

In the  
**Supreme Court of Ohio**

STATE EX REL. KENT LANHAM,

Relator,

v.

DANNY R. BUBP,  
STATE REPRESENTATIVE

Respondent.

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: Case Number 2012-0131  
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: Original Action in Mandamus  
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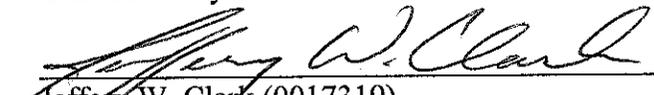
**RESPONDENT'S MOTION TO STRIKE**

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Now comes Respondent pursuant to Civ. R. 12(F) and moves to strike the voluminous immaterial, impertinent, and scandalous statements contained in Relator's Complaint. The referenced text and exhibits are manifestly unrelated to a public records mandamus action brought pursuant to R.C. § 149.43(C), as supported by the memorandum filed herewith.

Respectfully submitted,

MIKE DEWINE (0009181)  
Ohio Attorney General

  
Jeffery W. Clark (0017319)  
*\*Counsel of Record*

Jeannine R. Lesperance (0085765)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-2872  
(614) 728-7592 (fax)

*Attorneys for Respondent*  
*Danny R. Bulp, State Representative*

**FILED**  
APR 18 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

## MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE

### I. STATEMENT OF THE FACTS

Relator commenced this action pursuant to the Ohio Public Records Act, R.C. 149.43(C), alleging that he had received no response<sup>1</sup> from Respondent to his public records request. (Relator's Exhibit A). Relator alleges that Respondent thereby violated a duty to respond within a reasonable period of time (Complaint, ¶¶53-54, 57, 65) and to provide a written explanation for any denial of the request (Complaint, ¶59). Relator seeks,

“... the issuance of a peremptory writ of mandamus or, alternatively, an alternative writ of mandamus, compelling Mr. Bubp (i) to produce copies of those public records which have been withhold [sic] or not produced pursuant to the Public Records Request Letter; and (ii) to provide a written response to the Public Records Request Letter if the request is being further denied (including legal authority for any such denial), together with an award of statutory damages, attorney fees and costs.” Complaint, pp. 17-18.

However, Relator devotes more than ten pages of his lengthy Complaint to unrelated allegations that Respondent has a conflict related to holding two public offices.<sup>2</sup> Relator states no claim for relief in the Complaint that is related to these allegations.

### II. ARGUMENT

#### A. *Standards for Pleading*

Under Civ. R. 8(A), a Relator's complaint is required to contain only a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment for the relief to which the party claims to be entitled. For an original action in the Ohio Supreme Court, S. Ct. Prac. R. 10.4(B) adds the requirement that the complaint “shall contain a specific

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<sup>1</sup> As Respondent is limited to the contents of the pleadings in making a motion to strike, the “facts” herein are set forth *arguendo*, for the purposes of this motion only. However, Respondent in fact provided Relator with all requested records, and the required explanation for items withheld under attorney-client privilege, the day after the filing of the complaint.

<sup>2</sup> See Complaint, ¶¶4, 8-47, and 69-83, fn.1, the word “putative” in ¶1, and Relator's Exhibits B through D.

statement of facts *upon which the claim for relief is based.*" (emphasis added). However, S. Ct. Prac. R. 10.4(B) does not grant a party license to plead "redundant, immaterial, impertinent, or scandalous matter." *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 26, 1996-Ohio-228, 661 N.E.2d 180, or expand the statement of alleged facts beyond those on which the claim for relief is based.

Relator does not limit his Complaint to the straightforward elements of a public records mandamus action or to the facts on which a public records claim is based (e.g., the written request made to the public office and the response thereto). Relator instead piggybacks into his Complaint over ten pages of accusations of alleged conflict in Respondent's holding of two different public offices. These allegations are factually and legally immaterial to the public records claim. Nothing in the referenced paragraphs is probative of any element of the claim for relief which Relator does make – a writ of mandamus to obtain public records. As such, this Court can and should strike the referenced paragraphs for indefiniteness. See *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1498 (S.D. Ohio 1991).

Further, Relator is apparently using this Complaint as a public forum to attack Respondent and attempt to elicit responsive pleadings and conduct discovery<sup>3</sup> on these extrinsic matters. The ruse is attempted at the expense of the Court's decorum and imposes unnecessary time and expense on Respondent as well as the Court to correct the abuse of judicial process. Civ. R. 12(F) provides, in pertinent part,

(F) Motion to strike. Upon motion made by a party before responding to a pleading, ... or upon the court's own initiative at any time, the court may order

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<sup>3</sup> An online article in The News Democrat, the newspaper of record for Brown County, states: "The case is currently in mediation in the Ohio Supreme Court. Lenzo said since the records have been released, there is no reason for Hartman to proceed with the lawsuit. Hartman, however, predicted that "nothing would come" from a mediation and said he plans to create depositions against Bulp in the case." <http://newsdemocrat.com/main.asp?SectionID=1&SubSectionID=1&ArticleID=135191>.

stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

The operative terms within the functionally identical federal rule have been defined as follows:

"Immaterial" allegations are generally defined as those that "have no bearing on the subject matter of the litigation." *Johnson v. The County of Macomb*, 2008 U.S. Dist. LEXIS 38617, 2008 WL 2064968, \*1 (E.D. Mich. May 13, 2008); see also *Dean v. Gillette*, 2004 U.S. Dist. LEXIS 27244, 2004 WL 3202867, \*1 (D. Kan. June 8, 2004). "Impertinent" allegations have been defined as statements that do not pertain or are not necessary to the issues in question. See 5C Wright & Miller Federal Practice & Procedure §1382 (3d ed. 2009). A "scandalous" allegation "generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003)

*New Day Farms, LLC v. Bd. of Trs. of York Twp.*, 2009 U.S. Dist. LEXIS 130429, 8-9 (S.D. Ohio 2009). All of the referenced portions of Relator's Complaint fall within one or more of these categories and should therefore be stricken.

Among other purposes, a motion to strike immaterial claims serves to remove improper matter so that the parties can focus judicial and litigant resources on the real issues of the case.

"... motions to strike 'serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case.' *United States v. Marisol, Inc.*, 725 F. Supp. 833, 836 (M.D. Pa. 1989)."

*Pretty Products*, 780 F. Supp. 1488 at 1498. The Court and Respondent should not have to waste litigation resources on unrelated grievances not probative of any element of this public records action. The Court should strike Relator's immaterial allegations so that the Court and the litigants can focus on the real issues of this case. Where the majority of a complaint is superfluous and irrelevant, the appropriate remedy is to order Relator to file an amended complaint. *Scaccia v. Lemmie*, 2d Dist. No. 21506, 2007-Ohio-1055, ¶23.

Where a party gratuitously makes allegations irrelevant to the action in the nature of personal attacks, and allegations of wrongdoing on the part of individuals whose alleged actions have no bearing on the case at hand, a motion to strike the improper matter is appropriate. *Scaccia v. Lemmie*, 2d Dist. No. 21506, 2007-Ohio-1055, ¶22. See also *In re Estate of Call*, 9th Dist. No. 04CA008560, 2005-Ohio-1466, ¶29 (in objection to estate accounting, immaterial allegations that the executrix had not allowed decedent to receive necessary cancer treatment and other claimed irregularities were found scandalous for purposes of motion to strike and Rule 11 sanctions). Relator's allegations in this case are not merely immaterial and impertinent, but unnecessarily disparage the character of Respondent. Relator's allegations of impropriety are replete with epithets such as "usurper" (Complaint ¶¶45, 69) and the unnecessary disparagement is even reflected in the caption of the complaint, through Relator's use of the word "putative." Relator's language and accusations are manifestly prejudicial and detract from the dignity of the Court by their inclusion in this public records mandamus action.

***B. A Public Records Requester's Purpose is Immaterial to his Right to Records and to Respondent's Duty to Provide Records***

A person requesting public records has no obligation to reveal his purpose in making his public records request, or his intended use of such records, R.C. § 149.43(B)(4). Nor is the purity or baseness of a requester's motives a condition to an action to enforce the Ohio Public Records Act:

There is no condition based on the moral quality of the person requesting the record. Nor is the purpose of the requester relevant to the propriety of the request. *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 610 N.E.2d 997, syllabus ("A person may inspect and copy a 'public record,' as defined in R.C. 149.43(A), irrespective of his or her purpose for doing so").

*State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 43, 2006-Ohio-6365, 857 N.E.2d 1208, ¶54. Since this matter is brought pursuant to the Ohio Public Records Act, R.C. §

149.43 (Complaint, ¶1), the purpose of Relator in making his public records request is utterly immaterial to his allegations of violation of R.C. § 149.43(B).

**C. Any Contingent Assertion of a “Public Benefit” is Premature**

Respondent expects that Relator will argue that the ten pages detailing his theory of conflict of public offices is made anticipatorily, to support a claim for attorney fees in the event that the Court finds a violation of R.C. § 149.43(B). Because an award of attorney fees is not mandatory even when a violation is found, “[i]n granting or denying attorney fees under R.C. 149.43(C), courts consider 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.*” *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 525, 2006-Ohio-1215, 844 N.E.2d 1181 (emphasis added), quoting *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 54, 1998-Ohio-444, 689 N.E.2d 25. However, the need to consider alleged public benefit will not arise until and unless a violation is found, and even then a requester/Relator need only allege the nature of the putative public benefit (e.g., a relevant version of Complaint ¶¶ 79-82), not litigate fancied future actions in advance.

In the event a finding of a violation of R.C. § 149.43(B) is made, the Court should make a tentative decision regarding the award of fees, followed by the submission of evidence relevant to the nature and scope of the violation found. For example, the factors specified in R.C. § 149.43(C)(2)(c)(i) and (ii) are considered *after a court makes an initial, tentative decision to award fees.* *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 50, 2009-Ohio-4149, 914 N.E.2d 159 (emphasis added). See also *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 168, 2009-Ohio-590, 902 N.E.2d 976 (a remand for the introduction of additional evidence and argument is appropriate). Thus, Relator’s lengthy and impertinent allegations regarding

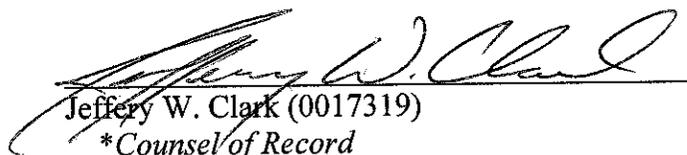
Representative Bulp's offices are not relevant to any issue now before this Court, nor are they likely to become relevant.

**CONCLUSION**

Motions to strike are not favored, and Respondent does not seek this order lightly. However, the voluminous immaterial, impertinent, and scandalous allegations included in Relator's Complaint present a compelling example for application of this remedy. Respondent therefore respectfully requests this Court to strike the referenced paragraphs and footnote from Relator's Complaint, as well as Exhibits B through D, along with any other action the Court deems appropriate. Respondent requests that the Court order Relator to file an amended complaint that complies with the pleading requirements of Civ. R. 8 and S. Ct. Proc. R. 10.4(B), and direct Relator to omit from the amended complaint any reference to his ulterior motive or its purported public benefit unless and until a violation of R.C. § 149.43(B) is found.

Respectfully submitted,

MIKE DEWINE (0009181)  
Ohio Attorney General



Jeffrey W. Clark (0017319)  
*\*Counsel of Record*

Jeannine R. Lesperance (0085765)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-2872  
(614) 728-7592 (fax)

*Attorneys for Respondent*  
*Danny R. Bulp, State Representative*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion to Strike of Respondent* was sent by regular U.S. mail on April 18<sup>th</sup>, 2012 to the following:

Curt C. Hartman  
The Law Office of Curt C. Hartman  
3749 Fox Point Court  
Amelia, Ohio 45102

*Attorney for Relator,  
Kent Lanham*

  
Jeffery W. Clark  
Assistant Attorney General