

IN THE SUPREME COURT  
OF THE STATE OF OHIO

The State of Ohio ex rel. : CASE NO. 2014-1141  
Ohio Republican Party, :  
 :  
Relator, : ORIGINAL ACTION IN MANDAMUS  
 :  
v. :  
 :  
Edward FitzGerald, et al., :  
 :  
Respondents. :

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**RESPONDENTS' OPPOSITION TO  
RELATOR'S MOTION TO STRIKE RESPONDENTS' REPLY TO  
RELATOR'S EXPLANATION AS TO WHY THE CASE IS NOT MOOT**

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Koula Celebrezze*

## FACTS AND ARGUMENT

On March 25, 2015, this Court issued an order, *sua sponte*, that Relator Ohio Republic Party (“Relator”) show cause within 20 days of the date of its order why the above captioned case should not be dismissed as moot (“Show Cause Order”). In its Order, the Supreme Court further provided that Respondents may file a reply to Relator’s response to the show cause order within 10 days of the filing of Relator’s response.

The day following issuance of the Show Cause Order, on March 26, 2015, Relator filed its “Explanation of Why This Case Should Not Be Dismissed as Moot” (“Response” or “Response to the Show Cause Order”). In its Response Relator argued that the case should not be dismissed as moot because the public records requested have not been provided even though 1) the subject of the public records request, former County Executive FitzGerald, is no longer in office; 2) the physical location of the Office of the County Executive has moved; and 3) Respondents have willingly released key card data relating to Mr. FitzGerald to *The Plain Dealer*, a Cleveland based newspaper. In supporting these arguments Relator cites to its Motion to Take Judicial Notice of January 2, 2015; its Motion to Take Judicial Notice of November 24, 2014; and a Cleveland.com article dated January 2015 relating to the release of Mr. FitzGerald’s key card records to *The Plain Dealer*.<sup>1</sup>

On April 3, 2015, within the time frame provided in the Court’s Show Cause Order, Respondents filed their Reply addressing the arguments raised in Relator’s Response (“Respondents’ Reply”). An Affidavit attached to Respondents’ Reply authenticated correspondence from the County responding to the records request from *The Plain Dealer* as well as e-mails by and between the County and Relator’s counsel sent subsequent to *The Plain*

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<sup>1</sup> Two of the three of these filings/events occurred after Relator filed its Merit Brief and would therefore be “supplementation” to Relator’s Merit Brief as that term is defined by Relator.

*Dealer* request. The arguments, e-mails and correspondence were not submitted by Respondents in their Reply as a supplementation to Respondents' Merit Brief but solely in direct response to arguments made by Relator in its Response to the Show Cause Order.

On April 8, 2015, Relator filed a Motion to Strike Respondents' Reply pursuant to S.Ct.Prac.R. 16.08 ("Motion to Strike") claiming that Respondents' Reply was an improper supplementation of their Merit Brief in that Respondents engaged "in a lengthy argument" including the "submission of additional evidence, i.e., affidavits."

Supreme Court Practice Rule 16.08 provides:

Except as provided in S.Ct.Prac. R. 3.13 and S.Ct. Prac. R. 17.08 and 17.09, merit briefs shall not be supplemented. If a relevant authority issued after the deadline has passed for filing a party's merit brief, that party may file a citation to the relevant authority but shall not file additional argument.

The Reply filed by Respondents was not an improper supplementation of their merit brief. Instead the Reply specifically answered the question that Relator, in its Motion to Strike, claimed Respondents ignored --- whether they have provided *or not* the records requested. Respondents did not cite to any relevant new authority issued after the deadline passed for filing their merit brief, but simply referenced arguments already set forth in their merit brief for purposes of providing context and argument in support of their Reply to Relator's Response to the Show Cause Order.<sup>2</sup> Additionally, Respondents did not submit additional evidence in supplementation of their merit brief but simply provided the County's response to *The Plain Dealer*' records request and follow up e-mails by and between the County and Relator's counsel

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<sup>2</sup> Relator meanwhile filed a notification of supplemental authority concurrently with its Motion to Strike; authority which Respondents will address at the appropriate time in keeping with this Court's Rules of Practice should this case not be dismissed as moot.

for purposes of supporting Respondents' position on arguments raised by Relator in its Response.<sup>3</sup>

Respondents' Reply specifically addressed arguments made by Relator in support of its contention that the case should not be dismissed as moot including:

- 1) Relator's claim that the records at issue have not been produced;
- 2) the decision by Cuyahoga County to release similar records in response to a records request from the Plain Dealer;
- 3) the County's invitation to Relator to re-submit its original records request;
- 4) the failure of Relator to re-submit its request or to respond in any way to the invitation; and
- 5) Relator's contention that the County had a "change in position" with regard to "willingly" releasing the records at issue.

Respondents' Reply did not ignore the question of whether or not they have provided the records requested but instead specifically addressed that contention and the basis for the original denial (a discretionary act allowed by public records law on the facts at the time); a position Respondent Cuyahoga County has consistently held throughout the entirety of this action. Respondents' Reply was not an improper supplementation of their merit brief as this Court's Rules envision and define supplementation. All of the arguments made by Respondents were in direct reply to Relator's Response to the Show Cause Order and a direct response to the Court's Order as to whether this case should be dismissed as moot.

### **CONCLUSION**

For all of the foregoing reasons, the Court should deny Relator's Motion to Strike.

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<sup>3</sup> The Affidavit referred to by Relator was solely for purposes of authenticating the emails and response to *The Plain Dealer* records request.

Respectfully submitted,

CUYAHOGA COUNTY DEPARTMENT OF LAW  
Robert J. Triozzi, Interim Director

*/s/ Robin M. Wilson*

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[Representation pursuant to August 27, 2013  
Agreement governing the division of duties between the  
Cuyahoga County Prosecutor's Office and Department of  
Law]

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on all parties of record by electronic mail

this 10<sup>TH</sup> day of April, 2015 to:

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