

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.*
DAVID QUOLKE,

Relator-Appellee,

v.

STRONGSVILLE CITY SCHOOL
DISTRICT BOARD OF EDUCATION, *et al.*,

Respondent-Appellants.

) Supreme Court of Ohio

) Case No.

13-1809

) On Appeal from the Cuyahoga

) County Court of Appeals,

) Eighth District

) Court of Appeals Case No.

) CA 13 099733

**NOTICE OF APPEAL OF RESPONDENTS-APPELLANTS
STRONGSVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION,
SUPERINTENDENT JOHN KRUPINSKI, PRESIDENT DAVID FRAZEE,
AND TREASURER DEBORAH HERRMANN**

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TREASURER DEBORAH HERRMANN

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APPELLEE STATE *ex rel.*
DAVID QUOLKE

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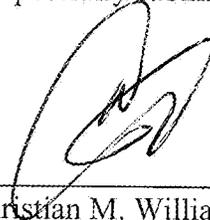
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Notice of Appeal of Respondents-Appellants Strongsville City School District
Board of Education, Superintendent John Krupinski, President David Frazee,
and Treasurer Deborah Herrmann

Respondents-Appellants, Strongsville City School District Board of Education, Superintendent John Krupinski, President David Frazee, and Treasurer Deborah Herrmann, by and through counsel, hereby give notice of their appeal to the Supreme Court of Ohio from the final judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in State ex rel. Quolke v. Strongsville City School Dist. Bd. of Edn. et al., Court of Appeals Case No. CA 13 099733, on October 7, 2013. A copy of the Court's final judgment entry and decision, together with the underlying opinion, are attached hereto.

This case, having originated in the Court of Appeals, is an appeal under S.Ct. Prac. R. 5.01(A)(3).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2013, a copy of the foregoing Notice of Appeal of Respondents-Appellants Strongsville City School District Board of Education, Superintendent John Krupinski, President David Frazee, and Treasurer Deborah Herrmann was sent by regular U.S. mail, postage prepaid, to the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99733

STATE OF OHIO, EX REL.
DAVID QUOLKE

RELATOR

vs.

STRONGSVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.

RESPONDENTS

JUDGMENT:
WRIT GRANTED

Writ of Mandamus
Order No. 468670
Motion No. 464050

RELEASE DATE: October 7, 2013

SEAN C. GALLAGHER, J.:

{¶1} On April 3, 2013, the relator, David Quolke, commenced this public records mandamus action against the respondents, the Strongsville City School District Board of Education (“the Board”); John Krupinski, the superintendent of the Strongsville City School District; David Frazee, the president of the Strongsville Board of Education; and Deborah Herrmann, the treasurer of the Strongsville City Schools. Quolke commenced this mandamus action during a teacher strike in Strongsville, which lasted from early March 2013 to late April 2013. He sought the names of the replacement teachers, those teachers’ home addresses, their personal telephone numbers, their employee identification numbers, and all payroll information for Strongsville’s teachers.

{¶2} On April 4, 2013, the respondents provided Quolke with all of the payroll records, but did not provide the names of the replacement teachers, the addresses, phone numbers, or employee identification numbers. The respondents maintained that the replacement teachers’ constitutional rights to privacy and personal safety are state or federal laws prohibiting the release of such information pursuant to R.C. 149.43(A)(1)(v). The respondents substantiated this position with evidence of threats and violent acts against the replacement teachers during the strike. Quolke subsequently filed a second amended complaint in which he limited his request to the names of the replacement teachers.

{¶3} After the submission of evidence and briefs, this court on August 21, 2013, granted the writ of mandamus and ordered the release of the replacement teachers' names. This court reasoned that the respondents did not establish that the threats and violent acts continued after the strike. Thus, the respondents did not sustain their burden to prove that the records fell squarely within an exemption, and the records should be released. The court also ruled that Quolke had not fulfilled the requisites for statutory damages. The court further ordered briefing on the issue of attorney fees.

{¶4} Quolke submitted his brief with a supporting affidavit and a "time sheet" of his attorney, Susannah Muskovitz, on September 4, 2013. The respondents filed their brief in opposition on September 18, 2013. Quolke seeks a total of \$10,098.75 in attorney fees as follows: two hours billed at \$165.00 an hour for the services of Susannah Muskovitz, a principal with the law firm of Muskovitz & Lemmerbrock, L.L.C., and 72 hours billed at \$135.00 an hour for the services of William E. Froehlich, an associate with the firm. Initially, this court rules that these rates are reasonable. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 8th Dist. Cuyahoga No. 94226, 2010-Ohio-2108.

{¶5} Both sides agree that R.C. 149.43(C)(2)(b) controls: "If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award

reasonable attorney's fees subject to reduction * * *." The statute clarifies that an award of attorney fees is remedial and not punitive in nature. Thus, the court has discretion to award attorney fees, but the discretion is to be exercised within certain limitations. First, the requester must have substantially succeeded in the public records mandamus action. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913. Attorney fees are available only to the extent that the relator actually paid or is obligated to pay an attorney to win the public records action. In-house counsel or pro se representation precludes an award. *State ex rel. Hous. Advocates, Inc. v. Cleveland*, 8th Dist. Cuyahoga No. 96243, 2012-Ohio-1187, ¶ 6. An award of attorney fees is dependent upon showing the release of the records is more for the public benefit than for the requester's benefit. *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 34; and *State ex rel. Petranek v. Cleveland*, 8th Dist. Cuyahoga No. 98026, 2012-Ohio-2396. The court may reduce the amount of attorney fees pursuant to R.C. 149.43(C)(2)(c) if the custodian, based on the ordinary application of statutory and case law, would reasonably believe that the withholding of the records did not constitute a failure to comply with the statute and that the custodian's actions would serve the public policy that underlies the authority permitting the withholding of the records. The court may also reduce the award to the extent that the time

expended did not advance the public records case or was extraneous. *Mun. Constr. Equip. Operators*.

{¶6} The respondents' first argument is that Quolke is not entitled to attorney fees because he is not obligated to pay for them; he has not presented any evidence that he is personally responsible for the fees. The respondents continue that because Quolke is the president of the Cleveland Teachers Union, that union is really responsible for the bill.

{¶7} However, Muskovitz's affidavit contradicts this argument. In paragraph 6 she states: "My hourly rate for legal services for David Quolke is \$165." Paragraph 8 states: "Mr. Froehlich's hourly rate for legal services for David Quolke is \$135." Finally, in paragraph 9, Muskovitz swears that the following time sheet "lists fees charged to Mr. Quolke" and "[t]o date, our office billed Relator Quolke for 74.00 hours of work for a total bill of \$10,098.75." Moreover, respondents' reliance on *Hous. Advocates; State ex rel. O'Shea & Assoc. Co. L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087; and *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 721 N.E.2d 1044 (2000), is misplaced. Those cases stand for the principle that attorney fees are not available when the relator is representing himself pro se, including in-house counsel. In the present

case, Quolke's lawyers are not in-house counsel; they represent more than just the Cleveland Teachers Union. (Respondents' exhibit N.)

{¶8} Quolke proffers that the release of the replacement teachers' names would allow the public to determine how qualified these individuals were to be teachers. The court rules that this states a sufficient public benefit to support an award of attorney fees. This is the type of record that is necessary to have open to the public to allow the public to evaluate its government. The General Assembly enacted R.C. 149.43, including provisions for attorney fees, to ensure that these records are available. This benefit also transcends the proffer of ensuring that the government complies with the public records law that necessarily comes with any public record request. Thus, the respondents' reliance on *Petranek*, 8th Dist. Cuyahoga No. 98026, 2012-Ohio-2396, is misplaced.

{¶9} Next, the respondents ask this court in its discretion to disallow attorney fees because their position to withhold the replacement teachers' names was reasonable and promoted various public policies, including physically protecting their employees and ensuring the continued operation of the schools. Whatever the merits of this argument during the strike may have been, the rationale lost its persuasiveness after the strike. The benefit of allowing the public to determine the qualifications of the replacement teachers outweighs the near non-existent risk to the replacement teachers after the strike.

{¶10} Finally, the respondents seek to reduce the amount of the award because some of the time spent did not advance the public records case or was extraneous to the case. In reviewing the time sheet, the court concludes that some reductions are appropriate. First, the court disallows one hour of time from the amount billed on March 28, 2013, for review of newspaper articles about a similar mandamus action and communications with Quolke about those articles. The court disallows one hour of time from the amount billed on April 3, 2013, relating to media inquiries about the mandamus action. The court also disallows 0.75 hours from the time spent on July 12, 2013, and July 24, 2013, relating to news articles. These services are extraneous to the mandamus action, and the respondents should not have to pay for them.

{¶11} The court also disallows all of the time spent from April 8, 2013, through April 15, 2013, a total of 13 hours. This time was spent on preparing the first amended complaint and the application for an alternative writ. Because Quolke abandoned the claims in the first amended complaint, except the names of the replacement teachers, this court concludes that it would not be appropriate for the respondents to pay for these hours. Additionally, the court denied the alternative writ. Because Quolke did not prevail on these points, the respondents should not have to pay for them. Nor is it clear how time conferring with a Strongsville teacher necessarily advanced the case. The court further notes that this time was incurred while the strike was still on-going. The rest

of the time, including 2.5 hours for a motion for summary judgment, was necessary and appropriate in pursuing a successful public records mandamus action.

{¶12} The disallowed 15.75 hours were billed at the rate of \$135.00 per hour for a total of \$2,126.25. Subtracting \$2,126.25 from \$10,098.75 leaves a difference of \$7,972.50.

{¶13} In conclusion, the court issues the writ of mandamus to compel the release of the names of the replacement teachers. The court denies the application for an alternative writ as moot. The court denies the application for statutory damages and awards \$7,972.50 in attorney fees. Respondents to pay costs. The court directs the clerk of court to serve all parties with notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶14} Writ granted. Final.



SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
TIM McCORMACK, J., CONCUR

AUG 21 2013

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

DAVID QUOLKE

Relator

COA NO.
99733

-vs-

ORIGINAL ACTION

STRONGSVILLE BD. OF EDUCATION, ETAL.

Respondent

MOTION NO. 467273

Date 08/21/13

Journal Entry

Writ granted in part. See journal entry and opinion of same date.

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

AUG 21 2013

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OF THE COURT OF APPEALS
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Presiding Judge MARY J. BOYLE, Concur

Judge TIM MCCORMACK,
CONCURS IN JUDGMENT ONLY


SEAN C. GALLAGHER
Judge

AUG 21 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99733

STATE OF OHIO, EX REL.
DAVID QUOLKE

RELATOR

vs.

STRONGSVILLE CITY SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.

RESPONDENTS

JUDGMENT:
WRIT GRANTED IN PART

Writ of Mandamus
Order No. 467273

RELEASE DATE: August 21, 2013

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

AUG 21 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
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SEAN C. GALLAGHER, J.:

{¶1} On April 3, 2013, the relator, David Quolke,¹ commenced this public records mandamus action against the respondents, the Strongsville City School District Board of Education (“the Board”); John Krupinski, the superintendent of the Strongsville City Schools; David Frazee, the president of the Strongsville Board of Education; and Deborah Herrmann, the treasurer of the Strongsville City Schools. Quolke seeks to compel the respondents to release the names of the replacement teachers during the recent teacher strike in Strongsville. The court ordered the parties to submit evidence and briefs, which they have done. Additionally, the court allowed the Ohio School Boards Association to file an amicus brief. The court has reviewed all of the material and concludes that the matter is ripe for resolution. For the following reasons, this court issues the mandamus and orders the respondents to release the names of the replacement teachers.

{¶2} On February 21, 2013, the Strongsville Education Association (“the Union”), the collective bargaining unit for the Strongsville School District’s 385 teachers and other licensed personnel, gave the Board ten days’ notice of a strike, which would begin on March 4, 2013. Thus, on March 3, 2013, the Board began hiring replacement teachers. The Union members had assembled outside

¹ Quolke is a resident of Cuyahoga County, a teacher in the Cleveland Metropolitan School District, and president of the Cleveland teachers’ union.

the city of Strongsville's council chambers, where the Board was accepting and processing applications, and jeered and cursed the applicants as they entered. Throughout the eight-week strike, there were several violent incidents, as evidenced by police reports. A teacher driving a pickup truck "cut off" a van transporting replacement teachers; the driver of the van avoided a collision by immediately braking. Another time someone yelled "scab"² and threw a rock at a replacement teacher's car window while the replacement teacher was driving on I-71. Someone also slashed the tires on a van used to transport replacement teachers. There was also evidence of leaflets decrying the replacement teachers being distributed in those teachers' neighborhoods and derogatory remarks posted on the Union's website. However, there was no evidence of actions taken against the replacement teachers after the strike ended.³ Indeed, the amicus opined that the risk of physical harm diminished after the strike ended.

{¶3} On March 5, 2013, at Quolke's direction, his attorneys sent the respondents a public records request asking for the following documents: (1) the names of all persons employed as teachers or substitute teachers for the Strongsville City School District from March 4, 2013, to the present; (2) the home addresses of those teachers; (3) the home and cellular telephone numbers

² The amicus brief proffered that "scab" originated as a 16th century term for a despicable person.

³ The reference to a posting on the Union's website about the replacement teachers in the Berea strike is of dubious evidentiary value.

of those teachers; (4) the employee identification numbers of those teachers; and (5) all payroll information identifying days worked, rates of compensation and any and all salary benefits received for those teachers. It appears that Quolke's lawyers sent this request via email, as stated on each of the requests; there is no evidence of service by certified mail or by hand delivery. Respondent Krupinski replied by email that he would forward the request to Treasurer Herrmann, who would respond appropriately.

{¶4} However, when there was no further response, Quolke had his lawyers resend the request, again apparently through email, on March 20, 2013. Again, Krupinski replied through email that he would forward the request to Herrmann, who would reply. When there was no further reply, Quolke commenced this public records mandamus action asking for all five categories of records.

{¶5} The next day on April 4, 2013, the respondents through Herrmann made their full response to the public records request. They sent 65 pages of documents to Quolke providing the salary information. However, the respondents redacted or refused to disclose the replacement teachers' names, employee identification numbers, home addresses, and telephone numbers. The respondents explained that the teachers' constitutional rights to privacy and personal safety are state or federal laws prohibiting the release of such information. Thus, such information is to be redacted from public records

pursuant to R.C. 149.43(A)(1)(v) that provides that “public record” does not mean “records the release of which is prohibited by state or federal law.” The respondents supported their response with multiple references to case authority.

{¶6} On April 11, 2013, Quolke filed an amended complaint and an application for an alternative writ. After the respondents filed their answer and had explained that employee identification numbers are formed from the employee’s initials and social security numbers, Quolke on May 10, 2013, moved for leave to file a second amended complaint, in which he limited his demand for judgment to the names of the replacement teachers. On May 16, 2013, this court granted the motion to amend, accepted the second amended complaint, and issued a schedule for the submission of evidence and briefs. Thus, Quolke has narrowed his request to the release of the replacement teachers’ names.

{¶7} The principles governing public records mandamus actions are well-established. Mandamus is the appropriate remedy to compel compliance with Ohio’s Public Records Act, R.C. 149.43. Thus, the relator does not need to establish that there is no adequate remedy at law. The courts are to construe the act liberally in favor of broad access and resolve any doubt in favor of disclosure of the records. Indeed, exceptions to disclosure under the act are to be strictly construed against the records custodian, and the custodian has the burden to establish the applicability of the exception. *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 11 and

12. Additionally, a “court in exercising the extraordinary power of mandamus will take in consideration the facts and circumstances existing at the time it determines whether to issue a peremptory writ.” *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 162, 228 N.E.2d 631 (1967).

{¶8} As a threshold matter, the respondents first argue that Quolke does not have standing to bring this mandamus action because he did not make the initial requisite request. The attorneys of the firm Muskovitz & Lemmerbrock, L.L.C., actually made the request without identifying Quolke as the requester. Thus, Quolke is not the person aggrieved, as required by R.C. 149.43(C)(1). The respondents rely on *State ex rel. Finnerty v. Strongsville Police Dept.*, 96 Ohio App.3d 569, 645 N.E.2d 780 (8th Dist.1994), for the proposition that if a records requester uses a designee, he must identify the designee.

{¶9} However, this is not a persuasive argument because amendments to R.C. 149.43 have superseded respondents’ arguments. First, R.C. 149.43(B)(4) provides that “no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester’s identity.” Requiring requesters to identify themselves as a prerequisite to bringing a public records mandamus action would violate the spirit, if not the letter, of this provision. Furthermore, this court would not discourage a person’s use of an attorney for this purpose by requiring disclosure of the client at the requesting stage.

{¶10} Additionally, the respondents' reliance on *Finnerty* is misplaced. In 1994, R.C. 149.43 did not explicitly permit a public entity to respond by mail; thus, the Supreme Court of Ohio had ruled that the statute did not create a duty to send records by mail. Therefore, prisoners, such as the relators in *Finnerty*, had to have a designee outside of prison to inspect and take possession of records, if they were going to have their requests fulfilled. *Finnerty* elaborated on the necessity of a prisoner naming a designee and stating the designee's scope of authority. R.C. 149.43(B)(7) now permits and under some circumstances requires the public entity to respond by mail. R.C. 149.43(B)(8) limits a prisoner's right to public records concerning criminal investigations and prosecutions by requiring the prisoner to first obtain judicial permission to access such records. These provisions render the need for a designee and *Finnerty's* safeguards obsolete.

{¶11} The Ohio School Boards Association in its amicus brief argues that Quolke's request is improper because he does not ask for specific records but information. Under R.C. 149.43, the requester must ask for specific records; the public entity has no duty to disclose information, discern which records have that information, or create new records that contain the requested information. Indeed, in *State ex rel. Fant v. Tober*, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591 (Apr. 28, 1993), this court dismissed a public records mandamus action because the request did not ask for records but information.

However, in the instant case the respondents produced 65 pages of records, with the names of the replacement teachers redacted. Thus, records fulfilling the request exist, and the respondents to their credit have released those portions of the records that they believe are public. Under these circumstances, denying the mandamus for improper form would elevate form over substance.

{¶ 12} Finally, there is the respondents' substantive argument that the names of the replacement teachers are exempt from disclosure because those teachers' constitutional rights to privacy and personal safety are state or federal laws that prohibit the release of their names under R.C. 149.43(A)(1)(v). The respondents base their argument upon the multiple occurrences of threats and acts against the replacement teachers during the strike. However, the respondents did not establish that the threats and acts continued after the strike was over. Because of this paucity of evidence, the court has no reason to believe that the replacement teachers would be threatened months after the strike. Thus, the respondents have not sustained their burden to prove that the records fall squarely within an exception. Accordingly, resolving doubts in favor of disclosure, this court issues the writ of mandamus to compel the respondents to release the names of the replacement teachers. The court notes that this is a narrow decision. It issues the writ of mandamus taking into consideration the facts and circumstances as they exist now, several months after the strike. It does not resolve the issue of whether the constitutional right of privacy and

personal safety would be a state or federal law prohibiting the release of the replacement teachers' names during a strike that showed threats and acts against those replacement teachers.

{¶13} Quolke asks for statutory damages pursuant to R.C. 149.43(C)(1) because, he argues, the respondents did not comply with his request after the commencement of his mandamus action. However, that subsection conditions the award of statutory damages upon transmitting a written request by hand delivery or certified mail. In the present case, there is no evidence that Quolke fulfilled either of those conditions. The evidence before the court indicates that the request was submitted by email. Therefore, this court denies statutory damages.

{¶14} Quolke has also asked for attorney fees pursuant to R.C. 149.43(C)(2)(b). However, he did not provide this court with any necessary information, such as a reasonable fee or reasonable fee rate, proof of reasonableness, and time sheets. Accordingly, the court orders the parties to further brief this issue. Quolke shall submit his brief in support of attorney fees within two weeks of this decision, and the respondents shall file their brief in opposition within two weeks of the filing of Quolke's brief.

{¶15} In summary, the court issues the writ of mandamus to compel the release of the names of the replacement teachers. The court denies the

application for an alternative writ as moot. The court denies the application for statutory damages and orders further briefing on the issue of attorney fees.

{¶16} Writ granted in part.



SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., CONCURS;
TIM McCORMACK, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE
OPINION

TIM McCORMACK, J., CONCURRING IN JUDGMENT ONLY:

{¶17} I agree with my colleagues that the requested writ of mandamus should be issued ordering the respondents Strongsville Board of Education, et al., to release the names of replacement teachers as sought by relator David Quolke. I fully concur with the majority's statement that Ohio's public records law holds that "the courts are to construe the act liberally in favor of broad access and resolve any doubt in favor of disclosure of records."

{¶18} The Strongsville Board of Education oversees a public school system established by the state of Ohio. It is a public entity funded by Strongsville citizen taxpayers. When a public entity in Ohio operates solely as a result of the assent of its citizens through the popularly adopted tangible support of its school levies, then any pretext that the entity can operate as if exempt from reporting its business conduct to its public is nonexistent. Exemptions are purposefully

rare. City halls, public school systems, park districts, and all other public entities owe their continued existence to the goodwill of the governed. When the governed in turn request public records detailing the operation of that entity, the public entity is required to respond not only by explicit Ohio law but more importantly by the fact that we are inherently an open society. Keeping ours an open society is an ongoing task.

{¶19} We note that releasing highly specific information about public employees is often distasteful and difficult both for record keepers and the public employees. Those records often contain information that for many reasons the entity and employees would prefer remain private: names, addresses, age, resumes, sponsors, personnel files, and salaries. Discomfort, even elevated discomfort, as well as caution are not the standards by which Ohio's open records law operates. The strict presumption is that any entity spending public funds has a near plenary responsibility to accurately and timely report to the public on its operations.

{¶20} Secrecy at any level of government is the enemy of free, self-governing people. Whether encountered at the township or federal levels, secrecy greatly erodes trust and accountability. Caution on the part of the respondents in this matter was understandable on a human level when tension and conflict were so palpable. The failure to provide their public records in this

matter though is inconsistent with Ohio's open records law and cannot be ratified and condoned.