ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

JASON MAHE 160 State Route 720 Lakeview, Ohio, 43331, Relator, -vs- MR. GARY C. MOHR, DIRECTOR Ohio Department of Rehabilitation and Correction 770 West Broad Street Columbus, Ohio, 43222 And, R. MICHAEL DEWINE, ESQ. Ohio Attorney General State Office Tower – 26th Floor 30 East Broad Street Columbus, Ohio, 43215 And, RICHARD T. CHOLAR, JR., Senior Assistant Attorney General Criminal Justice Section Corrections Litigation Unit 150 East Gay Street, 16th Floor Columbus, Ohio, 43215, Respondents.	Case No. 11-2207

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COMPLAINT FOR ORIGINAL WRIT OF MANDAMUS (PUBLIC RECORDS)

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COMPLAINT FOR ORIGINAL WRIT OF MANDAMUS
(PUBLIC RECORDS)

I. JURISDICTION

1. This is an original action for a writ of mandamus, as well as for ancillary relief, compelling the Respondents to comply with their obligations under the Ohio Public Records Act, Ohio Revised Code §149.43(B), to make available to Relator public records in Respondents' files. The records at issue consist of documentation relating to Relator's incarceration in multiple correctional facilities within the State of Ohio operated by Respondent, the Ohio Department of Rehabilitation and Correction (hereafter "ODRC"), including incidents of alleged personal injury to Relator on or about April 23, 2011 and on or about June 26, 2011, which incidents were, or should have been, foreseen by Respondents, and which incidents are now being investigated by counsel for the Relator. The records further consist of documentation relating to the conduct of Respondent ODRC and its agents and/or employees towards Relator during his period of incarceration. In violation of Respondents' obligations under the Act, Respondents have failed and refused to make the records available to Relator or his counsel, notwithstanding requests by Relator that they do so, beginning on July 19, 2011, to the present. This Court has jurisdiction of the action under Article IV, §2, of the Constitution of Ohio, and under Ohio Revised Code §149.43(C) and §2731.02.

II. PARTIES

2. Relator was, until his release this morning, an inmate serving a four-year sentence which expired on December 30, 2011. He was most recently incarcerated in the Infirmary at the Madison Correctional Institution under "protective custody" or "safe housing" status, such status having been granted only after written request for same by counsel for Relator.

3. Respondent Mohr is the Director of The Ohio Department of Rehabilitation and Correction (hereafter "ODRC"), the state agency with primary and sole responsibility for housing, rehabilitating, and protecting Relator during his period of incarceration with ODRC. Respondent Mohr is a "public official" within the meaning of Ohio Revised Code §149.011(D).

4. Respondent DeWine is the Attorney General of the State of Ohio and he, and his Assistant Attorneys General, are primarily responsible for representation of state agencies, including

ODRC. His office is responsible for developing the state's public records policy, including training, certifying, and educating Ohio public officials about the policy, as well as advising, reviewing, and/or determining, on behalf of ODRC, which documents requested by Relator may be released, including form and redaction of content, if any. Respondent DeWine is a "public official" within the meaning of Revised Code §149.011(D).

5. Respondent Cholar is the Senior Assistant Attorney General, Criminal Justice Section, Corrections Litigation Unit, in the Office of the Attorney General of the State of Ohio and is primarily responsible for representation of ODRC. The Corrections Litigation Unit of the Ohio Attorney General's Office is responsible for advising, reviewing, and/or determining, on behalf of ODRC, which documents requested by Relator may be released, including form and redaction of content, if any. Respondent Cholar is a "public official" within the meaning of Revised Code §149.011(D).

III. FACTS

6. On or about March 28, 2008, Relator entered the Corrections Reception Center of ODRC to begin serving a four-year sentence for conviction of a first-degree felony from Logan County, Ohio. Since Relator's entry into the ODRC prison system, he has served portions of his sentence at the Corrections Reception Center ("CRC"), Oakwood Correctional Facility ("OCF"), Marion Correctional Institution ("MaCI"), London Correctional Institution (LoCI"), and Madison Correctional Institution ("MaCI").

7. During the Relator's period of incarceration with ODRC, he has performed certain work assignments on or at the behest of representatives of ODRC, the disclosure of which have placed Relator at great risk of physical harm, which risk was, or should have been, known or obvious to Respondents. Respondent Mohr is in possession of records documenting the Relator's inmate, institution, and unit files, and other records germane to the work assignments performed by Relator.

8. On or about April 23, 2011, while incarcerated at the Marion Correctional Institution ("MaCI"), Relator was placed in a cell with an inmate bearing a higher security level, who attempted to kill Relator by stabbing him with a knife fashioned from glass. Relator's assailant indicated that

the attempt on his life was made at the behest of an ODRC employee/investigator. Respondent Mohr is in possession of records documenting the attack, including internal investigation of the stabbing, the institution investigator's file on Relator, Relator's inmate, institution, and unit files, and other records germane to the stabbing of Relator.

9. On or about May 31, 2011, counsel for Relator was contacted, in writing, by Relator himself seeking representation. On or about June 7, 2011, Relator sent kites to the Marion Correctional Warden and Deputy Warden/Administration and the Institution Inspector, placing them on notice of representation by counsel, and advising them "[I] would like to give Marshall and Morrow, LLC, Attorney Office (John Marshall) access to review any and all records including medical, concerning me. Thank you very much for your time and consideration" (Exhibit A). On June 25, 2011, Relator was moved to London Correctional Institution.

10. On or about June 26, 2011, within 24 hours of Relator's transfer to London Correctional Institution, Relator was attacked in "the yard" by a group of inmates. Respondent Mohr is in possession of records documenting the attack, including internal investigation of the attack, the institution investigator's file, Relator's inmate, institution, and unit files, and other records germane to the attack on Relator.

11. On or about July 19, 2011, counsel for Relator wrote to William A. Eleby, Chief of the Bureau of Classification and Reception of the Ohio Department of Rehabilitation and Correction, requesting protective custody status for Relator. Relator's request for protective custody status was finally granted on August 19, 2011, and Relator was moved from Marion Correctional Institution to London Correctional Institution, with the proviso that he would be moved to Oakwood Correctional Facility "as soon as space is available and transportation can be arranged." (Relator remained in "safe housing" in the Infirmary at MaCI until his release today, December 30, 2011.)

12. Since the stabbing on April 23, 2011, and Relator's retention of counsel, Relator has filed several internal grievances and complaints regarding his treatment by ODRC personnel; their interpretation of "protective custody" and/or "safe housing" status; and, the inconsistent application of rules, or "changes" to rules as applied to the Relator.

13. On or about July 19, 2011, Relator's counsel sent a written Public Records Act request to Respondents Mohr and DeWine (attached hereto as Exhibit B).

14. On or about July 27, 2011, Respondent DeWine acknowledged receipt of Relator's Public Records request and stated said request had been forwarded to Richard T. Cholar, Jr., who forwarded it to the Legal Services Division of ODRC. The letter, received by counsel for Relator on August 1, 2011, stated "I am not sure which attorney from ODRC will be handling the request, but I believe Austin Stout, Steve Young, and Trevor Clark have received notice of it." (Exhibit C).

15. On or about July 28, 2011, Relator's counsel sent a supplemental written Public Records Act request to Respondents Mohr and DeWine (attached hereto as Exhibit D).

16. On or about August 4, 2011 (Exhibit E), Respondent DeWine acknowledged Relator's supplemental Public Records request and stated:

> "I have received your supplement to your original public records request, in your letter dated July 28, 2011. Your requested records, <u>if they exist</u>, would likely be in the possession of the Ohio Department of Rehabilitation and Correction. As with your last request, this letter was forwarded to Rich Cholar, the Unit Coordinator for the Corrections Litigation Unit of the Criminal Justice Section of this Office. This letter was also forwarded to Austin Stout, Trevor Clark, and Steve Young of the Legal Services Division of ODRC. . ." [emphasis added].

Respondent-Mohr was placed on notice by letter dated July 19, 2011 (Exhibit F) of counsel's investigation into Relator's claims, and requested that a pre-litigation hold be placed on any documents, data, or other potential evidence in regard to Mr. Mahe's potential claims.

17. On or about October 19, 2011, and again at the end of October, as described in the Affidavit of Kirsten Dell, an Ohio State Bar Association Certified Paralegal (Exhibit G), calls were made to the office of Respondent Cholar attempting to follow-up on the Public Records requests. Ms. Dell left voice mail messages for Respondent Cholar on both occasions.

18. On or about November 1, 2011, as described in the Affidavit of John S. Marshall, counsel for Relator (attached Exhibit H), and Kirsten L. Dell (Exhibit G), a conference call was held between Trevor Clark, Assistant Attorney General, John Marshall (counsel for Relator), and Kirsten Dell (Paralegal) to discuss the Public Records Requests. Mr. Clark advised Relator's counsel that

Relator was "a bad guy"; that inmates are not entitled to any public records; that he (Mr. Clark) was "sort of like Internal Affairs for the Department of Rehabilitation and Correction"; and, that, if a signed Release were provided to Mr. Clark, ODRC "*might* release *some* records" to Relator.

19. As of the filing of this action, no further communications have been received from Respondents. Respondents have not timely responded to Relator's requests; they have not provided a written denial of Relator's requests; they have not provided an explanation or legal authority for failure to respond to Relator's requests (other than Mr. Clark's November 1, 2011 verbal statement to counsel and his paralegal that inmates are not entitled to any public records).

V. CLAIM FOR RELIEF

20. Paragraphs one (1) through nineteen (19) are restated and incorporated by reference as if fully set forth herein.

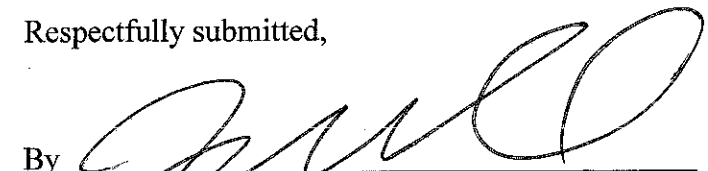
21. The failure and refusal of Respondents to provide any of the requested records violates their duties under Ohio Revised Code §149.43, thereby entitling Relator to the issuance of a Writ of Mandamus to compel Respondents to comply with the Ohio Public Records Act.

22. In addition, failure of Respondents to respond promptly or in writing to the Relator's written public record requests violated Revised Code §149.43(B)(3), entitling Relator to the issuance of a Writ of Mandamus to compel Respondents to comply with the Ohio Public Records Act.

WHEREFORE, Relator requests that this Court issue a peremptory writ of mandamus directing Respondents to make the requested records available for inspection and copying without further delay. In the alternative, Relator requests that this Court issue an alternative writ requiring Respondents to show cause why the peremptory writ requested above should not be issued. Relator further requests the costs of this action, including reasonable attorneys' fees, pursuant to Ohio Revised Code §149.43(C)(2). Relator further requests statutory damages pursuant to Ohio Revised

Code Section 149.43(C)(1) in the amount of one hundred dollars ($100.00) for each day during which Respondents fail to comply with the statute, beginning on the date of this action.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF COMPLAINT FOR ORIGINAL WRIT OF MANDAMUS (PUBLIC RECORDS)

Relator hereby submits this Memorandum in Support of his Complaint for Original Writ of Mandamus and respectfully requests that the Court grant a peremptory writ in his favor. The analysis set forth below demonstrates Relator's clear right to the immediate production of the requested records.

II. Factual Background

This mandamus action arises from attempts to investigate alleged personal injuries sustained by Relator while in the care, custody, and control of Respondent, ODRC, as well as ODRC's response, or lack thereof, to Relator's concerns for his personal safety and requests for protective custody. Relator and his family contacted counsel in April, 2011, after he was stabbed by his cell

mate at the Marion Correctional Institution ("MaCI"), a prison operated under the auspices of the Ohio Department of Rehabilitation and Correction.

On or about June 25, 2011, after Respondent Mohr was advised by counsel for Relator of the law firm's representation, Relator was moved, without warning or notice to Relator's counsel, to the London Correctional Institution ("LoCI"). Within less than 24 hours of his transfer to LoCI, Relator was attacked in "the yard" by a group of inmates on June 26, 2011. Relator believes he was attacked because information was intentionally leaked to ODRC personnel and the prison general population, the release of which information placed Relator at risk of great harm.

Relator's counsel is investigating potential legal claims that may be brought on behalf of Relator. As part of that investigation, counsel for the Relator, a Columbus-based law firm with experience handling civil rights violations, issued two written public records request to the Ohio Attorney General and the Director of the Ohio Department of Rehabilitation and Correction. (*See* Affidavits of John S. Marshall and Kirsten L. Dell, Exhibits H and G, respectively, detailing the requests, attached Exhibits B and D, and efforts to obtain response to same.)

Based upon the number of requests and the multiple institutions involved, Relator and his counsel certainly did not expect "immediate" response to the public records requests. Relator and his counsel did, however, expect some form of response other than the acknowledgement of receipt of the requests, or the verbal statement of Assistant Attorney General Trevor Clark that inmates are not entitled to public records.

96 days after counsel's second public records request [dated July 28, 2011], Assistant Attorney General Trevor Clark called the law firm and participated in a conference call with Mr. Marshall and Ms. Dell, during which conversation, he advised that inmates are not entitled to public records. Mr. Clark made it clear that ODRC does not believe Relator is entitled to a response to his public records requests, and will not be provided with any of the requested records. Inaction, lengthy delay, and failure to provide a written denial and legal explanation for not supplying the requested records constitutes a refusal to comply with Ohio Revised Code §149.43.

III. Legal Analysis

Ohio Courts have made it abundantly clear that public records must be produced "promptly" and within "a reasonable period of time," upon request, and that refusal merits relief through an action in mandamus pursuant to Revised Code Section 149.43(C).

Here, at the time of this filing, 165 days have passed since the initial public records request; 252 days have passed since the April 23, 2011 stabbing incident; 156 days have passed since the supplemental public records request; 188 days have passed since the June 26, 2011 attack on Relator in the yard at LoCI, yet no legitimate explanation has been provided by the Respondents for their failure and refusal to provide any of the documents at issue. The Respondents have, through Assistant Attorney General Clark, indicated that Relator, an inmate at the time the requests were made, is not entitled to <u>any</u> public records.

It should be noted that, in connection with the investigation of Relator's injuries, counsel for Relator forwarded separate medical records requests – not as part of either public records request – to the Corrections Medical Center and Madison and London Correctional Institution Infirmaries, and received Relator's personal medical information within a reasonable period of time (as authorized by Relator's signed medical authorization in compliance with HIPAA). It is notable that records considered exempt from a public records request were immediately provided by Respondent.

Counsel for Relator recognizes the safety concerns and rationale for keeping personal information regarding any ODRC personnel, who came into contact with Relator in the performance of their duties, from disclosure, and, in fact, specifically requested that personal information be redacted from any records provided in response to the public records requests.

Protection of inmate information contained in any ODRC investigatory report made in regard to the stabbing on April 23, 2011, is rendered moot by the fact that the perpetrator of the stabbing, Travis Smith, was Relator's cell-mate and was known to the Relator.

The majority of the public records requests propounded to Respondents specifically relate to the Relator, his disciplinary record, the ODRC institutions in which he has served time and the dates of such periods of incarceration, Relator's work history (including any work assignments conducted

on behalf of, or at the behest of, ODRC), Relator's grievances and requests for protective custody status, as well as ODRC's responses to same, and investigation of the conditions and circumstances leading to two separate events of alleged personal injury to the Relator, as well as the conditions of Relator's "protective custody" or "safe housing" status.

Ohio Administrative Code §5120-9-49 states, in part:

> (A) A "record" means <u>any</u> item that is kept by the department of rehabilitation and correction (department) that: (1) is stored on a fixed medium, (2) is created, received, or sent under the jurisdiction of a public office and (3) documents the organization, functions, policies, decisions, procedures, operations, or other activities of the department. "Public record" means records kept by the department unless exempted by any provision of the Ohio Revised Code or other binding legal authorities. <u>The records of the department that shall be deemed public records include, but are not limited to</u>, the following:
>
> (1) <u>Rules of general applicability and procedure</u> (i.e., rules of the Ohio Administrative Code) and <u>statements of general policy</u> (i.e., department policies exclusive of security).
>
> (2) <u>Charges and decisions in inmate disciplinary cases</u>.
>
> (3) Non-security related <u>manuals</u> and instructions.
>
> * * *
>
> (C) Upon request from a representative of an approved news media organization or a private citizen, <u>the following non-public information about an inmate</u>, parolee, probationer or other releasee <u>may be made available upon the prior approval from the department's bureau of communication or from the appropriate managing officer:</u>
>
> (1) Name and number.
>
> (2) Age and date of birth.
>
> * * *
>
> (4) Physical description.
>
> (5) Admission date.
>
> (6) Sentencing entry.
>
> (7) Prison transfers (i.e., dates and locations only).

* * *

(9) Institutional work assignments.

(10) Security level.

[Emphasis added.]

It strains credulity that Respondents would have counsel for Relator believe that a member of the public holds greater entitlement to copies of an inmate's disciplinary history, or the orientation manual for an ODRC institution, which is supposed to be provided to each inmate upon entry into each institution (52-RCP-10, Ohio Department of Rehabilitation and Correction Policies, effective April 1, 2011, superseding prior version dated March 15, 2010), than the inmate himself. It is even more audacious to suggest that a reporter or private citizen has greater standing to request copies of an inmate's personal information – age and date of birth and physical description – even his prison work assignments – than the inmate himself.

Even if Respondents rely upon Ohio Revised Code §149.43(B)(8) to strengthen their claim that inmates are not entitled to public records, distinctions are evident in regard to the information to which an inmate is, or is not, entitled:

> (8) A public office or person responsible for public records is not required to permit a person who is incarcerated. . . to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution. . . 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 [and] . . . the information sought in the public record is necessary to support what appears to be a justiciable claim of the person. [Emphasis added.]

The records requested have nothing to do with a pending criminal investigation or prosecution. The medical records provided by the Infirmary at Madison Correctional Institution to Relator's counsel, however, do bear out that the Relator was, indeed, stabbed on or about April 23, 2011, and that injury to his person occurred, and further revealed that, subsequent to the June 26, 2011 attack in the yard at LoCI, Relator reported to the Infirmary for injuries to his face and eye. Relator is entitled to those records and investigative reports necessary and available to either substantiate or refute his potential legal claims.

In further regard to the investigative reports conducted of the April 23, 2011 stabbing, and the June 26, 2011 attack in the yard, Relator is entitled to the same disclosure of those investigative reports, as well as the information and details acquired through investigation of those incidents, as he would be had he been a victim involved in a motor vehicle accident in the private sector.

Ohio Courts have made it abundantly clear that routine incident and accident reports generated by police departments are public records, subject to immediate disclosure upon request. See, e.g., *State ex rel. Rasul-Bey v. Onunwor* (2002), 94 Ohio St. 3d 119, 120, 760 N.E. 2d 421 (reaffirming that police incident reports are public records that must be produced immediately upon request, and refusal merits relief through an action in mandamus pursuant to Revised Code §149.43(C)); *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St. 3d 30, 30, 33-34, 485 N.E.2d 706 (holding that accident reports and other accident-related documents are clearly public records); *State ex rel. Beacon Journal Pub. Co. v. Maurer* (2001), 91 Ohio St. 3d 54, 57, 741 N.E.2d 511; *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 434, 639 N.E.2d 83, and *State ex rel. Logan Daily News v. Jones* (1997), 78 Ohio St. 3d 322, 323, 677 N.E.2d 1195) (holding that incident reports are not confidential and must be produced pursuant to a public records request).

In *Maurer* and *Rasul-Bey*, the Court cited the existence of precedent reaffirming the public-record status of such reports as a factor in the award of attorneys' fees to the relators in both cases. [See *Maurer*, 91 Ohio St. 3d at 58 (basing award of fees on public benefit of request for accident reports and the fact that the Court's precedents had "consistently and summarily rejected" the respondent's arguments) and *Rasul-Bey*, 94 Ohio St. 3d at 122 (holding that public benefit of request for report was sufficient because, "by forcing a recalcitrant public official to comply with the unambiguous mandate of precedent, it will make compliance with this precedent more likely in the future."]

The failure of Respondents to approve or deny Relator's public records requests has no justifiable excuse or rational explanation. Respondent, the Ohio Attorney General, is tasked with the responsibility of developing the state's model public records policy, as well as the certification and

training of public officials ". . .to enhance the officials' knowledge of the duty to provide access to public records" (Ohio Revised Code §149.43(E)(1), emphasis added). The Attorney General and his Assistant Attorneys General are responsible for developing the public records policy, and for certifying and training the public officials (i.e., Director Mohr and his designees) required to comply with same.

The web site of the Ohio Department of Rehabilitation and Correction includes on its Privacy Statement page, the following:

> **Public Records**. Visitors should be aware that, subject to certain statutory exceptions, most documents and records maintained by the state of Ohio, including but not limited to electronic data, are public records under Ohio law. Therefore, information submitted through this web site may be subject to disclosure pursuant to a public records request. [Emphasis added.]

All Respondents named herein should be well-aware of the state's policies regarding public records, including the requirement to notify the requester, in writing, if the request is being denied, and providing an explanation for the denial, as well as legal authority relied upon in making such determination.

Respondents know, or *should* know, that "public records must be made available for inspection promptly. Copies of public records must be made available within a reasonable period of time. . ." [OAC §5120-9-49(E) and 07-ORD-02(VI)(1)]. Further, Respondents should be well-aware that ". . .non-public records of the department may. . . be made available to counsel of record of an inmate. . ." [OAC §5120-9-49(F)].

Ohio Revised Code §149.43 does not define "promptly," nor do we find a definition that encompasses "a reasonable period of time." In *State, ex rel., Striker v. Smith*, 5th Dist. No. 2008-CA-0336, 2010-Ohio-457, the Court wrote:

> "The term 'promptly' is not defined in the statute. However, statutes in other states give their agencies from between three and 12 days from the date the public records were requested to make the documents available. The word 'prompt' is defined as 'performed readily or immediately' [emphasis added] Webster's Eleventh New Collegiate Dictionary (2005) 993.' *State, ex rel. Simonsen v. Ohio Dept. of Rehab. & Corr.* 2008 WL 5381924 6 (Ohio App. 10th Dist.).

> "Other courts have examined the number of days which may be considered reasonable or unreasonable. Ten business days has been held to be reasonable while 32, 37, and 79 business days have been held to be unreasonable. *See, State, ex rel. Bardwell v. Cuyahoga Cty. Bd. Of Commrs.*, 2009 WL 3387654, 1 (Ohio App. 8th Dist.) (ten business days not violation); *State, ex rel. Simonsen v. Ohio Dept. of Rehab & Corr.*, 2009 WL 250867, 7 (Ohio App. 10th Dist.) (37 days not reasonable); *State, ex rel. Bardwell v. Rocky River Police Dept.*, 2009 WL 406600, 7 (Ohio App. 8th Dist.) (32 business days unreasonable); *Bardwell v. Cleveland*, 2009 WL 3478444, 5 (Ohio App. 8th Dist.) (79 days unreasonable). . ."

Internet research regarding the public records policies of other states unearthed a web site, sunshinereview.org, with an overview of the Public Records, Open Meetings, Open Records, or Freedom of Information Act policies and response times for the 50 states. Ohio is one of 15 states that does not specifically state a time limit for replies to public records requests. The remaining 35 states' response times vary from two to 15 days, the most stringent of which being the state of Vermont, which requires that denials be issued within two days of receipt of the request. The response times by state are attached hereto as Exhibit I.

Ohio Courts have held that requests made under Ohio's Public Records Act must be given great latitude, leaning in favor of maintaining open government and the public right to know. The Act must be construed ". . .liberally in favor of broad access and resolve any doubt in favor of disclosure of public records" [*State, ex rel. Rocker v. Guernsey Cty. Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327 ¶6].

Last, but not least, public records should not be withheld based upon the personal status of the requester (*State, ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711). In *Dehler*, an inmate sought "access to all the records of the prison quartermaster's orders for and receipt of clothing and shoes for a period of over seven years." Id. at 313, 2010-Ohio-5711 at ¶1, 939 N.E.2d at 832. The Court rejected his mandamus because his request was overbroad in requesting a complete duplication of records, he refused to pay the cost of duplication, and inspection risked destruction of the records. The Court would never have reached those issues had inmates lacked standing to invoke the Public Records Act. Indeed, in dissent, Justice Brown wrote that ". . .the unmistakable, albeit unstated, motivation for the majority's and the court of appeals' holding in this

case is. . . Dehler's status as an inmate. . ." [With citation to *State, ex rel WBNS-TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116 ¶37, quoting *State, ex rel. Consumer News Serv., Inc. v. Worthington City Bd. Of Edn.*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82 ¶54, that "public records custodians and courts 'cannot withhold public records simply because they disagree with the policies behind the law permitting the release of these records.'"].

On that point, the dissent reflected the established law: inmates may invoke the Public Records Act. The same inmate sought damages for a violation of the Public Records Act in *State ex rel. Dehler v. Kelly*, 127 Ohio St.3d 309, 2010-Ohio-5724, 939 N.E.2d 828 (per curiam), but they were denied even though the lower court had compelled production. Respondents are simply wrong that the General Assembly exempted inmates from the Public Records Act.

In determining the validity of a public records request, the adjudicators must weigh the public's right to know with the need to keep certain information private. The records requested herein seek information related to the incarceration, conduct, grievances, and disciplinary history of the Relator, <u>personally</u>, as well as investigation of injuries to Relator's person while he has been in the custody, care, and control of Respondent, ODRC.

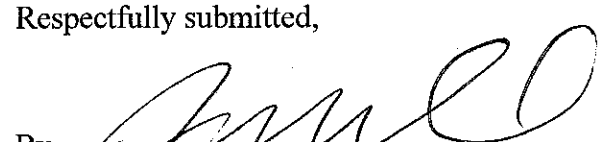
Finally, it should be noted that the Respondents' failure to respond promptly in any manner to the Relator's request, their failure to provide anything other than a verbal denial of the Relator's request or to provide legal support for that verbal denial, and their continued failure to respond in writing to requests that were made in writing, violated the Act. See R.C. §149.43(B)(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."). Such a violation makes mandamus *per se* appropriate, and makes an award of attorneys' fees mandatory. See R.C. §149.43(C)(2)(b)(i) ("The court <u>shall</u> award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when. . . [t]he 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" [emphasis added]).

IV. Conclusion

For the reasons stated above, the Relator requests that this Court grant a peremptory writ of mandamus in his favor; statutory damages pursuant to Ohio Revised Code Section 149.43(C)(1) in the amount of one hundred dollars ($100.00) for each day during which Respondents fail to comply with the statute, beginning on the date of this action; and, order an award of reasonable attorneys' fees and costs incurred, pursuant to Ohio Revised Code §149.43(C)(2).

Respectfully submitted,



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Jason Mahe

Of Counsel:

Louis A. Jacobs (002101)
(*LAJOhio@aol.com*)
66871 Rayo del Sol
Desert Hot Springs, CA 92240-1871
Phone: (614) 203-1255
Fax (760) 288-2146

63

Number:	Name:	Date:
576-230	Jason Mahe	6-7-11

Unit:	Lock:	Assignment:
C Block	63	

To: MR. MILLIGAN warden

Issued By (Staff Member Signature):

FOLD HERE

CASE MANAGER	INST. INSPECTOR	QUARTERMASTER
CLASSIFICATION	INVESTIGATOR	RECORDS
COMMISSARY	JOB COORDINATOR	RECOVERY SERVICES
DENTAL	LIBRARY	RECREATION
DEPUTY WARDEN ADMINISTRATION	MAIL ROOM	RELIGIOUS SERVICES
DEPUTY WARDEN OPERATIONS	MAJOR	UNIT MANAGER _____
DEPUTY WARDEN SPECIAL SERVICES	MEDICAL	WARDEN
EDUCATION	MENTAL HEALTH	OTHER _____

KITE PROCEDURE

1. *Check with your Sergeant or Case Manager to see if this communication can be handled without a kite.*
2. *Write only to the Department that handles the problem you have. Others will merely forward your kite.*
3. *State your problems clearly and completely and thereby get immediate attention.*
4. *Avoid duplication of Kites, Writing to more than one office about the same thing will not obtain any faster attention.*
5. *Kites are to be used only for communication between inmates and Institutional Staff and not for any other purpose.*

Relator's Exhibit A

I would like to give Marshall and Morrow, LLC, attorney office (John marshall) access to review any and all records including medical, concerning me.
Thank you very much for your time and consideration.

Jason Mahe
576-230

Mr Mahe,
Your attorney may make the request himself. He will need to send a letter or fax with something on a letterhead from his office, requesting the file. Additionally there is an official DAC release of information form you will be requested to fill out. T. Sullivan 6/10/11

KITE PROCEDURE

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Number:	Name:	Date:
576.230	Jason Make	6-7-11
Unit:	Lock:	Assignment:
O-Block	63	

To: R. Smith

Issued By (Staff Member Signature):

FOLD HERE

CASE MANAGER	INST. INSPECTOR	QUARTERMASTER
CLASSIFICATION	INVESTIGATOR	RECORDS
COMMISSARY	JOB COORDINATOR	RECOVERY SERVICES
DENTAL	LIBRARY	RECREATION
DEPUTY WARDEN ADMINISTRATION	MAIL ROOM	RELIGIOUS SERVICES
DEPUTY WARDEN OPERATIONS	MAJOR	UNIT MANAGER
DEPUTY WARDEN SPECIAL SERVICES	MEDICAL	WARDEN
EDUCATION	[illegible]	[illegible]

63

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I would like to give Marshall and morrow, LLC, attorneys (John Marshall's) office access to review any and all records including medical concering me.
Thank you very much for your time and consideration.

60

JASON MAHE
576-230

your attorney's need to contact us.

I have nothing to do with this.

RO

6/9/11

63

Number:	Name:	Date:
576-230	Jason Mahe	6-7-11

Unit:	Lock:	Assignment:
O-Block	103	

To: Jason Bunting Warden

Issued By (Staff Member Signature):

FOLD HERE

CASE MANAGER	INST. INSPECTOR	QUARTERMASTER
CLASSIFICATION	INVESTIGATOR	RECORDS
COMMISSARY	JOB COORDINATOR	RECOVERY SERVICES
DENTAL	LIBRARY	RECREATION
DEPUTY WARDEN ADMINISTRATION	MAIL ROOM	RELIGIOUS SERVICES
DEPUTY WARDEN OPERATIONS	MAJOR	UNIT MANAGER _____
DEPUTY WARDEN SPECIAL SERVICES	MEDICAL	WARDEN
EDI		

KITE PROCEDURE

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I would like to give Marshall and Morrow LLC, attorney office (John marshall) access to review any and all records including medical concering me.
Thank you for your time and consideration.

Jason Mahe

MARSHALL
MORROW

John S. Marshall*
Edward R. Forman, Associate
Louis A. Jacobs, Of Counsel

Joshua J. Morrow
1970-2003

John S. Marshall
jmarshall@marshallandmorrow.com

July 19, 2011

VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/466-5087:

R. Michael DeWine, Esq.
Ohio Attorney General
State Office Tower – 26th Floor
30 East Broad Street
Columbus, Ohio, 43215

VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/728-9327:

Richard T. Cholar, Jr., Esq., Chief
Ohio Attorney General
Criminal Justice Section
Corrections Litigation Unit
150 East Gay Street
16th Floor
Columbus, Ohio, 43215

Re: Jason Mahe, Inmate Number 576230
Public Records Request

Dear Mr. DeWine:

We have been retained by Jason Mahe, Inmate Number 576230, most recently moved to the Madison Correctional Institution ("MaCI"), regarding concerns for his safety and health. Mr. Mahe advised Marion Correctional Institution ("MCI") and London Correctional Institution ("LoCI") of his desire for our representation. We believe it is noteworthy, by the way, that very shortly after Mr. Mahe advised MCI that we had been contacted for legal representation, he was moved to LoCI.

We are currently in the investigative stage of Mr. Mahe's case, including the following: an attack on Mr. Mahe's person at Marion Correctional ("MCI") on or about April 23, 2011 when he was stabbed by his cell mate, Travis Wise (Inmate Number 635031, now housed at Lebanon Correctional); an attack at London Correctional Institute ("LoCI") on or about June 26, 2011, by a group of inmates, which attack occurred within less than 24 hours of Mr. Mahe's arrival at LoCI; a written blackmail threat to Mr. Mahe demanding payment of $400.00 ("the price for snitching. If you don't send money, you don't breath [*sic*]"); and, an altercation between Mr. Mahe and a "white shirt," which was allegedly witnessed by two "gray shirts," on or about July 6, 2011.

MARSHALL AND MORROW LLC
111 WEST RICH STREET, SUITE 430, COLUMBUS, OHIO 43215 TEL. 614-463-9790 FAX 614-463-9780
jmarshall@marshallandmorrow.com eforman@marshallandmorrow.com
www.marshallandmorrow.com
*Certified by the Ohio State Bar Association as a specialist in labor and employment law

On Mr. Mahe's behalf, we are requesting copies of the following records under the Ohio Open Meetings and Public Records Act:

1. A copy of Mr. Mahe's Inmate Master File;

2. Copies of Mr. Mahe's Unit Files from Correctional Reception Center ("CRC"), Pickaway Correctional Institution ("PCI"), Oakwood Correctional Facility ("OCF"), Marion Correctional Institution ("MCI"), London Correctional Institution ("LoCI"), and Madison Correctional Institution ("MaCI");

3. Copies of Mr. Mahe's kites;

4. Copies of any and all Managing Officer files from the above-referenced facilities for any protective custody requests made by Mr. Mahe, his family, or his friends;

5. Copies of any and all requests for protective custody, including the Ohio Department of Rehabilitation and Correction ("ODRC") Form DRC4167, completed by, or on behalf of, Mr. Mahe;

6. Copies of any and all written requests, correspondence, or notations of telephone messages sent or made directly to Mr. William A. Eleby requesting protective custody for Mr. Mahe;

7. Name(s), title(s), and position(s) of any and all employees or staff (including, but not limited to "COs," "white shirts," "gray shirts," unit managers, or any other prison personnel) who received verbal or written requests from Mr. Mahe for protective custody or a request for protective custody form and/or to whom Mr. Mahe made such requests;

8. Copies of the Bureau of Classification and Reception records, notes, and name(s) of any and all protective custody committees or hearing panels appointed to review Mr. Mahe's requests for protective custody, including, but not limited to:

    a. The date(s) of any hearing(s) held; transcript(s) of the proceedings; correspondence and emails exchanged; certificates/confirmation of training and certification of any person(s) serving on a protecting custody committee or hearing panel for Mr. Mahe, and for each such person:

        i. Name, title, and personnel file, with personal information redacted;

    b. A copy of the determination made by such protective custody committee or hearing panel; and,

c. Copies of the written notice to Mr. Mahe of the determination of the committee or hearing panel and his right to appeal such determination.

9. Copies of the ODRC policy, administrative rule, Ohio Administrative Code section, or other legal authority/source stating that the protective custody determination of the Bureau of Classification and Reception is final and cannot be appealed;

10. Copies of notes and transcripts, if any, and the name(s), title(s), and position(s) of any and all persons serving on any and all Rules Infraction Board reviewing any incident or conduct report involving Mr. Mahe;

11. Copies of any and all conduct reports for Mr. Mahe;

12. Copies of any and all Incident Reports involving Mr. Mahe;

13. Copies of any and all Reports of Security Control regarding Mr. Mahe and his unit;

14. Copies of formal and/or informal complaints made by Mr. Mahe and/or Incident Reports and Reports of Security Control made in regard to the attack on Mr. Mahe at MCI on or about April 23, 2011;

15. Copies of formal and/or informal complaints made by Mr. Mahe and/or Incident Reports and Reports of Security Control made in regard to the attack on Mr. Mahe at LoCI on or about June 25, 2011;

16. Copies of formal and/or informal complaints made by Mr. Mahe and/or Incident Reports and Reports of Security Control made in regard to the "white shirt" altercation with Mr. Mahe at LOCI on or about July 6, 2011, which altercation was allegedly witnessed by two "gray shirts";

17. Copies of any and all formal and/or informal complaints made about Mr. Mahe, his alleged conduct, or any other activity or incident in some way connected to, or which contains reference to, Mr. Mahe, by any inmate(s) and/or any and all institution(s) staff, supervisors, managers, COs, "white shirts," "gray shirts," or other Ohio Department of Rehabilitation and Correction personnel;

18. Copies of any surveillance video of Mr. Mahe's cell, unit, hallway, and surrounding areas at MCI at or around the time of the stabbing by Mr. Mahe's cell mate on or about April 23, 2011;

19. Copies of any surveillance video of "the yard" for two hours prior, and two hours after, the inmate attack on Mr. Mahe at LoCI at or around 3:00 p.m., on June 25, 2011;

20. Copies of any surveillance video of the area in which Mr. Mahe's altercation with the "white shirt" took place on or about July 6, 2011;

21. Copies of any formal and/or informal complaints made by Mr. Mahe to Institution Investigators at CRC, PCI, OCF, MCI, LoCI, or MaCI regarding any incidents, inmate or staff conduct, inmate or staff threats, and/or personal safety concerns;

22. Copies of any and all waivers of his right to rules infraction/disciplinary hearings signed by Mr. Mahe;

23. A complete copy of Mr. Mahe's disciplinary/conduct record, including, but not limited to:

    a. The specific rule violated;

    b. The name(s) of the accuser or personnel reporting/complaining of the conduct;

    c. The date and time of the rules violation;

    d. The written summary of Mr. Mahe's hearing rights;

    e. The name(s) of any staff members/inmates assisting Mr. Mahe in the presentation of his case;

    f. Whether or not a hearing was held and the date(s) such hearing(s) was held;

    g. Whether any witnesses presented testimony, and the name(s), file(s), transcript(s), and records for same;

    h. Whether any evidence was presented by Mr. Mahe, and copies of any written or tangible evidence presented;

    i. The name(s) of any hearing officer(s) presiding over such hearing;

    j. A list of any limitations placed on the presentation of evidence or witnesses, and the hearing officer's reason(s) for same;

    k. Copies of written statements of fact and the reasons for discipline;

    l. The final determination and rules of conduct violated;

    m. The discipline imposed on Mr. Mahe;

24. Name(s), title(s), and position(s) of any and all managing officers, shift commanders, unit managers, and/or deputy wardens/designees responsible

for, or who conducted, reviews of Mr. Mahe's Security Control placement;

25. Copies of any and all Security Classification and Job Assignment Forms for Mr. Mahe;

26. Copies of any and all Interview Assessment Forms pertinent to Mr. Mahe's requests for protective custody;

27. Copies of any and all Protective Control Screening Forms related to Mr. Mahe's requests for protective custody;

28. Copies of any and all findings and written summaries pertinent to Mr. Mahe's requests for protective custody;

29. Copies of written notice of protective custody decisions to Mr. Mahe and copies of the written notice(s) of Mr. Mahe's right to appeal such decisions;

30. Copies of any and all Objections to Protective Control Decision Forms completed by Mr. Mahe;

31. Copies of any and all Transfer Authorization Request Forms for Mr. Mahe;

32. Copies of any and all Institutional Separation Forms for Mr. Mahe;

33. Name(s), title(s), position(s), phone number(s), and agency name of any person(s) providing statements or information regarding any and all protective custody requests made by Mr. Mahe;

34. Copies of Protective Control Reviews for Mr. Mahe;

35. A copy of the Incident Report regarding the altercation between Mr. Mahe and a "white shirt," which was allegedly witnessed by two "gray shirts," at LoCI on or about June 25, 2011, including any and all witness statements (whether by institution staff, managers, supervisors, and/or inmates housed at LoCI);

36. Name(s) and title(s) of the shift supervisor and highest ranking supervisor on duty at the time of the altercation between Mr. Mahe and a "white shirt," which was allegedly witnessed by two "gray shirts," at LoCI on or about June 25, 2011;

37. Copies of any and all Special Incident Reports involving Mr. Mahe;

38. Copies of Mr. Mahe's Conduct Reports, including name(s), title(s), position(s), and agency of the charging official, with copies of the

Statement of Loss/Injury and/or Incident Report Forms, as well as the rule(s) violated, formal statement of the charge(s), name(s) of staff witnesses, physical evidence (if any) and the disposition of same, immediate action taken, and the name(s), title(s), position(s), and agency of the reporting staff member(s);

39. Copies of any and all digital or other recordings of RIB hearings for Mr. Mahe, with case numbers, at all ODRC institutions listed above;

40. Name(s) of hearing officers and RIB panel members and certification of RIB training;

41. Copies of any and all Institutional Policy manuals and/or inmate handbooks provided to Mr. Mahe at Correctional Reception Center ("CRC"), Pickaway Correctional Institution ("PCI"), Oakwood Correctional Facility ("OCF"), Marion Correctional Institution ("MCI"), and London Correctional Institution ("LoCI");

42. Copies of any and all appeals of RIB decisions made by Mr. Mahe;

43. A copy of Mr. Mahe's RIB file;

44. Copies of the Director's review of any and all RIB appeals;

45. A copy of the personnel file of William Freed/"Bill" Freed, Institution Investigator, with personal information redacted;

46. A log or copies of Mr. Freed's access, via electronic means or review of hard copies of his file, to Mr. Mahe's records;

47. Copies of Mr. Freed's notes, correspondence, emails, telephonic recordings, or other records of contact with Mr. Mahe;

48. A list of any and all investigations of Mr. Mahe or Mr. Mahe's conduct by Mr. Freed;

49. A list of any and all investigations conducted by Mr. Freed based upon information acquired through Mr. Mahe's monitored calls or other communications;

50. A copy of Mr. Freed's Investigation Log during the period of Mr. Mahe's incarceration at MCI;

51. Copies of any and all electronic unit files and documents scanned into OnBase or the DOTS Portal on Mr. Mahe;

52. A log or copies of Mr. Freed's access, via electronic means or review of hard copies of his file, to the records of inmate, Travis Wise (635031);

53. Copies of Mr. Freed's notes, correspondence, emails, telephonic recordings, or other records of contact with Mr. Wise;

54. A list of any and all investigations of Mr. Wise or Mr. Wise's conduct by Mr. Freed;

55. A list of any and all investigations conducted by Mr. Freed based upon information acquired through Mr. Wise's monitored calls or other communications;

56. Copies of any and all electronic unit files and documents scanned into OnBase or the DOTS Portal on Mr. Wise;

57. Copies of any and all correspondence, emails, notes, or other documents or tangible items containing the enticement, "early judicial release," generated by Bill Freed.

Receipt of this information at your earliest possible opportunity would be greatly appreciated. If you have any questions regarding this request, or you require any additional information, please do not hesitate to contact my office. If there is a charge for these records, please contact us and we will hand-deliver a check for same immediately upon request.

Thank you very much for your anticipated cooperation and prompt attention to this matter.

Very truly yours,

John S. Marshall

JSM/kld
cc: Mr. Jason Mahe
\PNC\Mahe\Correspondence\Mahe-Pub Rec Req to OAG.doc

Mike DeWine
Ohio Attorney General

Criminal Justice Section
Office 614.644.7233
Fax 614.728.9327

150 E. Gay St., 16th floor
Columbus, OH 43215
www.ohioattorneygeneral.gov

July 27, 2011

Mr. John S. Marshall
Marshall & Morrow LLC
111 W. Rich St.
Suite 430
Columbus, OH 43215

RE: Jason Mahe, Inmate Number 576230, Public records request

Dear Mr. Marshall:

I have received your public records request for documents regarding inmate Jason Mahe from the Constitutional Offices Section of the Ohio Attorney General's Office. This Office does not have any of the items you have specifically requested. The documents are more likely in the possession of the Ohio Department of Rehabilitation and Correction, and its individual institutions.

Consequently, your request has been forwarded to Rich Cholar, the Unit Coordinator for the Corrections Litigation Unit of the Criminal Justice Section of this Office, who forwarded it to the Legal Services Division of ODRC. I am not sure which attorney from ODRC will be handling the request, but I believe Austin Stout, Steve Young, and Trevor Clark have received notice of it. You can contact them at 614/752-1765.

Sincerely,

MIKE DEWINE
Ohio Attorney General

s/Gene D. Park
Gene D. Park
Assistant Attorney General
Criminal Justice Section
16th Floor, 150 E. Gay St.
614/644-7233

Relator's Exhibit C

COPY

MARSHALL
MORROW

John S. Marshall*
Edward R. Forman, Associate
Louis A. Jacobs, Of Counsel

Joshua J. Morrow
1970-2003

John S. Marshall
jmarshall@marshallandmorrow.com

July 28, 2011

VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/466-5087:

FAXED 7/28/11 @ 3:29p

R. Michael DeWine, Esq.
Ohio Attorney General
State Office Tower – 26th Floor
30 East Broad Street
Columbus, Ohio, 43215

VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/728-9327:

FAXED 7/28/11 @ 3:30p

Richard T. Cholar, Jr., Esq., Chief
Ohio Attorney General
Criminal Justice Section
Corrections Litigation Unit
150 East Gay Street
16th Floor
Columbus, Ohio, 43215

Re: Jason Mahe, Inmate Number 576230
Public Records Request

Dear Mr. DeWine:

The purpose of this letter is to supplement our public records request of July 19, 2011, regarding Jason Mahe, Inmate Number 576230, who is currently housed in the infirmary at the Madison Correctional Institution ("MaCI"). We are requesting copies of the following records under the Ohio Open Meetings and Public Records Act:

1. The names of all inmate and staff who were in the hallway at London Correctional Institution ("LoCI") during the altercation between Mr. Mahe and the "white shirt" on July 6, 2011; and,

2. Video and/or surveillance footage of the hallway for two hours prior and two hours subsequent to the event.

Receipt of this information at your earliest possible opportunity would be greatly appreciated. If you have any questions regarding this request, or you require any additional information, please do not hesitate to contact my office. If there is a charge for these records, please contact us and we will hand-deliver a check for same immediately upon request.

MARSHALL AND MORROW LLC
111 WEST RICH STREET, SUITE 430, COLUMBUS, OHIO 43215 TEL. 614-463-9790 FAX 614-463-9780
jmarshall@marshallandmorrow.com eforman@marshallandmorrow.com
www.marshallandmorrow.com
*Certified by the Ohio State Bar Association as a specialist in labor and employment law

Relator's Exhibit D

Thank you very much for your anticipated cooperation and prompt attention to this matter.

Very truly yours,

John S. Marshall

JSM/kld
cc: Mr. Jason Mahe
\PNC\Mahe\Correspondence\Mahe-Supplemental Pub Rec Req to OAG.doc

RECEIVED AUG - 8 2011

Mike DeWine
Ohio Attorney General

Criminal Justice Section
Office **614.644.7233**
Fax **614.728.9327**

150 E. Gay St., 16th floor
Columbus, OH 43215
www.ohioattorneygeneral.gov

August 4, 2011

Mr. John S. Marshall
Marshall & Morrow LLC
111 W. Rich St.
Suite 430
Columbus, OH 43215

RE: Jason Mahe, Inmate Number 576230, Supplement to public records request.

Dear Mr. Marshall:

I have received your supplement to your original public records request, in your letter dated July 28, 2011. Your requested records, if they exist, would likely be in the possession of the Ohio Department of Rehabilitation and Correction. As with your last request, this letter was forwarded to Rich Cholar, the Unit Coordinator for the Corrections Litigation Unit of the Criminal Justice Section of this Office. The letter was also forwarded to Austin Stout, Trevor Clark, and Steve Young of the Legal Services Division of ODRC. You can contact them at 614/752-1765.

Sincerely,

MIKE DEWINE
Ohio Attorney General

s/Gene D. Park
Gene D. Park
Assistant Attorney General
Criminal Justice Section
16th Floor, 150 E. Gay St.
614/644-7233

Relator's Exhibit E

MARSHALL
MORROW

John S. Marshall*
Edward R. Forman, Associate
Louis A. Jacobs, Of Counsel

Joshua J. Morrow
1970-2003

John S. Marshall
jmarshall@marshallandmorrow.com

July 19, 2011

VIA REGULAR MAIL AND FACSIMILE TRANSMISSION TO 614/752-1171:

Mr. Gary C. Mohr, Director
Ohio Department of Rehabilitation and Correction
770 West Broad Street
Columbus, Ohio, 43222

Re: Jason Mahe, Inmate Number 576230

Dear Mr. Mohr:

This office has been retained by Mr. Jason Mahe, an inmate housed at the Madison Correctional Institution (MaCI) to investigate the viability of legal claims arising from several incidents that cause concern for Mr. Mahe's safety. The alleged incidents have taken place within several correctional facilities of the Ohio Department of Rehabilitation and Correction ("ODRC").

The purpose of this letter is to place ODRC on notice to protect and preserve any and all evidence which may be crucial to the subject matter of Mr. Mahe's claims. Foundation for this notice may be found in *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St.3d 28, 615 N.E. 2d 1037.

On Mr. Mahe's behalf, we are placing you on notice that ODRC, its directors, management and staff, agents and representatives should preserve any and all documents, tangible things, and electronically stored information ("ESI") relevant to, or mentioning, Mr. Mahe throughout the period of his incarceration by ODRC (March 28, 2008, to the present) including, but not limited to: any and all correspondence, emails, notes, incident reports, special incident reports, investigative reports, kites, complaints, disciplinary records (including hearing transcripts of any Rules Infraction Board hearings). This request to preserve potential evidence extends to any and all hard copies or items filed electronically via the OnBase, DOTS web portal, or any other electronic or web-based method of filing inmate records, disciplinary files, RIB records, and/or institutional, investigative, and/or other reports.

ODRC has a continuing obligation to preserve any future documents, things, and information as set forth above, that is created between the date of this letter and the end of Mr. Mahe's sentence, currently December 30, 2011, and/or the termination of his obligations to report to ODRC.

You should anticipate that much of the information requested may be subject to disclosure or responsive to discovery should this matter proceed to litigation, and that it is, or may be, stored on ODRC's current and/or former computer systems and other media and devices (including personal digital assistants, voice-messaging systems, online repositories and cell phones).

MARSHALL AND MORROW LLC
111 WEST RICH STREET, SUITE 430, COLUMBUS, OHIO 43215 TEL. 614-463-9790 FAX 614-463-9780
jmarshall@marshallandmorrow.com eforman@marshallandmorrow.com
www.marshallandmorrow.com
*Certified by the Ohio State Bar Association as a specialist in labor and employment law

Relator's Exhibit F

Electronically stored information should be afforded a broad definition and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically or optically stored as:

- Digital communications (e.g., e-mail, voice mail, instant messaging);
- Word processing documents (e.g., Word or WordPerfect documents and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data files);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound/Audio Recordings (e.g., .WAV and .MP3 files);
- Video and Animation, Surveillance or otherwise (e.g., .AVI, .MPG, .MPEG and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, Yahoo, blog tools);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Back Up and Archival Files (e.g., Zip, .GHO)

ESI resides not only in areas of electronic, magnetic, and optical storage media reasonably accessible to ODRC, but also in areas ODRC may deem *not* reasonably accessible. ODRC is obliged to *preserve* potentially relevant evidence from *any and all* sources of ESI, even if ODRC does not anticipate *producing* such ESI. Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. ODRC must also intervene to prevent loss due to routine operations and employ proper techniques and protocols suited to protection of ESI.

Nothing in this demand for preservation of ESI should be interpreted as diminishing ODRC's concurrent obligation to preserve documents, tangible things and other potentially relevant evidence.

ODRC is asked to initiate an immediate litigation hold for potentially relevant ESI, documents and tangible things, and to act diligently and in good faith to secure and audit compliance with such litigation hold, including identification, modification, or suspension of features of ODRC's information

systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

- Purging the contents of e-mail repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding back up media;
- Re-assigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs effecting wholesale metadata alteration;
- Releasing or purging online storage repositories;
- Using metadata stripper utilities;
- Disabling server or IM logging; and,
- Executing drive or file defragmentation or compression programs.

ODRC should anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Application metadata is information automatically included or embedded in electronic files but which may not be apparent to a user, including deleted content, draft language, commentary, collaboration and distribution data and dates of creation and printing. Actions should be taken to avoid corruption of metadata that could be overwritten or corrupted by careless handling or improper steps to preserve ESI. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC fields.

Though we expect that ODRC will act to preserve data on office workstations and servers, ODRC should also determine if home or portable systems may contain potentially relevant data. To the extent that employees or agents of ODRC may have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, ODRC must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-ROM, disks, PDAs, smart phones, voice mailboxes, or other forms of ESI storage.). Similarly, if ODRC employees, officers, management, staff, or agents used online or browser-based email accounts or services (such as AOL, Gmail, Yahoo Mail or the like) to send and/or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted and Archived Message folders) should be preserved.

ODRC must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms,

abbreviation keys, user ID and password rosters or the like. ODRC must preserve any passwords, keys or other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

The law clearly provides that any person who negligently or intentionally damages evidence can be held liable for any resulting detriment to another person's lawsuit caused by the destruction or damage of evidence. For that reason, do not take any action with regard to potential evidence without contacting this office. Failure to maintain the integrity of this evidence could result in a cause of action in tort and for punitive damages.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

John S. Marshall

JSM/kld
cc: Mr. Jason Mahe
Richard T. Cholar, Jr., Esq., Assistant Attorney General, Criminal Justice Section
PNC\Mahe\Correspondence\Mahe-ESI Preservation Ltr to Dir ODRC.doc

AFFIDAVIT OF KIRSTEN L. DELL
IN SUPPORT OF COMPLAINT FOR ORIGINAL WRIT OF MANDAMUS

STATE OF OHIO,

COUNTY OF FRANKLIN, ss:

KIRSTEN L. DELL, having been first duly cautioned and sworn, does hereby depose and state, as follows, based upon her personal knowledge.

1. I am an Ohio State Bar Association Certified Paralegal employed by Marshall and Morrow, LLC, counsel for the Relator.

2. During the week preceding July 19, 2011, our office prepared a public records request to the Ohio Attorney General and the Ohio Department of Rehabilitation and Correction requesting records on behalf of the firm's client, Jason Mahe. Said request was sent out in final on July 19, 2011.

3. On or about July 28, 2011, our office prepared a supplemental public records request to the Ohio Attorney General and the Ohio Department of Rehabilitation and Correction requesting records on behalf of the firm's client, Jason Mahe. Said request was sent out in final on July 28, 2011.

4. On or about August 1, 2011, our office received correspondence from the Ohio Attorney General's Office dated July 27, 2011, acknowledging its receipt of our July 19, 2011 public records request.

5. On or about August 8, 2011, our office received correspondence from the Ohio Attorney General's Office dated July 27, 2011, acknowledging its receipt of our July 19, 2011 public records request.

6. On or about October 19, 2011, I placed a call to Rich Cholar to follow up on the status of our public records request. A second call was made at the end of October, 2011.

7. On or about November 1, 2011, our office received a call from Trevor Clark, Assistant Attorney General, and Mr. Marshall and I participated in a conference call with Mr. Clark. During that call, Mr. Clark advised us that our client, Jason Mahe, is "a bad guy"; stated that, under

Relator's Exhibit G

the law, inmates are not entitled to copies of all public records; stated that he is "sort of like Internal Affairs for the Ohio Department of Rehabilitation and Correction"; and, stated that, if we wanted to provide a release signed by Jason Mahe, the Ohio Department of Rehabilitation and Correction "might" be willing to release "some" records.

Further, affiant saith naught.

Date: 12·30·11

By Kirsten L. Dell
Kirsten L. Dell

Sworn to before me and subscribed in my presence on this 30th day of December, 2011.

By
Notary Public
John S. Marshall
State of Ohio
Lifetime Commission

AFFIDAVIT OF JOHN S. MARSHALL
IN SUPPORT OF COMPLAINT FOR ORIGINAL WRIT OF MANDAMUS

STATE OF OHIO,

COUNTY OF FRANKLIN, ss:

JOHN S. MARSHALL, having been first duly cautioned and sworn, does hereby depose and state, as follows, based upon her personal knowledge.

1. I am an attorney licensed by the State of Ohio, and the sole, surviving partner in the law firm of Marshall and Morrow, LLC. My office has been retained to serve as counsel for the Relator, Jason Mahe.

2. During the week preceding July 19, 2011, our office prepared a public records request to the Ohio Attorney General and the Ohio Department of Rehabilitation and Correction requesting records on behalf of the firm's client, Jason Mahe. Said request was sent out in final on July 19, 2011.

3. On or about July 28, 2011, our office prepared a supplemental public records request to the Ohio Attorney General and the Ohio Department of Rehabilitation and Correction requesting records on behalf of the firm's client, Jason Mahe. Said request was sent out in final on July 28, 2011.

4. On or about August 1, 2011, our office received correspondence from the Ohio Attorney General's Office dated July 27, 2011, acknowledging its receipt of our July 19, 2011 public records request.

5. On or about August 8, 2011, our office received correspondence from the Ohio Attorney General's Office dated July 27, 2011, acknowledging its receipt of our July 19, 2011 public records request.

6. On or about October 19, 2011, my paralegal, Kirsten Dell, placed a telephone call to Rich Cholar to follow up on the status of our public records request. A second call to Mr. Cholar was made by Ms. Dell at the end of October, 2011.

Relator's Exhibit H

7. On or about November 1, 2011, our office received a call from Trevor Clark, Assistant Attorney General, and Ms. Dell and I participated in a conference call with Mr. Clark. During that call, Mr. Clark advised us that our client, Jason Mahe, is "a bad guy"; stated that, under the law, inmates are not entitled to copies of all public records; stated that he is "sort of like Internal Affairs for the Ohio Department of Rehabilitation and Correction"; and, stated that, if we wanted to provide a release signed by Jason Mahe, the Ohio Department of Rehabilitation and Correction "might" be willing to release "some" records.

Further, affiant saith naught.

Date: 12·4·11

By _____
John S. Marshall

Sworn to before me and subscribed in my presence on this 4th day of December, 2011.

By _____
Notary Public

KIRSTEN L. DELL
NOTARY PUBLIC, STATE OF OHIO
DELAWARE COUNTY
My Comm. Expires July 28, 2015

PUBLIC RECORDS REQUESTS – RESPONSE TIMES BY STATE

http://sunshinereview.org/index.php/Request_response_times_by_state

Most states specify a time period within which a response to a public records request must be made by. This page gives the time period of each state. All time frames given are business days and exclude weekends, holidays, etc.

Response time generally refers to the time frame within which a public body must either provide the requested records, ask for an extension to gather the records, or deny the request.

In 15 states (**Alabama, Arizona, Delaware, Florida, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin and Wyoming**), there is no statutory time limit for public agencies to reply to open records requests. In 2008, Tennessee adopted a statutory time limit (seven days) for the first time.

The other 35 states specify a time within which public documents must either be furnished, denied, or an extension may be requested. **Rhode Island** gives the longest reply time (up to 30 days) and **Mississippi** requires the quickest turn-around of records (1 day if the agency does not have a written policy stating otherwise).

The mandatory response time under the Illinois Freedom of Information Act was reduced on January 1, 2010 from seven days to five days.

Arkansas Freedom of Information Act - 3 Days

Public bodies have 24 hours to determine eligibility of a FOIA request. If the records are unavailable, the department has three business days to assemble them.

California Public Records Act - 10 Days

The California Public Records Act allows for 10 days for an agency to comply with a records request.

Colorado Open Records Act - 3 Days

Colorado Law stipulates a three day deadline.

Connecticut Freedom of Information Act - 4 days

The allotted response time for Connecticut open records requests is four days.

Delaware Freedom of Information Act - 15 days

In 2010, the Delaware General Assembly added a 15 day response time for all FOIA requests.

Georgia Open Records Act - 3 days

Government agencies must either comply with or deny a written request for public records within **three working days** after receiving it.

Specifically, the law says that the custodian of the requested records "shall have a reasonable amount of time to determine whether or not the record or records requested are subject to access

Relator's Exhibit I

under this article and to permit inspection and copying. In no event shall this time exceed three business days."

If the custodian denies the request, the custodian must issue the denial within three days.

Hawaii Uniform Information Practices Act - 10 days

Hawaiian law allows for 10 business days to respond to records requests.

Idaho Public Records Act - 3 days

The PRA requires a department to respond within three business days to any request by either granting it or denying it. If the department feels that the request may take longer they may extend the time to ten days by notifying the person in writing.

Illinois Freedom of Information Act - 5 days

Government agencies must either comply with or deny a written request for public records within **five working days** after receiving it. The five-day rule goes into effect on January 1, 2010. Prior to then, the legal response time is seven days.

Under 5 ILCS 140/3(d), the 5-working-day time limit can be extended for 5 additional working days under these circumstances:

- If the requested records are stored in whole or in part at other locations than the office having charge of the requested records;
- If the request requires the collection of a substantial number of specified records;
- If the request is couched in categorical terms and requires an extensive search for the records responsive to it;
- If the requested records have not been located in the course of routine search and additional efforts are being made to locate them;
- If the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure under the exemption provisions of the Act or should be revealed only with appropriate deletions;
- If the request for records cannot be complied with by the public body within the 7-working-days' time limit without unduly burdening or interfering with the operations of the public body;
- If there is a need for consultation, which must be conducted with all practicable speed, with another public body or among two or more components of a public body having a substantial interest in the determination or in the subject matter of the request.

Indiana Access to Public Records Act - 7 days

The Indiana statute allows for 7 days to process APRA requests.

Iowa Open Records Law - 10-20 days

Iowa allows for 10-20 days for record request responses to be completed.

Kansas Open Records Act - 3 days

Kansas statutes allow for three days to respond to a request. However, if the department feels it needs more time to complete the request, it may notify the person making the request in writing and provide the earliest possible date the records will be prepared.

Kentucky Open Records Act - 3 days

Kentucky law sets a three day limit on records requests but allows for extensions if the extension is justified in writing to the person requesting the records.

Louisiana Public Records Act - 3 days

Section 44:32(D) of the relevant statute dictates that the custodian of the records must respond to requests within three days. Weekends and holidays are excluded from the three day countdown. The custodian of the records is required to respond in some fashion within the three-day window even if the custodian is still engaged in a decision process about which, if any, of the requested records can be withheld. See *Association of Rights of Citizens v. St. Bernard*, a 1990 case.

Maine Freedom of Access Act - 5 days

The law does not specify a time limit with regard to positive request responses. However, a rejection must occur within 5 business days of the receipt of the request.

Maryland Public Information Act - 30 days

Maryland law allows the department 30 days to either grant the materials or deny the request.

Massachusetts Public Records Act - 10 days

Massachusetts' law allows 10 days for record responses.

Michigan Freedom of Information Act - 5 days

Michigan allows 5 days for FOIA requests. The agency can get an additional 10 day automatic extension.

Mississippi Public Records Act - 1-14 days

Mississippi law states that, if not decided upon by the individual department, departments have 1 working day to respond to PRA requests. However, departments may establish their own time limits of up to fourteen working days.

Missouri Sunshine Law - 3 days

Missouri law allows for three business days for the return of records requests. However, it does permit lengthening this but only with written notice by the custodian of the records.

Nebraska Public Records Law - 4 days

Nebraska law allows for four business days for the completion of records requests. However, it does permit extensions if the department requesting the extension submits a written statement of justification and declaration of the soonest the records can be made available to the person making the request.

Nevada Open Records Act - 5 days

Nevada law allows for five business days to respond to open records requests, but permits extensions if notice is given to the person making the request, in writing.

New Hampshire Right to Know Law - 5 days

New Hampshire law allows for 5 days to respond to records requests. Extensions are available if the person making the request is notified in writing within 5 days of when the records will be available.

New Jersey Open Public Records Act - 7 days

New Jersey law allows for up to seven days to respond to a records request. Failure by a department to respond in the time frame is considered a denial of the request.

New Mexico Inspection of Public Records Act - 3 days

New Mexico law allows for three business days to respond to records request. However, if the assigned custodian is unable to obtain the records in that time, he or she must notify the person making the request in writing when the records will be available. The records must be made available within 15 days of the receipt of the request. However, the law does leave an outlet for what are deemed "excessively burdensome" requests in that the custodian merely make the materials available in a reasonable amount of time.

New York Freedom of Information Law - 5 days

New York law allows for 5 days to respond to FOIL requests.

Pennsylvania Right to Know Law - 5 days

Effective in 2009, "The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied."

The government agency may determine that:

- The requested records require some redaction.
- The records are stored in a remote location so that retrieval will take some time.
- Staffing limitations exist.
- The agency is uncertain as to whether it is required under the law to provide the records that have been requested and therefore wants to request a legal review prior to making a decision as to whether to fulfill the request.

- The requestor did not adequately comply with the policies regarding how to ask for records.
- The requestor did not pay the fees associated with the request.
- The "extent or nature of the request precludes a response within the required time period." If the agency decides that one or more of those reasons for not providing the records within the 5-day window apply, the agency is required to provide the requestor with a letter saying why it is going to take more than 5 days. That letter must be provided within the 5 day window.

Rhode Island Access to Public Records Act - 10 days

Rhode Island law allows 10 days for a public body to deny a request. If the agency does not respond by within 10 days, it is deemed a denial

South Carolina Freedom of Information Act - 15 days

South Carolina law allows for 15 business days to respond to records requests.

Tennessee Open Records Act - 7 days

Tennessee allows 7 days to respond to records requests.

Texas Public Information Act - 10 days

Texas law allows 10 days for public records requests.

Utah Government Records Access and Management Act - 10 days

The Utah GRAMA code requires that public records responses be made within at least 10 business days if the records are for individuals purposes or within 5 business if the record is meant to benefit the general public (pursuant to 63G-2-204).

Vermont Public Records Law - 2 days

Records denials must be issued within 2 days of receiving the records request. This limit can be extended to ten days for unusual circumstances. Vermont law does not prescribe a specific time for the release of records.

Virginia Freedom of Information Act - 5 days

Virginia law requires open records request responses to be made within 5 business days. However, agencies may petition courts for additional time for larger requests.

Washington Public Records Act - 5 days

Washington allows 5 days for records responses.

West Virginia Freedom of Information Act - 5 days

West Virginia law allows for 5 business days for records request responses.