

IN THE SUPREME COURT OF OHIO

**STATE EX REL. O'SHEA & ASSOCIATES
CO., L.P.A.**

Case No.: 2010 -1536

Relator,

-v-

**CUYAHOGA METROPOLITAN HOUSING
AUTHORITY**

Respondent,

**On Appeal from the Court of Appeals,
Eighth Appellate District
Cuyahoga County, Ohio
Case No.: 93275**

RELATOR'S MOTION FOR RECONSIDERATION

Michael J. O'Shea, Esq. (0039330)
michael@moshea.com
O'SHEA & ASSOCIATES CO., L.P.A.
19300 Detroit Road
Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 – fax

Counsel for Relator

Shawn Maestle, Esq. (0063779)
smaestle@westonhurd.com
Hilary Taylor, Esq. (0017496)
Weston Hurd LLP
The Tower at Erieview
1301 East Ninth Street – Suite
1900
Cleveland, Ohio 44114
Fax: (216) 621-8369

Counsel for Respondent

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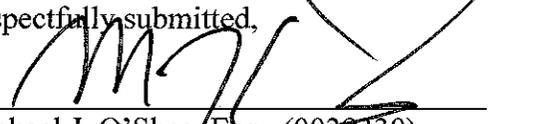
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Now comes Relator, by and through counsel, and hereby moves this Court for reconsideration of its ruling and order journalized January 19, 2012, reversing the Appeals Court ruling awarding attorney's fees to O'Shea & Associates.

In support of this motion, and as more fully set forth in the following memorandum, Realtor argues that the Court made no finding that Respondent CMHA's failure to produce a single responsive record, either redacted or not, was reasonable. Secondly, all of Respondent's arguments for non-production of documents were rejected. Thirdly, this Court made no finding that the Court of Appeals abused its discretion in awarding Realtor attorney's fees. And finally, the Court's decision sets a binding precedent which is unclear and may have several unintended consequences.

Wherefore, Realtor respectfully requests this Court reconsider its decision with respect to attorney's fees, uphold the Appeal's Court decision in that regard, or in the alternative, clarify its ruling to avoid any ambiguity or unintended consequences.

Respectfully submitted,



Michael J. O'Shea, Esq. (0039330)
michael@moshea.com
O'SHEA & ASSOCIATES CO., L.P.A.
19300 Detroit Road, Suite 202
Rocky River, Ohio 44116
(440) 356-2700
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Counsel for Relator

MEMORANDUM IN SUPPORT

I. Introduction & Standard of Review

In this case, this Court has justified the overturning of Realtor's attorney's fees on the grounds that (1) "...O'Shea was not entitled to most of the personal identifying information contained in these records" and (2) "...O'Shea introduced no evidence that it either paid or was obligated to pay its own counsel[s] attorney's fees."

As to the issue of attorney's fees, this Court in State ex rel. Beacon Journal Publ'g Co. v. City of Akron, 104 Ohio St. 3d 399, 411 (Ohio 2004) pronounced,

An award of attorney fees under R.C. 149.43 is not mandatory. State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys. (1988), 39 Ohio St.3d 108, 529 N.E.2d 443, paragraph two of the syllabus. "In an appeal of a judgment granting or denying fees in a public records case, we review whether the court abused its discretion." State ex rel. Dillery v. Icsman (2001), 92 Ohio St.3d 312, 314, 2001 Ohio 193, 750 N.E.2d 156. An abuse of discretion means an unreasonable, arbitrary, or unconscionable action. State ex rel. Hamilton Cty. Bd. of Commrs. v. State Emp. Relations Bd., 102 Ohio St. 3d 344, 2004 Ohio 3122, 810 N.E.2d 949, P17. In exercising its discretion, a court considers the reasonableness of the government's failure to comply with the public records request and the degree to which the public will benefit from release of the records in question. WBNS TV, Inc., v. Dues 101 Ohio St. 3d 406, 2004 Ohio 1497, 805 N.E.2d 1116, P47.

It is Realtor's position that the Court of Appeals did not abuse its discretion in awarding attorney's fees for the following reasons.

II. This Court rejected all of Respondent's arguments and Respondent was unreasonable in its failure to comply with R.C. 149.43.

The factual record in this matter is undisputed that Respondent failed to produce a single document that was responsive to Realtor's public records request, it **refused and failed to engage in the redaction of any protected information**, and all of its arguments were geared toward non-production of any of the requested records. A review of Respondent's brief, reveals that they argued that they should not have to produce any records

and nowhere in their brief is their any argument about what information should be redacted before production as required in State ex rel. Master v. Cleveland (1996), 75 Ohio St. 3d 23, 31, 1996 Ohio 228. Further, Respondent attempted to mislead this Court (essentially setting up a strawman argument) by falsely claiming that only two documents were responsive to Realtor's requests (resident questionnaire and medical release), and then proceeded to gear their arguments to demonstrate why only those two documents are not public records.

As this Court's opinion makes clear, all of Respondent's arguments were summarily rejected. It was this Court, *sua sponte*, who came up with the idea that documents containing personally identifiable information should be first redacted and then produced, not Respondent. Further, this Court's decision vindicated Realtor's position in its entirety by ordering Respondent to produce each and every document that was sought, including specifically the resident questionnaire and medical release that Respondent fought so hard to withhold.

Therefore, based on this Court's decision, Realtor is going to receive every document that it has requested, albeit in redacted form. As a result, this Court should determine that Respondent was unreasonable in its failure to comply with R.C. 149.43.

III. The Appellate Court did not abuse its discretion in awarding Realtor attorney's fees.

As stated in State ex rel. Beacon Journal Publ'g Co., an appeal of a judgment granting or denying fees in a public records case is reviewed under an abuse of discretion standard. This Court has overturned the Court of Appeals based on its finding that "...O'Shea introduced no evidence that it either paid or was obligated to pay its own counsel[s] attorney's fees" and cited to State ex rel. Beacon Journal Publ'g Co. in support. As the

record indicates, Realtor was represented by Michael O'Shea, who is the sole shareholder of the law firm. In support of its motion for attorney's fees, Realtor presented to the Court of Appeals a copy of a "Time Entry Report", indicating the amount of time the firm spent on the mandamus case along with the times and descriptions of each service, an email to Respondent's counsel indicating the hourly rate and total fee amount of \$ 7,537.50, and an affidavit attesting to these documents.

It is Realtor's position that the Court may have discounted the structure of Realtor's law firm when determining that it was not obligated to pay its own counsel attorney's fees and by implication, that Realtor did not incur any costs to bring this action against Respondent. From what is evident from Respondent's brief, it has never argued that Realtor did not actually pay the billed attorney's fees or that Realtor has not incurred costs to bring this action, therefore Realtor did not address this issue in its brief. However, the fact remains that Realtor is a law office which has overhead utility expenses, advances filing fees, employs a principle attorney (Michael O'Shea), an associate attorney, a paralegal, and an office manager. The business model used by Realtor is one where all work performed on a particular case is billed at a single hourly rate and once that invoice is paid, the income is used to pay all of the aforementioned office expenses, including the salaries of Michael O'Shea and the other employees who assisted in this case.

Should this Court's decision stand, it would stand upon the assumption that Realtor has not incurred a single expense in the form of salaries, overhead, or case expenses in preparing and litigating this case. Here, Realtor has submitted the aforementioned "Time Entry Report" and affidavit to the Court of Appeals, who likely placed more weight on the fact that Realtor, as a law firm, must have incurred significant expenses in litigating this case.

Therefore, based on the documents submitted in evidence and the fact that Realtor incurred office expenses and paid wages to those who worked on this case, it is Realtor's

position that the Court of Appeals decision to award Realtor attorney's fees was not an unreasonable, arbitrary, or unconscionable action and should be upheld.

IV. The Court's opinion on attorney's fees for public records cases brought in the name of the law firm seeking the records is unclear and will result in unintended consequences.

As this case is now binding precedent in this State, Realtor is concerned that this Court's decision is unclear and will have the effect of resulting in unintended consequences. The basis of this concern is that the majority's opinion will work to discourage law firms, especially small firms owned by one attorney, from bringing public records cases in their own name as they will essentially be treated as pro-se cases. As this decision is understood by Realtor, single owner law firms would have to prove that they were paid for their time on public records cases, before the attorney's fees issue is decided, and before the fees are paid by the losing party. The practical effect of this is law firms will now have to organize strawman Plaintiff's or hire outside counsel to bring public records cases and send them the bill so that the firm will be eligible to collect attorney's fees on these cases.

Realtor does not believe that it was this Court's intention to preclude single owner law firms from attorney's fees awards on public records cases, however based on the structure and language of the opinion, this is the practical effect. Therefore, Realtor requests this Court reconsider its decision and uphold the Court of Appeals award of attorney's fees, or in the alternative, clarify the decisions language to avoid the aforementioned consequence.

IV. Conclusion

Wherefore, based on the foregoing, Realtor respectfully requests this Court reconsider its decision with respect to attorney's fees, uphold the Appeal's Court decision in that regard, or in the alternative, clarify its ruling to avoid any ambiguity or unintended consequences.

Respectfully submitted,



Michael J. O'Shea, Esq. (0039330)
michael@moshea.com
O'SHEA & ASSOCIATES CO., L.P.A.
19300 Detroit Road, Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 - fax

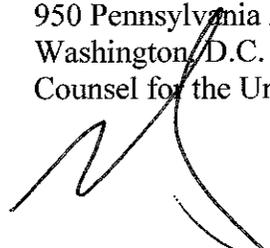
Counsel for Relator

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via U.S. mail, postage prepaid to the following party,
this 26 day of Jan., 2012.

Shawn Maestle, Esq.
Hilary Taylor, Esq.
Weston Hurd LLP
The Tower at Erieview
1301 East Ninth Street – Suite 1900
Cleveland, Ohio 44114

Daniel J. Lenerz
Civil Division, Room 7242
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for the United States



Michael J. O'Shea, Esq.