



Ohio Coalition for Open Government

Open Records Report

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Groups file lawsuit challenging cost of driving records

Can the public records law requiring actual cost for records be trumped by a transportation budget that marks up the cost of records to help finance other areas of state government? That's the issue at the heart of a lawsuit filed in July 2009 by the Ohio Trucking Association and several other plaintiffs.

The suit was filed in Franklin County Common Pleas Court. The additional plaintiffs are the Ohio Insurance Institute and the Professional Insurance Agents of Ohio, both state trade associations. The defendants are Cathy Collins-Taylor, director of the Ohio Dept. of Public Safety, and Carolyn Williams, acting registrar for the Ohio Bureau of Motor Vehicles.

At issue is an increase in the cost of motor vehicle driving records from \$2 to \$5, as written into the current state transportation budget. Adopted by the General Assembly as House Bill 2 in April 2009, the transportation budget and the fee increase took effect on July 1, 2009.

In the filing, attorneys for the Ohio Trucking Association contend the fee increase is unconstitutional not only because it violates the Public Records Act but because it violates Article XII of the Ohio Constitution which states that "no moneys derived from fees, excises, or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles" may be used other than for costs of administering those laws and costs for construction and maintenance of highways and bridges.

The current transportation budget states that the \$5 fee for records will send \$2 to the state bureau of motor vehicle fund, 60 cents to the trauma and EMS fund, 60 cents to the homeland security fund, 30 cents to the investigations fund, \$1.25 to the emergency management agency service fund, and 25 cents to the justice program services fund.

The suit contends that "the amended statute clearly states that the cost of ob-

taining the sought-after records is two-dollars, and then apportions the other three dollars of the fee to government functions not at all related to the production of documents."

Members of the trucking and insurance associations are concerned because of the large volume of driver license abstracts they request in carrying out normal background checks on drivers for employment and other purposes.

The plaintiffs further contend that the new fee imposes a tax in violation of the Ohio Constitution and imposes a barrier on the public's right to access public documents.

Plaintiffs are seeking a declaratory judgment and award of attorney fees. Judge Richard Frye has scheduled oral arguments for Feb. 19. The plaintiffs are represented by attorneys Lisa Pierce Reisz, Kenneth Rubin, and Thomas Szkyowny of the Columbus firm of Vorys, Sater, Seymour and Pease.

Cincinnati Enquirer wins access to sealed court records

By John Greiner, Graydon Head & Ritchey LLP, Cincinnati

In July 2009 the Court of Appeals for Ohio's 12th Appellate District issued a ruling that will have major implications for court room access throughout Ohio. The court ruled that two Warren County judges erred when they sealed court records in the murder case of Michel Veillette without holding a required hearing. The ruling resulted from a mandamus action filed in 2008 by The Cincinnati Enquirer. The decision also includes an award of attorney fees to the Enquirer.

Veillette, an engineer, was jailed on charges that he fatally stabbed his wife in January 2008 in their Mason, Ohio home, and then set a fire that killed the couple's children. Following Veillette's preliminary hearing, which was open to the public, Judge Neal Bronson, of the Warren County Common Pleas Court issued an order that sealed the evidence presented in the preliminary hearing, along with

search warrants and all other documents in the case. The case was later assigned to the late Judge James Heath, who issued an order continuing Bronson's mandate sealing the records from public view.

Both judges claimed to base their decision on the prosecutor's concern that public disclosure of the information would taint the jury pool and potentially deprive Veillette's 6th Amendment right to a fair trial. Neither judge, however, conducted an evidentiary on the issue, relying instead on the prosecutor's unsupported contention.

The case was complicated when Veillette committed suicide in his jail cell shortly after the Enquirer filed its mandamus action. Because Judge Heath issued an order to release the records following Veillette's death, the 12th District Appellate court originally dismissed the mandamus suit as moot. But the Ohio Supreme Court overruled that decision, and

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Proficiency tests deemed trade secrets

With a fall 2009 decision in favor of the Cincinnati Public School District, the Ohio Supreme Court has further expanded the rights of state and local governments to claim that their records are “trade secrets,” an exception to the Public Records Act.

The Cincinnati school district retained a nonprofit agency to develop proficiency tests for high school students. The school district paid over \$750,000 to develop separate tests for 9th, 10th, and 11th graders measuring their proficiency in English, math, history, and science. The district administered the same test questions -- mostly multiple-choice -- every year.

After working with the tests, about 60 teachers petitioned school administrators to release copies of the tests to them because they questioned the tests’ accuracy and validity, and they wanted to have an expert assess the tests. The administration refused, claiming that the test questions were the school district’s trade secrets, so a high school teacher sued the district under the Public Records Act.

The Ohio Supreme Court ruled for

the administration, deciding that the tests were the school district’s trade secrets. The court did not find that releasing the exams would in some way give an unfair advantage to some competitor of the school district in the commercial marketplace. Indeed, the school district is not a business and does not compete in the commercial marketplace for the right to create or administer exams.

Instead, in an opinion written by Justice Judith Lanziger, the court decided that the exams “would have no or minimal value if they were made public before they were administered.” The court added that ordering the district to disclose the exams to the teachers “would open the door for students to have access to these tests as well, undermining the tests’ effectiveness in measuring student ability if the test is given in the future.”

To reach the justifiable end of ensuring that public school students can’t see high school test questions before taking the tests, the court greatly expanded the authority of state and local governments to claim that their records are their own trade secrets.

A Trade Secrets Evolution

Analysis by David Marburger, Baker & Hostetler

In 1992, The (Toledo) Blade sued the University of Toledo Foundation to see the identities of those who had donated money to the University of Toledo. The court decided that the foundation was a public office because it received donations on behalf of the state university and administered them for the university.

The court rejected the foundation’s argument that its donor list was a trade secret. The court doubted that “a public office can even have its own protected trade secrets.” The court explained that the purpose of trade secret law is to protect “competitive advantage in private, not public, business.”

The court maintained that view when a high school student and her father sued the state education de-

partment and Ohio State University for access to previously-administered 12th-grade proficiency exams and previously-administered vocational competency exams, ruling that all were public records. Again, the court rejected the claim, emphasized by Ohio State University, that the exams were the university’s trade secrets.

A few years later, a physician sued OSU demanding to see the university’s records studying the feasibility of acquiring a particular private hospital in Columbus. The records included a memo outlining financial projections, a memo used for negotiating a staff contract for the newly acquired hospital, a memo about potential staffing of the hospital, a summary analysis of po-

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Paper may seek lawyer fees from schools

Ruling by a one-vote margin, the Ohio Supreme Court in November said a newspaper could seek attorney fees from a school district in a public records suit.

Justices narrowly cleared the way for The Cincinnati Enquirer to seek an award of attorney fees from Cincinnati Public Schools in a now-resolved dispute over obtaining public records.

The court said in a 4-3 opinion that even though the Enquirer's lawsuit to obtain documents about the district's hiring of a new superintendent was moot because the material was eventually made available, the newspaper still could seek recovery of its legal fees.

The Supreme Court ordered the 1st District Court of Appeals to conduct further proceedings to consider the merits of the newspaper's attorney fee request.

In February 2009 the Enquirer asked the district for documents on prospective candidates for superintendent.

The district refused because it had not yet checked the post office box to which the applications and related materials were directed, and would not do so until March of 2009. The newspaper filed a complaint in the appellate court.

Appellate judges subsequently found the newspaper's case was moot because the school district ultimately produced the documents.

Veterans commission meetings being probed

Prosecutor Ron O'Brien is investigating allegations in a controversy over pay raises given to executives of the Franklin County Veterans Service agency. According to a series of articles in The Columbus Dispatch, evidence is mounting that suggests the board of the veterans service commission illegally voted in private to give the staff executives hefty raises, then attempted to revise meeting minutes to show a proper vote.

A board secretary disputes claims that her minutes were flawed. "Don't you blame me," Catherine Radford said she told the board president. "I never, ever heard them discuss a raise in public session -- not ever." Radford, who has taped and transcribed board minutes for 10 years, said she had a "duty to report wrong doing," which she did in a letter

The Supreme Court ruled November 2009 that the appeals court had properly dismissed the Enquirer's claim based on mootness.

"Nevertheless, as we recently held in a different public records mandamus case ... 'even if the Enquirer's mandamus claim were properly dismissed as moot, a claim for attorney fees in a public records mandamus action is not rendered moot by the provision of the requested records after the case has been filed,'" justices said in an opinion that did not identify an author.

Concurring were Chief Justice Thomas Moyer and Justices Maureen O'Connor, Judith Lanzinger, and Robert Cupp. Justices Paul Pfeifer, Evelyn Stratton and Terrence O'Donnell agreed with the decision to dismiss the newspaper's mandamus claim, but said the request for attorney fees also should have been dismissed.

"I believe that the requested documents did not constitute public records ... when the Enquirer made its initial request," Justice Stratton said.

"The district was not obligated to produce copies of the documents until it had used them to carry out the school district's duties and responsibilities, at which point they became public records subject to inspection," she said.

to the county prosecutor and commissioners.

At issue are minutes from meetings of Sept. 10, 2008, and April 22, 2009, which show the board entering executive session to discuss personnel and never voting on raises in open session. The agency's board has granted three staff -- executive director, assistant director and executive assistant -- raises totaling 66 to 80% since 2005.

In a Dec. 16 veterans commission meeting, board members voted to amend their minutes "to reflect the fact that in open session of the board meeting, the board properly moved and voted for the increase in compensation."

The prosecutor's office has collected recordings of the Veterans Service Commission meetings in which the board said the raises were approved.

Teachers' data are private, union leader tells judge

From The Columbus Dispatch

The head of Ohio's largest teachers union told a judge, during Dec. 21 testimony, that releasing the names, addresses and other personal information of licensed teachers, administrators and school staff puts their safety and privacy at risk. "Acts of violence, verbal abuse and threats" were among the concerns cited by Patricia Frost-Brooks, president of the Ohio Education Association.

The union is seeking a permanent injunction blocking the Department of Education from releasing the information. It was requested by the Ohio Republican Party under the state's public records law.

After a four-hour hearing in Franklin County Common Pleas Court, Judge Daniel Hogan said he would keep in place a temporary restraining order preventing the state agency from releasing the information until he decides whether to grant a permanent injunction. Hogan will hear arguments from attorneys for both sides on March 19.

During cross examination by Assistant Attorney General Jeffrey Clark, Frost-Brooks said she had received only four complaints from her members about the issue. She also acknowledged that the information is also available from property records and voting records kept by county governments.

The Ohio attorney general's office, representing the Education Department, says the information is considered government records and subject to disclosure upon request. There are no exemptions protecting the personal information of educators, attorneys say.

In testimony, an Education Department employee stated that the department's database includes the names of up to 900,000 who have or once had educator licenses in Ohio.

Four police officers sue city for test records

From The Columbus Dispatch

Three sergeants and a lieutenant in the Columbus Police Division are suing the city's Civil Service Commission, claiming it violated Ohio public-records law by destroying scorers' notes from promotional examinations in 2008.

"The destruction of the scorers' notes is part of a pattern" of records destruction that will continue unless stopped by the Franklin County Common Pleas Court, according to the lawsuit, filed May 2009.

Sgts. Jimmie Barnes, Joseph Horton and Steven Wilkinson and Lt. Scott Hyland, who were among those who took the examinations, say in the lawsuit that they filed public-records requests for documents related to the testing process because of concerns about "irregularities" in the test and "to confirm that they had been scored fairly and correctly."

Barnes, Horton and Wilkinson, seeking promotion to lieutenant, and Hyland, seeking promotion to commander, fell short in the promotional rankings.

The Civil Service Commission, which administers the test, refused to release a large portion of the records based on "confidentiality and security of testing materials." As for the notes taken by scorers during an oral portion of the examination, they were destroyed immediately after the test, the officers were told.

Fred Gittes, the attorney for the officers, said there is no provision within the city's records-retention schedule permitting the destruction of such records.

Although the lawsuit's language raises questions about the fairness of the testing process, Gittes said his clients are not challenging the examination.

"We point out our concerns about the exam to show why it's so important to retain these records," he said.

In addition to seeking an injunction to prevent future destruction of promotional-examination records, the lawsuit seeks \$1,000 for each record destroyed, plus attorney's fees.

Highway patrol records destroyed

Proceeds from sales of police merchandise mismanaged

From The Columbus Dispatch

State Highway Patrol officials stockpiled tens of thousands of dollars from the sale of patrol-branded merchandise without proper safeguards against mispending the money, the state watchdog said in November 2009.

Although it contains less than \$20,000, the obscure fund known as the GHQ Activities Account was ripe for abuse, Inspector General Thomas P. Charles reported.

The former patrol superintendent, Richard Collins, billed more than \$300 in meals to the fund in 2007 and 2008 without telling the public about it on his mandatory state financial-disclosure forms, the report said.

In addition, Charles faulted two current patrol officials -- including one of the candidates to replace Collins -- for improperly shredding records about the account after it began to get scrutiny.

Charles did not find evidence of rampant misspending from the account, which typically earns \$50,000 to \$60,000 a year from the sale of patrol-branded merchandise such as caps, coffee mugs and key chains. The products are sold in a small store at the patrol academy near the state fairgrounds.

The inspector general said the fund is poorly managed and subject to abuse. The official who has managed the account since 2005, Capt. David Dicken, removed some of the protections that had been in place, Charles said.

Dicken was recently selected to succeed Collins as superintendent.

"Insufficient records exist to account for lost, stolen or misused inventory from the academy store," the inspector general's report said. "Similarly, there are insufficient records to determine whether any funds were lost, stolen or misused from the time the money was collected by store personnel to the time Dicken deposited the money."

The report also noted that Dicken shredded pre-2006 records of expenditures from the account.

Shredding the records was "improper, not to mention highly suspicious," Charles' report said.

"The department is still reviewing the inspector general's findings," Hunter said Nov. 3. "We'll be complying with the inspector general's request, and we're committed to take action to address the

issues with the account."

Collins resigned in August, capping a months-long power struggle and personality conflict with his boss, then-Department of Public Safety Director Henry Guzman, who resigned on the same day.

The fund was one flash point in their

feud.

In August, the department's lawyer suggested that Collins had tapped the fund on several occasions in 2007 without disclosing it as the law requires. The expenses were minor -- five meals totaling \$168 -- but failing to disclose them on state ethics filings could be a first-degree misdemeanor.

Collins maintained that he had disclosed everything required and that Charles' probe would vindicate him.

The investigation, however, said Collins violated state law by not putting his 2007 meals, along with \$183 in expenses from 2008, on his annual financial-disclosure forms.

Reached Nov. 3, Collins did not concede the point but said he would work with the Ohio Ethics Commission to resolve the matter.

His attorney, Mary C. Mertz, said she doesn't expect any criminal charges to arise from Collins' failure to report the items.

"We are definitely going to work with the Ohio Ethics Commission to make sure that if anything needs to be revised, it is," Mertz said.

The former patrol superintendent, Richard Collins, billed more than \$300 in meals to the fund in 2007 and 2008 without telling the public about it on his mandatory state financial-disclosure forms, the report said.

Juvenile arson ruling has negative impact on attorney fees

By David Marburger
Baker & Hostetler

In its first crack at interpreting the state legislature's sweeping rewrite in 2007 of the Public Records Act's provision for attorneys' fees, the Ohio Supreme Court has neutralized the legislature's broad changes.

Before September 2007, the Ohio Supreme Court had ruled that a citizen winning a public-records suit also could win an award of attorneys' fees only by proving two things: that the victory benefited the public and that the public office did not have a reasonable legal ground for refusing to provide the requested records. The legislature had not written those conditions into the Public Records Act; instead, the court added them itself when it applied the Act in particular cases. The court justified adding those conditions in part by deciding that attorneys' fees are meant to punish a public office for unlawfully withholding public records.

In 2007, the General Assembly completely rewrote the part of the Act that addressed a victorious citizen's right to

win an award of attorneys' fees. In doing so, the General Assembly rejected the court's view that attorneys' fees are supposed to punish, saying "attorneys' fees awarded under this section shall be construed as remedial and not punitive." Remedial means to compensate the citizen for expending the citizen's own money to enforce the government office's public duty to make the contested records available to the entire public.

The legislature did not adopt the conditions that the court had imposed before 2007: proving lack of reasonable ground for withholding the record and proving public benefit.

Instead, the legislature said that courts had the discretion to award attorneys' fees to those who win suits to see public records. The legislature said that a court could reduce the amount of attorneys' fees awarded, or award none at all, if the court decided both of the following:

- Given the state of the law as assessed by the court, and treating a public office as well-informed about the law, the law justified the public office's

refusal to comply.

- Viewed objectively, the public office's refusal to provide the records advanced the rationale underlying the legal authority supporting the public office's refusal to comply.

Those tests should make a public official's acting in "good faith" irrelevant; the test focuses only on the state of the law viewed objectively and from the perspective of someone who is well-informed about the law.

The Ohio Supreme Court's first interpretation of the legislature's rewrite of the Public Records Act's provisions for attorneys' fees came in 2009 when a Clermont County judge sent a letter to a local township police department saying that the police could not release a report of the arrest of a 14-year-old boy cited for aggravated arson. When an attorney asked for a copy of the report, the police chief said that "there is no information available."

On behalf of a client using a pseudonym, the attorney sued the police chief in the court of appeals to get the report.

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Madison firefighters obtain performance review of chief after initial denial

From The Columbus Dispatch

After filing a public-records lawsuit against the township, Madison Township firefighters have obtained a first draft of their chief's performance review, which rated him as "below requirements."

Township officials have called the draft inaccurate and initially tried to withhold it from the firefighters.

"After some additional research, we felt that, at the end of the day, it was going to be judged as a public document, so why prolong the inevitable?" said Larry James, the township's attorney.

Former Township Administrator Judy Edwards signed and dated the document in January and noted that the chief had refused to sign it. It gave Chief Clifford Mason 47 of 140 possible points.

Mason said he contacted the trustees to explain the evaluation.

Edwards said in a letter that she put the evaluation in the chief's personnel

file as a final copy. After that, trustees refused to renew Edwards' one-year contract.

They approved a positive review in February, the same day the firefighters union held a vote of no confidence in the chief. In that review, the chief ranked "exceeds expectations" and scored 94.5 out of 140 points.

"Edwards was very unfair because she spent a lot of time at the fire station listening to and believing untrue things that the firefighters said," said Township Administrator Larry Flowers.

Flowers, who hired many of the firefighters when he was fire chief, said he was disappointed that they are airing dirty laundry in public.

"We are trying to build bridges, and they don't want to work out issues, just get them in the newspaper," he said. "They have the best of everything and a multimillion-dollar budget, and yet

they're not happy just because they don't like the fire chief."

Each side has called the department a hostile work environment, but blames the other.

Members of International Association of Fire Fighters Local 2507 have said Mason is out of the office too much and doesn't interact with his employees enough. Mason is also the mayor of Hebron and president of the Ohio Fire Chiefs' Association.

Mason said he has tried to follow recommendations by recognizing firefighter accomplishments and posting more on the department blog.

The union sued in September in Franklin County Common Pleas Court, saying that the township was withholding the original performance review.

Union steward Anthony Robinette said the firefighters intend to settle out of court for attorney's fees.

Voters let city councils add to private sessions

From The Columbus Dispatch

Hilliard voters have given their city council the green light to keep the public out of some meetings.

New Albany, meanwhile, has become one of the first municipalities in central Ohio to expand the standard reasons for closed meetings, allowing economic development to be discussed behind closed doors.

"We have a new tool in our toolbox," Village Administrator Joe Stefanov said. But votes on development incentives still must take place in open meetings.

About 56% of New Albany voters decided to expand the reason for closed meetings, according to final, unofficial election results Nov. 3.

The village is working to fill a 2,000-acre business park, and companies sometimes want to be discrete when they're shopping for a new home, Deputy Administrator Debra Mecozzi said.

Closed meetings could come in handy during the early stages of negotiations for development incentives, she said.

Unless they add other reasons, government bodies in Ohio are allowed to hold closed meetings -- called executive sessions -- on topics such as personnel, litigation and real-estate transactions.

City or village council members can not vote or agree how they're going to vote while in executive session.

Hilliard was among the few cities that banned closed meetings, along with Columbus and Grove City.

About 52% of Hilliard voters elected to change that Nov. 3.

Brett Sciotto, president of Hilliard City Council, said he was pleased but surprised.

"There was a natural cynicism about elected officials being able to meet in private," he said.

Hilliard's new rules, which mostly follow state standards, require an attorney to be present to make sure officials discuss only what they're allowed.

Judge ordered to pay attorney fees

**By David Marburger
Baker & Hostetler**

The Ohio Supreme Court has ordered a Logan County probate judge to pay a Logan County woman's attorneys' fees because she persuaded the court of appeals to overturn the judge's order that barred anyone from copying a record filed in the woman's lawsuit.

Rosanna Miller sued in the Logan County probate court asking the court to appoint a guardian for her father against his will. As typically happens in those kinds of cases, the presiding judge, Michael Brady, ordered a psychologist to evaluate the father's mental competency and to present a report to the judge assessing the father's mental state. When he received the psychologist's report, Judge Brady ordered that no one could inspect it except in the presence of court officers, and that no one could copy it.

After writing letters to Judge Brady asking him to vacate the order, Miller sued the judge in the court of appeals under the Public Records Act, while her guardianship case before the judge proceeded. She asked the court of appeals to rule that Judge Brady's order violated the Public Records Act because the Act has no exemption for competency assessments in guardianship cases. Miller

also asked the court of appeals to award attorneys' fees to her under the Act.

The court of appeals ruled for Miller and announced that it would require Judge Brady to pay her attorneys' fees. Before the court of appeals decided how much Judge Brady would have to pay in attorneys' fees, Judge Brady moved to reconsider. He argued that the constitutional doctrine of separation-of-powers bars the Public Records Act from controlling judges' decisions to open or close court records when exercising the core judicial power to adjudicate matters that arise in cases over which the judges preside.

Without analyzing Judge Brady's constitutional argument, the court of appeals denied his motion to reconsider. Judge Brady then appealed to the Ohio Supreme Court.

The Ohio Supreme Court decided not to address Judge Brady's separation-of-powers argument. The court ruled that Judge Brady raised the argument too late. So the court affirmed the court of appeals' decision to require Judge Brady to pay Miller's attorneys' fees, and sent the case back to the court of appeals to decide how much to award in additional fees covering the appeal to the Ohio Supreme Court.

ENQUIRER

(continued from p. 1)

remanded the case, noting that the issue was "capable of repetition, but evading review" and that the question of attorney fees remained at issue.

Following the remand, the 12th Appellate District determined that Judge Bronson and Judge Heath improperly sealed the records because they failed to hear any evidence demonstrating that such an order was actually necessary. The judges also erred by not considering any alternatives to the blanket sealing order.

In deciding to award the Enquirer's attorney fees, the court noted: "[t]he Enquirer has established a sufficient public benefit. Further, [the judges] failed to comply with the Enquirer's records re-

quest for reasons that are invalid."

The decision has state wide ramifications because it establishes that courts cannot close public proceedings merely because a prosecutor asks that the proceeding be closed. This practice happens frequently, and often in high profile cases. Significantly, the decision does not say that proceedings can never be closed. It merely requires that courts perform their constitutionally mandated function which requires that they hear actual evidence supporting a closure request. The order requiring that Warren County pay the attorney fees gives that order teeth.

The decision is a clear victory for open access and the First Amendment.

ACLU to defend man for ‘abusing’ the Public Records Act

A northeast Ohio man is setting bad court precedents under the Public Records Act while gaining a reputation among some of the judiciary as a public nuisance.

Brian Bardwell, 28, of the Cleveland suburb of Strongsville has been abusing the Public Records Act, a three-judge panel of the Cuyahoga County Court of Appeals has concluded. The court ordered Bardwell to pay over \$1,000 in attorneys’ fees to the Cuyahoga County Prosecutor’s office after ruling against Bardwell in his suit against Cuyahoga County’s Board of Commissioners

to gain access to draft contracts prepared by lawyers for the commissioners. The contracts were prepared during the county’s negotiations with a private developer to build a “medical mart” in Cleveland. The medical mart -- akin to an exposition center for the manufacturers of medical equipment -- has been controversial.

The court found that Bardwell proceeded with his suit even after the county provided him with the drafts within

two weeks after he sued for them. He sought statutory damages under the Act, which the court denied by ruling that “drafts” are not public records, and because the attorney-client privilege allowed the county to withhold the drafts. The county released the draft contracts

upon reaching a final contract with the medical-mart developer.

On their own, the judges ordered Bardwell to show cause why the court should not sanction him for misusing the Public Records Act to gain the Act’s statutory damages. The court found that Bardwell had filed 19 suits under the Public Records

Act, typically seeking damages. In most of those suits, Bardwell has represented himself, as he did in suing the county commissioners. The court decided that Bardwell “willfully” sued the county commissioners “in bad faith.”

The court cited with approval a local government’s brief in a prior Bardwell case, accusing Bardwell of using the Act in a “gotcha” exercise for monetary gain. But the court added that it “cannot find with certainty that Bardwell,

through his numerous actions for mandamus, is attempting to employ the Ohio Public Records Act for his own personal gain,” but that such “a conclusion could be inferred.”

The court warned Bardwell that “the continued filing of original actions, under the guise of the Ohio Public Records Act, shall result in additional show cause hearings with the sole purpose of inquiry as to whether his conduct is frivolous” and therefore subject to “more drastic” sanctions. The court warned that it could bar Bardwell from filing more suits.

The American Civil Liberties Union has decided to represent Bardwell in an appeal to the Ohio Supreme Court. Bardwell is a founder of a nonprofit group called Citizens for Sunshine, which advocates enforcing the Public Records Act.

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ATTORNEY (continued, p. 5)

The court of appeals ruled against the police chief and ordered the township to pay attorneys’ fees to the client. The client appealed the fee award to the Ohio Supreme Court, arguing that the amount should have been much more.

The Ohio Supreme Court affirmed the award, while applying the new provisions in the Act for attorneys’ fees. The court decided that the legislature’s rewrite of the attorneys’ fees provisions did not change the pre-2007 analysis. The court decided that, since the police chief acted on advice of the township’s lawyer, the police chief acted reasonably and so should not be subjected to a full award of fees.

That reasoning effectively guts the new legislative language. Under the new language, a fee award should never rest on whether an official relied on a lawyer’s advice. The question is whether the lawyer’s view of the law comports with a well-informed interpretation of the existing state of the law. The court did not explore that question. Instead, it allowed the police chief’s apparently innocent state of mind to control. That apparently innocent state of mind should have been irrelevant.

ANALYSIS

(continued from p. 3)

tentially comparable hospitals, a memo outlining OSU’s goals for the transaction, and a preliminary business plan for acquiring and operating the hospital.

Although Ohio State had in fact acquired the hospital, it refused to release those records, arguing that they were OSU’s trade secrets.

Relying on the word “person” in Ohio’s trade secrets law, the Ohio Supreme Court ruled that state and local governments can, indeed, own trade secrets. The law allows a “person” to own trade secrets, and the court construed the word “person” broadly to include governmental entities. After privately inspecting the records, the court decided that most were not trade secrets, but that

part of the university’s business plan for acquiring the hospital was a trade secret.

In the case of Cincinnati school tests, it is hard to argue with the wisdom of preventing students from learning the questions in advance of taking the tests, it is equally hard to analyze the tests as the school district’s “trade secrets.” The school district isn’t in a “trade”; can’t go “out of business”; has no competitor in the field of creating or administering scholastic tests; and seeks nothing more than to shield the questions from the students, whom state law requires to attend the district’s schools. The students hardly comprise the school district’s competitors.

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