. 149.43(C)(1).

(i) The Commencement of an Action in Public Records Mandamus Just Three Business Days After Receipt of a Request for Public Records Could Not Be Considered Under Any Circumstance, A Failure to Provide the Records Within a Reasonable Period of Time.

In setting in motion his personal agenda of misplaced vengeance, the record discloses that Appellant Strothers commenced his action in public records mandamus just three business days after receipt of his request for public records.

In addressing whether the lapse of three business days is sufficient to prove an aggrievement, attention is respectfully directed to the case of *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 689 N.E.2d 25; which raised the issue of when public records must be made available to the public for inspection and copying. In *Wadd* the relator, having experienced a 13 to 24 day delay in obtaining accident reports from the City of Cleveland, sought a determination of the appropriate length of time for the preparation and availability of such records. In disposition this Court issued a writ of mandamus determining reasonable access be provided within eight (8) business days. *Wadd* at 55.

Further, in this regard, the Eighth District Court of Appeals in a show cause hearing in disposition of a claim of bad faith against a public records requestor recently held that “the lapse

of just one day, from the making of the request for public records to the filing of the complaint for a writ of mandamus, could not be considered, under any circumstances, a failure to provide the requested records within a reasonable period of time.” *State ex rel. Bardwell v. Cuyahoga County Bd. of Commissioner*, 2009-Ohio-5573 at ¶ 5, 93058 (OHCA8).

In *Bardwell*, 2009-Ohio-5573, the Eighth District Court of Appeals, cited to the Ohio Supreme Court’s definition of the term bad faith which found that:

“[a] lack of good faith is the equivalent of bad faith, **and bad faith, although not susceptible of concrete definition**, embraces more than bad judgment or negligence. **It imports a dishonest purpose**, moral obliquity, conscious wrongdoing, breach of a known duty through some **ulterior motive or ill will partaking of the nature of fraud**. It also embraces actual intent to mislead or deceive another.”

Id at. ¶ 13 citing *Slater v. Motorists Mutual Insurance Co.* (1962), 174 Ohio.St. 148, 187 N.E.2d 45, at paragraph two of the syllabus. (Emphasis added).

In comparison to the record requests as considered in *Wadd* and in *Bardwell* 2009-Ohio-5573 (where the records request were modest: “(i) records of communications from the Plain Dealer or its attorneys regarding the release of Medical Mart contracts or drafts of those contracts; (ii) drafts of development agreements related to Medical Mart projects; and (iii) the records retention schedule.” *Bardwell* 2009-Ohio-5573 at ¶ 2); the records request in the case *sub judice*, as acknowledged by Appellant Strothers, was voluminous.⁴ (See December 1, 2010

⁴ “Strothers sought significantly more records covering a larger period of time in this case. He requested two years of records for contracts relating to food services at the city jail; contracts relating to laundry service; financial records paid to ‘outside contractors’ including ‘bid requests, proposals and resumes of any winning and non-winning bidder(s)’; records documenting all purchases of jail bedding, pads and sheets; records of bid requests for jail ‘plumbing problems’ including repairs made by in-house custodians and ‘all plumbing invoices minor or major’; records showing certification to provide medical care and dispensation of medications by jail personnel; records relating to contracts for extermination services, including ‘service calls from outside professional and non-professional exterminators’; jail policy pertaining to prisoner access to telephones, showers, exercise or recreation; inspection reports from state or county offices tasked with monitoring jail conditions; and jail policies

letter from Gerald O. Strothers Jr., to Mayor of East Cleveland attached hereto as Exhibit F; see also Journal Entry and Opinion No. 96147 at p. 8; dissent Stewart, M.).

At this juncture it is imperative to discern the appropriate standard of review, and as the issue presented involves a question of law as to whether Appellant Strothers had standing to commence an action in mandamus, it is urged that the appropriate standard of review is de novo. See *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio*, 112 Ohio.St.3d 59, ¶ 6, 2006-Ohio-6499, ¶ 23.

This Court is therefore urged to find that the lapse of three business days was insufficient to establish that Appellant Strothers was “allegedly aggrieved” under R.C. 149.43(C)(1) as essential to invoke the lower court’s subject matter jurisdiction.

It is therefore urged that based on the voluminous nature of Appellant Strothers’ request, Appellant Strothers’ filing of his action in mandamus, just three (3) business days after Appellee Mayor Norton’s receipt of the request for documents; constitutes an act in bad faith which abrogates the presumption of intended access and does not allow Appellant Strothers to be classified as being “aggrieved” as that term is used in R.C. 149.43(C)(1).

As more fully set forth hereinafter, the undisputed facts find that through Appellant Strothers’ attempts to impede the production of documents he could not be deemed “aggrieved” and thus he lacked standing to commence an action in mandamus as.

relating to prisoner treatment, medical care, and discipline encompassing prisoner control by non-lethal means or confinement with handcuffs or chains.”

See Journal Entry and Opinion No. 96147 at p. 9; dissent Stewart, M.

(ii) Appellant Strothers' Attempt to Impede the Production of Documents Through The Submission of a Second and "Punishing" Voluminous Public Records Request Should be Viewed As A Detraction from His Claiming He Was "Allegedly Aggrieved" Under R.C. 149.43(C).

On December 21, 2010 Appellee Mayor Norton personally hand delivered an installment of the records requested by Appellant Strothers. Having been advised that he would be receiving these documents at the City Council Meeting, it is urged that Appellant Strothers with a clear design to impede the City's timely satisfaction of its responsibilities came prepared with a second request for public record access. Indeed, Appellant Strothers' second request for public records was as excessive as his first request and sought:

1. Complete copy of the contract or agreement between the company or companies owning and providing traffic cam services for the City of East Cleveland.
2. List of all current and projected traffic camera placements in East Cleveland; traffic studies, videos, DVD's showing operation of each traffic camera; streets targeted for enforcement.
3. Amount of revenue each of the currently installed traffic cams has generated from 2009 to present.
4. Computerized reports showing breakdown of citizens ticketed by zip code, Traffic Cam Company or companies compile.
5. Yearly, weekly, monthly or daily calibration reports for every traffic camera installed in East Cleveland Ohio year 2010.
6. Copies of correspondence from any citizens who have complained or praised the traffic cams in year 2010, also any public records requests asking about traffic cam data in 2010."

See December 21, 2010 Letter from Gerald Strothers requesting public records attached hereto as Exhibit G.

Despite Appellant Strothers' attempt to paint himself as civically responsible, "*Mr. Strothers also has a right to know where the revenue from the Traffic Cam tickets is being directed; show the money trail; who, where, why, when, how money is spent.*" (See Amended Merit Brief of Appellant Gerald O. Strothers at p. 5); it is urged that in light of the voluminous

nature of his second request, the timing thereof and particularly the preface thereto, such façade is irrefutably denied as Appellant Strothers would state:

“Because of the egregious treatment, so far that I have received I am going to add some more records to the original request tonight. In addition to the records, I have now sued in court to receive about the deplorable conditions at our city jail I am now requesting the following public records pertaining to all of the traffic cams this city has installed.”

See Exhibit G. (Emphasis added).

In discussion of the effect of these machinations, it is urged as essential to acknowledge that Appellant Strothers is quite experienced in pursuing mandamus actions for public records, citing his previous filings against various entities including, but not limited to: Maple Heights;⁵ Garfield Heights Police Chief;⁶ Clerk of Cleveland Municipal Court;⁷ Clerk of Cuyahoga County Common Pleas Court;⁸ Cleveland Parking Violations Bureau;⁹ Lakewood;¹⁰ Cuyahoga County;¹¹ Cuyahoga County and other filings of record.¹²

-
- ⁵ *State ex rel. Strothers v. Rish, Maple Heights Superintendent*, 100 Ohio St.3d 1341(2003).
⁶ *State ex rel. Strothers v. Murphy, Chief of Police*. 132 Ohio App.3d 645 (Ohio App. 8 dist. 1999).
⁷ *State ex rel. Strothers, Appellant, v. Turner, Clerk, Appellee*, Case No. 97-444. (8th Dist.CtAppls) July 23, 1997; aff'd 79 Ohio St.3d 272 (1997).
⁸ *State ex rel Strothers, Jr. v. Gerald E. Fuerst*, Clerk of Courts, Case No. _____ (8th Dist. C/Apls); 85 Ohio St.3d 1485 (Ohio 1999).
⁹ *State ex rel. Strothers v. Cleveland Parking Violations Bureau*, 84 Ohio St.3d 1426 (Ohio 1998) motion for reconsideration denied 84 Ohio St.3d 1489 (Ohio 1999).
¹⁰ *State ex rel. Strothers v. Lakewood*, 79 Ohio St.3d 1480, 683 N.E.2d 785 (Ohio 1997).
¹¹ *State ex rel. Strothers v. McFaul*, 122 Ohio App.3d 327, 701 N.E.2d 759 (Ohio App. 8 Dist. 1997).
¹² *State ex rel Strothers v. Gorden, Mayor*, 3 Ohio St.3d 436, 700 N.E.2d 2595 (Ohio 1998) (ii) *State ex rel Storthers v. Wertheim*, 80 Ohio St.3d 155(1997); motion for reconsideration denied, 80 Ohio St.3d 1472 (Ohio 1997); motion to show cause and Rule 11 sanctions denied; 81 Ohio St.3d 1429, 689 N.E.2d 49 (Ohio 1998); motion to clarify denied 81 Ohio St. 3d 1469 (Ohio 1998). (iii) *State ex rel. Strothers v. Sweeney*, 79 Ohio St.3d 1415, 680 N.E.2d 154 (Ohio 1997).

It is urged that with this level of experience the activities engaged in by Appellant Strothers starkly illustrates that Appellant Strothers never desired access to the requested records. Indeed, Appellant Strothers' motives prove far more black-hearted than mere naked greed. Here, Appellant Strothers sought to punish the city for enforcing its laws as against drug dealers!

“The Supreme Court of Ohio has noted that, “[t]he requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.”

Ohio Trucking Association v. Stickrath, 2011-Ohio-4361, 10AP-673 (OHCA10) citing *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 321.

As more fully set forth hereinafter, Appellant Strothers' further actions in impeding production of the records should be construed as a waiver of any legally enforceable right that Appellant Strothers may have possessed.

(iii) Appellant Strothers' Attempt to Thwart the Production of Documents through His "Failure" to Inspect the Requested Documents or To Receipt for Same When Delivered Constitutes a Waiver of Any Enforceable Legal Right Under R.C. 149.43(B) And Denies Him Standing As "Allegedly Aggrieved" Under R.C. 149.43(C).

In finding that relief in mandamus was moot, the lower court found;

“[t]he evidence in the record in this action indicates that the mayor has made the records available to Strothers by providing him copies **as well as the opportunity to inspect the records**. We must conclude, therefore, that respondent has discharged his duty to make the records available to Strothers. As a consequence, we deny the request for relief in mandamus as moot.”

See Journal Entry and Opinion No. 96147 at p. 4. (Emphasis added).

It is urged, that the lower court should have found that Appellant Strothers' failure to accept delivery of an installment of those requested records when proffered; and Appellant Strothers' failure to timely inspect such documents when such opportunity was afforded fatally impugned standing to commence an action for statutory damages.

While, R.C. § 149.43 does not address the consequences of a relator's failure to accept service of requested documents or to timely make inspection thereof; it is urged as untenable that a relator could, "throw a rock" by setting dates to make inspection of requested records, later renege on those promises; then further, refuse service thereof, and later "hide its hand" and cry foul!

Observing that this Court has a duty to construe statutes to avoid unreasonable or absurd results (see R.C. §1.47(C)); it is urged that this Court should exercise its original jurisdiction as conferred by Section 2(B)(1)(4), Article IV of the Ohio Constitution. Section 2(B)(1)(f), Article IV of the Constitution of Ohio grants original jurisdiction to this court "[i]n any cause on review as may be necessary to its complete determination." This Court has interpreted this provision "...to authorize judgments that are necessary to achieve closure and complete relief in actions pending before the court." *State v. Steffen*, 1994-Ohio-111, 70 Ohio St.3d 399, 407, 639 N.E.2d 67 (Ohio 1994) citing *State ex rel. Polcyn v. Burkhardt* (1973), 33 Ohio St.2d 7, 62 O.O.2d 202, 292 N.E.2d 883.

Such extraordinary exercise of the Court's plenary jurisdiction is appropriately evoked as this Court has stated that,

"[While, it] is true that '[courts] cannot create the legal duty enforceable in mandamus.'" *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, 874 N.E.2d 1200, ¶ 22. It is equally true, however, that "courts in mandamus actions have a duty to construe constitutions, charters, and statutes, if necessary, and thereafter evaluate whether the relator has established the required clear legal right and clear legal duty." *State ex rel. Fattlar v. Boyle* (1998), 83 Ohio St.3d

123, 125, 698 N.E.2d 987; see also *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119, 120, 549 N.E.2d 505 (“we will construe constitutions as well as statutes as necessary to discover whether the duty exists”). It is also our duty “to resolve all doubts concerning the legal interpretation of these provisions.” *Fattlar*, 83 Ohio St.3d at 125, 698 N.E.2d 987; see also *State ex rel. Melvin v. Sweeney* (1950), 154 Ohio St. 223, 226, 43 O.O. 36, 94 N.E.2d 785....”

State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner, 2008-Ohio-2824, 118 Ohio St.3d 515, 890 N.E.2d 888 (Ohio 2008) at ¶ 83.

This Court is therefore respectfully urged to exercise its plenary jurisdiction and in construing R.C. § 149.43 determine the consequences of failure to accept service of requested documents and/or to make timely inspection thereof.

In the exercise of such examination, it is immediately recognized that “the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or *unreasonably interfere*, with the duties of a public official having custody of the record.” *State ex rel. Dann v. Taft*, 2006-Ohio-1825, 109 Ohio St.3d 364, 848 N.E.2d 472 (Ohio 2006) at ¶ 101 (Emphasis added) citing Moyer, interpreting Ohio’s Sunshine Law: a Judicial Perspective (2003), 59 N.Y.U.Ann.Surv.Am.Law 247, 248.

It is further observed that this Court has emphasized that underlying the Public Records Act is the “fundamental policy of promoting open government, not restricting it.” *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, P 7, quoting *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St. 3d 168, 171, 680 N.E.2d 956.

In defining the term, “unreasonable” this Court has provided that, “[t]he word ‘unreasonable’ means: ‘[n]ot conformable to reason, irrational, not governed or influenced by reason; immoderate, exorbitant.’ In Volume 43 Words and Phrases p. 368 ‘unreasonable’ is defined as ‘carrying the same idea as irrational, foolish, unwise, absurd, silly, preposterous,

senseless and stupid.” *Beerman v. City of Kettering*, 14 Ohio Misc. 149, 237 N.E.2d 644 (Ohio Com.Pl. 1965).

Furthermore, according to *Merriam-Webster’s Collegiate Dictionary* 610 (10th ed. 2003), the word “interfere” is defined as “1: to interpose in a way that hinders or impedes: come into collision or be in opposition.”

It is urged that when the accepted definitions of the terms “unreasonable” and “interfere” are read together they create a guideline by which this Court may accurately gauge whether a request represents an unreasonable interference with the duties of a public official having custody of the record. Here it is urged that any interposition that irrationally, foolishly, unwisely, absurdly, preposterously, senselessly hinders or impedes the fundamental policy of promoting open government and acts to restrict open government is an unreasonable interference with the duties of a public official having custody of the record.

It is urged that Appellant Strothers’ failure to timely inspect the requested records; and his failure to accept delivery of those requested records is properly characterized as an unreasonable interference with the duties of a public official having custody of the record.”

In a recent public records case, the Richland County Court of Appeals in peripherally examining this issue rejected a relator’s claim of failure to fulfill a request for documents, observing that the “...oral request made on June 15, 2009 was withdrawn when Relator left the office. Relator made no request to be contacted and left no information for Respondent to contact him once the file had been retrieved.” *State ex rel. Striker v. Cline*, 2010-Ohio-3592, 09CA107 (OHCA5). It is urged that the rationale utilized in *Striker* observes the distinction of an irrational interposition as the acts of of Relator Strothers in failing to timely make inspection of the public records as afforded and/or his failure to accept receipt for those documents when

provided, served to deny the public records officer any rational opportunity to fulfill its obligations.

In concurrence with the holding in *Striker* this Court is urged to find Appellant Strothers thus abandoned his claim and therefore lacked standing to either commence an action in mandamus under R.C. § 149.43(C)(1) or to seek damages thereunder.

Based on the foregoing study it is respectfully urged that this Court in the exercise of its plenary jurisdiction find that the timely inspection of requested records; and, acceptance of requested records upon delivery is an inherent duty essential to the validity of a public records request and that the failure to abide by such inherent duty abrogates any alleged “aggrievement” under R.C. § 149.43(B); thus denying a relator standing to commence an action in mandamus.

As more fully set forth hereinafter, this Court should vacate the lower court’s Judgment as its finding that Appellee Strothers was entitled to statutory damages was fundamentally flawed through the erroneous application of case law.

**Proposition of Law No. II:
The Lower Court’s Finding that Appellee Strothers was Entitled to Statutory Damages Was Fundamentally Flawed Through the Erroneous Application of Case Law.**

The award of statutory damages was fundamentally flawed through the lower court’s erroneous application of case law. Specifically, the lower court misconstrued the holding in *Patton, infra* where this Court held that the public records custodian could satisfy its statutory obligations by,

“...two primary means ... (1) making the records ‘available for inspection to any person at all reasonable times during regular business hours’ and (2) making ‘copies of the requested record[s] available at cost and within a reasonable time.’”

See Journal Entry and Opinion No. 96147 at p. 6, citing *State ex rel. Patton v. Rhodes*, 2011-Ohio-3093, 2011-0183 (OHSC) (Emphasis added).

Observing that it is axiomatic that it is the facts of the case which determine the scope of its holding; it is urged that a reading of *Patton*, reveals distinctions that render its holding distinguishable from the case at hand. In distinction to the case *sub judice*, where Appellee Strothers solely requested the inspection of public records (see discussion *infra* at ____); an examination of the facts in *Patton* finds that the relator requested:

“...a copy of the financial reports of Hamilton County prepared by the county auditor for the fiscal years of 2004, 2005, 2006, and 2008. *The information may be... put on the county auditor’s website....*”

Patton, supra at ¶ 3. (Emphasis added).

In construing the relator’s claim the *Patton* court found a two-part request had been expressed for copying “...of the financial reports of Hamilton County” and for inspection as, “...*Patton* received the access he sought by virtue of the posting of the requested records on the county auditor’s website.” *Patton, supra* at ¶ 1.

The duty to provide access to public records is set forth under R.C. § 149.43(B) which requires that,

“[u]pon request ... *all public records* responsive to the request *shall be promptly prepared and made available for inspection* to any person at all reasonable times during regular business hours.”

See R.C. § 149.43(B)(1). (Emphasis added).

Continued examination of R.C. § 149.43(B)(1) discloses the statutory imperative to provide copies of public records is precipitated,

“... *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.*”

See R.C. § 149.43(B)(1). (Emphasis added)

Observing that the language utilized in R.C. § 149.43 is clear and unambiguous and must be applied as it is written; see e.g., *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 2005-Ohio-685, 105 Ohio St.3d 172, 824 N.E.2d 64 (Ohio 2005), ¶ 14, ref. *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004, ¶ 23 (“Because R.C. 149.43(B)(2) is unambiguous, we must apply it as written.”); there can be no doubt that the disclosure requirements of R.C. § 149.43 are mandatory, and under the factual issues of *Patton* (a dual request for inspection and copying) clearly exposed the public records custodian clearly exposed the public records custodian to liability upon proof of either failure to, (a) allow inspection; or (b) provide copies of requested records.

Consequently, when the rule enunciated in *Patton*, is read in light of the attendant factual issues, a more narrow reach of that holding becomes apparent.

As more fully set forth hereinafter, observing the proper categorization of Appellee Strothers’ Complaint as that solely for access, the lower court’s decision was fundamentally flawed leading to an invalid award of statutory damages and must be overturned.

A. Appellee Strothers Solely Alleged A Denial of Requested Access.

In turning to categorize Appellee Strother’s Complaint, an examination of the record discloses that Appellee Strothers made a written “Request for Access to Review, Inspect and/or Copy Public Records.” (See Appellee Strothers’ Affidavit in Support of Petition for Writ of Mandamus). In elaborating upon his request Appellee Strothers would provide that “... *it is my intention to review the requested records* within a reasonable amount of time....” (See Appellee Strothers’ December 1, 2010 letter attached hereto as Exhibit B. (Emphasis added)).

The record further finds that Appellee Strothers in his Petition for Writ of Mandamus, solely alleged that, "Relator has requested access to review, inspect and copy public records held by Respondent. Relator has been denied requested access." (See Relator's Petition for Writ of Mandamus at p. ____).

Finally, it is observed that on January 28, 2011 Appellee Strothers contacted Brenda Blanks, (Executive Assistant/Paralegal to the Law Director for the City of East Cleveland) to lodge a complaint regarding the invoicing of copying charges. In this regard, Appellee Strothers,

"[explained] that he never requested that I send him copies of the records, but that he specifically stated, in his requests that he wanted to come into the office "to review, inspect and copy at cost" the records and scan the ones he desired into his personal computer...."

(See Affidavit of Brenda L. Blanks at para. 5).

Indeed, Appellee Strothers' position stands wholly consistent with this Court's observations where this Court has held that, "...[t]he right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under R.C. 149.43." *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 1994-Ohio-5, 70 Ohio St.3d 619, 640 N.E.2d 174 (Ohio 1994) at pp. 623-4.

It is thus urged that, as manifested through Appellee Strothers' sworn affidavit, verbal instructions and as upon application of law,

"[Strothers did] not seek copies of everything requested. Instead, [Strothers wanted] to inspect everything requested and then decide whether to make copies following inspection."

State ex rel. The Warren Newspapers, Inc. v. Hutson, 1994-Ohio-5, 70 Ohio St.3d 619, 640 N.E.2d 174 (Ohio 1994).

Therefore, while it is patently clear that Appellant Mayor Norton's sole duty as educated by Appellee Strothers' request, required access to the requested records, the Court of Appeals, in finding that Appellant Mayor Norton had failed to abide by his statutory obligations clearly interposed the *Patton* holding finding,

“The mayor received the request for records on December 2, 2010. Strothers filed this action on December 9. **The first delivery of records was on December 21. Additional transmittals of records occurred on January 13, 18 and 25, 2011.** In a letter from the law director dated February 11, 2011, Strothers was advised to contact Blanks ‘to arrange a day for any future visits to review, inspect and/or copy records.’ Blanks Affidavit, at 10”

See Journal Entry and Opinion No. 96147 at ¶ 16. (Emphasis added).

Thus, upon its face, the lower court's judgment demonstrates, in juxtaposition with the statutory language set forth in R.C. § 149.43, that through the erroneous application of the holding in *Patton* the Court impermissibly commingled two distinct provisions under R.C. § 149.43(B)(1).

Indeed, it is urged that the lower court's ruling stands against the manifest weight of the evidence. As the record clearly establishes that Appellee Strothers was afforded the opportunity to inspect the records

Moreover, this Court is respectfully urged to find that the lower court's decision establishes a dangerous precedent that threatens the very core of the Ohio Public Records Act. Indeed, under such precedent a public records custodian could reasonably assume that they are imbued with the authority to refuse “*prompt access*” of requested records and instead satisfy their statutory obligations by delivery of requested public records via U.S. mail.

This case therefore presents the potential for injury to the public at large, as this Court has often noted, “[w]hen records are available for public inspection and copying is often as important as what records are available.” *State ex rel. Wadd v. City of Cleveland*, 1998-Ohio-

444, 81 Ohio St.3d 50, 52, 689 N.E.2d 25 (Ohio 1998) ref., *e.g.*, H.R.Rep. No. 876, 93d Cong., 2d Sess. 6, 1974 U.S.Code Cong.

Alternatively, the lower court's decision places public records custodians in an untenable position, requiring that even absent a specified request, in order to avoid liability, a public records custodian would be required to make copies of records, even where such production is unrequested and may prove prohibitively voluminous.

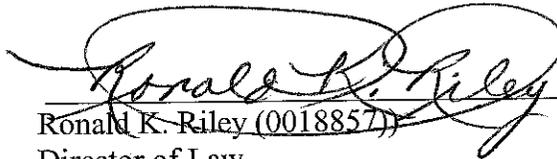
Thus, by its ruling, the court of appeals' decision undermines the legislative intent of the Ohio Public Records Act, ignores its plain meaning, and creates its own unsupported view of the manner in which a public records officer may execute its statutory duties thereby infusing the Ohio Public Records Act with confusion and ambiguity.

It is thus urged that in order to promote the purposes and preserve the integrity of the Ohio Public Records Act, to assure uniform application, and to remove the impediment of confusion; this Court is compelled to reverse the erroneous decision of the court of appeals and overturn the grant of statutory damages.

CONCLUSION

This Court is respectfully urged to dismiss the appeal of Appellant/Cross-Appellee Gerald O. Strothers, Jr.'s and render judgment in favor of Appellee/Cross-Appellant Mayor of East Cleveland, Ohio Gary Norton, Jr., on its cross-claim and reverse the Eighth District Court of Appeals' finding that rendered judgment in Appellant Strothers' favor as to his claim for statutory damage.

Respectfully submitted,

A handwritten signature in cursive script, reading "Ronald K. Riley", is written over a horizontal line. The signature is fluid and somewhat stylized.

Ronald K. Riley (0018857)
Director of Law
City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112

COUNSEL FOR APPELLANT,
MAYOR GARY NORTON, JR.,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellant Mayor of East Cleveland, Ohio Gary Norton, Jr., was sent this 22ND day of DECEMBER 2011 via regular U.S. mail postage prepaid to:

Gerald O. Strothers, Jr.,
14019 Northfield Avenue
East Cleveland, Ohio 44112

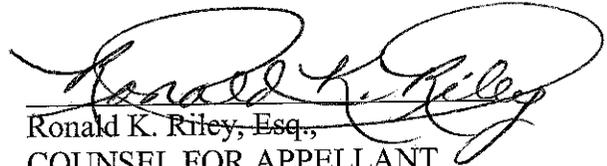

Ronald K. Riley, Esq.,
COUNSEL FOR APPELLANT
MAYOR GARY A. NORTON, JR.,

EXHIBIT LIST

EXHIBIT

PAGE

A.	East Cleveland Law Department Receipt for December 1, 2010 Public Records Request of Gerald Strothers	1
B.	January 18, 2011 Letter from City of East Cleveland to Gerald Strothers	7
C.	January 27, 2011 Letter from City of East Cleveland to Gerald Strothers	7
D.	December 7, 2010 Letter from Gerald Strothers to Mayor of East Cleveland	17
E.	East Cleveland Police Incident Report No.: 11-04935	17
F.	December 1, 2010 Letter from Gerald Strothers to Mayor of East Cleveland	20
G.	December 21, 2010 Letter from Gerald Strothers to Mayor of East Cleveland	22

Gerald O. Strothers Jr.
14019 Northfield Ave
East Cleveland, OH 44112
(216) 324-4783

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE
CERTIFIED MAIL™



7008 1830 0003 8037 8905



1000

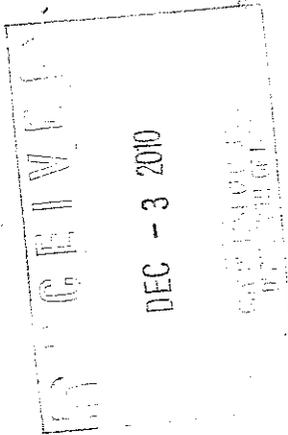


44112

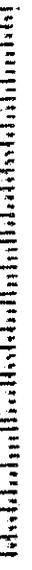
U.S. POSTAGE
PAID
CLEVELAND, OH
44199-0100
DEC 01 2010
AMOUNT

\$5.10
00041849-02

Mayor of East Cleveland Ohio
Gary Norton Jr.
14340 Euclid Ave
East Cleveland, OH 44112



441233499 0007





The City of East Cleveland

14340 EUCLID AVENUE • EAST CLEVELAND, OHIO 44112 • PHONE (216) 681-2310 • FAX (216) 681-5044

GARY A. NORTON, JR.
MAYOR

January 18, 2011

Gerald O. Strothers, Jr.
14019 Northfield Avenue
East Cleveland, Ohio 44112

Re: Your Public Records Request

Dear Mr. Strothers:

Pursuant to your second records request enclosed are copies of (a) the City of East Cleveland's Traffic Signal Violation Video-Enforcement System and Mobile Speed Enforcement Professional Service Agreement, and (b) a public records request which seeks information about the City of East Cleveland's automated traffic camera program.

The cost for the copies is \$1.90, which is due at the time of delivery or pick-up. Please make your check payable to:

The City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112

Again, we will continue to provide you with responsive records as identified. Thank you for your patience.

Cordially,

Brenda L. Blanks
Executive Assistant

Enclosure

cc: Mayor Gary A. Norton, Jr.
Deborah Gooden-Blade,
Assistant Law Director

EXHIBIT B

Working Together For A Better East Cleveland

WWW.EASTCLEVELAND.ORG



The City of East Cleveland

14340 EUCLID AVENUE • EAST CLEVELAND, OHIO 44112 • PHONE (216) 681-2310 • FAX (216) 681-5044

January 27, 2011

GARY A. NORTON, JR.
MAYOR

Gerald O. Strothers, Jr.
14019 Northfield Avenue
East Cleveland, Ohio 44112

Re: Your Public Records Request

Dear Mr. Strothers:

Pursuant to your Public Records Request concerning the City of East Cleveland's traffic camera program, attached are copies of the following documents:

- A copy of ATS' list of intersection survey for East Cleveland;
- A copy of ATS' Calibration Certificates
- Copies of some correspondence received from citizens who have complained about the traffic camera.

ATS does not have a report that provides a break down of violators by zip code.

The cost for the copies is \$2.30. Please make your check payable to:

The City of East Cleveland
Attn: Law Department
14340 Euclid Avenue
East Cleveland, Ohio 44112

Cordially,

Brenda L. Blanks
Executive Assistant

Enclosure

cc: Mayor Gary A. Norton, Jr.
Ronald K. Riley, Law Director
Deborah Gooden Blade,
Assistant Law Director

EXHIBIT C

Working Together For A Better East Cleveland

Gerald O. Strothers Jr.
14019 Northfield Ave.
East Cleveland, OH 44112
(216) 324-4783

December 7, 2010

Mayor of East Cleveland, Gary Norton Jr.
Council President, Dr. Joy Jordan
Council Vice-President Chantelle C. Lewis
Councilman Nathaniel Martin
Councilwoman Mildred Brewer
Concerned Citizens of East Cleveland

*COUNCILWOMAN
Barbara J. Thomas*

Repeated Request for Access to Public Records

On the night of Tuesday, November 9, 2010, the East Cleveland Police Department falsely charged me of Drug Trafficking, Drug Abuse, Drug Possession and several weapons charges.

The East Cleveland Police Swat Team forcibly entered the residence I was renting the third floor of, 14019 Northfield Road. Upon entrance the police detectives executed the second floor tenants' dog, shooting it in the head over five times. Bullets went through the first floor residences apartment and could have killed that young lady but thanks to God she was not at home.

Ladies and Gentlemen let me state for the record that my last drink or use of any drug was March 15, 1984 and I have been straight and sober since that date. Up to November 9, 2010 I had no criminal record, no parking tickets, not even an overdue library book. As one of our fine detectives put it I was caught in the wrong place at the wrong time.

Even though the East Cleveland Police Department took every one of my electronic devices including my computers, projector, tape recorders, and even my professional Minolta Digital Camera bag, I have faith that this incident will be resolved quite soon.

RELATOR EXHIBIT
TWO

EXHIBIT D

What this incident did was to open my eyes to the horrific conditions of the East Cleveland Ohio jail. As I was sent to our jail and forbidden from making a phone call, not allowed to shower or even brush my teeth for the seven days I was held captive. During my time in the East Cleveland Jail facility I watched mice scot across the floor, insects crawl up and down the isles and grown men begging to be fed. The funk of grown men denied basic hygiene was overwhelming to say the least. There were only two cells with running water with many of them not having functional toilets. Another concern is that we have non-medical personnel being allowed to dispense medications to inmates at our facility.

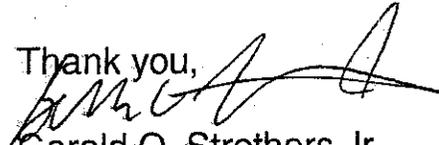
I have asked the Mayor to provide access to obvious public records for my inspection and or copying but to date no one has responded to my public records request pursuant to Ohio Revised Code § 149.43. And now prior to initiation of a Writ of Mandamus commanding the Mayor and City of East Cleveland and City Council to allow access I am making that same request verbally and in writing tonight per Ohio Revised Code § 149.43.

Folks the condition at our city jail is a mess and since we now house traffic violators for extended periods of times housed in conditions that we would not even put a pet in, there needs to be some changes made.

If anyone is interested in knowing more or discussing a plan to end this dungeon, we call a jail; my phone number is (216) 324-4783

I truly hope that the records I have requested on the attached letter to the Mayor can be made available this week not later than Thursday, December 9, 2010 twelve o'clock Noon. What say you?

Thank you,


Gerald O. Strothers Jr.

RELATOR EXHIBIT

TWO

EAST CLEVELAND POLICE



Incident Number

11-04935

EUCLID AV 216-451-1234

Uniform Incident / Offense Report

In Progress	Method Received	Time Received	Time Dispatched	Time Arrived	Time Cleared
YES	IN PERSON	1531	1534	1534	1534

Report Date / Time		Incident Occurred From		Incident Occurred To	
Date	Time	Date	Time	Date	Time
Wednesday 07/20/2011	1600	Wednesday 07/20/2011	1540	Wednesday 07/20/2011	1600

Location of the Incident (Street #, Street, Apt. #, City, State, Zip) Zone
14019 NORTHFIELD AV EAST CLEVELAND OH 44112 - **EA3**

Persons Involved: GERALD O STROTHERS - ARA CITY OF EAST CLEVE - VIC GERALD O STROTHERS - ARA 3	Property: DELL LAPTOP 6 (20) LATEX CONDOMS 2 CELLULAR PHONES Amount: SONY CYBER SHOT CAMERA 0.00FD MAVICA CAMERA
--	---

Units:	Officers:	Photos:	Arrests:
1st: 3158	DET ANTONIO MALONE	0	1
2nd: 3158	SGT RANDY HICKS		
3rd:			
4th:			
5th:			
Report: 0187	DET ANTONIO MALONE		

Codes:	Descriptions:	OFFENSES
4002	PROCURE FOR PROSTITUTE (PIMPING)	
5297	POSSESSING CRIMINAL TOOLS	

Weapons Used:	Trade Marks:	Hate Bias:
Unknown		NO
Entry:	Location Type:	
	Multiple Dwelling	

Refer to Arrest:	Incident #:	Tow#:	Dispatcher: 0983	Officer in Charge: 0117	Entry Id: 0983
Case Status: Arrest - Adult	Cleared Date: 07/22/2011	Cleared By: 0187			

Narrative: 11-04935 Page: 1

det malone//drug investigation

Reviewing Supervisor: _____ Bureau Supervisor: _____ Officer: _____

EAST CLEVELAND POLICE



Incident Number

11-04935

Page #

1

Persons Involved with Incident

Incident #:	Master Number:	Relation:	Arrest #:	Date of Contact:
1104935	001	Arrested Person - Adult	1106321	07/21/2011
Last Name:	First Name:	Mi:	Til:	DOB:
STROSHERS	GERALD	O		07/18/1957
SSN:	Cell Phone:	Pager:		
161480257				
Street #:	Street Name:	Apt:	City:	St:
14019	NORTHFIELD AVE		E.CLEVELAND	OH
Zip:	Phone:	Employee Phone:		
44112	216-324-4783			
Hgt:	Wgt:	Hair:	Eyes:	Race:
602	236	BLK	BRO	B
Sex:	Physical Marks:			
M				
Offenses:	4002	PROCURE FOR PROSTITUTE (PIMPING)		
	5297	POSSESSING CRIMINAL TOOLS		
Resident Class:	Suspected of using:	Victim Type:		
Resident	/	/		

Incident #:	Master Number:	Relation:	Arrest #:	Date of Contact:
1104935	002	Victim		07/20/2011
Last Name:	First Name:	Mi:	Til:	DOB:
EAST CLEVE	CITY OF			//
SSN:	Cell Phone:	Pager:		
Street #:	Street Name:	Apt:	City:	St:
14340	EUCLID		EAST CLEVELAND	OH
Zip:	Phone:	Employee Phone:		
44112	216-451-1234			
Hgt:	Wgt:	Hair:	Eyes:	Race:
Sex:	Physical Marks:			
Offenses:	4002	PROCURE FOR PROSTITUTE (PIMPING)		
	5297	POSSESSING CRIMINAL TOOLS		
Resident Class:	Suspected of using:	Victim Type:		
Other	/	/ Society/pulic		

Incident #:	Master Number:	Relation:	Arrest #:	Date of Contact:
1104935	003	ARREST	1106321	07/21/2011
Last Name:	First Name:	Mi:	Til:	DOB:
STROTHERS	GERALD	O		07/18/1957
SSN:	Cell Phone:	Pager:		
161480257				
Street #:	Street Name:	Apt:	City:	St:
14019	NORTHFIELD AVE		E.CLEVELAND	OH
Zip:	Phone:	Employee Phone:		
44112	216-324-4783			
Hgt:	Wgt:	Hair:	Eyes:	Race:
602	236	BLK	BRO	B
Sex:	Physical Marks:			
M				
Offenses:	4002	PROCURE FOR PROSTITUTE (PIMPING)		
	5297	POSSESSING CRIMINAL TOOLS		
Resident Class:	Suspected of using:	Victim Type:		
Resident	/	/		

Reviewing Supervisor:

Bureau Supervisor:

Officer:

EAST CLEVELAND POLICE



Incident Number

11-04935

Page # 1

Property Involved with Incident

Item #: 001	Item: DELL LAPTOP	NCIC#	Property Tag #
Make:	Model:	Serial #:	Quantity: 1.00
Value: 0.00	Owner Applied Number:	Type: Seized	UCR Property Code: Office Equipment
Notes:			

Item #: 002	Item: (20) LATEX CONDOMS	NCIC#	Property Tag #
Make:	Model:	Serial #:	Quantity: 20.00
Value: 0.00	Owner Applied Number:	Type: Seized	UCR Property Code: Miscellaneous
Notes:			

Item #: 003	Item: 2 CELLULAR PHONES	NCIC#	Property Tag #
Make:	Model:	Serial #:	Quantity: 2.00
Value: 0.00	Owner Applied Number:	Type: Seized	UCR Property Code: Miscellaneous
Notes:			

Reviewing Supervisor:

Bureau Supervisor:

Officer:

EAST CLEVELAND POLICE



Incident Number

11-04935

Page# 2

Property Involved with Incident

Item #:	Item:	NCIC#	Property Tag #
004	SONY CYBER SHOT CAMERA		
Make:	Model: Serial #:	Quantity: Unit Measure:	
		1.00	
Value:	Owner Applied Number: Type:	UCR Property Code:	
0.00	Seized	Miscellaneous	
Notes:			

Item #:	Item:	NCIC#	Property Tag #
005	FD MAVICA CAMERA		
Make:	Model: Serial #:	Quantity: Unit Measure:	
		1.00	
Value:	Owner Applied Number: Type:	UCR Property Code:	
0.00	Seized	Miscellaneous	
Notes:			

Item #:	Item:	NCIC#	Property Tag #
006	2 BOOKS ABOUT ESCORTING		
Make:	Model: Serial #:	Quantity: Unit Measure:	
		2.00	
Value:	Owner Applied Number: Type:	UCR Property Code:	
0.00	Seized	Miscellaneous	
Notes:			

Reviewing Supervisor:

Bureau Supervisor:

Officer:

EAST CLEVELAND POLICE

Incident Number

11-04935

Investigative Report

Title / Subject: Promoting Prostitution

entered the passenger side of the Oldsmobile and he the female driver pulled off.

I (as "Johnell") contacted Strothers by phone once again (recorded conversation) to inquire if the female "Lexi" who he was going to arrange the sexual encounter with had arrived, which he stated "yes she's right here with me". I then spoke with the female who identified herself as "Lexi". The female stated that she didn't wish to talk over the phone. I then continued to speak with Strothers who advised me that he was at Kim's Wings, and informed me that he would be returning home soon, the conversation then ended.

At approximately 2230 hrs surveillance units observed the red Oldmobile return to the target location, the unknown female and Mr. Strothers entered the residence. I then text messaged Strothers that I would be there in ten minutes, which he replied "ok".

At that time the Street Crimes and Unit Narcotics Unit assisted by Sgt Gardner executed the search Warrant at 14019 Northfield. Upon making entry inside of the home we found Strothers and a female later identified as Shatori Stalling seated on the livingroom couch. Gerald Strothers was placed under arrest for Promting Prostitution, and Ms. Stallings was detained. Both parties were separated and informed of their Miranda rights which they both stated that they understood. Ms. Stallings was asked by Sgt Hicks why she was at that residence, which she stated that she was going to make some money. Ms. Stallings went on to state the arrangements that she and Mr. Strothers had regarding sexual acts for money. Ms. Stallings agreed to come to the East Cleveland Police Department to give a voluntary witness statement.

The following are itmes retrieved as evidence from 14019 Northfield;

- 1.(20) Latex Condoms
2. Dell Laptop Computer
- 3.Notebook paper with names and phone numbers listed
4. Sonya Cybershot
5. "Sex Secrets of Escorts" Book
6. "Blue print for Escort Service" Book
- 7.Clear plastic bag of Marijuana
8. FD Mavica Sony Camera
9. Kingston USB Wirless Adapter
10. 2 Cellular phones (phone numbers 216-324-4783/ 216-244-9058)
11. Video Camera

The evidence was logged on page 152 of the Detective Bureau Property Book and placed in a locked evidence cabinet. The recovered evidence will be sent to BCI for further testing.

Gerald Strothers was advised of hs charges and transported to East Cleveland City Jail.

Shatori Stalling was given a Specific Warning Regarding Interrogation Form which she read aloud, signed

By: DET ANTONIO . MALONE

Badge# 0187

Date: 07/20/2011 Time: 1607

No. 001 Page#: 2

Reviewing Supervisor: _____

Date: _____

EAST CLEVELAND POLICE

Incident Number

11-04935

Investigative Report

Title / Subject: Promoting Prostitution

same and indicated that she understood her rights. Ms. Stallings indicated that she wanted to speak with Detectives.

Shatori Stalling stated that she met "Jerry" aka Gerald Strothers at a bar on the west side called Omalleys. Stallings stated that "Jerry" asked her to be one of his prostitutes and informed her that after completing sex acts they would split the money 60percent / 40percent. Stallings stated that "Jerry" made up the name "Lexi" for her. Stallings stated that today was the first time she was set up with a man by Strothers, but he tried several other times. Stallings stated that she met three other prostitutes that worked for Strothers. Stallings had nothing further to add and the interview was ended.

An index card and computer check was completed on the above listed felony suspect Gerald Strothers. Strothers was found to have a (2) cycle arrest record with FBI:587358AA7 and BCI: C672627 numbers. Gerald Strothers has no convictions.

Gerald Strothers was received into the Detective Bureau. He was fingerprinted and photographed (photo # 19302). Strothers was given a Specific Warning Regarding Interrogation Form which he read aloud, signed same and indicated that he understood his rights. Gerald Stothers indicated that he wanted to speak with Detectives regarding his arrest.

Strothers at first denied that he was running a brothel. Sgt. Hicks advised Strothers that police had a Detective posing as a "john" and that he had conversation with him about sex acts for money. Sgt. Hicks also advised Strothers about his web site and that, police also had a written statment from Stalling that he was running a brothel. Strothers then admitted that he was and that he made a mistake. Strother staid that he has been doing this from 2006. Sgt. Hicks stated that detective had complaints that he was using 16 and 17 year old females for hi business, Strother stated that he never used any under age females. The interviewed ended.

Gerald was given the opportunity to make telephone calls then returned to his jail cell

By: DET ANTONIO MALONE

Badge# 0187

Date: 07/20/2011 Time: 1607

No. 001 Page #: 3

Reviewing Supervisor: _____

Date: _____

Gerald O. Strothers Jr.
14019 Northfield Ave
East Cleveland, OH 44112
(216) 324-4783

December 1, 2010

Mayor of East Cleveland Ohio
Gary Norton Jr.
14340 Euclid Ave
East Cleveland, OH 44112

Request for Access to Review, Inspect and or Copy Public Records
Pursuant to Ohio Revised Code § 149.43

I am requesting to review, inspect and or copy the following public records pertaining to East Cleveland Ohio from (2009 to present):

- Copy of Contract to Provide food / catering service for jail prisoners
- Copy of Contract to provide Laundry Service to jail prisoners
 - All financial records which contain data about the
 - jail which includes all payments made and received, amounts paid to outside contractors, bid requests, proposals and resumes of any winning and non-winning bidder(s).
- Copy of all purchases of jail bedding, pads and sheets
- Request for bids of jail plumbing problems including the many non-working sinks and toilets in the facility, this may include repairs made by in-house custodians; all plumbing invoices minor or major.
- Certification to provide medical care, dispense medications by jail personnel or written authorization allowing non-medical personnel, correctional officers to dispense prescription medications.
- Extermination Contracts or requests for extermination services made by jail personnel and prisoners, including the plan to address rat, mice and insect

infestation at the jail facility; all service calls from outside professional and non-professional exterminators.

- o Jail policy pertaining to prisoner's use of telephones, showers, and being able to step out of their cells for exercise or recreation, or letter directing jail personnel to keep prisoners caged up without release.
- o Inspection reports from State of Ohio and Cuyahoga County offices tasked with monitoring jail facilities.
- o Written jail policies pertaining to prisoner treatment, phone calls, medical attention, and discipline including incidents where prisoners were stunned with electronic non-lethal weapons and physically restrained using chains or handcuffs. (I witnessed one such person receive such treatment while there)

I realize that this is a large request for documents but it is my intention to review the requested records within a reasonable amount of time and perhaps help our fair city avoid any future mistreatment of prisoners in the city jail facility.

Mr. Mayor, please contact me within a reasonable time to discuss date(s) and time(s) for record review and *copy cost per page.

Sincerely



Gerald O. Strothers Jr.
IRSman1040ez@aol.com

State ex rel. Strothers v. Wertheim, 80 Ohio St. 3d 155, 158, 1997 Ohio 349 (1997)

State ex rel. Strothers v. Rish, 2003-Ohio-2955

* *State ex rel. Strothers v. Murphy* (1999), 132 Ohio App.3d 645, 650

Certified Mail: 7008 1830 0003 8037 8905

Gerald O. Strothers Jr.
14019 Northfield Ave.
East Cleveland, OH 44112
(216) 324-4783

December 21, 2010 - East Cleveland City Council Meeting - 6:30 PM

Mayor of East Cleveland, Gary Norton Jr
Council President, Dr. Joy Jordan
Council Vice-President Chantelle C. Lewis
Councilwoman Barbara J. Thomas
Councilman Nathaniel Martin
Councilwoman Mildred Brewer
Concerned Citizens of East Cleveland

Letter of Disappointment

On December 1, 2010, I requested from our honorable Mayor, Gary Norton Jr. to access to review, inspect and copy at cost public records held by the City of East Cleveland. That request was pursuant to Ohio Revised Code Statute 149.43, better known as Ohio's Sunshine Law.

Not having heard any response from our Mayor, I came before this City Council on December 7, 2010 and once again asked to see public records and hoped that council would intervene.

HOWEVER, the assembled members of this city council (Not including Councilwoman Brewer) did nothing to help the mayor comply with Ohio Law; not one single council member even bothered to get involved.



Having no other recourse, I filed a Writ of Mandamus in the Eighth District Court of Appeals on December 9, 2010, based on the continued hiding of the public held records by East Cleveland City Hall.

The clock on this proceeding started ticking at 2:34 PM, December 13, 2010 and based on the law each day the city continues to hide these requested public records could cost this cash strapped city \$100 per day each day the mayor refuses to turn over the records requested.

Mr. Mayor, City Council Members and Citizens of East Cleveland, I do not want the money, what I want is to conduct a citizens audit of the books and records requested; if the city has nothing to hide release the records now and let me see the documents I have requested.

Because of the egregious treatment, so far that I have received I am going to add some more records to the original request tonight. In addition to the records, I have now sued in court to receive about the deplorable conditions at our city jail I am now requesting the following public records pertaining to all of the traffic cams this city has installed.

1. Complete copy of the contract or agreement between the company or companies owning and providing traffic cam services for the City of East Cleveland.



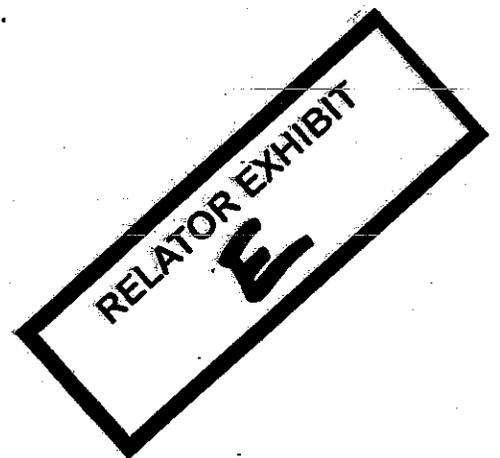
2. List of all current and projected traffic camera placements in East Cleveland; traffic studies, videos, DVD's showing operation of each traffic camera; streets targeted for enforcement.
3. Amount of revenue each of the currently installed traffic cams has generated from 2009 to present.
4. Computerized reports showing breakdown of citizens ticketed by zip code, Traffic Cam Company or companies compile.
5. Yearly, weekly, monthly or daily calibration reports for every traffic camera installed in East Cleveland Ohio year 2010.
6. Copies of correspondence from any citizens who have complained or praised the traffic cams in year 2010, also any public records requests asking about traffic cam data in 2010.

Ohio Revised Code Statute 149.43 directs that public records be available within a reasonable amount of time.

To the citizens watching this fiasco on cable, I invite you to join me in this audit of our cities finances. My phone number is (216) 324-4783, Gerald Strothers of 14019 Northfield Ave in East Cleveland.

Respectfully Submitted


Gerald O. Strothers Jr.



APPENDIX

- A. NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT, MAYOR OF EAST CLEVELAND, OHIO GARY NORTON, JR.**
- B. JOURNAL ENTRY OF THE EIGHTH DISTRICT COURT OF APPEALS (JULY 26, 2011).**
- C. OHIO REVISED CODE SECTION 149.43.**

IN THE SUPREME COURT OF OHIO

GERALD O. STROTHERS, JR.)

Appellant/Cross-Appellee,)

v.)

MAYOR OF EAST CLEVELAND,)
OHIO, GARY NORTON, JR.,)

Appellee/Cross-Appellant.)

11-1483

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District
Court of Appeals
Case No.: CA-10-96147

NOTICE OF CROSS APPEAL OF APPELLEE/CROSS-APPELLANT,
MAYOR OF EAST CLEVELAND, OHIO GARY NORTON, JR.

Gerald O. Strothers, Jr., *pro se* (COUNSEL OF RECORD)
14019 Northfield Avenue
East Cleveland, Ohio 44112
(216) 324-4783

GERALD O. STROTHERS, JR., *pro se*
For APPELLANT/CROSS-APPELEE GERALD O. STROTHERS, JR.,

Ronald K. Riley (0018857) (COUNSEL OF RECORD)
Director of Law
City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112
Phone: (216) 681-2393
Fax: (216) 681-2199 Facsimile
rriley@eastcleveland.org

COUNSEL FOR APPELLEE/CROSS-APPELLANT,
MAYOR OF EAST CLEVELAND OHIO,
GARY NORTON JR

FILED
SEP 08 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellee/Cross-Appellant Gary Norton, Jr.,
Mayor of the City of East Cleveland

Appellee/Cross-Appellant Mayor of East Cleveland, Ohio, Gary Norton, Jr., hereby gives Notice of Cross Appeal to the Supreme Court of Ohio from the Judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No.: CA-10-096147 on July 26, 2011.

Pursuant to S.Ct. Prac R. 2.1(A)(1) this case is an appeal of right as it invokes the appellate jurisdiction of the Ohio Supreme Court as this case originated in the Court of Appeals for the Eighth Appellate District.

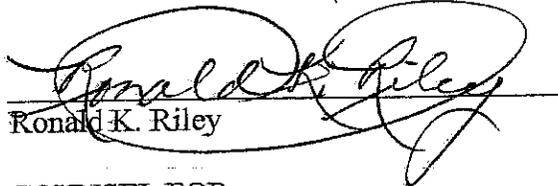
Respectfully submitted,
Ronald K. Riley, Counsel of Record


Ronald K. Riley

COUNSEL FOR APPELLEE/CROSS-
APPELLANT, MAYOR OF EAST CLEVELAND
OHIO, GARY NORTON JR

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Cross Appeal of Appellee/Cross-Appellant, Mayor of East Cleveland, Ohio Gary Norton, Jr., was sent by regular U.S. Mail postage prepaid to counsel for Appellant/Cross-Appellee, Gerald O. Strothers, Jr., 14019 Northfield Avenue, East Cleveland, Ohio 44112 on September 7th, 2011.


Ronald K. Riley

COUNSEL FOR
APPELLEE/CROSS-APPELLANT,
MAYOR OF EAST CLEVELAND, OHIO,
GARY NORTON JR.,

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

GERALD O. STROTHERS, JR.

Relator COA NO.
96147
ORIGINAL ACTION

-VS-

MAYOR OF E. CLEVE. OH. GARY NORTON, JR

Respondent MOTION NO. 446174

Date 07/26/11

Journal Entry

WRIT DENIED; STATUTORY DAMAGES AWARDED.

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 26 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY Frank S. Celebrezze, Jr. DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES - 8:00 AM 7/26/11

Adm. Judge, MARY EILEEN KILBANE, Concur

Judge MELODY J. STEWART,
CONCURS AND DISSENTS IN PART

Frank S. Celebrezze, Jr.
Judge FRANK S. CELEBREZZE, JR.
RECEIVED
JUL 28 2011
CITY OF EAST CLEVELAND
DEPARTMENT OF LAW

APPENDIX B

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96147

GERALD O. STROTHERS, JR.

RELATOR

vs.

**MAYOR OF EAST CLEVELAND, OHIO
GARY NORTON, JR.**

RESPONDENT

**JUDGMENT:
WRIT DENIED;
STATUTORY DAMAGES AWARDED**

Writ of Mandamus
Motion No. 440450
Order No. 446174

RELEASE DATE: July 26, 2011

FOR RELATOR

Gerald O. Strothers, Jr., pro se
14019 Northfield Avenue
East Cleveland, Ohio 44112

ATTORNEY FOR RESPONDENT

Ronald K. Riley
Director of Law
City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112

**COPIES MAILED TO COUNSEL FOR
ALL PARTIES - COSTS TAXED**

FRANK D. CELEBREZZE, JR., J.:

Relator, Gerald O. Strothers, Jr., requests that this court compel respondent, Gary Norton, Jr., Mayor of East Cleveland ("the mayor"), "to provide access to review, inspect and copy 'at cost'" various records. Complaint, at 4. Strothers also requests that this court award statutory damages for the delay in making the records available to him. For the reasons stated below, we deny his request for relief in mandamus and enter judgment for statutory damages in the amount of \$1,000.

Strothers sent a letter to the mayor requesting records relating to the operation of the East Cleveland jail including: food service; laundry service; financial records; purchases of jail bedding; plumbing repairs; medical care and dispensing medications; extermination contracts; jail policy regarding various prisoner rights and treatment of prisoners; and state and county inspection reports. The letter was dated December 1, 2010. The certified mail return receipt indicates that it was received on December 2, 2010.

Strothers filed the complaint in this action on December 9, 2010. On December 27, 2010, the mayor filed a "response" in which he argues that he had not been provided a reasonable opportunity to respond to the request for records when Strothers filed this action. Also on December 27, Strothers filed a motion for summary judgment.

On April 13, 2011, this court ordered the parties to each file an inventory listing the category of records requested and whether and to what extent respondent had made the records available. Each party responded.

In his inventory, Strothers attempts to expand the scope of this action to include records regarding East Cleveland's use of traffic cameras. He requested these records in a December 21, 2010 letter to the mayor and members of the city council. Although this letter is attached to his motion for summary judgment, Strothers has not moved to amend his complaint to include this additional request for records, which occurred after the filing of this action on December 9, 2010. See Civ.R. 15. As a consequence, we hold that the scope of this action is limited to the request for records in the December 1, 2010 letter.

Strothers acknowledges that he has received records. He contends, however, that he has not received all or the correct records. We note, however, that none of these representations is made in an affidavit or other material of evidentiary quality.

By contrast, the mayor filed a "supplemental response," which is supported by the affidavit of Brenda L. Blanks, Executive Assistant/Paralegal to the city's law director. Blanks avers that she was responsible for responding to the request for records.

In her affidavit, Blanks states that she mailed records to Strothers. The accompanying copy of a certified mail receipt reflects that, although the records were sent to the same address that Strothers used in filing this action, the item was returned "unclaimed." She also avers that, although she and the law director have invited Strothers by telephone and by letter to schedule an appointment to examine records, he has not done so.

Blanks also refers to respondent's inventory of records made available to Strothers. The inventory accompanies the "supplemental response" and reflects that records were transmitted to Strothers primarily on December 21, 2010 but also on January 13, 18 and 25, 2011.

R.C. 149.43 establishes the standards for making public records available. "That statute specifies two primary means of providing access to public records: (1) making the records 'available for inspection to any person at all reasonable times during regular business hours' and (2) making 'copies of the requested record[s] available at cost and within a reasonable time.' R.C. 149.43(B)(1)." *State ex rel. Patton v. Rhodes*, __ Ohio St.3d __, 2011-Ohio-3093, __ N.E.2d __, at ¶15.

As noted above, Blanks represents that the mayor has provided to Strothers either copies of the records he requested or the opportunity to inspect the records during regular business hours. She also avers that Strothers has not

acted on the opportunities to inspect records and that copies of records that were mailed to him were returned "unclaimed." Strothers has not submitted any material of evidentiary quality to rebut the averments by Blanks.

The evidence in the record in this action indicates that the mayor has made the records available to Strothers by providing him copies as well as the opportunity to inspect the records. We must conclude, therefore, that respondent has discharged his duty to make the records available to Strothers. As a consequence, we deny the request for relief in mandamus as moot.

Strothers has also requested that this court award statutory damages.

"If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section." R.C. 149.43(C)(1).

Strothers contends that the mayor did not timely make the records available. R.C. 149.43(B)(1) provides, in part: "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.”

The mayor received the request for records on December 2, 2010. Strothers filed this action on December 9. The first delivery of records was on December 21. Additional transmittals of records occurred on January 13, 18 and 25, 2011. In a letter from the law director dated February 11, 2011, Strothers was advised to contact Blanks “to arrange a day for any future visits to review, inspect and/or copy records.” Blanks Affidavit, at 10.

The record in this case, therefore, reflects that the mayor did not fully respond to the public records request by Strothers for at least seven weeks after receipt of the request and more than a month after Strothers commenced this action. Strothers contends that the mayor did not make the records available “within a reasonable period of time” as required by R.C. 149.43(B)(1).

In *State ex rel. Bardwell v. Rocky River Police Dept.*, Cuyahoga App. No. 91022, 2009-Ohio-727, the relator hand-delivered a public records request on January 18, 2008. The respondents transmitted records between February 7 and March 28, 2008. We observed that 45 days (32 business days) elapsed between the filing of the action in mandamus and the transmittal of the last record. As a consequence, we entered judgment for the maximum amount of statutory damages — \$1,000.

“The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.” R.C. 149.43(C)(1).

The mayor has not presented to this court any authority for delaying the release of the records for 12 to 47 calendar days after the filing of this action on December 9, 2010. Clearly, some of the records were made available to Strothers more than ten calendar days after the filing of this action. The language of R.C. 149.43(C)(1) is clear and *Bardwell* exemplifies that we must enter judgment for Strothers in the amount of \$1,000 for statutory damages.¹

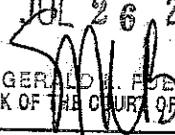
¹ Additionally, we note that the complaint has various defects. The action is not on relation of the state as required for an action in mandamus by R.C. 2731.04. *State v. Grunden*, Cuyahoga App. No. 96114, 2011-Ohio-744. Loc.App.R. 45(B)(1)(a) requires that a complaint in an original action be verified and supported by an affidavit specifying the details of the claims. Strothers filed an affidavit that states, “the statements made in the Petition are proper and true.” “It is well-established that a relator’s conclusory statement in an affidavit does not comply with the requirement of Loc.App.R. 45(B)(1)(a) that an affidavit specify the details of the claim. Failure to do

Accordingly, relator's motion for summary judgment for relief in mandamus to compel the mayor to make records available is denied. Judgment for Strothers in the amount of \$1,000 statutory damages. Respondent to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ denied; statutory damages awarded.


FRANK D. CELEBREZZE, JR., JUDGE

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 26 2011

GERALD E. FORST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

MARY EILEEN KILBANE, A.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART AND DISSENTS IN PART
(SEE SEPARATE OPINION)

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN
PART:

I agree that the city of East Cleveland has produced the records requested by Strothers for the reasons stated in the majority opinion and that the writ is properly denied. I disagree, however, with the majority's finding that the city did not produce those records within a reasonable period of time and consequently disagree with the majority decision to award statutory damages.

so is a basis for denying relief. See, e.g., *State ex rel. Castro v. Corrigan*, Cuyahoga App. No. 96488, 2011-Ohio-1701." *State ex rel. Wright v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 96397, 2011-Ohio-2159, at ¶4.

The rote application of the 45-day standard applied in *State ex rel. Bardwell v. Rocky River Police Dept.*, 8th Dist. No. 91022, 2009-Ohio-727, is wholly contrary to the statutory directive that public records be turned over within a "reasonable" time. The concept of "reasonableness" under R.C. 149.43(B)(1) is elastic, not static, and at all events depends on the particular facts and circumstances of each case. In *Bardwell*, we concluded that 45 days to respond to a records request seeking certain police logs expense account records for a two-month period was too long.

Strothers sought significantly more records covering a larger period of time in this case. He requested two years of records for contracts relating to food services at the city jail; contracts relating to laundry service; financial records paid to "outside contractors" including "bid requests, proposals and resumes of any winning and non-winning bidder(s)"; records documenting all purchases of jail bedding, pads and sheets; records of bid requests for jail "plumbing problems" including repairs made by in-house custodians and "all plumbing invoices minor or major"; records showing certification to provide medical care and dispensation of medications by jail personnel; records relating to contracts for extermination services, including "service calls from outside professional and non-professional exterminators"; jail policy pertaining to prisoner access to telephones, showers, exercise or recreation; inspection reports from state or

county offices tasked with monitoring jail conditions; and jail policies relating to prisoner treatment, medical care, and discipline encompassing prisoner control by non-lethal means or confinement with handcuffs or chains.

Any rational application of the reasonable time standard set forth in R.C. 149.43(B)(1) would show that the records request in this case was far more onerous than that made in *Bardwell*. Unlike the two-month time period for which records were sought in *Bardwell*, Strothers sought, without time limitation, virtually every record documenting the operation of the East Cleveland jail. Indeed, Strothers himself acknowledged in the records request that "I realize that this is a large request of documents * * *." We might also acknowledge that Strothers made his records request toward the end of the year and approaching the Christmas and New Year holidays when it could reasonably be presumed that offices were understaffed. But despite acknowledging that he requested a large number of documents, Strothers filed this complaint in mandamus just eight days after the city received his request. These facts make Strothers less a good-faith victim of delay in producing public records and more an opportunist seeking to manipulate the statutory damages provisions of the public records law. Given the circumstances described, I would find that the city's production of all requested documents within 47 days was certainly accomplished within a reasonable period of time.

149.43 [Effective Until 10/17/2011] Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

APPENDIX C

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code;

- (aa) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;
- (bb) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.
- (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:
- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
- (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;
- (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
- (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.
- (3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.
- (4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.
- (5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.
- (6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.
- (7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator

of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of

the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

- (a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;
- (b) The social security number, birth date, or photographic image of a person under the age of eighteen;
- (c) Any medical record, history, or information pertaining to a person under the age of eighteen;
- (d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, 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. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, 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. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to

Identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a

justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C) (1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in

this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for

charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 02-12-2004; 04-27-2005; 07-01-2005; 10-29-2005; 03-30-2007; 2006 HB9 09-29-2007; 2008 HB214 05-14-2008; 2008 SB248 04-07-2009

This section is set out twice. See also § 149.43, as amended by 129th General Assembly File No. 43, HB 64, § 1, eff. 10/17/2011.

149.43 [Effective 10/17/2011] Availability of public records for inspection and copying

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational

services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

- (a) Medical records;
- (b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;
- (c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;
- (d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;
- (e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;
- (f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;
- (g) Trial preparation records;
- (h) Confidential law enforcement investigatory records;
- (i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;
- (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Intellectual property records;
- (n) Donor profile records;
- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting

attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code;

(aa) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(bb) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent

that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee

of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, 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. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, 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. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible

for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator

of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C) (1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an

obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Amended by 129th General Assembly File No. 43, HB 64, § 1, eff. 10/17/2011.

Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 02-12-2004; 04-27-2005; 07-01-2005; 10-29-2005; 03-30-2007; 2006 HB9 09-29-2007; 2008 HB214 05-14-2008; 2008 SB248 04-07-2009

This section is set out twice. See also § 149.43, effective until 10/17/2011.