[Cite as *State ex rel. Bell v. London*, 2011-Ohio-3914.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE ex rel. GEORGE F. BELL,	:	
		CASE NOS. CA2010-11-027
Relator-Appellant,	:	CA2010-11-029
	:	O P I N I O N
- vs -		8/8/2011
	:	
CITY OF LONDON, et al.,	:	
Respondents-Appellees.	:	

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CVH20090267

William E. Walker, P.O. Box 192, Massillon, Ohio 44648, for relator-appellant

Zahid H. Siddiqi, London City Law Director, 102 South Main Street, P.O. Box 724, London, Ohio 43140, for respondents-appellees, City of London, Mayor David Eades, and Police Chief David Wiseman

Edwin Davila, 15 Federal Avenue, Massillon, Ohio 44646-0564, nonparty appellant, pro se

PIPER, J.

{¶1} Relator-appellant, George F. Bell, appeals from a decision of the Madison County Common Pleas Court denying his claim for civil forfeiture under R.C. 149.351(B)(2) against respondents-appellees, the city of London, London's Mayor, David Eades, and London's Chief of Police, David Wiseman, for their alleged, improper and unlawful

destruction or disposition of certain public records, namely, the London Police Department's "'911 style' reel-to-reel tapes" from 1994 to 1999. Nonparty appellant, Edwin Davila, appeals from the trial court's order denying his motion to intervene in the action.

{¶2} In January 2009, Bell sent a public records request to the London Police Department in care of London's then-Chief of Police, Peter Tobin, stating that Bell was "conducting a survey concerning the trends of response times for Ohio's safety forces over the years[,]" and that it was his understanding that the London Police Department "used a reel-to-reel audio recording device" that "recorded telephone calls and radio traffic on both a primary and back-up set of 24 hour reel-to-reel tapes" that "were routinely changed at midnight." Bell requested access to the police "departments [sic] collection of the above described reel-to-reel tapes[,]" "includ[ing] both the primary and back-up tapes that your department used over the years during the time that such a tape recording system was used."

{¶3} London Law Director Zahid Siddiqi sent Bell a letter informing him that Chief Tobin was leaving his position as London's chief of police that very day, and therefore Bell's public records request was being forwarded to the city's acting chief of police, Sergeant David Litchfield. Siddiqi's letter asked Bell, "[i]n the meantime," to be "more specific" in his public records request "by identifying a range of dates you are interested in reviewing," in order to "better allow us to respond to your request." Several days later, London Police Dispatcher James D. Spriggs sent Bell a letter informing him that "[i]t has been some time since we used the reel-to-reel system for recording" and that the city currently has "a digital system that utilizes a hard drive for storage." Dispatcher Spriggs reiterated Law Director Siddiqi's request that Bell be more specific regarding his public records request, stating "we would need much more definite parameters on dates and times if you would like us to fulfill your request."

{¶4} In February 2009, Bell made a second public records request of the city's police department, addressed this time to London's acting chief of police, Sgt. Litchfield, explaining that he was "interested in reviewing the entire collection of audio tapes used by your reel-to-reel recording system." Bell requested copies of the department's "Retention Schedules (Form RC-2)," "Certificates of Records Disposal (Form RC-3)" and "Applications of One-Time Disposal For [sic] Obsolete Records (Form RC-1)" "that were sent to both the Ohio Historical Society [OHS] and Auditor of State." Bell also requested that any copies sent to him of the city's retention schedules and disposal applications "bear the stamp" of the OHS and the state auditor to show "that the forms were indeed received by those offices." The certified mail return on Bell's second public records request, signed by a "Jeannie Porter," shows that London received the request several days after Bell had sent it to the city. Dispatcher Spriggs claims that he never received Bell's second public records request, and there is no evidence that appellees replied in any matter to that request.

{¶5} In July 2009, Bell filed in the Madison County Common Pleas Court a verified complaint seeking a writ of mandamus ordering appellees to comply with their obligations under the Ohio Public Records Act in R.C. 149.43, and, in the alternative, a civil forfeiture award of $1,000 for each violation of Ohio's records-retention law in R.C. 149.351 as a result of appellees' failure "to maintain the people's records [i.e., the reel-to-reel 911 tapes] as required by law." Appellees filed an answer to Bell's complaint, admitting that they no longer had the reel-to-reel 911 tapes, but denying that they failed to comply with the procedures set forth in R.C. 149.39 before destroying or disposing of said tapes, including the requirement that they notify OHS before destroying or disposing of such records.

{¶6} Several weeks prior to the scheduled hearing on his claims, Bell submitted a witness list that included the names of two persons, one of whom was Davila. Appellees moved to exclude the testimony of those witnesses at the upcoming trial on the ground that

Bell failed to disclose the witnesses' names in a timely manner. Shortly before the scheduled hearing on Bell's claims, Davila moved to intervene in the action either as a matter of right under Civ.R. 24(A) or with the court's permission under Civ.R. 24(B). The trial court granted appellees' motion to exclude the testimony of Bell's two proposed witnesses, including Davila, finding that appellees were prejudiced as a result of Bell's untimely disclosure of the witnesses' names. However, the trial court denied Davila's motion to intervene in the action, finding that it was "a poorly disguised effort to circumvent the discovery conundrum created by the untimely disclosure of witnesses."

{¶7} After holding a hearing on Bell's mandamus and civil forfeiture claims, the trial court entered judgment in favor of appellees. The trial court initially determined that for purposes of R.C. 149.351, Bell "was *allegedly aggrieved* at the time he filed the within claims" and that he was not required to prove that he had a valid purpose for seeking the reel-to-reel 911 tapes in order to bring his claims against appellees for their alleged improper and unlawful destruction of those public records. (Emphasis added.) However, the trial court subsequently determined that appellees had "substantially complied" with R.C. 149.351 by disposing of the reel-to-reel 911 tapes under the rules adopted by London's records commission as provided for under R.C. 149.39, and therefore Bell was "not *actually aggrieved* because he is not entitled to public records that were properly and lawfully destroyed[.]" (Emphasis added.)

{¶8} Bell now appeals, assigning the following as error:

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED TO BELL'S PREJUDICE WHEN IT ERRONEOUSLY FOUND THAT 'SUBSTANTIAL COMPLIANCE' IS A SUBSTITUTE FOR 'ACTUAL COMPLIANCE' UNDER THE LAW."

{¶11} Assignment of Error No. 2:

{¶12} "NOTWITHSTANDING THE FACT THAT THERE IS NO SUBSTITUTE FOR 'ACTUAL COMPLIANCE'; [sic] THE TRIAL COURT ERRED TO BELL'S PREJUDICE WHEN IT ERRONEOUSLY FOUND THAT THERE WAS 'SUBSTANTIAL COMPLIANCE' – BECAUSE THERE IS NO EVIDENCE THAT THE LONDON RECORDS COMMISSION APPROVED THE DESTRUCTION OF THE RECORDS AT ISSUE OR NOTIFIED THE STATE ARCHIVEDS AS REQUIRED BY LAW."

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED TO BELL'S PREJUDICE WHEN IT *SUA SPONTE* RAISED THE AFFIRMATIVE DEFENSE UNDER THE CIVIL RULES."

{¶15} We shall address Bell's assignments of error jointly, since they are interrelated.

{¶16} Bell argues the trial court erred in finding that appellees could avoid liability under R.C. 149.351 for destroying or disposing of the reel-to-reel 911 tapes merely by showing that they "substantially complied" with R.C. 149.39's requirements for destroying or disposing of such public records. Bell asserts that in order to avoid such liability, appellees were required to show that they "strictly" or "actually" complied with the requirements in that section. Bell also argues that even if appellees could avoid liability simply by showing that they substantially complied with R.C. 149.39's requirements, the trial court erred in finding that appellees had done so in this case. Lastly, Bell argues the trial court erred by raising, sua sponte, what Bell characterizes as the "affirmative defense" of substantial compliance, because appellees failed to raise substantial compliance as an affirmative defense in their answer and thus waived it. Therefore, Bell requests that we vacate or reverse the trial court's judgment entered against him and in favor of appellees on his civil forfeiture claim. We decline to do so.

{¶17} The reel-to-reel 911 tapes in question are "records" as defined in R.C. 149.011(G), since they qualify as a "document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." The reel-to-reel 911 tapes are also "public records" as defined in R.C. 149.43(A), since they are "records kept by any public office, including, a *** city[,]" and do not fall within any of the exceptions listed in R.C. 149.43(A)(1)(a)-(aa). See, also, *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d 374, 376, 1996-Ohio-214 (911 tapes are generally not exempt from disclosure).

{¶18} R.C. 149.351 provides:

{¶19} "(A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code.

{¶20} "(B) Any person who is aggrieved by a violation or threatened violation of division (A) may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:

{¶21} "(1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;

{¶22} "(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action."

{¶23} R.C. 149.39 provides:

{¶24} "There is hereby created in each municipal corporation a records commission composed of the chief executive or the chief executive's appointed representative, as chairperson, and the chief fiscal officer, the chief legal officer, and a citizen appointed by the chief executive. The commission shall appoint a secretary, who may or may not be a member of the commission and who shall serve at the pleasure of the commission. The commission may employ an archivist or records manager to serve under its direction. The commission shall meet at least once every six months and upon call of the chairperson.

{¶25} "The functions of the commission shall be to provide rules for retention and disposal of records of the municipal corporation and to review applications for one-time disposal of obsolete records and schedules of records retention and disposition submitted by municipal offices. The commission may dispose of records pursuant to the procedure outlined in this section. The commission at any time may review any schedule it has previously approved and for good cause shown may revise that schedule.

{¶26} "When the municipal records commission has approved any application for one-time disposal of obsolete records or any schedule of records retention and disposition, the commission shall send that application or schedule to the Ohio historical society for its review. The Ohio historical society shall review the application or schedule within a period of not more than sixty days after its receipt of it. Upon completion of its review, the Ohio historical society shall forward the application for one-time disposal of obsolete records or the schedule of records retention and disposition to the auditor of state for the auditor's approval or disapproval. The auditor shall approve or disapprove the application or schedule within a period of not more than sixty days after receipt of it. Before public records are to be disposed of, the commission shall inform the Ohio historical society of the disposal through the submission of a certificate of records disposal and shall give the society the opportunity for a

period of fifteen business days to select for its custody those public records that it considers to be of continuing historical value."

{¶27} R.C. 149.351(A) prohibited appellees from destroying or disposing of the reel-to-reel 911 tapes in question, except as provided by law or under the rules adopted by London's records commission as provided for under R.C. 149.39. R.C. 149.39 permitted London's records commission to destroy or dispose of those tapes "pursuant to the procedure outlined in th[at] section." R.C. 149.351(B)(2) allows any person who is "aggrieved" by a violation or threatened violation of R.C. 149.351(A) to commence a civil action to recover a $1,000 civil forfeiture award plus reasonable attorney's fees for each violation. See *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶28-44 (city's destruction of 850 compensatory-time sheets constituted 850 "violations" as that term is used in R.C. 149.351).

{¶28} "Under its normal and customary meaning, an 'aggrieved' person is defined as one 'having legal rights that are adversely affected; having been harmed by an infringement of legal rights.'" *Walker v. The Ohio State University Bd. of Trustees*, Franklin App. No. 09AP-748, 2010-Ohio-373, ¶25, quoting Black's Law Dictionary (9th Ed.2009) 77. This court has held that a person is "aggrieved" for purposes of R.C. 149.351(B) "where the improper disposition of a record infringes upon a person's legal right to scrutinize and evaluate a governmental decision." *State ex rel. Sensel v. Leone* (Feb. 9, 1998), Butler App. No. CA97-05-102, reversed on other grounds in 85 Ohio St.3d 152, 1999-Ohio-446.

{¶29} Bell argues in his first and second assignments of error that appellees failed to present evidence showing that they complied with the requirements set forth in R.C. 149.39, because (1) "there is no evidence that the London Records Commission 'approved' any applications for one-time disposal of obsolete records or any schedules of records retention and disposition[,]" (2) "there was no evidence presented by anyone with first-hand knowledge

that any such applications or schedules were sent to the [OHS] for review[,]" and (3) "not a shred of evidence was presented showing that any certificates of records disposal ever existed or were ever submitted to [OHS] as required." Bell asserts that as a result of appellees' failure "to comply with the 'approval' and 'notice' requirements mandated by R.C. 149.39[,]" "their disposal of the records at issue [i.e., the reel-to-reel 911 tapes] was unlawful and is subject to forfeiture pursuant to R.C. 149.351(B)(2)." We find Bell's assertions unpersuasive.

{¶30} First, despite Bell's assertion to the contrary, there was sufficient evidence in the record to support the trial court's finding that London's records commission approved a records retention schedule for the city's police department. Mayor Eades, who serves as the chairman of London's records commission by virtue of R.C. 149.39, testified that the city's records commission adopted a "schedule of continuing records disposal" in April 1993 or April 1994 that followed the suggested records retention schedule for "Fire and Police Records" found in the Ohio Municipal Records (Rev.1990), p. 38-42, published by the OHS. The OHS's 1990 manual, which was admitted into evidence, recommended that "Radio/Phone Calls Audio Recording Tape" records be retained for a period of "30 days," after which the tape can be "erase[d] and reuse[d,] provided no action [is] pending." Also admitted into evidence was an April 28, 1994 memorandum from Sgt. Litchfield to Mayor Eades, stating that records of "Radio/Phone Tapes" would be stored on "recording tape" and retained for a "period" of "30 days."

{¶31} Second, there was sufficient evidence presented to support a finding that London's records commission sent the records retention schedule that it approved to the OHS for that entity's review and approval. Mayor Eades testified that he "believe[d]" the records retention schedule was sent to the OHS by London's auditor and records commission's secretary, Kathy McClellon. Mayor Eades acknowledged at one point in his

testimony that he was unwilling to "say here today whether th[e] [records retention] schedule was sent to the [OHS] for their review and approval[,]" because he was "not the one that mailed it[.]" However, we read this part of Mayor Eades' testimony as meaning that he was unwilling to say with *absolute certainty* that the records retention schedule was sent to the OHS, since he was not the person who *actually* mailed it, because Mayor Eades, as head of the city's records commission, was in a position to know whose responsibility it was to actually mail the records retention schedule to the OHS. Thus, Mayor Eades' testimony that he "believe[d]" McClellon had done so was sufficient to establish that London's records commission complied with R.C. 149.39's requirement that it send any records retention schedule it approves to the OHS for its approval.

{¶32} Bell is correct, however, when he asserts that there is no evidence that London's records commission created any certificates of records disposal for the reel-to-reel 911 tapes, let alone, submitted them to the OHS. Moreover, the trial court's use of the substantial compliance standard in this case is problematic, since application of that standard generally has been limited to cases involving the criminal, juvenile, or civil rules of procedure, see, e.g., *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶38-45; and *In the Matter of C.K. Alleged Delinquent Child*, Washington App. No. 07CA4, 2007-Ohio-3234, ¶15, or provisions of the Ohio Administrative Code. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶27-28; and *State ex rel. Potten v. Kuth*, 61 Ohio St.2d 321, paragraph three of the syllabus.

{¶33} In *Burnside*, the Ohio Supreme Court discussed the applicability of the substantial compliance standard in cases involving the determination of the admissibility of alcohol-test results regulated by Ohio Adm.Code 3701–53–05:

{¶34} "[W]e have observed that 'there is leeway for substantial, though not literal,

compliance with such regulations.' [*State v.*] *Plummer* (1986), 22 Ohio St.3d [292] at 294 ***. The state must therefore establish that it substantially complied with the alcohol-testing regulations to trigger the presumption of admissibility. Our conclusion that the state must establish substantial compliance rather than strict compliance, however, does not relieve the state of its burden to prove compliance with the alcohol-testing regulations, but rather defines *what compliance is.*

{¶35} "***

{¶36} "'[I]f we were to agree * * * that any deviation whatsoever from th[e] regulation rendered the results of a [test] inadmissible, we would be ignoring the fact that strict compliance is not always realistically or humanly possible.' *Plummer,* 22 Ohio St.3d at 294 ***. Precisely for this reason, we concluded in [*State v.*] *Steele,* 52 Ohio St.2d at 187 that rigid compliance with the Department of Health regulations is not necessary for test results to be admissible. [Id.] at 187 *** (holding that the failure to observe a driver for a 'few seconds' during the 20–minute observation period did not render the test results inadmissible). *To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in Plummer to excusing only errors that are clearly de minimis.* Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as 'minor procedural deviations.' *State v. Homan* (2000), 89 Ohio St.3d 421, 426[.]" (Emphasis added.) *Burnside* at ¶27 and 34.

{¶37} The problem, then, with using the substantial compliance standard in determining whether London's records commission complied with R.C. 149.351 and 149.39 is that, potentially, it may usurp not just an administrative agency, but the General Assembly, itself. Thus, use of the substantial compliance standard generally should be limited to errors

that are clearly de minimis or that involve minor procedural deviations. Therefore, we disagree with the trial court's use of the substantial compliance standard in evaluating London's records commission's adherence to the requirements set forth in R.C. 149.39. However, in the very narrow context of the specific facts of this case, we agree with the trial court's ultimate conclusion that the procedures employed by the city's records commission did not cause injury to Bell so as to render him an aggrieved party for purposes of R.C. 149.351(B), and that because Bell was not "actually aggrieved" by the destruction of the reel-to-reel 911 tapes he requested, appellees should not be held liable to him for a civil forfeiture award under R.C. 149.351(B)(2).

{¶38} In order for a person to recover a $1,000 civil forfeiture award plus reasonable attorney fees under R.C. 149.351(B)(2) for a public entity's or public official's improper destruction or disposition of a record, a person must have been "aggrieved by the violation or threatened violation." To be "aggrieved" for purposes of R.C. 149.351(B), a person must have been harmed by an infringement of his legal rights, *Walker*, 2010-Ohio-373, ¶25, or by the improper disposition of a record that infringes upon his or her legal right to scrutinize and evaluate a governmental decision. *Sensel*, Butler App. No. CA97-05-102 at *6.

{¶39} In his action against appellees, Bell sought to exploit the failure of London's records commission to strictly comply with the requirements in R.C. 149.39, including the requirement that the city's records commission submit a certificate of records disposal to the OHS regarding the police department's reel-to-reel 911 tapes *before* any of the tapes were reused and thus erased. However, the practice of reusing and thereby erasing such tapes every 30 days, provided no action was pending, was *expressly approved by the OHS, itself*. See Ohio Municipal Records (Rev.1990) at page 42. The evidence showed that London's records commission adopted a records retention schedule that followed OHS's manual. We agree with the trial court that the OHS and the state auditor "would have certainly approved"

the schedule had they received it, and there was evidence presented that the records commission's secretary sent the records retention schedule to the OHS. Following OHS's suggested procedures is tantamount to obtaining OHS's approval, within the spirit of R.C. 149.39. Therefore, we agree with the trial court that under the facts and circumstances of this case, it was reasonable for appellees to expect that if they followed the OHS's suggested protocols, they were acting properly and thus would not be held liable as a result.

{¶40} Furthermore, in light of the fact that appellees followed the established policies of OHS regarding the reel-to-reel 911 tapes, requiring London's records commission to create certificates of records disposal for the tapes after they had been reused and thus erased, thereby destroying any information recorded on them (as permitted by OHS's suggested records retention policy), and then to send said certificates to the OHS, would have been tantamount to requiring the commission to perform a vain or useless act, which the law generally does not require parties to perform. *Showe Mgt. Corp. v. Moore*, Licking App. No. 08 CA 10, 2009-Ohio-2312, ¶42. It is also clear that the procedural irregularities that Bell seeks to rely on in support of his claim for a civil forfeiture award under R.C. 149.351(B)(2) did not prevent Bell from receiving the records he claims he wanted. Technical inaccuracy on the part of London's records commission does not render Bell "aggrieved" for purposes of R.C. 149.351(B) where it is clear that Bell suffered no prejudice solely as a result of those inaccuracies.

{¶41} Even if appellees should be faulted for failing to strictly comply with the requirements of R.C. 149.351(A) and 149.39, Bell still would not have been entitled to prevail on his civil forfeiture claim under R.C. 149.351(B)(2). Bell acknowledged at trial that his January 14, 2009 letter requesting access to the London Police Department's reel-to-reel 911 tapes was actually authored by himself and three other persons, including Davila and Timothy Rhodes. Bell, Davila and Rhodes have brought lawsuits against a number of

municipalities across this state whose police departments have disposed of their antiquated reel-to-reel 911 tapes, allegedly, in violation of the procedures for destroying such records set forth in R.C. 149.351(A) and 149.39. See, e.g., *State ex rel. Davila v. East Liverpool*, Columbiana App. No. 10 CO 16, 2011-Ohio-1347; *State ex rel. Davila v. Bucyrus*, Crawford App. No. 3-10-20, 2011-Ohio-1731; and *Rhodes v. New Philadelphia*, Tuscarawas App. No. 2009AP020013, 2010-Ohio-1730, reversed by the Ohio Supreme Court in Slip Opinion No. 2011-Ohio-3279.

{¶42} Bell, Davila and Rhodes refer to themselves as the "public records police," and relying on the civil forfeiture provision in R.C. 149.351(B)(2) that awards an "aggrieved" person $1,000 for each violation of that section, have sought to become some of the highest paid "police" in Ohio. For example, Bell asserted at trial that by his count, appellees committed 22,077 violations under R.C. 149.351 from January 1, 1994 to July 1, 1999, and therefore he was entitled to an award of $1,000 for each violation, for a total award of $22,077,000.[1] In *State ex rel. Davila v. Bucyrus*, 2011-Ohio-1731, ¶16, Davila was awarded $1,409,000 for the city of Bucyrus' alleged, improper destruction or disposition of 1,409 reel-to-reel 911 tapes, following that city's failure to respond to Davila's request for admissions. Id. at ¶22-32. Davila's award was reversed by the Third District Court of Appeals, which held that the trial court abused its discretion by not granting Bucyrus' Civ.R. 36(B) motion for relief from default admissions, and remanded the case to the trial court for further proceedings. Id. at ¶40.

{¶43} The evidence presented in this case shows that like the police departments in

1. Bell arrived at the figure of 22,077 violations by taking the number of days from January 1, 1994 through June 30, 1999, which is approximately 2,007 days, and multiplying that number by 11, which represents the number of "channels" on each tape; Bell contends that each channel constitutes a separate violation of R.C. 149.351(A). Bell then multiplied the 22,077 alleged violations by $1,000, which is the amount of civil forfeiture to be awarded under R.C. 149.351(B)(2) for each violation of R.C. 149.351(A) and 149.39, and claimed that he was entitled to a total forfeiture award from appellees of $22,077,000.

the cities of Bucyrus, East Liverpool, and New Philadelphia, the London Police Department used a reel-to-reel recording system to record all 911 emergency calls made to the department and the radio communications between the department's officers. The London Police Department used the reel-to-reel system from January 1, 1994 to July 1, 1999, at which time it was replaced by a digital recording system. During the period in which it used the reel-to-reel system, the London Police Department owned 31 reel-to-reel tapes. The department changed these tapes daily at midnight and used them on a rotating basis, with each tape being used once per month and with any recording on the tape being erased each time the tape was reused. Bell asserts that every time appellees allowed the recording on one of the reel-to-reel tapes to be erased without complying with R.C. 149.39's requirements for destroying or disposing of such records, they violated R.C. 149.351(A), thereby entitling him to a $1,000 civil forfeiture award for each improperly destroyed record.

{¶44} In *State ex rel. Davila v. East Liverpool*, 2011-Ohio-1347 at ¶22-30, the Seventh District Court of Appeals upheld a trial court's decision rejecting Davila's public records request for access to the reel-to-reel 911 tapes recorded over a period of 2,191 days by the city of East Liverpool's police department. The Seventh District held that Davila's request was "overbroad and therefore unenforceable." In support of its decision, the Seventh District cited the Tenth District Court of Appeals' decision in *State ex rel. Zauderer v. Joseph* (1989), 62 Ohio App.3d 752, and the Ohio Supreme Court's decisions in *State ex rel. Glasgow v. Jones* (2008), 119 Ohio St.3d 391, 2008–Ohio–4788, ¶ 16–19; and *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010–Ohio–5711, ¶3. The *Davila* court found that these decisions "stand for the proposition that a request can become so voluminous that it is overbroad and unenforceable." *Davila* at ¶28.

{¶45} The Seventh District's reliance on *Zauderer*, *Glasgow*, and *Dehler* may be questionable, however, as those cases involve instances in which the requester sought a writ

of mandamus under R.C. 149.43 rather than a civil forfeiture under R.C. 149.351. More importantly, unlike the situations in *Davila* and this case, there was no evidence in *Zauderer*, *Glasgow*, and *Dehler* that the records sought by the requester did not exist. In *Davila* and this case, the records Davila and Bell requested no longer exist, and thus the custodians of the records being sought, i.e., the East Liverpool Police Department in *Davila* and appellees in this case, arguably, may not be entitled to avail themselves of the defense that Davila's and Bell's public records requests were "overbroad and unenforceable," because while Davila's and Bell's requests in their respective actions may, indeed, have been overbroad, that fact does not address any failure of the police departments in East Liverpool and London to maintain their records as required by R.C. 149.351 and 149.39.

{¶46} While this case has been pending on appeal, the Ohio Supreme Court issued its decision in *Rhodes v. New Philadelphia*, Slip Opinion No. 2011-Ohio-3279. In that case, Timothy Rhodes made a public records request of the city of New Philadelphia's police department, asking for access to the reel-to-reel 911 tapes that recorded all the department's daily telephone calls and radio dispatches from 1975 through 1995. Id. at ¶2. Upon learning that New Philadelphia had erased its reel-to-reel 911 tapes 30 days after each recording was made without having established an approved records-retention schedule in violation of R.C. 149.351(A), Rhodes filed a complaint for civil forfeiture under R.C. 149.351(B), claiming that he was entitled to a $1,000 civil forfeiture award for each improperly destroyed 24-hour recording. Id. at ¶4.

{¶47} Rhodes testified at his trial that "he had requested the tapes because he planned to listen to them to see how the police department handled dispatch calls." Id. at ¶6. However, Rhodes admitted that, in making a similar public records request of the city of Dover, he had stated that "he would like to request certain public records only if the city did not have an approved record-disposition schedule." Id. The jury returned a unanimous

verdict in favor of New Philadelphia, finding that Rhodes had not been aggrieved by the improper destruction of the reel-to-reel 911 tapes, and the trial court entered judgment in favor of New Philadelphia.

{¶48} The Fifth District Court of Appeals reversed the jury's verdict, finding that the trial court should not have allowed the issue of whether Rhodes was "aggrieved" for purposes of R.C. 149.351 to go to the jury, "because 'an aggrieved party is any member of the public who makes a lawful public records request and is denied those records.'" Id. at ¶12, quoting *Rhodes*, 2010-Ohio-1730 at ¶32. Upon determining that Rhodes was entitled to summary judgment on the question of whether he was an aggrieved party for purposes of R.C. 149.351, the Fifth District remanded the matter for a new trial to determine the number of violations committed by New Philadelphia. *Rhodes* at ¶12.

{¶49} The Ohio Supreme Court reversed the Fifth District's decision, finding that for purposes of R.C. 149.351, the term "aggrieved" was to be defined as meaning that a public official's or public entity's improper conduct in failing to maintain a record "must have infringed upon [the requester's] legal rights." Id. at ¶18. The court found that since the General Assembly provided the right of civil forfeiture under R.C. 149.351 only to persons who were "aggrieved" by a public official's or public entity's improper conduct in destroying a record, and not to just "any person," "the General Assembly did not intend to impose a forfeiture when it can be proved that the requester's legal rights were not infringed, because the requester's only intent was to prove the non-existence of the records." Id. at ¶23. The *Rhodes* court explained:

{¶50} "The requirement of aggrievement indicates that a forfeiture is not available to 'any person' who has made a request and discovered that the records were not available due to the public office's violation of R.C. 149.351; it is available only to a person who made a request with the goal being to access the public records. If the goal is to seek a forfeiture,

then the requester is not aggrieved. The presumption, however, is that a request for public records is made in order to access the records. This presumption is evident in other cases in which this court has construed associated terms of the public-records act. See, e.g., *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244 ***; *State ex rel. Morgan v. New Lexington,* 112 Ohio St.3d 33, 2006-Ohio-6365 ***." Id. at ¶24.

{¶51} The *Rhodes* court stated that a public records request cannot be denied merely on the basis that the requester intended to use the records for "a bad purpose," explaining at ¶25-27:

{¶52} "In *Morgan,* this court held that the relator was entitled to access public records that related to her discharge from employment with the city of New Lexington due to her alleged falsification of official records and misappropriation of funds. Interpreting the phrase 'any person,' as used in R.C. 149.43, we held that neither the moral quality nor the purpose of the requester is relevant to the validity of her public-records request. Id. at ¶ 54 ***. Even though the records related to her alleged malfeasance, and even though she may very well have wanted to use the records for a bad purpose, it is clear that the relator actually wanted the records. Likewise, in *Kish,* it is clear that the respondents actually wanted the requested records, which documented their unused compensatory time, so they could use them in their suit against their previous employer, the city of Akron. *Kish* at ¶6-8 ***.

{¶53} "Like the relator in Morgan, Rhodes was under no obligation to explain his reason for wanting the public records in order for his request to be valid. What distinguishes Rhodes's case from cases such as *Morgan* and *Kish* is the simple fact that Rhodes did not actually want the records.

{¶54} **"**When a party requests access to public records with the specific desire for access to be denied, it cannot be said that the party is using the request in order to access

public records; he is only feigning that intent. Here, Rhodes feigned his intent to access public records when his actual intent was to seek forfeiture awards. Consequently, the jury correctly concluded that Rhodes was not aggrieved by the destruction of the records he had requested. The trial court's denial of Rhodes's motion for summary judgment on the issue of aggrievement and the entry of the jury's verdict in favor of New Philadelphia therefore did not contain reversible error."

{¶55} The *Rhodes* court concluded by stating:

{¶56} "The destruction of a public record in violation of R.C. 149.351(A) gives rise to a forfeiture if the requester was 'aggrieved' by the destruction. If a public office is able to establish that the requester did not actually want the records and instead wanted the request to be denied, then a finder of fact may conclude that the requester was not aggrieved by the destruction. New Philadelphia was able to establish through competent credible evidence that Rhodes's objective was not to obtain the records he requested but to receive notice that the records had been destroyed in violation of R.C. 149.351(A) so that he could seek forfeiture awards. Because Rhodes was not aggrieved by New Philadelphia's improper destruction of the recordings on its reel-to-reel tapes, we reverse the decision of the Fifth District Court of Appeals." Id. at ¶28.

{¶57} *Rhodes* indicates that the determination as to whether a person who requests access to records actually wanted the records, or instead merely wanted proof that the records did not exist and had been destroyed or disposed of in violation of R.C. 149.351(A), so that the requester can collect a $1,000 civil forfeiture award under R.C. 149.351(B)(2) for each record so destroyed or disposed of, is a determination that must be made by the trier of fact. Indeed, the *Rhodes* court stated that the presumption is that "a request for public records is made in order to access the records." Id. at ¶24. However, the facts and circumstances of this case overwhelmingly indicate that Bell did not actually want the reel-to-

reel tapes he requested, but instead, merely wanted proof that the records no longer existed and had been destroyed or disposed of in violation of RC. 149.351(A) and 149.39, so that Bell could obtain a $1,000 civil forfeiture award for each record so destroyed or disposed of.

{¶58} For example, Bell's claim that he was seeking to review the reel-to-reel 911 tapes to help mount opposition to a sales tax in his home county, which was earmarked to fund an emergency dispatch system in that county, was highly implausible in light of the facts that Bell acknowledged at trial that he did not know if London imposed a sales tax to pay for its emergency dispatch service, and that Bell never asked to see anything with regards to London's *current* emergency dispatch system.

{¶59} Also, when the city's law director and later the city's emergency dispatcher asked Bell to narrow his request to facilitate gathering the information Bell sought, Bell responded by "clarifying" that he was requesting access to the London Police Department's "entire collection" of such tapes, which, of course, did nothing to narrow his request. This is inconsistent with Bell acknowledging at trial that he and Davila wanted to see only a random sample of 10% of the tapes—a sample that Bell and Davila could have chosen from the 2,007 days between January 1, 1994 and July 1, 1999 without first seeing the entire collection of tapes. Bell never offered any explanation as to why he wanted access to the entire collection of tapes when he merely needed a random sample of 10% of the tapes. Once again, the obvious reason for not choosing the random sample beforehand, and instead, requesting the entire collection of tapes was to increase the size of the civil forfeiture award he hoped to obtain from appellees.

{¶60} Furthermore, when Bell requested copies of the department's retention schedule (Form RC-2), certificates of records disposal (Form RC-3), and applications of one-time disposal for obsolete records (Form RC-1) that had been sent to both the OHS and state auditor, he also requested that any copies of the forms sent to him "bear the stamp" of the

OHS and state auditor to show that the forms were, in fact, received by those offices. These requests provide additional evidence that strongly indicates that Bell did not actually want the records and documents he requested, but instead, merely wanted proof that they did not exist and that the records had been destroyed or disposed of in violation of R.C. 149.351(A) and 149.39.

{¶61} In light of the foregoing, the trial court properly concluded that Bell was not an "aggrieved" person for purposes of R.C. 149.351(B), and thus was not entitled to a civil forfeiture award under R.C. 149.351(B)(2).

{¶62} Accordingly, Bell's first, second, and third assignments of error are overruled.

{¶63} Davila's sole assignment of error states:

{¶64} "THE TRIAL COURT IN ITS SEPTEMBER 17, 2010 JUDGMENT ABUSED ITS DISCRETION AND VIOLATED DAVILA'S DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTION WHEN IT DENIED HIS MOTION TO INTERVENE BUT THEN ENTERED A VITRIOLIC JUDGMENT ON OCTOBER 28, 2010 AGAINST RELATOR THREE DAYS BEFORE THE NOVEMBER, 2010 ELECTION CRITICIZING DAVILA WHERE THERE WAS NO EVIDENCE PRESENT AT TRIAL TO JUSTIFY THE CRITICISM."

{¶65} Davila argues the trial court deprived him of his due process rights by denying his motion to intervene in Bell's action as a matter of right under Civ.R. 24(A). Davila also argues the trial court abused its discretion by not allowing him to intervene in Bell's action with the trial court's permission under Civ.R. 24(B). We disagree with both arguments.

{¶66} Both a motion to intervene in an action as a matter of right under Civ.R. 24(A) and a motion to intervene in an action with the trial court's permission under Civ.R. 24(B) must be filed in a timely manner. Civ.R. 24(A) and (B). The decision as to whether a motion to intervene has been timely filed is a matter left to sound discretion of the trial court, *S. Ohio*

Coal Co. v. Kidney (1995), 100 Ohio App. 3d 661, whose decision on the matter will not be overturned absent an abuse of discretion. *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St. 3d 501, 1998-Ohio-192.

{¶67} Factors to considered in determining timeliness include (1) the point to which the action in which intervention is sought has progressed, (2) the purpose for which intervention is sought, (3) the length of time between the point at which the party who seeks to intervene knew or reasonably should have known of his interest in the case, (4) any prejudice to the original parties resulting from the proposed intervenor's failure to seek to intervene earlier in the proceedings, and (5) the existence of unusual circumstances militating against or in favor of the proposed intervention. *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St. 3d 118, 2002-Ohio-3748, ¶48.

{¶68} Here, Davila did not seek to intervene in Bell's action until less than a week before trial. Davila's purpose in seeking to intervene was to make an argument concerning Bell's standing to bring the action—an argument that the trial court rejected, and an issue that has not been raised in this appeal. Moreover, we agree with the trial court's observation that it appears Davila sought to intervene in the action merely as a way of circumventing the trial court's refusal to allow Bell to name him as one of Bell's potential witnesses at trial, after Bell failed to timely disclose Davila's name to appellees. Under these circumstances, the trial court did not deny Davila his due process rights by overruling his motion to intervene as a matter of right in Bell's action under Civ.R. 24(A), nor did the trial court abuse its discretion by overruling Davila's motion for permissive intervention under Civ.R. 24(B).

{¶69} Davila also claims that the trial court was biased and prejudiced against him. However, that claim is not properly before us, since "[o]nly the Chief Justice of the Ohio Supreme Court or his designee has the authority to determine a claim that a common pleas court judge is biased or prejudiced." *Ford Motor Credit Co., L.L.C. v. Ryan & Ryan, Inc.*,

2010-Ohio-2905, citing *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442.

{¶70} In light of the foregoing, Davila's sole assignment of error is overruled.

{¶71} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.