

Case No. 2012-2132

**Supreme Court
of the State of Ohio**

**STATE OF OHIO *ex rel.*
MARK MILLER,**

Relator-Appellant,

v.

OHIO STATE HIGHWAY PATROL

and

JEFF MAUTE,

Respondents-Appellees.

RELATOR'S MERIT BRIEF

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RELATOR-APPELLANT'S MERIT BRIEF

I. FACTUAL BACKGROUND

Relator Mark Miller ("Relator") is a founding member and treasurer of the Coalition Opposed to Additional Spending and Taxes ("COAST"). (Miller Affidavit ¶3, filed September 10, 2012.¹) In addition to opposing excessive taxes and spending, COAST involves itself in identifying and criticizing abuse of power of government officials, and as such works to learn of, document and expose policies, practices and procedures of government officials that exceed their statutory and constitutional authority, or that involve waste, fraud and abuse. (Miller Affidavit ¶4.) To that end, Mr. Miller has made a series of public records requests, including the request at issue in this case. (Miller Affidavit ¶5.)

On September 9, 2011, Mr. Miller tendered, via certified mail, a public records request (the "Public Records Request Letter") to the Respondents Jeff Maute and the Ohio State Highway Patrol. (Miller Affidavit ¶¶6, 7 & Exh. A.) Respondents received the Public Records Request Letter on September 19, 2011. (Miller Affidavit Exh. B.) Via the Public Records Request Letter, Mr. Miller sought a number of public records, including certain records which related to traffic incidents involving Trooper Joseph Westhoven of the Ohio State Highway Patrol's Batavia Patrol Post. (Miller Affidavit ¶9 & Exh. A.)

When the Respondents appeared to have not responded affirmatively or negatively to the public records request for nearly one-and-a-half months, Mr. Miller commenced an original mandamus action in the Twelfth District Court of Appeals on October 27, 2011. (Complaint ¶14, filed May 10, 2012; Answer ¶14, filed June 6, 2012.) Subsequently, Respondents informed

¹ As this case originated in the court of appeals as an original action, no transcript of the proceedings has been prepared by the clerk of courts. Thus, on the first reference to a filing, the date of the filing with the clerk of the court of appeals will be provided.

Mr. Miller that responsive records had been provided to the e-mail addressed identified in the Public Records Request Letter. (Complaint ¶15; Answer ¶15.) In light of this miscommunication, Mr. Miller voluntarily dismissed on January 5, 2012, the mandamus action which he had previously filed. (Complaint ¶16 & Exh. C; Answer ¶16.)

Following the dismissal of the foregoing action in the Twelfth District, Respondents provided Mr. Miller with *some* of the records responsive to the Public Records Request Letter. But instead of providing all of the requested public records, Respondents still refused to provide two distinct categories of records requested by Mr. Miller, *viz.*:

- (i) any and all video and audio recordings from the police cruiser operated by Trooper Joseph Westhoven, Batavia Patrol Post, from the beginning of his shift on June 1, 2011, through the end of his shift on August 5, 2011; and,
- (ii) any and all Impaired Driver Reports drafted and/or printed by Trooper Joseph Westhoven, Batavia Patrol Post, relating to any OVI arrests made between June 1, 2011 and August 5, 2011, including, but not limited to, narrations on statements of facts, filed sobriety test reports, and evaluations.

(Miller Affidavit ¶10.) And specifically, Respondents refused to provide the following “Outstanding Records” which are the only records requested by Mr. Miller which remain at issue for this mandamus action:

- (i) the portion of the video and audio recording from the police cruiser operated by Trooper Joseph Westhoven documenting the traffic stop, detention, arrest and transport of Ashley Ruberg occurring between July 15 and July 16, 2011, and
- (ii) the impaired driver report relating to the same incident.

(Complaint ¶20 & Miller Affidavit ¶11 (specifically identifying as the “Outstanding Records” the foregoing two records); Complaint ¶21 & Miller Affidavit ¶12 (the Outstanding Records are the only records at issue in this litigation); Respondents’ Answer ¶21 (admitting and acknowledging that “the Outstanding Records are the only records at issue”).)

In the interim between the dismissal of the first mandamus action and the commencement of the present mandamus action, counsel engaged in various exchanges of communication pursuant to this Court's encouragement for requestors of public records to work with public offices relative to such requests. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105 ¶18. Ultimately, though, Respondents still refused to provide copies of the Outstanding Records, viz., the video and audio recording of the traffic stop, detention, arrest and transport of Ashley Ruberg, as well as the associated impaired driver report. In a letter dated March 20, 2012, and addressed to Mr. Miller's attorney, counsel on behalf of the Respondents confirmed their continual refusal to provide the Outstanding Records, claiming that the Outstanding Records constituted "investigative work product" for an ongoing criminal investigation. (Miller Aff. ¶13 and Exh. C.) As indicated in that letter, Respondents claimed that "[b]ecause the investigative work produce exception applies until the matter has concluded, information regarding open/pending criminal cases may be excluded." And, thus, based upon this incorrect and erroneous legal assertion, Respondent withheld and refused to produce the Outstanding Records.²

Thus, the earlier representation by Respondents' counsel that all responsive records had been provided was not completely accurate; instead and as noted above, *some* responsive records had been provided but other responsive records were being withheld under a claim that such records constituted investigative work product. As the basis for the dismissal of the first-filed mandamus action proved to be false, Mr. Miller filed on May 10, 2012, a second mandamus action (the present action) seeking, this time, to obtain a mandamus compelling production of the

² Though it must be recognized that the Respondents put forth no evidence in support of their *ipse dixit* assertion concerning the alleged application of an exemption under the Public Records Act.

Outstanding Records.³ (Complaint, at 7-8 (prayer for relief specifically seeking the issuance of a writ of mandamus “commanding Respondent[s] to immediately provide to relator copies of the Outstanding Records”). On June 6, 2012, Respondents filed an answer essentially contending that they had no duty to provide copies of the Outstanding Records because, according to the Respondents, the Outstanding Records were exempted from the definition of “public records” under the Public Records Act. (Answer, at 5 (asserting as a defense that “Respondents have no duty to provide documents that are excluded from the definition of ‘public records’ under R.C. 149.43”)).

Eventually and in order to supplement the pleadings, Mr. Miller filed an affidavit on September 10, 2012, wherein he reiterated, *inter alia*, that “[t]he Outstanding Records are the only records I requested in the Public Records Request Letter that are at issue in this litigation” and the refusal of the Respondents to produce the Outstanding Records on the claimed basis that such records constituted “investigative work product.” (Miller Affidavit ¶¶12 & 13, filed September 10, 2012.) But instead of tendering any evidence to support and establish the actual application of the investigative work product exemption to the Outstanding Records, Respondents filed a motion to strike Mr. Miller’s affidavit and to dismiss the action. The Respondents’ motion was not based upon any argument going to the merits but, instead, upon a claimed technicality that the affidavit was not permissible evidence in a mandamus action. (Respondents’ Motion to Strike and to Dismiss, filed September 21, 2012.) And when Mr. Miller filed a merits brief (Relator’s Brief, filed September 25, 2012), the Respondents once

³ When Mr. Miller filed the first mandamus action, he had not received any of the responsive records and, thus, in that action would have sought all responsive records sought via the Public Records Request Letter. As noted, after the dismissal of that action, Respondents provided some (but not all) of the responsive records. Thus, the newly filed mandamus action simply sought to obtain the issuance of a writ of mandamus to compel production of those records which had still not been produced, *i.e.*, the Outstanding Records.

again avoided addressing the merits and sought, again, to strike Relator's brief, claiming it was untimely. (Respondents Motion to Strike, filed October 9, 2012.)

The Twelfth District rejected the effort of the Respondents to strike Mr. Miller affidavit and merit brief. (Twelfth District Decision, at 3-4.) But even though the Twelfth District recognized that "[t]he evidence submitted shows that relator made a public records request, and that it was complied with except for documents withheld based upon the investigative work product exception to the public records law" (Twelfth District Decision, at 5), it proceeded to deny the requested writ even though the Respondents put forth no evidence or argument in support of its claimed exemption. For in so doing, the Twelfth District ignored the fact that the pleadings acknowledged and that the undisputed evidence established that the only records at issue were the Outstanding Records, *viz.*, the video and audio recording of the traffic stop, detention, arrest and transport of Ashley Ruberg, as well as the associated impaired driver report, and that the only issue was whether the Outstanding Records were exempt from disclosure pursuant to the definition of "public records" as contained in the Public Records Act. Instead, the Twelfth District found fault in that Mr. Miller and the Respondents limited the case to records concerning Ashley Ruberg, notwithstanding the agreement and acknowledgment of the parties as to what the case was about, *i.e.*, the Outstanding Records. Instead, the Twelfth District ignored how the parties had limited the case and focused exclusively upon the broader, original request tendered by Mr. Miller and the fact that the request did not specifically mention Ashley Ruberg by name. (Decision, at 5.)

However, because the undisputed evidence and pleadings established Mr. Miller's entitlement to the Outstanding Records and the lack of the application of the exemption claimed

by the Respondents, Mr. Miller filed a timely appeal with this Court on December 20, 2012.
(Notice of Appeal.)

II. ARGUMENT

Proposition of Law No. 1:

In an appeal of an action seeking an extraordinary writ, an appellate court has plenary authority to consider the appeal as if the original action had been filed in that court.

This Court possesses “plenary authority in extraordinary actions [so as] to consider the instant appeal as if it had been filed in this court originally.” *State ex rel. Walker v. Lancaster City School Dist. Bd of Ed.*, 79 Ohio St.3d 216, 220, 680 N.E.2d 993 (1997); *accord State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 318, 750 N.E.2d 156, 2001-Ohio-193 (2001)(“we have plenary authority to consider extraordinary writ cases as if they originally had been filed here”); *State ex rel. Cleveland Police Patrolmen’s Ass’n v. Cleveland*, 84 Ohio St.3d 310, 312, 703 N.E.2d 796 (1999)(in ruling on appeal of public records case, recognizing “[t]his court has plenary authority in extraordinary writ cases”). And “[this] plenary authority generally refers to [this Court’s] ability to address the merits of a writ case without the necessity of a remand if the court of appeals erred in some regard.” *State ex rel. Nat’l Elec. Contrs. Ass’n, Ohio Conference v. Ohio Bur. of Emp. Serv.*, 88 Ohio St.3d 577, 579, 728 N.E.2d 395 (2000). As developed herein, the court of appeals clearly erred when it failed to consider the sole issue in this case as narrowed by the pleadings, *viz.*, whether the Respondent met their burden of demonstrating the application of the investigative work product exemption to the disclosure of the Outstanding Records. Accordingly, this Court should simply and directly address the merits of the Respondents’ claimed exemption from disclosure of the Outstanding Records under its plenary authority in extraordinary actions.

Proposition of Law No. 2:

A writ of mandamus is the proper remedy for the failure of a public office or person responsible for public records to comply with any of the requirements or mandates of the Public Records Act.

A writ of mandamus is the appropriate remedy to compel compliance with the Ohio Public Records Act. *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas*, 73 Ohio St. 3d 19, 12, 652 N.E.2d 179, 183 (1995); *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 593, 639 N.E.2d 1189, 1195 (1994); *see also* R.C. 149.43(C) (“[i]f a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section”).

A writ of mandamus is warranted when (1) the relator has a clear legal right to the relief prayed for; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy at law. *State ex rel. Berger v. McMonagle*, 6 Ohio St. 3d 28, 28, 451 N.E.2d 225, 226-27 (1983). “A relator meets those three requirements when a public office fails to comply with R.C. 149.43(B) requirements for public access to public records.” *State ex rel. Beacon Journal Pub. Co. v. Bodiker*, 134 Ohio App. 3d 415, 420, 731 N.E.2d 245, 249 (1999); *State ex rel. Dist. 1199, Health Care & Social Serv. Union, SEIU, AFL-CIO v. Gulyassy*, 107 Ohio App.3d 729, 733, 669 N.E.2d 487 (1995) (“Relators meet those three points when a keeper of public records fails to comply with R.C. 149.43(B) requirements for public access to public records”); *see State ex rel. Findlay Pub. Co. v. Schroeder*, 76 Ohio St. 3d

580, 582 (1996)(“we have held that persons seeking public records pursuant to R.C. 149.43(C) need not establish the lack of an adequate remedy at law in order to be entitled to a writ of mandamus”); *Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 580, 757 N.E.2d 357 (2001)(“the requirement of the lack of an adequate legal remedy does not apply to public-records cases”). Thus, this Court has “consistently held that mandamus is the appropriate remedy to seek compliance with the Public Records Act under R.C 149.43.” *State ex rel. Highlander v. Rudduck*, 103 Ohio St. 370, 383, 816 N.E.2d 213, 216, 2004-Ohio-4952.

Because the “[t]he purpose of pleadings is to define the issues to be determined, to inform the respective parties of the claims of each and the nature and scope of the trial,” *Jarvis v. Hall*, 3 Ohio App.2d 321, 323, 210 N.E.2d 414 (1964), the court of appeals should have, but failed, to even consider the pleadings so that it might recognize the scope of the issues, as well as what facts were not in dispute. The pleadings in this case reveal:

- the following records were referred throughout the Complaint as “Outstanding Records”: the portion of the video and audio recording from the police cruiser operated by Trooper Joseph Westhoven documenting the traffic stop, detention, arrest and transport of Ashley Ruberg occurring between July 15 and July 16, 2011; and (ii) the impaired driver report relating to the same incident. (Complaint ¶19 (defining the term “Outstanding Records”));
- the “Respondents admit[ted] that the Outstanding Records are the only records at issue.” (Answer ¶21);
- “Respondents admit[ted] that they denied Relator’s request for the Outstanding Records.” (Answer ¶25);
- “Respondents admit[ted] that the Outstanding Records have not been provided to the Relator.” (Answer ¶26).

Thus, even though Mr. Miller’s public records request sought for a two-month period audio and visual recordings, as well as driving impairment reports, through their pleadings and pre-filing communications, the parties limited and constrained the issue in this case to records during that

period relating to a particular individual, *viz.*, Ashley Ruberg. Thus, by failing to even consider the pleadings and how the pleadings limited the scope of the records at this case to those records dealing only with Ashley Ruberg, the court of appeals should not have even premised its disposition of this case on its contradictory conclusion that “[n]o evidence, other than the statements in relator’s affidavit, has been submitted indicating that relator’s specific request, which did not even mention the name ‘Ashley Ruberg,’ was ever denied, improperly or otherwise.” (Decision at 5.⁴) But the pleadings in this case clearly established that Relator’s public records request included the audio and visual recordings, as well as driving impairment reports, relating to the traffic stop, detention, arrest and transport of Ashley Ruberg; such records were the only records at issue in this case. And the Respondents explicitly acknowledged that such records were the records at issue and that they denied Mr. Miller copies of those records. Additionally, the affidavit of Mr. Miller provided evidence concerning the foregoing aspect of his public records request. And because the Respondents did not offer any evidence in this case, Mr. Miller’s affidavit provides the only and unrefuted evidence in this case, *viz.*, his public records request included the Outstanding Records and the Respondents have refused to provide the Outstanding Records.

⁴ It is oxymoronic to declare in a single breath that there is “no evidence” but then to condition such a declaration with the proviso of “other than the statements in relator’s affidavit.” In other words, there was evidence (and, in fact, undisputed evidence) indicating concerning the scope of the public records at issue in the case.

Proposition of Law No. 3:

The burden of demonstrating the application of an exemption from disclosure of records under the Public Records Act is upon the person responsible for the public records or the applicable public office.

Proposition of Law No. 4:

A person responsible for the public records or the applicable public office must demonstrate with proper and admissible evidence the application of a claimed exemption from disclosure of records under the Public Records Act; *ipse dixit* is not evidence and does not satisfy such a burden.

Thus, as framed by the pleadings, the sole issue in this case simply concerns whether the two records which the Respondents have refused to produce, *i.e.*, the Outstanding Records, *viz.*, (i) the portion of the video and audio recording from the police cruiser operated by Trooper Joseph Westhoven documenting the traffic stop, detention, arrest and transport of Ashley Ruberg occurring between July 15 and July 16, 2011, and (ii) the impaired driver report relating to the same incident, are subject to the statutory exemption under the Public Records Act as “confidential law enforcement investigatory records.” *See* R.C. § 149.43(A)(h).⁵

The Ohio Public Records Act exempts from disclosure otherwise responsive records that constitute “confidential law enforcement investigatory records” which are defined as:

any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record

⁵ The underlying generic premise posited by the Respondents via their Answer, *i.e.*, that the exemptions in the Public Records Act do not constitute “public records”, is correct, for the Act actually excludes all exempt records from the definition of “public records” when it precedes all of the exemptions with the declaration that “[p]ublic record” does not mean any of the following . . .” R.C. 149.43(A)(1). *See State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 857 N.E.2d 1208, 2006-Ohio-6365 ¶47 (2006)(“R.C. 149.43 exempts ‘[c]onfidential law enforcement investigatory records’ from the definition of ‘[p]ublic record’ for purposes of the Public Records Act”); *State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler*, 149 Ohio App.3d 350, 777 N.E.2d 320, 2002-Ohio-4803 ¶24 (2002)(“the Ohio Public Records Act specifically exempts from the definition of a ‘public record’ those ‘[r]ecords the release of which is prohibited by state or federal law.’ R.C. 149.43(A)(1)(v)”); *Wessell Generations, Inc. v. Bonnifield*, 193 Ohio App.3d 1, 950 N.E.2d 989, 2011-Ohio-1294 ¶24 (2011)(not that law-enforcement investigatory files are “explicitly exempt[ed] them from the definition of public records”).

would create a high probability of disclosure of any of the following: (c) Specific confidential investigatory techniques or procedures or specific investigatory work product....;

R.C. § 149.43(A)(2). However, the burden of proving with evidence the application of such an exemption is upon the person responsible for the public records or the applicable public office. *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St.3d 261, 266, 685 N.E.2d 1223 (1997)(“the custodian [of a responsive public record] has the burden to establish an exemption” under the Public Records Act); *accord State ex rel. Natl Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 83, 526 N.E.2d 786 (1988). Additionally, “[e]xemptions to disclosure must be strictly construed against the custodian of public records.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376-377, 662 N.E.2d 334 (1996). Accordingly, “all doubt should be resolved in favor of disclosure,” *State ex rel. Ware v. City of Cleveland*, 55 Ohio App.3d 75, 76, 562 N.E.2d 946 (1989). Yet, in the present case, Respondents did not present any evidence by which to meet and establish their evidentiary burden. For that reason alone, the writ of mandamus should issue to compel the Respondents to provide copies of the Outstanding Records to Mr. Miller.

Instead, Respondents appear to rely solely upon their *ipse dixit* to justify their refusal to release the responsive records. But unless Respondents has proven with proper and admissible evidence that the records at issue “fall squarely” within the claimed exception, they have not met their burden of proof. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770 ¶10 (“[a] custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception”). For “[s]peculation and innuendo are not evidence.” *Williams v. Ormsby*, 131 Ohio St.3d 427, ___ N.E.2d ___, 2012-Ohio-690 ¶11. Yet that appears to be the sole basis by which the Respondents attempted to meet their burden in this

case. What Respondents have offered is insufficient and, accordingly, the Outstanding Records are not exempt from disclosure under the Public Records Act and Respondents are obligated to provide Mr. Miller the requested copies thereof.

Proposition of Law No. 5:

Pursuant to the Public Records Act, an award of statutory damages is mandatory when, *inter alia*, a requestor is denied access to public records, brings a mandamus action to compel compliance with the Act and the following conditions are met: (i) the requestor transmits a written request; (ii) the request is tendered by hand delivery or certified mail; and (iii) the request fairly describes the public record or class of public records for which inspection or copying is sought.

Through Amendments to the Ohio Public Records Act in 2007, the General Assembly sought to discourage resistance by public officials to public records requests. One such measure that the General Assembly, as the final arbiter of public policy, created in order to promote the full and unfettered disclosure of public records is to provide for an award of statutory damages when an individual commences a mandamus action in order to obtain requested records. Specifically, Section 149.43(C)(1) provides:

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

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

Thus, in order for a requestor of public records to be entitled to statutory damages under the Public Records Act, the following conditions must be met: (1) the request is made in writing; (2) the request is tendered via hand delivery or certified mail; (3) the request fairly describes the public record or class of public records sought; and (4) the public office or person responsible for public records failed to comply with any obligation contained within R.C. 149.43(B). When such conditions exist, the requestor shall be awarded statutory damages of \$100 per day, beginning with the day on which the mandamus action is filed, up to a maximum of one thousand dollars.

As developed above, Respondents failed to comply with their obligation under the Public Records Act to provide a copy of the Outstanding Records. No fair reading of statutory or case law could lead a well-informed public official to believe that such law entitled the withholding of the Outstanding Records. Through their actions Respondents effectively negated the rule in Ohio that “public records are the people’s records and that the officials in whose custody they happen to be are merely trustees for the people.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 848 N.E.2d 472, 2006-Ohio-1825 ¶ 104. As such, Realtor is entitled to the statutory damages of \$100 per day, beginning with the day on which this mandamus action was filed and capped at the maximum amount of \$1,000.

Furthermore, the Outstanding Records are akin to “routine offense and incident reports...relating to a charge of driving under the influence” created in the normal course of a traffic stop. For as this Court recognized in *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420 (1994):

. . . [t]he [investigatory] work product exception [under the Public Records Act] does not include ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence and records containing the results of intoxilyzer tests. Routine offense and incident

reports are subject to immediate release upon request. If release is refused, an action in mandamus, pursuant to R.C. 149.43(C), will lie to secure release of the records.

Id. (syllabus ¶5). This was in line with this Court's reasoning and holding in *State ex rel. Beacon Journal Publ. Co. v. Maurer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001), wherein the Court held that an "incident report, including the typed narrative statements; is not a confidential law enforcement investigatory record but is a public record, and that its custodian...must release an unredacted copy immediately upon request." *Id.* at 56; accord *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 662 N.E.2d 334, 1996-Ohio-214 (1996)(holding that tapes of 911 calls were public records not subject to an exception even though the recordings could subsequently be used as part of a criminal prosecution; "the fact that the tapes in question subsequently came into the possession and/or control of a prosecutor, other law enforcement officials, or even the grand jury has no significance. Once clothed with the public records cloak, the records cannot be defrocked of their status"). For this Court has repeatedly recognized that "incident reports initiate criminal investigations but are not part of the investigation." *Maurer*, 91 Ohio St.3d at 56, 741 N.E.2d at 514; accord *Cincinnati Enquirer*, 75 Ohio St.3d at 378, 662 N.E.2d at 337; *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 120, 760 N.E.2d 421, 423, 2002-Ohio-67.

Although the burden is on the Respondents to demonstrate that the Outstanding Records are not subject to disclosure under the Public Records Act, the foregoing unequivocally establishes that the Outstanding Records are "public records" which have been wrongfully withheld from Relator. Therefore, in light of Respondents' failure to provide the Outstanding Records, as described more particularly herein, the Court should issue a writ of mandamus

compelling Respondents to produce the Outstanding Records, together with an award of statutory damages and attorney fees.

Proposition of Law No. 6:

Because the General Assembly has explicitly declared that an award of attorney fees in public records cases are “remedial and not punitive,” there exists, at a minimum, a strong presumption in favor of an award of attorney fees in successful public records cases.

Proposition of Law No. 7:

The law enforcement function is subject to accountability to individual taxpayers, as are other governmental functions, and thus unrefuted claims for access to public records in order to assure proper application of the law and constitutions by law enforcement is a sufficient public purpose under the Ohio Public Records Act to provide the requestor the records and entitle the requestor to an award of statutory damages and reasonable attorney fees.

Prior to September 2007, court decisions have characterized an award of attorney fees in mandamus actions to be punitive in nature. *See e.g., State ex rel Multimedia, Inc. v Whalen*, 51 Ohio St.3d 99, 100, 554 N.E.2d 1321 (1990) (“since the award is punitive, reasonableness and good faith of the respondent in refusing to make disclosure may be considered”); *State ex rel. Fox v. Cuyahoga Cty. Hosp. System*, 39 Ohio St.3d 108, 112, 529 N.E.2d 443 (1988) (“attorney fees are regarded as punitive”); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 404, 678 N.E.2d 557 (1997) (“we may also consider the reasonableness of the custodian’s failure to comply, since attorney fees are regarded as punitive”). However, through the 2007 Amendments to the Public Records Act, the General Assembly, as the final arbiter of public policy, has explicitly rejected such a proposition, having declared that “[c]ourt costs and reasonable attorney’s fees awarded under [the Public Records Act] shall be construed as remedial and not punitive.” R.C. §149.49(C)(2)(c); *see* 2006 Sub. H.B. 9, 151 Ohio Laws 8219.

Thus, through this legislative enactment, a significant change in the scheme and perspective regarding attorney fees in successful mandamus case has taken place.

As the award of court costs and attorney fees are now remedial (and not punitive), the application of statutory scheme for such awards must “be liberally construed in order to promote [its] object and assist the parties in obtaining justice.” R.C. §1.11. As such, there should be, at minimum, a strong presumption in favor of an award of attorney fees in successful public records cases. *See, e.g., Lally v. Am. Isuzu Motors, Inc.*, 2006 WL 1781411, 2006-Ohio-3315 ¶48 (“Lally asserts that the attorney fees provision of R.C. 4517.65 is mandatory, remedial in nature, and further Ohio public policy. For the most part, we agree. We agree that R.C. Chapter 4517 is remedial in nature. We further agree that the attorney fees provision in R.C. 4517.65 ‘has the remedial purpose of deterring manufacturers from using their vast resources to outspend opponents’”); *Ferrari v. Howard*, 2005 WL 1939352, Case No. 98-CVI-268 (Cleveland Muni Ct. May 19, 2005)(in discussing attorney fee provision of Consumer Sales Practices Act, “[t]he provision for attorney fees, *especially* if the business elects to protract litigation, is essential to the remedial design of the statute”); *Haghighi v. Moody*, 152 Ohio App.3d 600, 789 N.E.2d 673, 2003-Ohio-2203 (“[s]ince the statutes providing for attorney fees are remedial, we must liberally construe them to promote their object, which in this case is to prevent oppressive government action”); *Anderle v. Ideal Mobile Home Park, Inc.* 114 Ohio App.3d 385, 390, 683 N.E.2d 348 (1996)(“we interpreted the analogous attorney fee provisions of R.C. 5321.02 as serving in part to encourage the private bar to provide representation to tenants who could not ordinarily afford to hire an attorney”)

Through the enactment of the Public Records Act, the General Assembly has sought to ensure and to vindicate the rights of the public to their records. *See, e.g., State ex rel. Patterson*

v. Ayers, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960) (“[t]he rule in Ohio is that public records are the people’s records and that the officials in whose custody they happen to be are merely trustees for the people”). When a public office or person responsible for public records fails to promptly make such records available for inspection or copying, the availability of the people to be fully informed of their government’s operations are impeded. As this Court noted in *Kish v. Akron*, 109 Ohio St.3d 162, 166, 846 N.E.2d 811, 2006-Ohio-1244:

Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance.... Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions,...promote cherished rights such as freedom of speech and press,...and “foster openness and...encourage the free flow in information where it is not prohibited by law.”

Id. ¶16.

The court cost and attorney fee provisions of the Public Records Act, especially in light of the General Assembly’s enacted declaration that such provision is remedial and not punitive, should now be construed so as to create a strong presumption in favor of the award of attorney fees. Doing so will serve and promote the legislative goals and purposes behind the Public Records Act by recognizing the strong presumption in favor of an award of attorney fees upon the successful prosecution of an action. As noted above, the “people’s records” should be made open and available for inspection. And the attorney fee provision, like that in other remedial legislation, is included in order to encourage private counsel to take such cases in order to challenge governmental action.

In this case, Relator Mr. Miller testified, and it was unrefuted, that this records request was in furtherance of his objectives “to learn of, document, and expose policies, practices, and procedures of government officials that exceed their statutory and constitutional authority, or that

involve waste, fraud and abuse.” (Miller Aff. ¶¶4 & 5.) Furthermore, as this Court already recognized in cases identified above, such as *Maurer* and *Cincinnati Enquirer*, records of the type involved in this case are clearly public records and not subject to any exemption under the Public Records Act. Thus, Relators have established a sufficient public purpose for obtaining the records sought and, accordingly, an award of attorney fees.

Furthermore this Court has held that simply ensuring compliance with the Ohio Public Records Law is itself a proper and sufficient public purpose to warrant an award of attorney fees. For example, in *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 122, 760 N.E.2d 421, 2002-Ohio-67, even though the relator sought a copy of a police incident report that related to alleged misconduct on the part relator, this Court still awarded attorney fees, declaring that “the public benefit is still sufficient: 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.” *Id.* at 122. Similarly in *State ex rel. Kim v. Wachenschwanz*, 93 Ohio St.3d 586, 589, 757 N.E.2d 367, 2001-Ohio-1616, this Court found ensuring future compliance with the law to be a sufficient public benefit to allow for the award of attorney fees in a public records case: “[Kim] is entitled to an award of attorney fees. She has established a sufficient public benefit by access to the requested records, which may result in [the village marshal] abiding by the terms of both R.C. 149.43 and Ordinance No. 10-19-99 of the village of Chauncey in the future. And [the village marshal] failed to comply with Kim's requests for records and failed to specify any reasons justifying his noncompliance.” *Id.* at 589. An award of attorney fees in this case will or should enforce future respect for the Public Records Act, including this Court’s decisions regarding public records of the type at issue herein, including the decisions in *Maurer*, *Cincinnati Enquirer* and *Rasul-Bey*.

In allowing and providing for awards of attorney fees in successful public record actions, the General Assembly has sought to advance the proposition that “[o]ne of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body’s final decision on a matter, but the ways and means by which those decisions were reached.” *White v. Clinton Cty. Bd. of Commr’s*, 76 Ohio St.3d 416, 419, 1996-Ohio-380, 667 N.E.2d 1223. For an informed public “is the most potent of all restraints upon misgovernment.” *Grosjean v. America Press Co.*, 297 U.S. 233, 250 (1936). “[They] alone can here protect the values of democratic government.” *New York Times v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

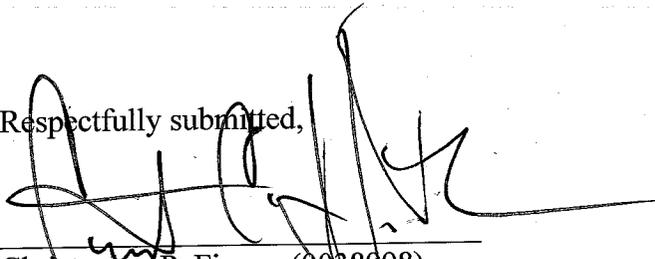
III. CONCLUSION

As this Court noted in *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808, 1995-Ohio-19:

While we have, time and time again, informed public officials and public agencies of their duties pursuant to R.C. 149.43 (to release records in their possession, which records clearly belong to the public), we, nevertheless, continue to see obfuscation, cunctation, delay and even arrogance in far too many cases. This case is a good example.

Id. at 186. Once again, instead of appreciating that the public records are the people’s records, Respondents have sought to thwart the ability of the public to serve as watchdogs of the republic. The efforts of the Respondents should not be reward. Accordingly, under the plenary authority of this Court, a writ of mandamus should issuing compelling Respondents to immediately provide to Mr. Miller a copy of the Outstanding Records and Mr. Miller should be awarded, pursuant to the Public Records Act, statutory damage together with attorney fees and costs.

Respectfully submitted,



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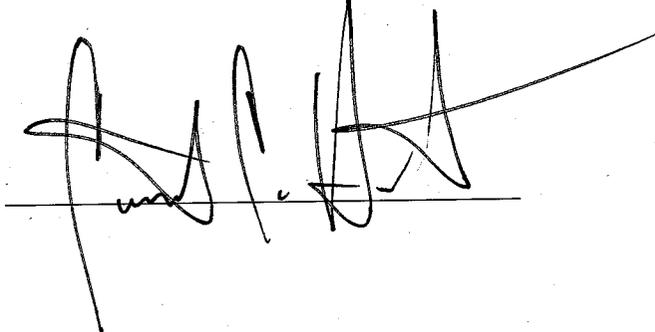
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Attorneys for Relator Mark Miller

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served, via regular mail, upon the following on the 19th day of February 2013:

Bridget Coontz
Assistant Attorney General
1970 W. Broad Street, Suite 521
Columbus, OH 43215



APPENDIX

Notice of Appeal (filed December 20, 2012),

together with

Twelfth District' Entry Granting Motion to Dismiss (filed November 21, 2012)

Case No. 12-2132

**Supreme Court
of the State of Ohio**

**STATE OF OHIO *ex rel.*
MARK MILLER,**

Relator-Appellant,

v.

OHIO STATE HIGHWAY PATROL

and

JEFF MAUTE,

Respondents-Appellees.

**NOTICE OF APPEAL OF RELATOR-APPELLANT MARK MILLER
APPEAL OF RIGHT (CASE ORIGINATING IN COURT OF APPEALS)**

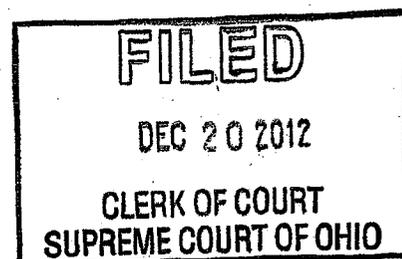
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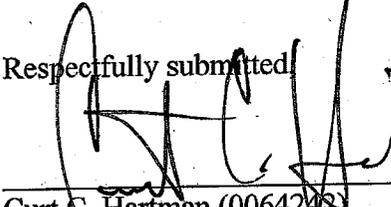


NOTICE OF APPEAL

Relator-Appellant Mark Miller, on relation and behalf of the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clermont County Court of Appeals, Twelfth Appellate District, entered on November 21, 2012 in *State ex rel. Miller v. Ohio State Highway Patrol, et al.*, Case Nos. CA2012-05-034, said case originating in the court of appeals. Attached hereto are copies of the Entry Granting Motion to Dismiss, said entry constituting a final appealable order and entered on November 21, 2012.

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Respectfully submitted

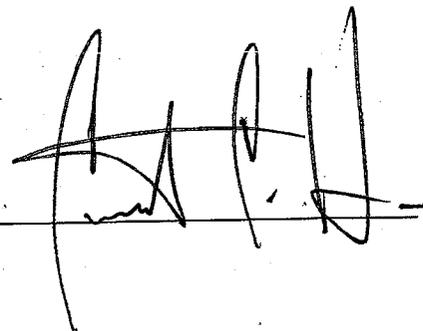

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Attorneys for Relator-Appellant Ross Hardin

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail, postage prepaid, on the 20th day of December 2012:

Bridget Coontz
Assistant Attorney General
1970 W. Broad Street, Suite 521
Columbus, OH 43215



IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

STATE OF OHIO, ex rel.
MARK MILLER,

CASE NO. CA2012-05-034

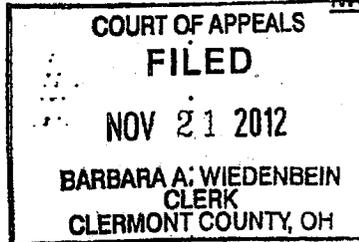
Relator

ENTRY GRANTING
MOTION TO DISMISS

vs.

OHIO STATE HIGHWAY
PATROL, et al.,

Respondents.



The above cause is before the court pursuant to a complaint for writ of mandamus filed by relator, Mark W. Miller, on May 10, 2012; an answer filed by counsel for respondents, Ohio State Highway Patrol and Jeff Maute, on June 6, 2012; the affidavit of Mark Miller filed on September 10, 2012; a motion to strike and motion to dismiss filed by counsel for respondents on September 21, 2012; the brief of relator, Mark Miller, filed on September 25, 2012; a "unified submission in response to the court's entry to show cause and in opposition to the motion to strike and motion to dismiss" filed by counsel for relator on October 2, 2012; and a motion to strike and reply to relator's memorandum in opposition to the motion to strike and dismiss filed by counsel for respondents on October 9, 2012.

The present mandamus action was filed by relator on May 10, 2012.¹ The complaint indicates that on September 9, 2011, relator tendered a public records request to the Ohio State Highway Patrol. The actual emailed request attached to the

¹ This action was previously filed and dismissed by relator without prejudice. See *State ex rel. Miller v Ohio State Highway Patrol, et al.*, Clermont No. CA2011-10-074.

complaint and the affidavit of Mark Miller is undated; the certified mail receipt appended to the affidavit which purportedly shows delivery of the September 9, 2011 public records request inexplicably indicates that the item was delivered on June 3, 2011. The request sought a number of public records related to the activities of Ohio State Highway Patrol trooper Joseph Westhoven during the summer of 2011.

It appears that respondents complied with the public records request with the exception of certain video and audio recordings and impaired driver reports relating to a traffic stop, detention, arrest and transport involving an individual named Ashley Ruberg which occurred between July 15 and July 16, 2011. According to the complaint, respondents notified relator that these particular records involved investigative work product and were therefore not subject to disclosure under Ohio public records law. Exhibit "D" to the complaint and Exhibit "C" attached to the affidavit of Mark W. Miller purport to be a letter from respondents notifying relator that all public records requested except those concerning Ashley Ruberg will be disclosed. However, the letter was clearly written in response to another public records request, apparently made by Christopher P. Finney, Esq., one of the attorneys representing relator, on February 16, 2012.

Pursuant to Loc.App.R. 20(H), a petitioner's (relator's) brief shall be filed within 15 days after the completion of an agreed statement of evidence. Pursuant to Loc.App.R. 20(N), unless all evidence is presented and the petitioner's brief is filed within four months after the filing of a complaint, an original action shall be dismissed, after notice to counsel of record, for want of prosecution unless good cause is shown to the contrary. As indicated above, this mandamus action was filed on May 10, 2012. Accordingly, relator's agreed statement of evidence and brief were due on or before

September 10, 2012.

The documents filed by the parties indicate that counsel for relator sent an email to counsel for respondents on Thursday, September 6, 2012 which stated that he was "planning on" drafting an agreed statement of facts that day, and stated "I can forward those on for you [sic] review and edits." This was the first time that respondents' counsel had been contacted regarding an agreed statement of facts. Respondents' counsel indicated that she would not be able to review the matter with her clients and agree to a statement of facts prior to September 10, 2012, which was the deadline for filing the agreed statement and relator's brief pursuant to Loc.App.R. 20(N). Respondents' counsel further indicated that she could not agree to a proposed joint motion for extension of time to file the agreed statement of facts. Relator's counsel responded that he would "simply file the brief on the tenth, with no stipulations, and let [respondents' counsel's] correspondence speak for itself."

The affidavit of relator Mark Miller was filed on September 10, 2012. On September 24, 2012, this court filed an entry directing relator to show cause why this action should not be dismissed because an agreed statement of evidence and a brief had not been filed. Relator's brief was filed the next day, September 25, 2012.

In their motion to strike and motion to dismiss, respondents contend that the affidavit of Mark Miller should be stricken because it is not an agreed statement of facts, stipulation or deposition as detailed in Loc. App.R. 20(G). The rule states that evidence in all original actions before this court "shall be submitted to the court by means of an agreed statement of facts, or stipulations, or depositions; oral testimony will not be heard." While affidavits are not mentioned in the rule, relator's affidavit will be considered by the court for whatever evidentiary value it may have. The motion to

strike the affidavit is accordingly DENIED.

With respect to whether this action should be dismissed, relator has presented the court with his affidavit and a brief in support of his petition for writ of mandamus. To be entitled to mandamus, relator must demonstrate a clear legal right to the relief prayed for, that respondents are under a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45 (1997).

A writ of mandamus is the appropriate remedy to compel compliance with the Ohio Public Records Act. *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St.3d (1995). The custodian of public records has the burden of proof to establish an exemption. *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261 (1997). However, the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence. *State ex rel. Donner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117.

In the present case, relator has submitted an affidavit indicating that he made a public records request, and that the public records request was not complied with in part because certain records were withheld based upon the investigative work product exception to the public records act, R.C. 149.43(A)(2)(c). Documentation attached to relator's affidavit in support of this position pertains, in part, to a different public records request made by Christopher P. Finney. The date that relator made his public records request appears in the affidavit, but is not supported, and is in fact contradicted by the attached documentary evidence.

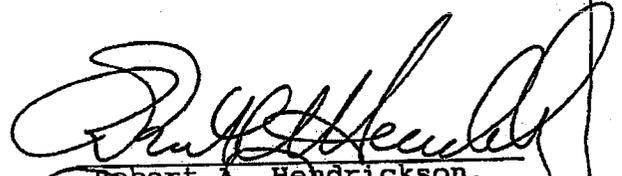
Based upon the record, the court cannot conclude that relator has established

entitlement to mandamus due to a violation of the public records law by clear and convincing evidence. He has not established a clear legal right to the records involving Ashley Ruberg, or that respondents have a clear legal duty to provide them. The evidence submitted shows that relator made a public records request, and that it was complied with except for documents withheld based upon the investigative work product exception to the public records law. No evidence, other than the statements in relator's affidavit, has been submitted indicating that relator's specific request, which did not even mention the name "Ashley Ruberg," was ever denied, improperly or otherwise.

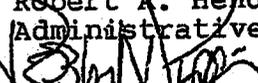
Significantly, relator's counsel decided not to obtain an extension of time to submit an agreed statement of evidence which may have resolved these matters, but instead elected to file a single affidavit containing partially inaccurate documentation and a brief.

Based upon the foregoing, the motion to dismiss is GRANTED. This case is hereby DISMISSED, with prejudice, costs to relator.

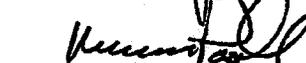
IT IS SO ORDERED.



Robert A. Hendrickson,
Administrative Judge



Robin N. Piper, Judge



Michael E. Powell, Judge