

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO ex rel.  
JAMES E. PIETRANGELO, II,**

**Relator-Appellant,**

**v.**

**CITY OF AVON LAKE, OHIO, et al.,**

**Respondents-Appellees.**

**Case No. 2015-0495**

**On Appeal from the  
Lorain County Court of Appeals,  
Ninth Appellate District  
Case No. 14CA010571**

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**MERIT BRIEF OF APPELLEES, CITY OF AVON LAKE, OHIO  
AND ABRAHAM LIEBERMAN, LAW DIRECTOR**

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## STATEMENT OF FACTS

Because the Statement of the Facts included in Appellant's Brief includes a significant amount of argument in addition to facts, Appellees submit this Statement of Facts.

On September 25, 2013, Relator-Appellant, James E. Pietrangelo, II ("Pietrangelo") initiated litigation against the City of Avon Lake, Ohio (the "City") by filing a Petition in the Lorain County Court of Common Pleas, which litigation is styled *James E. Pietrangelo, II v. City of Avon Lake, Ohio*, Lorain County Common Pleas Court Case No. 13CV181561 (the "Injunction Case"). In the Injunction Case, Pietrangelo sought an injunction to close a public skate park. To assist the City in defending against the litigation filed by Pietrangelo, the City retained Attorneys Margaret Koesel ("Koesel") and Tracey Turnbull ("Turnbull") and the law firm of Porter, Wright, Morris and Arthur, LLP ("Porter Wright"). Lieberman Affidavit, ¶ 2.<sup>1</sup>

Invoices for legal services rendered to the City with respect to the Injunction Case by Porter Wright were addressed to Abraham Lieberman ("Lieberman") as the City's Law Director and sent to his attention. Lieberman Affidavit, ¶ 3.

On or about March 13, 2014, Pietrangelo delivered to the offices of the City a written request for portions of billing statements submitted to the City by Koesel, Turnbull and/or the law firm of Porter Wright and other records pertaining to the Injunction Case. Petition, Ex. 1. The records requested, with certain redactions to the billing statements, were provided to Pietrangelo on or about March 19, 2014, along with a memorandum indicating that privileged information had been redacted. Petition, Ex. 2. In spite of Pietrangelo's claim that the memo did not sufficiently apprise him of the basis for the redaction, Pietrangelo, who is himself an

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<sup>1</sup> This Affidavit was attached as Appendix A to Respondents' Brief in Opposition to Relator's Motion for Summary Judgment and in Support of Respondents' Motion for Summary Judgment.

attorney, could not have failed to realize that the term “privileged” in this context, referred to the attorney-client privilege.

The information redacted from the invoices consisted of: narrative descriptions of particular legal services rendered, the exact dates on which such services were rendered, the particular attorney rendering each service, the time spent by each particular attorney on a particular day, the billing rate of each particular attorney, the total number of hours billed by each particular attorney during the period covered by the invoice, and the total fees attributable to each particular attorney for the period covered by the invoice. Lieberman Affidavit ¶ 5. Not redacted were the identity of the law firm submitting the invoice, the general matter for which the legal services were rendered, the date of the invoice, the total fees billed for the period covered by the invoice, itemized disbursements and expenses for which reimbursement was being sought, and the total disbursements and expenses for the period covered by the invoice. Petition Ex. 2 & Lieberman Affidavit, ¶ 5.

In his Statement of Facts, Pietrangelo for the first time complains of what he terms “‘opaque’ redaction,” asserting that it is impossible to tell exactly what information was redacted in the invoices. However, that is simply not true. The descriptive headings of the information redacted (date, name, services and hours) were left intact. See example of a redacted invoice at Appendix A1.

Pietrangelo initiated this action in the Lorain County Court of Appeals by filing his Petition for Writ of Mandamus on April 18, 2014. On May 2, 2014, Appellees, the City and Lieberman, filed their answer. On May 9, 2014, Pietrangelo filed a motion to strike initial Paragraph 9 of the Answer and all of the affirmative defenses and for sanctions. On May 12, 2014, Pietrangelo filed an amended motion to strike and for sanctions, adding almost all of the

initial paragraphs of the Answer to his motion to strike. On the same day, Pietrangelo filed a motion for summary judgment. Appellees' brief in opposition to the amended motion to strike and for sanctions was filed on May 23, 2014. On May 27, 2014, Appellees filed an opposition to Pietrangelo's motion for summary judgment and a motion for summary judgment in Appellees' favor. Appellees did not submit unredacted invoices to the Court of Appeals at that time for the reason that there was no genuine dispute as to the fact that Appellees had provided Pietrangelo with all portions of the invoices required to be disclosed by *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524.

Pietrangelo's motion to strike and for sanctions was denied, as were both motions for summary judgment. Simultaneous merit briefs were submitted by the parties pursuant to the Court's order of October 27, 2014. Also pursuant to the Court's order, Appellees filed, under seal, with the Clerk of Courts unredacted copies of the invoices at issue for in camera review by the Court of Appeals.

On March 11, 2015, the Court of Appeals issued its decision granting in part and denying in part Pietrangelo's petition for a writ of mandamus and determining that, based on the criteria set forth in R.C. 149.43(C)(1), Pietrangelo was not entitled to statutory damages.

## ARGUMENT

### **Proposition of Law No. I:**

**The exact dates on which legal services are rendered, the particular attorney rendering each service, and the time spent by each particular attorney on a particular day are not public records**

R.C. 149.43, which governs public access to public records, states that “public record” does not include “[r]ecords the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v). “The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of [those] records.” *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542, 2000-Ohio-475, 721 N.E.2d 1044. Even though not technically covered by the attorney-client privilege, certain records may be so inextricably intertwined with privileged materials as to also be exempt from disclosure. *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 29.

As the Court in *Dawson* observed:

[B]illing records describing the services performed for [the attorney's] clients and the time spent on those services, and any other attorney-client correspondence . . . may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, strategies to be employed in the event of litigation, and other confidential information exchanged during the course of the representation. . . . [A] demand for such documents constitutes 'an unjustified intrusion into the attorney-client relationship.'"

*Id.* at ¶ 28. (Citations omitted.)

Information that is exempt from the duty to permit public inspection may be redacted.

R.C. 149.43(B)(1).

This case turns on which of two Ohio Supreme Court cases is more pertinent to the situation before this Court: *Dawson* or *State ex rel. Anderson v Vermilion*, 134 Ohio St.3d 120, 2012-Ohio-5320, 980 N.E.2d 975.

Appellees submit that the facts of this case place it squarely within the holding of *Dawson*. The circumstances surrounding the records request in *Dawson* are similar to the circumstances of the case at bar. In both, there was pending litigation between the parties at the time the request was made. In *Dawson*, the “school district provided Dawson with summaries of the invoices for legal services noting the attorney’s name, the invoice total, and the matter involved.” *Dawson, supra*, at ¶ 2. The Court held that such summaries satisfied the obligation of the school district under R.C. 149.43, and that Dawson was not entitled to any more detail.

Prior to the filing of this action, the City provided to Pietrangelo all of the billing information required by *Dawson*. In fact, the City has actually provided billing information beyond that included in the *Dawson* summaries, including the identity of the law firm submitting the invoice, the general matter for which the legal services were rendered, the date of the invoice, the total fees billed for the period covered by the invoice, itemized disbursements and expenses for which reimbursement was being sought, and the total disbursements and expenses for the period covered by the invoice.

Pietrangelo’s reliance on *Anderson* is misplaced. Contrary to Pietrangelo’s contention, *Dawson* is still viable precedent. Faced with a different fact situation, *Anderson* distinguished, but did not preempt, overrule, clarify, modify or limit *Dawson*. There is not one sentence by the *Anderson* court stating that it was preempting, overruling, clarifying, modifying or limiting *Dawson* in any way. To the contrary, the express language of the *Anderson* court acknowledges that the court had before it a “crucial fact that *distinguishes* this case from *Dawson*.” (Emphasis added.) *Anderson* at ¶ 23. Therefore, any argument that *Dawson* is somehow no longer good law is simply not supported by *Anderson*. In fact, a little over two years ago, this Court cited *Dawson* and once again took the opportunity to distinguish *Anderson* on its facts. *State ex rel. Gambill v.*

*Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, ¶ 25, fn. 1. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, does not require a different conclusion, as the court in that case limited its writ of mandamus to compel the production of portions of calendars.<sup>2</sup>

Although the litigation covered by the billing statements in *Anderson* involved the City of Vermilion, it did not involve the relator. The litigation covered by the billing statements in *Anderson* was not litigation to which relator Anderson was a party. In contrast, all of the billing statements sought by Pietrangelo relate to the Injunction Case currently pending between the City and Pietrangelo. In *Anderson*, any harm that might have resulted from disclosure to the relator of attorney-client communications was remote and speculative, at best. The circumstances before this court show a much more concrete and immediate threat, as the information requested could give Pietrangelo information that would be useful in adjusting his litigation strategy to his advantage and to the corresponding detriment of the City. For example, the information sought by Pietrangelo as to how much time was spent by each of the attorneys of Porter Wright on any particular day might provide Pietrangelo an indication as to how much time was devoted to research or preparation of briefs and at what level of expertise the work was performed. There is therefore more justification for caution in disclosing anything that might touch on the attorney-client relationship or attorney work product.<sup>3</sup> At the very least, such information is so inextricably intertwined with privileged materials as to be exempt from disclosure.

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<sup>2</sup> As in *Anderson*, there is no language in *McCaffrey* preempting, overruling, clarifying, modifying or limiting *Dawson*.

<sup>3</sup> In *Dawson*, the school district also claimed that the requested records were exempt from disclosure as trial-preparation records. However, because the Court held that the records were covered by the attorney-client privilege, it did not address the issue.

Furthermore, unlike the City of Vermilion in *Anderson*, Appellees did provide Pietrangelo with all of the information required by *Dawson*. Lieberman Affidavit, ¶ 5. *See Anderson, supra*, at ¶ 21.

Based upon its in camera review of the unredacted invoices, the Court of Appeals ordered the Appellees to provide Pietrangelo with that portion of each invoice that summarized, by attorney, the hours, rates and fee charged for legal services for the period covered by the invoice. Although the disclosure of that information went beyond what *Dawson* requires, it provided Pietrangelo with all the information he claims he needed to make his argument that the fees charged by Koesel and Turnbull exceeded that charged by Lieberman. Pietrangelo Supreme Court Brief at 3. Any additional disclosure would serve no legitimate purpose and would serve only to reveal confidential information protected by the attorney-client privilege.

Should this Court determine that *Dawson* and *Anderson* are inconsistent, Appellees respectfully request that this Court reconsider *Anderson* and limit *Anderson* to its facts. If *Anderson* does indeed require the disclosure of the specific dates on which legal services were rendered, the time spent on a particular date and the particular attorney of a firm rendering such services, then the very heart of the attorney-client privilege is at risk. For example, if a litigant files a motion against a city on day 1 and is able to access a bill showing that ten hours' worth of legal services were performed for the city on day 4 by an associate of the law firm retained by the city, it would hardly take much thought for the litigant to determine that the associate of the law firm had spent ten hours doing research for the purpose of opposing the litigant's motion. The protection afforded to narrative portions of a bill would thus be rendered illusory.

“While the Public Records Act ‘serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy,’ ‘even in a society where an open

government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny’ and ‘[c]ertain safeguards are necessary.’” *Dawson, supra*, at ¶ 35, quoting *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 438, 2000-Ohio-213, 732 N.E.2d 960.

**Proposition of Law No. II:**

**In determining whether to award statutory damages for a violation of the Public Records Act, a court should consider the mitigating factors set forth in the statute, and a reviewing court may not reverse the lower court’s determination unless there has been an abuse of discretion**

R.C. 149.43(C)(1) provides in pertinent part:

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

In assessing whether a lower court erred in denying a request for statutory damages under R.C. 149.43(C)(1), the reviewing court uses an abuse of discretion standard. *Anderson, supra* at ¶ 25; *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, 950 N.E.2d 965, ¶ 12.

An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513, 858 N.E.2d 380, ¶ 10.

Pietrangelo bases his claim for entitlement to the additional billing information requested and to his claim for statutory damages on his assertion that *Dawson* is no longer good law. As indicated above, that is not the case and Pietrangelo is not entitled to any more of the billing statements than what is required by *Dawson* and with which he was originally provided. However, even if this Court should agree with Pietrangelo's assessment as to the continuing validity of *Dawson*, it is clear that the Court of Appeals did not abuse its discretion in refusing to impose statutory damages. As the Court of Appeals stated in its decision, "given the interplay between *Dawson* and *Anderson*, a well-informed public office could reasonably have believed that the nonexempt portion of the billing statements could be withheld from disclosure." This is evident as Pietrangelo, Appellees and the Court of Appeals all have differing views as to what portions of the billing statements were nonexempt and, therefore, as to what *Dawson* and *Anderson* required to be disclosed.

There is ample reason for the City to have exercised caution in disclosing invoices submitted to the City by its legal counsel. The argument has been made by Pietrangelo to both the Court of Appeals and this Court that, by disclosing portions of the billing statements not addressed by *Dawson*, the City waived the attorney-client privilege in its entirety, and is now required to disclose all information in the billing statements, even the narratives. Pietrangelo Reply/Opposition Brief at 6; Pietrangelo Supreme Court Brief at 19. Even though *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, 812 N.E.2d 976 (1st Dist.), ¶ 65, cautions against a liberal application of waiver of the attorney-client privilege, the fact that Pietrangelo has argued that the City's disclosure of even minor billing information (*i.e.*, itemized disbursements and expenses for which reimbursement was being sought, and the total disbursements and expenses for the period covered by the invoice) other than that specified by

*Dawson* somehow resulted in a waiver of the attorney-client privilege demonstrates convincingly why it was justified and prudent for the City to use every effort to protect attorney-client communications from disclosure to an adverse litigant. Pietrangelo Reply/Opposition Brief at 5-6; Pietrangelo Supreme Court Brief at 19-20. Guess wrong and release even an iota of information not absolutely, positively required to be released and the City may be required to release all otherwise privileged information, no matter how sensitive.

Therefore, the Court of Appeals did not abuse its discretion in denying Pietrangelo's demand for statutory damages.

**Proposition of Law No. III:**

**The imposition of sanctions is a matter of discretion, and a reviewing court may only reverse the lower court's determination if there has been an abuse of discretion**

First, Pietrangelo was not entitled to sanctions, because his motion to strike portions of the Answer filed by Appellees in the Court of Appeals was properly denied.

Civ.R. 11 states in pertinent part:

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . A party who is not represented by an attorney shall sign the pleading, motion, or other document . . . . The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

Civ.R. 12(F) states:

Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any

time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

In interpreting Civ.R. 12(F), state courts have looked to the federal courts' interpretation of the virtually identical language in Fed.R.Civ.P. 12(f). "‘Immaterial’ allegations are generally defined as those that 'have no bearing on the subject matter of the litigation. (citations omitted.) ‘Impertinent’ allegations have been defined as statements that do not pertain or are not necessary to the issues in question. (citations omitted.) 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. (citations omitted.) Striking a portion of a pleading is a drastic remedy and motions to strike under Fed.R.Civ.P 12(f) are generally disfavored . . . [M]otions to strike are typically denied unless the allegations at issue do not relate to the subject matter of the action and may cause ‘significant prejudice’ to one or more of the parties.” *Lockhart v. Bodnar*, Hamilton C.P. No. 0911879, 2010 Ohio Misc. LEXIS 516 (June 30, 2010) (citing *New Day Farms, LLC v. Board of Trustees of York Township, Ohio*, S.D.Ohio No. 2:08-cv-1107, 2009 U.S. Dist. LEXIS 130429 (June 10, 2009). *See also, United States of America v. The Firestone Tire and Rubber Company*, 374 F.Supp 431, 434 (N.D.Ohio 1974), *Hagins v. Eaton Corporation*, 8th Dist. Cuyahoga No. 64497, 1994 Ohio App. LEXIS 1400 (March 31, 1994), and *Estate of Myers*, 1st Dist. Hamilton No. C-940976, 1995 Ohio App. LEXIS 5788.

Using the very strict criteria of the cited cases, it is clear that Pietrangelo was not entitled to have any of the paragraphs of the Answer stricken.

With few exceptions, which will be addressed below, Pietrangelo claimed two bases for moving to strike. First he claimed that the paragraphs classified as affirmative defenses in the Answer were not affirmative defenses at all, but rather denials. Amended Motion to Strike Memo

at 5. Even if the defenses were misclassified, the relevancy and sufficiency of those defenses is not thereby lessened, Pietrangelo was in no way prejudiced, and it is difficult to see how misnaming an otherwise valid defense/denial can be used as justification for striking those defenses.

Second, Pietrangelo claimed that the denials and defenses were insufficient because of the holding in *Anderson*, which Pietrangelo claimed preempted *Dawson*, the case relied upon by Appellees. Amended Motion to Strike Memo at 15. However, as indicated above and contrary to Pietrangelo's contention, *Dawson* is still viable precedent. Therefore, in crafting their responses to Pietrangelo's Petition, Appellees were clearly justified in relying upon the holding of *Dawson*.

Pietrangelo claimed that initial Paragraph 8 of the Answer should have been stricken because it was unresponsive. Amended Motion to Strike Memo at 26. To do that, he first twisted the clear intent of a portion of that paragraph. As is evident from the context, the language to which Pietrangelo objected ("because they were subject to the attorney-client privilege and attorney work product doctrine") was intended to explain the reason for the redactions, not to imply that Pietrangelo agreed with that reason.

Pietrangelo also claimed that Appellees' references to the attorney work product doctrine (initial Paragraph 8 and Affirmative Defense Paragraph 2) should have been stricken because billing statements do not involve the mental processes sought to be protected by that doctrine. Amended Motion to Strike Memo at 15. However, the billing statements in question were first directed to the Law Director and thus involved a communication between legal counsel pertaining to the Injunction Case. Lieberman Affidavit, ¶ 3.

Pietrangelo also claimed that Paragraph 9 of the Answer, wherein the Appellees justified their redaction of certain portions of the invoices for legal fees on the basis of privilege, was

unresponsive and insufficient, because, in the memorandum that accompanied the redacted statements, Appellees did not cite a specific case or statute to justify the redaction. Amended Motion to Strike Memo at 22. However, Pietrangelo did not cite any case or statute that supported his claim that the City's justification was insufficient.

In arguing that Affirmative Defense Paragraph 4 was frivolous, Pietrangelo cited *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, for the proposition that circumvention of a court's discovery order is not a justification for refusing to produce records. Amended Motion to Strike Memo at 23. However, *Gilbert* did not involve records touching on the attorney-client relationship nor records that might otherwise be exempt from disclosure.

Finally, Pietrangelo claimed that Affirmative Defense Paragraph 5 should have been stricken because it was scandalous. Amended Motion to Strike Memo at 10. In Affirmative Defense Paragraph 5, Appellees attempted to set forth the situation with which they were faced when the request for copies of the legal invoices was submitted by Pietrangelo. The voluminous court filings listed in Affirmative Defense Paragraph 5 on their face clearly provided Appellees with justification for making the claims made in that paragraph, as did a total of over \$75,000 paid by the City up to that time to outside counsel to respond to each of the numerous filings. Petition, Ex. 2.<sup>4</sup> A review of the trial court's docket in the Injunction Case indicates that the filings have greatly expanded (as have the legal fees incurred by the City). Pietrangelo also complained of Appellees' reference to matters in the Injunction Case, claiming that the

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<sup>4</sup> It is ironic that Pietrangelo, who complains of criticism of his conduct in the Injunction Case, felt completely free to impugn the character and integrity in general of Appellees ("Respondents do not generally act in good faith in legal circumstances." Amended Motion to Strike Memo at 28.).

Injunction Case was not related to the instant case. Amended Motion to Strike Memo at 11. However, such a claim is disingenuous, since all the invoices requested by Pietrangelo related solely to the Injunction Case, Pietrangelo himself referred to the Injunction Case in Paragraph 6 of the Petition, and a review of the filings in the court of common pleas clearly indicate that the records request was made to provide Pietrangelo with ammunition in the Injunction Case. See also Pietrangelo Supreme Court Brief at 3.

Even assuming that the Court of Appeals should have granted Pietrangelo's motion to strike in whole or in part, this Court should not reverse the Court of Appeals' refusal to impose sanctions. A reviewing court should not reverse a lower court's decision on a Civ.R. 11 motion for sanctions absent an abuse of discretion. *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65, 29 OBR 446, 505 N.E.2d 966. As indicated above, an abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund, supra*, at ¶ 10.

The threshold for sanctions under either Civ. R. 11 or R.C. 2323.51 is extremely high. Civ. R. 11 states:

The signature of an attorney. . . constitutes a certificate by the attorney. . . that the attorney. . . has read the document; that to the best of the attorney's. . . knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a *willful* violation of this rule, *an attorney or pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action[.] (Emphasis added.)

"Civ. R. 11 employs a subjective bad-faith standard to invoke sanctions by requiring that any violation must be willful." *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 19. As Pietrangelo acknowledged in the memorandum in support of his motion, Civ. R. 11 only permits sanctions against an attorney or pro se party, *not* a represented party. See Amended Motion to Strike Memo at 4 (acknowledging rule); *David v. Kaiser*, 6th

Dist. No. L-03-1315, 2004-Ohio-3149, ¶ 5 (June 18, 2004) (stating rule and citing cases). Furthermore, Civ.R. 11 does not permit sanctions to be imposed upon the Assistant Law Director, since he did not sign the Answer.

R.C. 2323.51 permits an award of attorney fees, but only if there is substantial evidence of frivolous conduct.<sup>5</sup> See R.C. 2323.51(B)(2) (attorney fees are the only permissible sanction under R.C. 2323.51); *Wiltberger v. Davis*, 110 Ohio App.3d 46, 54, 673 N.E.2d 628 (10th Dist. 1996) (same).<sup>6</sup> “Frivolous conduct” is defined as, among other things, “denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.” R.C. 2323.51(B)(1)(a)(iv).

A motion for sanctions under R.C. 2323.51 requires a three-step analysis: whether the party engaged in frivolous conduct; if so, whether any party was adversely affected by it; and, if an award is to be made, the amount of the award. *Weaver v. Pillar*, 5th Dist. Tuscarawas No. 2012-CA-32, 2013-Ohio-1052, ¶ 19. Prejudice is not to be presumed. Rather, a party seeking R.C. 2323.51 sanctions “must affirmatively demonstrate that he or she incurred additional attorney’s fees as a direct, identifiable result of defending the frivolous conduct in particular.” *Wiltberger, supra*, at 54.

Like Civ. R. 11, sanctions may be imposed under R.C. 2323.51 only upon a showing of bad faith and willful misconduct. *Utley v. M.T. Auto, Inc.*, 9th Dist. Summit No. 24482, 2009-Ohio-5161, ¶¶ 24, 28 (denying attorneys’ fees as a sanction under Civ. R. 11 and R.C. 2323.51

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<sup>5</sup> See, e.g., *City of Cleveland v. Abrams*, 8th Dist. Cuyahoga No. 97814, 2012-Ohio-3957, ¶12 (affirming denial of R.C. 2323.51 sanctions where “the record lacks substantial evidence of frivolous conduct”).

<sup>6</sup> However, see *Henry v. City of Akron*, 27 Ohio App.3d 369, 370, 501 N.E.2d 659 (9th Dist. 1985) (holding that, in the absence of specific statutory authority, neither attorney fees nor punitive damages may be awarded against a municipal corporation).

where defendant did not act in bad faith); *State ex rel. Bardwell v. City of Lyndhurst*, 8th Dist. Cuyahoga No. 93636, 2010-Ohio-525, ¶ 14.

“R.C. 2323.51 was designed to chill egregious, overzealous, unjustifiable and frivolous actions, not to chill legitimate claims or punish misjudgment or tactical error.” *Weaver v. Pillar*, *supra*, at ¶ 21. “[A] claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim.” *Hickman v. Murray*, 2nd Dist. Montgomery No. CA 15030, 1996 Ohio App. LEXIS 1028, \*14 (March 22, 1996).

To provide the non-movant with an opportunity to establish good faith, Civ. R. 11 and R.C. 2323.51 sanctions cannot be imposed without a hearing. *State ex rel. Ebbing v. Ricketts*, 133 Ohio St.3d 339, 2012-Ohio-4699, 978 N.E.2d 188, ¶ 24; *Bond v. Village of Canal Winchester*, 10th Dist. Franklin No. 07AP-556, 2008-Ohio-945, ¶ 31; Civ. R. 11; R.C. 2323.51(B)(2). But a court may deny a motion for sanctions without a hearing where the movant has not established sanctions are appropriate. See, *e.g.*, *Abrams*, *supra*, at ¶ 12.

As noted above, the only possible sanction under R.C. 2323.51 is an award of attorney fees. However, as a pro se litigant, Pietrangelo is not entitled to recover attorney fees as a sanction under either Rule 11 or R.C. 2323.51. *Freeman v. Wilkinson*, 65 Ohio St.3d 307, 309, 603 N.E.2d 993 (1992) (noting that “R.C. 2323.51 provides for attorney fees, not compensation for pro se litigants,” and holding that attorney fees were not recoverable for pro se litigant); *Lakeview Holding (OH), LLC v. Haddad*, 8th Dist. Cuyahoga No. 98744, 2013-Ohio-1796, ¶ 24 (pro se party cannot recover attorney fees as sanctions under Civ. R. 11, only costs); *Mikhael v. Gallup*, 9th Dist. Summit No. 22992, 2006-Ohio-3917, ¶ 16 (Aug. 2, 2006) (pro se party, even if an attorney, cannot recover attorney fees under Civ. R. 11 because “[t]he fees a lawyer might

charge himself are not, strictly speaking, ‘attorney’s fees’”). Thus, Pietrangelo’s reliance on R.C. 2323.51 to support his demand for sanctions is misplaced.

Pietrangelo failed to satisfy his burden to show that he was adversely affected by the challenged responses to his Petition. A party seeking sanctions “must affirmatively demonstrate that he or she incurred additional attorney’s fees as a direct, identifiable result of defending the frivolous conduct in particular.” *Wiltberger, supra*, at 54. Pietrangelo relied solely on his conclusory assertions and made no attempt to affirmatively show any direct, identifiable effect of the alleged deficiencies in the City’s Answer. *See id.* (denying sanctions under R.C. 2323.51 where parties failed to provide “any evidence to support a finding that [they] were ‘adversely affected[.]’”).

Pietrangelo did not quantify direct, identifiable expenses he incurred due to the challenged statements in the City’s Answer, as was his burden. That failure was fatal to his motion for sanctions.

Finally, Pietrangelo’s claim that Appellees’ Answer may be punished by contempt is totally without support in the cases he cites. *Lable & Company v. Flowers*, 104 Ohio App.3d 227, 661 N.E.2d 782 (9th Dist. 1995), does not even refer to “contempt.” *Windham Bank v. Tomaszuk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), involved disobedience of a court order (“Contempt of court is defined as disobedience of an order of a court.” Syllabus 1.). *In re McGinty*, 30 Ohio App.3d 219, 507 N.E.2d 441 (8th Dist. 1986), involved criminal contempt consisting of disobedience of a court order and obstruction of justice. *State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 528 N.E.2d 1247 (1988), involved disobedience of a writ of mandamus. *City of Cincinnati v. Cincinnati District Council 51*, 365 Ohio St.2d 197, 299 N.E.2d 686 (1973), involved violation of a permanent injunction. *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36

Ohio St.3d 14, 520 N.E.2d 1362 (1988), involved failure of a subpoenaed witness to appear at trial. In *Fed. Land Bank Assn. of Fostoria v. Walton*, 99 Ohio App.3d 729, 651 N.E.2d 1048 (3rd Dist 1995), the contemnor accused the judge of engaging in fraud. *State ex rel. Anderson v. Industrial Commission*, 9 Ohio St.3d 170, 459 N.E.2d 548 (1984), involved a refusal to comply with a writ of mandamus. *City of Moraine v. Steger Motors*, 111 Ohio App.3d 265, 675 N.E.2d 1345 (2nd Dist. 1996), involved violation of a court order. Finally, *Citicasters v. Stop 26-Riverbend*, 147 Ohio App.3d 531, 2002-Ohio-2286, 771 N.E.2d 317 (7th Dist.), involved violation of a temporary restraining order.<sup>7</sup> In fact, to the extent courts have considered the issue at all, they have decided to the contrary. See *Wesely v. Churchill Development Corporation*, 6th Cir. No. 95-4024, 1996 U.S. App. LEXIS 27857 (Oct. 24, 1996) (holding that, except in the case of an outright lie about a fact, it is a stretch to characterize frivolous defenses as contempt of court).

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/ Abraham Lieberman

Abraham Lieberman (0014295)

Law Director, City of Avon Lake, Ohio

David M. Graves (0069670)

Assistant Law Director, City of Avon Lake, Ohio

Attorneys for Appellees, City of Avon Lake,

Ohio and Abraham Lieberman, Law Director

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<sup>7</sup> *Windham*, *Cincinnati District Council*, *Anderson v. Industrial Commission*, and *Moraine* were cited in Amended Motion to Strike Memo at 4-5.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Brief has been sent by ordinary U.S. mail, postage prepaid, this 26th day of June, 2015, to:

James E. Pietrangelo, II  
33317 Fairport Drive  
Avon Lake, Ohio 44012  
Relator, *Pro Se*

/s/ Abraham Lieberman  
Abraham Lieberman  
Law Director, City of Avon Lake, Ohio  
Attorney for Appellees, City of Avon Lake, Ohio  
and Abraham Lieberman, Law Director

APPENDIX A1

porterwright

Porter Wright Morris & Arthur LLP  
41 South High Street, Suites 2800-3200, Columbus, Ohio 43215-6194  
250 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202-5118  
925 Euclid Avenue, Suite 1700, Cleveland, Ohio 44115-1483  
One South Main Street, P.O. Box 1805, Dayton, Ohio 45401-1805  
9132 Strada Place, 3rd Floor, Naples, Florida 34108-2683  
1900 K Street, NW, Suite 1110, Washington, D.C. 20006

Internal Revenue Service Identification Number 31-4373657

Abraham Lieberman  
City of Avon Lake  
150 Avon Belden Road  
Avon Lake, OH 44012

January 27, 2014  
INVOICE NUMBER: 1048920

For legal services rendered as of December 31, 2013, in connection with:

4013244.195809 - James Pietrangelo v. Avon Lake

<u>Date</u>	<u>Name</u>	<u>Services</u>	<u>Hours</u>
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REDACTED

REDACTED

REDACTED

REDACTED

<u>Date</u>	<u>Name</u>	<u>Services</u>	<u>Hours</u>
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REDACTED

REDACTED

REDACTED

REDACTED

Date      Name      Services      Hours

REDACTED  
REDACTED  
REDACTED  
REDACTED

TOTAL FEES..... \$ 11,756.25

DISBURSEMENTS and/or EXPENSES

Copy Expense	\$ 78.48
Long Distance Telephone Charges	3.73
Facsimile Charges	2.34

TOTAL DISBURSEMENTS and/or EXPENSES..... \$ 84.55

TOTAL INVOICE..... \$ 11,840.80

## APPENDIX A2

### R.C. § 149.43

#### 149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

Effective: September 29, 2013 to March 19, 2015

(A) As used in this section:

(1) “Public record” means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to [section 3313.533 of the Revised Code](#). “Public record” does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under [section 2151.85 and division \(C\) of section 2919.121 of the Revised Code](#) and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under [section 3705.12 of the Revised Code](#);

(e) Information in a record contained in the putative father registry established by [section 3107.062 of the Revised Code](#), regardless of whether the information is held by the department of job and family services or, pursuant to [section 3111.69 of the Revised Code](#), the office of child support in the department or a child support enforcement agency;

(f) Records listed in [division \(A\) of section 3107.42 of the Revised Code](#) or specified in [division \(A\) of section 3107.52 of the Revised Code](#);

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under [section 2710.03](#) or [4112.05 of the Revised Code](#);

(j) DNA records stored in the DNA database pursuant to [section 109.573 of the Revised Code](#);

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to [division \(E\) of section 5120.21 of the Revised Code](#);

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to [section 5139.05 of the Revised Code](#);

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to [section 3121.894 of the Revised Code](#);

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in [section 1333.61 of the Revised Code](#);
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under [sections 307.621 to 307.629 of the Revised Code](#), and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to [division \(A\) of section 307.626 of the Revised Code](#);
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to [section 5153.171 of the Revised Code](#) other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under [section 4751.04 of the Revised Code](#) or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under [section 150.01 of the Revised Code](#);
- (x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;
- (y) Records listed in [section 5101.29 of the Revised Code](#);
- (z) Discharges recorded with a county recorder under [section 317.24 of the Revised Code](#), as specified in division (B)(2) of that section;
- (aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;
- (bb) Records described in [division \(C\) of section 187.04 of the Revised Code](#) that are not designated to be made available to the public as provided in that division.
- (2) “Confidential law enforcement investigatory record” means 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 would create a high probability of disclosure of any of the following:
- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
- (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source’s or witness’s identity;
- (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
- (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.
- (3) “Medical record” means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.
- (4) “Trial preparation record” means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) “Intellectual property record” means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) “Donor profile record” means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) “Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information” means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer’s, parole officer’s, probation officer’s, bailiff’s, prosecuting attorney’s, assistant prosecuting attorney’s, correctional employee’s, community-based correctional facility employee’s, youth services employee’s, firefighter’s, EMT’s, or investigator of the bureau of criminal identification and investigation’s employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer’s, parole officer’s, probation officer’s, bailiff’s, prosecuting attorney’s, assistant prosecuting attorney’s, correctional employee’s, community-based correctional facility employee’s, youth services employee’s, firefighter’s, EMT’s, or investigator of the bureau of criminal identification and investigation’s employer from the peace officer’s, parole officer’s, probation officer’s, bailiff’s, prosecuting attorney’s, assistant prosecuting attorney’s, correctional employee’s, community-based correctional facility employee’s, youth services employee’s, firefighter’s, EMT’s, or investigator of the bureau of criminal identification and investigation’s compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer’s appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, “peace officer” has the same meaning as in [section 109.71 of the Revised Code](#) and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of

a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, “correctional employee” means any employee of the department of rehabilitation and correction who in the course of performing the employee’s job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, “youth services employee” means any employee of the department of youth services who in the course of performing the employee’s job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, “firefighter” means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, “EMT” means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. “Emergency medical service organization,” “EMT-basic,” “EMT-I,” and “paramedic” have the same meanings as in [section 4765.01 of the Revised Code](#).

As used in divisions (A)(7) and (B)(9) of this section, “investigator of the bureau of criminal identification and investigation” has the meaning defined in [section 2903.11 of the Revised Code](#).

(8) “Information pertaining to the recreational activities of a person under the age of eighteen” means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person’s parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) “Community control sanction” has the same meaning as in [section 2929.01 of the Revised Code](#).

(10) “Post-release control sanction” has the same meaning as in [section 2967.01 of the Revised Code](#).

(11) “Redaction” means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a “record” in [section 149.011 of the Revised Code](#).

(12) “Designee” and “elected official” have the same meanings as in [section 109.43 of the Revised Code](#).

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a

location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, 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 or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal

investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If 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, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under [Section 2 of Article IV, Ohio Constitution](#), or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under [Section 3 of Article IV, Ohio Constitution](#).

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. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) 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 as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in [section 109.43 of the Revised Code](#). In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under [section 109.43 of the Revised Code](#). Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) “Actual cost” means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) “Bulk commercial special extraction request” means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. “Bulk commercial special extraction request” does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) “Commercial” means profit-seeking production, buying, or selling of any good, service, or other product.

(d) “Special extraction costs” means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. “Special extraction costs” include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, “surveys, marketing, solicitation, or resale for commercial purposes” shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

## APPENDIX A3

### R.C. § 2323.51

#### 2323.51 Definitions; award of attorney's fees as sanction for frivolous conduct

(A) As used in this section:

(1) "Conduct" means any of the following:

(a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action;

(b) The filing by an inmate of a civil action or appeal against a government entity or employee, the assertion of a claim, defense or other position in connection with a civil action of that nature or the assertion of issues of law in an appeal of that nature, or the taking of any other action in connection with a civil action or appeal of that nature.

(2) "Frivolous conduct" means either of the following:

(a) Conduct of an inmate or other party to a civil action, of an inmate who has filed an appeal of the type described in division (A)(1)(b) of this section, or of the inmate's or other party's counsel of record that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

(b) An inmate's commencement of a civil action or appeal against a government entity or employee when any of the following applies:

(i) The claim that is the basis of the civil action fails to state a claim or the issues of law that are the basis of the appeal fail to state any issues of law.

(ii) It is clear that the inmate cannot prove material facts in support of the claim that is the basis of the civil action or in support of the issues of law that are the basis of the appeal.

(iii) The claim that is the basis of the civil action is substantially similar to a claim in a previous civil action commenced by the inmate or the issues of law that are the basis of the appeal are substantially similar to issues of law raised in a previous appeal commenced by the inmate, in that the claim that is the basis of the current civil action or the issues of law that are the basis of the current appeal involve the same parties or arise from the same operative facts as the claim or issues of law in the previous civil action or appeal.

(3) "Civil action or appeal against a government entity or employee," "inmate," "political subdivision," and "employee" have the same meanings as in [section 2969.21 of the Revised Code](#).

(4) "Reasonable attorney's fees" or "attorney's fees," when used in relation to a civil action or appeal against a government entity or employee, includes both of the following, as applicable:

(a) The approximate amount of the compensation, and the fringe benefits, if any, of the attorney general, an assistant attorney general, or special counsel appointed by the attorney general that has been or will be paid by the state in connection with the legal services that were rendered by the attorney general, assistant attorney general, or special counsel in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(b) The approximate amount of the compensation, and the fringe benefits, if any, of a prosecuting attorney or other chief legal officer of a political subdivision, or an assistant to a chief legal officer of those natures, who has been or will be paid by a political subdivision in connection with the legal services that were rendered by the chief legal officer or assistant in the civil action or appeal against the government entity or employee, including, but not limited to, a civil action or appeal commenced pro se by an inmate, and that were necessitated by frivolous conduct of an inmate represented by counsel of record, the counsel of record of an inmate, or a pro se inmate.

(5) “State” has the same meaning as in [section 2743.01 of the Revised Code](#).

(6) “State correctional institution” has the same meaning as in [section 2967.01 of the Revised Code](#).

(B)(1) Subject to divisions (B)(2) and (3), (C), and (D) of this section and except as otherwise provided in [division \(E\)\(2\)\(b\) of section 101.15](#) or [division \(I\)\(2\)\(b\) of section 121.22 of the Revised Code](#), at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney’s fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court’s own initiative, but only after the court does all of the following:

(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;

(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;

(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined.

(3) The amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney’s fees shall not exceed, and may be equal to or less than, whichever of the following is applicable:

(a) If the party is being represented on a contingent fee basis, an amount that corresponds to reasonable fees that would have been charged for legal services had the party been represented on an hourly fee basis or another basis other than a contingent fee basis;

(b) In all situations other than that described in division (B)(3)(a) of this section, the attorney’s fees that were reasonably incurred by a party.

(4) An award made pursuant to division (B)(1) of this section may be made against a party, the party’s counsel of record, or both.

(5)(a) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded reasonable attorney’s fees and the party’s counsel of record may submit to the court or be ordered by the court to submit to it,

for consideration in determining the amount of the reasonable attorney's fees, an itemized list or other evidence of the legal services rendered, the time expended in rendering the services, and whichever of the following is applicable:

(i) If the party is being represented by that counsel on a contingent fee basis, the reasonable attorney's fees that would have been associated with those services had the party been represented by that counsel on an hourly fee basis or another basis other than a contingent fee basis;

(ii) In all situations other than those described in division (B)(5)(a)(i) of this section, the attorney's fees associated with those services.

(b) In connection with the hearing described in division (B)(2)(a) of this section, each party who may be awarded court costs and other reasonable expenses incurred in connection with the civil action or appeal may submit to the court or be ordered by the court to submit to it, for consideration in determining the amount of the costs and expenses, an itemized list or other evidence of the costs and expenses that were incurred in connection with that action or appeal and that were necessitated by the frivolous conduct, including, but not limited to, expert witness fees and expenses associated with discovery.

(C) An award of reasonable attorney's fees under this section does not affect or determine the amount of or the manner of computation of attorney's fees as between an attorney and the attorney's client.

(D) This section does not affect or limit the application of any provision of the Rules of Civil Procedure, the Rules of Appellate Procedure, or another court rule or section of the Revised Code to the extent that the provision prohibits an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal or authorizes an award of court costs, attorney's fees, or other expenses incurred in connection with a particular civil action or appeal in a specified manner, generally, or subject to limitations.