In the Supreme Court of Ohio

State ex rel. MARCELLUS GILREATH,	:	Case No. 2022-0824
Relator,	:	
	:	Original Action in Mandamus
vs.	:	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et al.,	:	
Respondents.	:	

RESPONDENTS' MERIT BRIEF

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I. INTRODUCTION

Due to a miscommunication among staff, Respondents, the Ohio Department of Job and Family Services ("ODJFS") and its Director, Matt Damschroder, did not affirmatively or negatively respond for more than four months to the records request submitted by counsel for Relator, Marcellus Gilreath, on February 25, 2022. Once they became aware of their miscommunication and corresponding failure to respond to the request, Respondents provided Relator with all records responsive to his request on July 19, 2022, which was shortly after they were served with this mandamus action. Although Respondents had pulled those records well before being served, Respondents acknowledge that, as a result of their delay in actually sending the responsive records to Relator, he is entitled to an award of $1,000 in statutory damages.

That is where this case should end. Yet Relator is trying to keep this case going by arguing that Respondents still have not turned over all responsive records. They have. Relator also argues that he is entitled to an award of costs and attorney's fees. He is not.

For the reasons that follow, this Court should award Relator $1,000 in statutory damages and deny Relator's requests for a writ of mandamus, court costs, and attorney's fees.

II. STATEMENT OF FACTS

A. Relator's Records Request

On February 25, 2022, Relator's counsel, Brian Bardwell, emailed a request for records to Bill Teets, Communications Director for ODJFS. *See* Respondents' Ex. A, Affidavit of Williams Teets ("Teets Aff."), at ¶ 4; Respondents' Ex. A-1. He requested the following records:

1. CRIS-E case history for Dr. Gilreath;
2. Ohio Benefits case history for Dr. Gilreath;
3. Overpayment records for Dr. Gilreath;
4. Records of any investigation into Dr. Gilreath's alleged theft of food stamps.

See Respondents' Ex. A-2. He also stated: "I prefer to inspect the records in person, in their native electronic format. If that is not possible, you may make them available for inspection by delivering electronic copies to brian.bardwell@speech.law." *See id.* at 2. That same day, Relator sent a request for the exact same records to Cuyahoga Job and Family Services ("Cuyahoga County"). *Compare id. with* Respondents' Ex. G-1; *see also* Am. Compl. at ¶¶ 36–37.

As Communications Director, Mr. Teets is the main point of contact for media inquiries from reporters and news organizations. *See* Teets Aff. at ¶ 3; Respondents' Ex. B, Affidavit of Kelly Brogan ("Brogan Aff.") at ¶ 5. Mr. Teets immediately confirmed receipt of the records request. *See* Teets Aff. at ¶ 4; Respondents' Ex. A-3 ("I will pass this along to our records section."). Because Relator's request was not a media inquiry, Mr. Teets immediately forwarded it to ODJFS's legal department. *See* Teets Aff. at ¶ 4; Respondents' Ex. B-1 ("Please see the attached public records request. This is not media, so I don't need involved."). *See also* Relator's Deposition of Bill Teets ("Teets Dep.") at 9:20–22 ("If it's a public records request, I send those to our Office of Chief Legal Counsel.").

Linette Alexander, Deputy Chief Legal Counsel for ODJFS, forwarded Relator's request to additional ODJFS staff, including Kelly Brogan, a new Senior Legal Counsel, and Matthew Cunningham, who supervised the ODJFS helpdesk. *See* Brogan Aff. at ¶¶ 3, 6; Respondents' Ex. B-1; Relator's Deposition of Kelly Brogan ("Brogan Dep.") at 26:9–11 (Q. How long had you been working for JFS at that point? A. Three months."). Mr. Cunningham asked Christi Rose, a helpdesk employee, to search for responsive records; Ms. Rose took screenshots of the records as they appeared in CRIS-E and sent them to Mr. Cunningham, who forwarded them to Ms. Alexander and Ms. Brogan. *See* Brogan Aff. at ¶¶ 8–9; Respondents' Ex. B-2 ("Nothing in OB, attached is CRISe"). Mistakenly, no one from the helpdesk or ODJFS's legal department sent the

records to Relator's counsel. *See* Brogan Aff. at ¶ 9; Brogan Dep. at 40:23–41:1 ("A. So when that was forwarded to me I did a brief review, and I thought, oh, it's been sent out. Q. What led you to believe it had been sent out? A. It was a mistake. I misread it.").

On June 28, 2022, Relator's counsel emailed a follow-up to Mr. Teets. *See* Teets Aff. at ¶ 5; Respondents' Ex. A-4. On July 15, 2022, Mr. Teets confirmed receipt of the follow-up and apologized for the delay. *See* Teets Aff. at ¶ 5; Respondents' Ex. A-5 ("Apologies for the delay. I am checking with our public records section on what happened to this request."). Mr. Teets also replied to the last email he had been copied on in February concerning the request and asked if anyone had acknowledged it. *See* Teets Aff. at ¶ 5; Respondents' Ex. B-3 ("Mr. Bardwell asked me for an update on the attached request. Does anyone know if anyone other than me acknowledged the request from him?").

Ms. Brogan reviewed her emails and realized that no one must have sent the responsive records to Relator's counsel. *See* Brogan Aff. at ¶ 8; Respondents' Ex. B-3 ("This is my fault. The help desk/matt forwarded over the requested records and I think I assumed they went out but I was supposed to forward them on."). She emailed Relator's counsel the next business day, July 18, 2022, and said that she was working to get him a response as soon as possible. *See* Brogan Aff. at ¶ 10; Respondents' Ex. B-4 ("I have received the attached request from you and I am working to get you a response as soon as possible. Apologies for the delay on this.").

B. Respondents' Search for Records

Relator's request included four types of records. For Item 1, CRIS-E is ODJFS's Client Registry Information System Enhanced, a retired electronic eligibility system. Brogan Aff. at ¶ 8. As already mentioned, Ms. Rose pulled the records from CRIS-E that are responsive to Item 1 on February 28, 2022, one business day after receiving the request. *See id.*; Respondents' Ex. B-2.

The records are identified in the upper-righthand corner with her initials (C ROSE) and the date and time she pulled them. *See* Relator's Ex. 2; Brogan Aff. at ¶ 8.

For Item 2, Ohio Benefits is ODJFS's current electronic eligibility system. Brogan Aff. at ¶ 11. Ms. Rose checked Ohio Benefits, and there were no records pertaining to Relator. *See id.*; Respondents' Ex. B-2.

For Item 3, Chris Dickens, Chief of the Fraud Control Section at ODJFS, checked Ohio Benefits on July 18, 2022, and there were no overpayment records for Relator. *See* Respondents' Ex. C, Affidavit of Christopher Dickens ("Dickens Aff.") at ¶ 6; Respondents' Ex. B-6 ("Marcellus Gilreath has no SNAP overpayments in Ohio Benefits"). Mr. Dickens's finding was consistent with Ms. Rose's earlier finding on February 28, 2022, that there were no records in Ohio Benefits pertaining to Relator.

For Item 4, Respondents would not keep any records related to the investigation into Relator's alleged theft of food stamps because such records would be kept by the county department of job and family services that administered the benefits and conducted the investigation. *See* Brogan Aff. at ¶ 13. In this instance, that county is Cuyahoga County. *See* Dickens Aff. at ¶ 7; Respondents' Ex. B-6. Mr. Dickens checked CRIS-E and saw that an Intentional Program Violation ("IPV") was established against Relator in 2013. *See* Dickens Aff. at ¶ 6; Respondents' Ex. B-6. *See also* Relator's Ex. 18 at 9 (noting "Foodstamp/ADC Violation Type: IPV"). As a courtesy, he emailed Cuyahoga County and asked it to gather copies of the IPV documents and send them to him. *See* Dickens Aff. at ¶ 7; Respondents' Ex. B-7. Amanda Jones, the Manager of the Investigation Division at Cuyahoga County, responded to his email and indicated it was her team who handled Relator's IPV and that Cuyahoga County was a party to this mandamus case, but she did not send Mr. Dickens copies of any records. *See* Dickens Aff. at

¶ 7; Respondents' Ex. B-7. Mr. Dickens did not hear anything else from Cuyahoga County regarding his inquiry. *See* Dickens Aff. at ¶ 7.

Since being served with this mandamus action, Cuyahoga County has produced its records responsive to Item 4. *See* Respondents' Ex. G-2, Settlement Agreement at II.B, IV.A ("[Respondents] have since produced additional records responsive to the March 8, 2017 and February 22, 2022 Requests"; "Respondents represent that they are not knowingly withholding any public records responsive to the Requests . . . .").

C. Respondents' Response to Relator's Request

Per Relator's request, Ms. Brogan emailed electronic copies of the responsive records to Relator's counsel's email address on July 19, 2022. *See* Brogan Aff. at ¶ 15; Respondents' Ex. B-8. Ms. Brogan stated:

> Attached are the CRIS-E Records for Marcellus Gilreath. No documents were found relating to overpayments or within Ohio Benefits. IPV related documents are kept by the county.
>
> Please let me know of any questions or concerns related to your request.

Respondents' Ex. B-8. Relator's counsel never responded to Ms. Brogan's email with any questions or concerns. *See* Brogan Aff. at ¶ 17.

D. Relator's Mandamus Action

Four business days after Relator's counsel followed up with Mr. Teets regarding his request, Relator filed this mandamus action against Cuyahoga County and Respondents on July 5, 2022. Respondents were served on July 13, 2022. However, Mr. Teets did not know about this action when he responded to Relator's follow-up email on July 15, 2022. *See* Teets Aff. at ¶ 5 ("I did not know this lawsuit had been filed."). Ms. Brogan did not know about this action until July 19, 2022, when Cuyahoga County referenced this action in its response to Mr. Dickens's

email about the IPV documents. *See* Brogan Aff. at ¶ 14 ("This was the first time I learned that this lawsuit had been filed."); Respondents' Ex. B-7 ("Yes I didn't know about the mandamus action. I had though the helpdesk forwarded on the documents but I was supposed to – so there was a mess-up in communication."). That was the same day Mr. Brogan emailed the responsive records to Relator's counsel.

On October 21, 2022, Relator settled his claims against Cuyahoga County regarding his records requests. *See* Respondents' Ex. G-2. The parties agreed that Cuyahoga County produced records responsive to Relator's requests, including Item 4: records of any investigation into Relator's alleged theft of food stamps. *Id.* at II.B, IV.A. On November 29, 2022, Relator dismissed his claims against Cuyahoga County.

Despite receiving all records responsive to his request from Respondents on July 19, 2022, Relator filed an Amended Complaint against them on December 29, 2022.

III. ARGUMENT

A. Standard of Review

To be entitled to a writ of mandamus, Relator must demonstrate that he has a clear legal right to the requested relief and that Respondents have a clear legal duty to provide that relief. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 10. Relator must prove his right to relief by clear and convincing evidence. *State ex rel. Frank v. Ohio State Univ.*, 161 Ohio St.3d 112, 2020-Ohio-3422, 161 N.E.3d 559, ¶ 7. The standard of clear and convincing evidence is:

> [T]hat measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

State ex rel. Kesterson v. Kent State Univ., 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 12, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

B. Respondents' Proposition of Law No. 1: Relator's request for a writ of mandamus should be denied because Respondents have provided all responsive records.

Relator's request for a writ of mandamus should be denied because Respondents provided all responsive records to Relator's counsel on July 19, 2022. Mandamus will not compel the performance of a duty that has already been performed. *State ex rel. Hopson v. Cuyahoga Cty. Court of Common Pleas*, 135 Ohio St.3d 456, 2013-Ohio-1911, 989 N.E.2d 49, ¶ 4. "In general, providing the requested records to the relator in a public-records mandamus case renders the mandamus claim moot." *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 14. *See also See State ex rel. Myers v. Meyers*, Slip Opinion No. 2022-Ohio-1915, ¶ 28 (finding that writ claim was moot after documents had been produced); *State ex rel. Stuart v. Greene*, 161 Ohio St.3d 11, 12, 2020-Ohio-3685, 160 N.E.3d 709, ¶ 5, quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 8 ("In general, the provision of requested records to a relator in a public-records mandamus case renders the mandamus claim moot."); *State ex rel. Pietrangelo v. City of Avon Lake*, 149 Ohio St.3d 273, 2016-Ohio-5725, 74 N.E.3d 419, ¶ 22 (denying writ of mandamus after all records had been produced).

Respondents provided all responsive records to Relator's counsel on July 19, 2022, six days after being served in this action. *See* Brogan Aff. at ¶ 15; Respondents' Ex. B-8. As further explained below, Relator has not presented clear and convincing evidence that Respondents have

not produced all records responsive to his request. Thus, Relator's request for a writ of mandamus is moot and should be denied.

1. Relator's Proposition of Law #1 should be denied because Respondents have no additional responsive records.

Relator first argues that "there is no indication that [Respondents] searched for Items 3 or 4" of his request and asks this Court to grant a limited writ requiring Respondents to produce records responsive to these two Items or certify that none exist. Relator's Brief at 3–4. Relator's argument is baseless.

As an initial matter, Relator cites only *foreign* cases and laws other than the Public Records Act for support of his Proposition. *See* Relator's Brief at 3, fn. 13–14. Contrary to Relator's position, this Court has said there is no duty under the Public Records Act for Respondents "to detail the steps taken to search for records responsive to the requests." *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26, citing *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, 950 N.E.2d 965, ¶ 17. Additionally, when public offices respond to public-records requests, they are "'presumed to have properly performed their duties . . . regularly and in a lawful manner.'" *State ex rel. Toledo Blade Co. v. Seneca Cnty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 29, quoting *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14 (1953).

Respondents have also submitted affidavits stating they have no responsive records other than those that have already been produced. *See* Brogan Aff. at ¶¶ 11–13; Dickens Aff. at ¶¶ 6–7. "The attestations in an affidavit may be rebutted by clear and convincing evidence showing a genuine issue of fact that additional responsive records exist." *State ex rel. Frank v. Clermont Cty. Prosecutor*, 164 Ohio St.3d 552, 2021-Ohio-623, 174 N.E.3d 718, ¶ 15. Relator's mere disbelief that there could be unproduced records does not constitute the clear and convincing evidence

necessary to establish that Respondents have additional responsive documents in their possession. *State ex rel. McCaffrey* at ¶ 26; *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471, ¶ 8. Moreover, the record clearly establishes the steps that Respondents took to search for responsive records as well as that Respondents do not have any additional responsive records for Items 3 and 4.[1]

With respect to Item 3—overpayment records for Relator—Christi Rose, an ODJFS helpdesk employee, and Chris Dickens, Chief of ODJFS's Fraud Control Section, checked Ohio Benefits and CRIS-E—ODJFS's current and former electronic eligibility systems—on February 28, 2022, and July 18, 2022, respectively, and found that there were no overpayment records for Relator. *See* Respondents' Ex. B-2 ("Nothing in OB, attached is CRISe"); Dickens Aff. at ¶ 6; Respondents' Ex. B-6 ("Marcellus Gilreath has no SNAP overpayments in Ohio Benefits"). Ms. Brogan told Relator's counsel that Respondents have no records responsive to Item 3 when she responded to his request. *See* Respondents' Ex. B-8 ("No documents were found relating to overpayments or within Ohio Benefits."). Relator has not presented any evidence that Respondents keep overpayment records anywhere except Ohio Benefits and CRIS-E, thus he has failed to meet his burden.

With respect to Item 4—records of any investigation into Relator's alleged theft of food stamps—Respondents do not possess any responsive records, as such records are created and kept by the applicable county department of job and family services ("county agency"). Ohio has a system in which ODJFS supervises county-administered benefits, like food stamps. *See* Respondents' Ex. D, Affidavit of Mark Smith ("Smith Aff.") at ¶ 6; Dickens Aff. at ¶ 4. *See also*

[1] Respondents also have no records responsive to Item 2, *see* Respondents' Exs. B-2 & B-8, but Relator does not raise any issue concerning Respondents' response to that Item.

R.C. 5101.54; Ohio Adm.Code Chapter 5101:4. County agencies administer benefits to qualifying recipients, and county agencies are responsible for criminal and administrative investigations related to the benefits they administer. Dickens Aff. at ¶ 4. County agencies determine whether an investigation is warranted, what to investigate, and how the investigation should be done. *Id.* at ¶ 5. ODJFS does not directly supervise county fraud staff or their investigations and does not have day-to-day oversight into county investigations or have first-hand knowledge of the assigned investigators or status and scope of such investigations. *Id.* County agencies maintain the records of such investigations, not ODJFS. *See id.* at ¶ 7; Brogan Aff. at ¶ 13.

"Respondents have no duty to create or provide access to nonexistent records." *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 15. Furthermore, a public office's "failure to produce a document outside its possession or control is not a violation of R.C. 149.43(B)." *State ex rel. Horton v. Kilbane*, 167 Ohio St.3d 413, 2022-Ohio-205, 194 N.E.3d 288, ¶ 28. Respondents do not have records responsive to Item 4 in Relator's request, as those records are in the possession of Cuyahoga County. Despite not having records responsive to Item 4 in Relator's request, and thus having no obligation to produce them, Mr. Dickens went beyond Respondents' obligation under the Public Records Act and asked Cuyahoga County for copies of its records that would be responsive. *See* Dickens Aff. ¶ 7. However, Cuyahoga County did not provide Mr. Dickens with copies of any records. *See id.*; Respondents' Ex. B-7.

Ms. Brogan told Relator's counsel that the county agency would be the one to have records responsive to Item 4 when she responded to his request. *See* Respondents' Ex. B-8 ("IPV related documents are kept by the county."). This Court has declined to issue a writ of mandamus when a public office refers a requester to a different office that can satisfy the request. *See, e.g.*, *State ex rel. Frank v. Ohio State Univ.*, 161 Ohio St.3d 112, 2020-Ohio-3422, 161 N.E.3d 559. In *Frank*,

this Court declined to issue a writ of mandamus when Ohio State University referred a requester to a different office that has the proper expertise for lawfully disclosing the requested records. *Id.* ¶¶ 11–12. This case is even clearer than *Frank*, since Respondents did not refer Relator to a different ODJFS office but rather to a different public office entirely—namely, the public office that actually has the records he sought. *See Cvijetinovic v. Cuyahoga Cty. Aud.*, 8th Dist. Cuyahoga No. 96055, 2011-Ohio-1754, ¶¶ 1–4 (finding that because the Cuyahoga County auditor was not the public official responsible for the requested records, the auditor had no duty to provide the requested records), citing *State ex rel. Keating v. Skeldon*, 6th Dist. Lucas No. L-08-1414, 2009-Ohio-2052, ¶¶ 7–17; *Alt v. Cuyahoga Cty. Prob. Dept.*, Ct. of Cl. No. 2017-00175-PQ, 2017-Ohio-4250, ¶ 12 ("A public records request must be made to the public office that keeps the desired records . . . ."). This conclusion makes sense because even if Respondents had access to Cuyahoga County's records, Respondents would not be the proper office to disclose them. Records of criminal investigations, like those Relator sought regarding his alleged theft of food stamps, are potentially subject to a number of exemptions to the Public Records Act, including confidential law enforcement investigatory records (CLEIRs) and attorney-client privilege. *See* R.C. 149.43(A)(1)(h) & (v). As a result, an Assistant Law Director in the Cuyahoga County Law Department reviews records of such investigations prior to production. *See* Respondents' Ex. F, Affidavit of Jason Snowbrick ("Snowbrick Aff.") at ¶ 6. Because ODJFS does not have day-to-day oversight of county agencies' investigations or first-hand knowledge of those investigations, Respondents would not be in a position to review Cuyahoga County's records for release in response to a public-records request, even if they had access to them (which they do not).

Respondents could not be clearer in the fact that they do not have records responsive to Items 3 and 4 of Relator's request, yet Relator attempts to cloud this issue by arguing that Bill

Teets and Kelly Brogan did not search for responsive records and therefore Respondents did not search for responsive records. *See* Relator's Brief at 4. Relator's argument is unfounded. The fact that two *other* ODJFS staff did not personally search for responsive records does not negate the fact that Mr. Dickens and Ms. Rose searched for responsive records and did not find any. Relator also misstates Ms. Brogan's testimony during her deposition: When asked whether she had knowledge of anyone at ODJFS who searched for records responsive to Item 3, Ms. Brogan testified, "I don't recall. There might be an e-mail about it, but I don't recall." Brogan Dep. at 37:8–9. Both parties filed those emails with their evidence. *See* Respondents' Ex. B-6; Relator's Ex. 13. When asked whether she had knowledge of anyone at ODJFS who searched for records responsive to Item 4, Ms. Brogan testified that she could not speak on behalf of anyone at ODJFS, and when Relator's counsel asked her again anyway, Ms. Brogan testified that she did not know. *See* Brogan Dep. at 37:10–18. This lack of personal knowledge by Ms. Brogan is not clear and convincing evidence that Respondents did not search for responsive records—particularly when considered against the sworn statement of the ODJFS employee who *did* search for responsive records. *See* Dickens Aff. at ¶ 6. *See also* Respondents' Ex. B-6.

Relator has not met his burden of proving that this Court should grant a limited writ requiring Respondents to produce records they do not possess (as is clear from the evidence in the record) or certify that none exist. Accordingly, his Proposition of Law #1 should be denied.

2. Relator's Proposition of Law #2 should be denied because CRIS-E records are not public records and Respondents provided those records consistent with Relator's request.

Relator's second proposition is that Respondents "refuse" to produce the CRIS-E records in the medium upon which they keep them. *See* Relator's Brief at 4–6. As an initial matter, Relator's CRIS-E records are not "public records" under the Public Records Act because their

release is prohibited by state and federal law. *See* R.C. 149.43(A)(1)(v); *State ex rel. Frank v. Clermont Cty. Prosecutor*, 164 Ohio St.3d 552, 2021-Ohio-623, 174 N.E.3d 718, ¶ 19. CRIS-E, or the Client Registry Information System Enhanced, is ODJFS's retired electronic eligibility system. *See* Brogan Aff. at ¶ 8. Disclosure of Relator's records in CRIS-E, which concern the public-assistance benefits he received, is broadly restricted to only certain circumstances by both state and federal law. R.C. 5101.27 (restricting disclosure of information regarding public assistance recipients); 7 C.F.R. 272.1(c) (restricting use and disclosure of information obtained from SNAP recipients). They are available to Relator upon his request, but they are not available to the general public. *See id.* Because Relator's CRIS-E records are not public records, this Court cannot compel Respondents pursuant to the Public Records Act to produce them in any specific medium. For this reason alone, Relator's Proposition of Law #2 must be denied.

Even if CRIS-E records were "public records" (which they are not), Relator's proposition still fails. His argument that Respondents refuse to produce the CRIS-E records in the medium upon which they keep them, *see* Relator's Brief at 4–6, is disingenuous and also contrary to public-records law. In his request, Relator stated: "I prefer to inspect the records in person, in their native electronic format. If that is not possible, *you may make them available for inspection by delivering electronic copies to* brian.bardwell@speech.law." (Emphasis added.) *See* Respondents' Ex. A-2 at 2. Because Relator gave Respondents the option of "delivering electronic copies" of the requested records to his counsel's email address, Respondents did just that and sent electronic copies of the requested CRIS-E records to Relator's counsel's email address on July 19, 2022. *See* Brogan Aff. at ¶ 15. Respondents have not refused to produce the requested CRIS-E records, and Relator has not provided any evidence of Respondents' purported refusal (because there is none).

Respondents provided the requested CRIS-E records in the format requested by Relator. Even if Relator's CRIS-E records were considered "public records" under the Public Records Act (which they are not), Respondents fulfilled their duty under the Act. The records within the CRIS-E database appear on the accessor's computer screen. Brogan Aff. at ¶ 8. When CRIS-E records are requested, screenshots of the accessor's—here, Ms. Rose—computer screen are taken and sent to a requester. *Id.* In accordance with this process, the requested CRIS-E records were screenshotted and then sent to Relator's counsel via email. *Id.* at ¶ 15.[2] *See also* Relator's Ex. 2.

To the extent Relator argues that Respondents have not fulfilled their duty to provide the requested CRIS-E records simply because the records were not provided "upon the same medium upon which ODJFS keeps it," and assuming Respondents even have such a duty concerning Relator's CRIS-E records (which they do not), this argument goes against public-records law for several reasons.[3] First, a public office has discretion to determine the form in which it will keep its records. *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St.3d 163, 164, 546 N.E.2d 203 (1989); *State ex rel. Bardwell v. City of Cleveland*, 126 Ohio St.3d 195, 2010-Ohio-3267, 931 N.E.2d 1080, ¶ 4. Here, that form is the CRIS-E database to which Relator does not have access, as the records in CRIS-E are confidential, as already explained. To the extent Relator is requesting access to the proprietary software program of CRIS-E, proprietary software is exempt from the Public Records Act. *See State ex rel. Recodat Co.* at 165; *State ex rel. Gambill v. Opperman*, 135 Ohio

[2] While Respondents originally provided screenshots of the requested CRIS-E records as they appeared on the accessor's computer screen, at Relator's request they later changed the color scheme of the records to grayscale, and Respondents' counsel re-sent them to Relator's counsel on August 11, 2022. *See* Answer to Am. Compl. at ¶ 44; Relator's Ex. 18. Changing the color scheme to improve the records' readability went beyond Respondents' obligations under the Public Records Act.

[3] Relator claims that "there is no dispute" that he "chose to have the records duplicated upon the same medium upon which ODJFS keeps it." Relator's Brief at 5. Respondents dispute this statement, and his own records request refutes it.

St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, ¶¶ 21–25 (holding that data "inextricably intertwined" with exempt proprietary software need not be disclosed). To the extent Relator is asking Respondents to provide the CRIS-E records in some other format, the Public Records Act does not require a public office to search a database for information and compile it to create new records. *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 707 N.E.2d 496 (1999), citing *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 695 N.E.2d 256 (1998).

Second, Respondents provided electronic copies of the requested CRIS-E records, exactly as they appeared on an ODJFS employee's screen. *See* Brogan Aff. at ¶ 8. Respondents do not understand why Relator thinks this does not comply with his request, which gave Respondents the option of making the records "available for inspection by delivering electronic copies" to his counsel's email address. Respondents' Ex. A-2. And the burden is on the Relator to ensure Respondents understand his request. *See State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 19; *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 27, 32. *See also State ex rel. Data Trace Information Servs. L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 71 ("[I]t is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue."). Further, R.C. 149.43(B)(6), which Relator cites in his request, states:

> The public office or the person responsible for the public record shall permit the requester 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. *Nothing in this section requires a public office or person responsible for the public record to allow the requester of a copy of the public record to make the copies of the public record*.

(Emphasis added.) This provision of the Public Records Act does *not* give a requester the option of accessing the proprietary software program within which records are stored in order to view the raw data—which again is confidential and can only be released under certain conditions—as Relator apparently seeks to do here. Nor does it require a public office to allow the requester to be the one to make copies of the records.

Finally, the cases cited by Relator are easily distinguishable. In *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, the respondent denied the relator's request for a 911 tape. 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64, ¶ 1. There, the parties did not dispute that the relator specifically requested an *audiotape* format of the 911 call or that the respondent refused to provide the audiotape. *Id*. Here, in sharp contrast, Relator requested electronic copies of CRIS-E records be sent to his counsel's email address, and Respondents sent electronic copies of the CRIS-E records as requested. Further, it is well-established that 911 tapes "in general are public records which are not exempt from disclosure and must be immediately released upon request." *Id.* at ¶ 5, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 379, 662 N.E.2d 334 (1996). Proprietary software, on the other hand, as already explained, is not subject to the Public Records Act and is exempt from disclosure The *Dispatch Printing* holding does not apply to the facts of this case because Respondents have fulfilled any purported duty with respect to the requested CRIS-E records, which are maintained on an electronic database that Relator does not have the software to access.

Relator's reliance on *State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, is similarly misplaced. *See* Relator's Brief at 5. The relators in *Data Trace* requested electronic images of documents recorded in the county recorder's office and, instead, were given paper printouts of the requested documents

and charged a $2 fee for each page. The facts of this case differ in that, here, Relator requested electronic copies of the records and received electronic copies of the records. Importantly, this Court has since clarified that "*Data Trace* does not concern requested data that was intertwined with exempt software." *State ex rel. Gambill*, 135 Ohio St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, at ¶ 31. Because providing the CRIS-E records in a manner other than how they were already provided would result in data intertwining with exempt proprietary software, Relator's case citations do not support his argument.

In sum, because Relator's CRIS-E records are not public records, Respondents have no duty under the Public Records Act to produce them. Nevertheless, Respondents have complied with Relator's request, and Relator's Proposition of Law #2 should be denied.

3. Relator's Proposition of Law #3 should be denied because Relator did not ask for emails in his request and any emails responsive to Relator's request are kept by a different public office.

Relator next argues that he is entitled to a writ of mandamus compelling Respondents to organize and maintain their public records in a manner that can be made available for inspection. Relator's Brief at 6–8. Relator makes this argument by contorting the evidence to imply that Respondents would be unable to produce emails responsive to a public-records request for emails because those emails are stored on servers owned by the Ohio Department of Administrative Services ("DAS"). *See id.* That is not the issue here.

Respondents have never claimed that they would not be able to produce their own emails in response to a proper public-records request for such emails, nor does Relator have any evidence except cherry-picked, out-of-context statements[4] to show that they could not. *See* Relator's Brief

[4] For example, Relator points to a statement from Mr. Johnson's deposition testimony as evidence that Mark Smith, ODJFS's Chief Information Officer, cannot access emails. *See* Relator's Brief at 7, fn. 29. However, only a few questions later, Relator's counsel clarified that Mr. Johnson had

at 7. Rather, Respondents have consistently claimed that 1) Relator did not ask for emails in his request, and 2) any emails responsive to Relator's request are kept by Cuyahoga County, not by ODJFS. Respondents have already briefed the latter contention in response to Relator's Proposition of Law #1.

As to Respondents' first contention, Relator's Proposition of Law #3 is not relevant to the Court's determination in this action because Relator did not ask for emails in his request. In Item 4 of his request, Relator asked for "Records of any investigation into Dr. Gilreath's alleged theft of food stamps." *See* Respondents' Ex. B-2. This does not reasonably indicate a request for emails, let alone for emails authored by specific Cuyahoga County employees, Ms. McGuinea and Mr. Gregorski, as Relator alleges in his Amended Complaint. *See* Am. Compl. at ¶¶ 11, 25, 62–68. Relator had an obligation to make his request with reasonable clarity for Respondents to be able to reasonably identify the responsive records. *See State ex rel. Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 17, quoting *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 29; *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 42. To the extent Respondents were required to allow Relator to clarify his request, they did so in their response when Ms. Brogan stated, "IPV related documents are kept by the county. Please let me know of any questions or concerns related to your request." Respondents' Ex. B-8. Relator's counsel did not ask for email records in any follow-up correspondence with Respondents. *See* Brogan Aff. at ¶ 19. Instead, Respondents were only placed on notice of their purported failure to produce such emails when Relator filed his Amended Complaint, more than five months after

never discussed this topic with Mr. Smith and that he did not actually know whether Mr. Smith has such ability, which Relator ignores in his Brief. *See* Johnson Dep. at 14:22–15:21.

Respondents responded to his request. *Id.* This is insufficient to compel a writ of mandamus. *See State ex rel. Zidonis*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, at ¶ 40.

Relator's own exhibits underscore that his request lacked the specificity to reasonably include emails. Relator filed copies of several other requests from Cuyahoga County to Mr. Johnson at ODJFS to search for email records. Relator's Ex. 28-H at 5–15. These requests included date ranges, search terms, and employee names, *see id.*, none of which Relator included in his twelve-word Item 4. Moreover, Relator's counsel, who sent the records request to Respondents, *see* Respondents' Ex. A-2, has made exactly these types of detailed requests for emails in the past, but did not do so here. *See, e.g.*, *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 10 (10th Dist.) (request by Relator's counsel for nine categories of records, six of which were for "[c]opies of all e-mails" between two named individuals "from November 2022 through April 2008"); *State ex rel. Bardwell v. City of Lynhurst*, 8th Dist. Cuyahoga No. 93636, 2010-Ohio-525, ¶ 4 (request by Relator's counsel for "all emails sent by the Chief of Police in April 2009; and all emails sent to the Chief of Police in April 2009"). If Relator intended to request emails authored by specific Cuyahoga County employees, his counsel knew how to request them. And while Relator points out a statement in his request that records "in officials' personal e-mail accounts" can still be public records, *see* Relator's Brief at 15; Respondents' Ex. A-2, it is not clear how a reminder to search personal devices was supposed to inform Respondents to search specific county staff email records. Because Relator did not ask Respondents for emails in his request, emails are not at issue here.

Further, Relator admits that Cuyahoga County—the public office that would have the emails alleged in the Amended Complaint concerning its employees—did not produce any emails in response to his identical request sent the same day:

> REQUEST FOR ADMISSION NO. 10: Admit that Cuyahoga County JFS did not produce any emails in response to your February 25, 2022, public records request to Cuyahoga County JFS.
>
> **RESPONSE: Admit.**

Respondents' Ex. G at 2. So while Cuyahoga County produced records of its investigation into Relator's alleged theft of food stamps, *see* Respondents' Ex. G-2 at II.B, that production did not include emails. Nevertheless, Relator dismissed Cuyahoga County from this action. Relator cannot reasonably claim that Respondents' purported failure to produce emails fails to satisfy his request when the evidence reflects that he dismissed his claims against Cuyahoga County, who also did not produce emails. *See id.* at IV.A. Simply put, it is disingenuous for Relator to hold Respondents to a different standard than Cuyahoga County for an identical request.

As a final point on Relator's Proposition of Law #3, even if Relator had requested emails in Item 4, which he did not, there is nothing with respect to how Respondents organize and maintain their emails for this Court to compel because any such issue is moot. While ODJFS had to rely on DAS to search its emails at the time Relator made his request in February 2022, that is no longer the case. As Mark Smith, ODJFS's Chief Information Officer, explained in his affidavit, in February 2023, DAS began allowing state agencies like ODJFS to use a tool called eDiscovery to search for content in Microsoft 365, the system ODJFS and other state agencies use for their email.[5] *See* Smith Aff. at ¶¶ 7, 13. Relator's own evidence corroborates this update and disproves his claim for a writ. *See* Relator's Ex. 28-I at 67–92 ("For Your Information" sheet from DAS concerning Microsoft Purview eDiscovery, dated Feb. 17, 2023). Relator's concern with

[5] This change is why Mr. Johnson updated his affidavit submitted with Respondents' Answer to the Amended Complaint on January 19, 2023—before this change went into effect—to limit his representations to 2022. *Compare* Affidavit of Steven Johnson (Exhibit B), attached to Respondents' Answer to Am. Compl. at ¶¶ 8–9 *with* Respondents' Ex. E, Affidavit of Steven Johnson, at ¶¶ 9–10.

Respondents' ability to search for emails, as demonstrated by his own evidence, is moot, and mandamus will not compel the performance of a duty that has already been performed. *See State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313, 318, 725 N.E.2d 663 (2000), citing, *State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 253, 703 N.E.2d 304, 305 (1998).

For all of these reasons, Relator's Proposition of Law #3 should be denied.

C. Respondents' Proposition of Law No. 2 and Response to Relator's Proposition of Law #4: Relator is entitled to $1,000 in statutory damages.

Respondents do not dispute that Relator is entitled to an award of statutory damages in the amount of one thousand dollars ($1,000) pursuant to R.C. 149.43(C)(2).

D. Respondents' Proposition of Law No. 3: Relator is not entitled to court costs because Respondents have now complied with their public-records obligations and did not act in bad faith.

A court can award court costs in two instances: 1) after ordering a public office to comply with the Public Records Act, *see* R.C. 149.43(C)(3)(a)(i), and 2) upon a showing of "bad faith." *See* R.C. 149.43(C)(3)(a)(ii). Neither provision applies here, so Relator is not entitled to an award of court costs.

First, R.C. 149.43(C)(3)(a)(i) provides that "[i]f the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive." As already discussed, because Respondents provided all the responsive records on July 19, 2022, this matter is moot and this Court should deny Relator's request for a writ of mandamus. *See State ex rel. Kesterson*, 156 Ohio St.3d 13, 2018-Ohio-5108, 123 N.E.3d 887, at ¶ 23 (denying request for court costs because the mandamus claim was moot). Therefore, R.C. 149.43(C)(3)(a)(i) does not apply.

Second, this Court can award courts costs if it finds that Respondents acted in bad faith. R.C. 149.43(C)(3)(a)(ii). "Bad faith" is described in R.C. 149.43(C)(3)(b)(iii):

> [If the court a determines that t]he public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with division (B) of this section. *No discovery may be conducted on the issue of the alleged bad faith* of the public office or person responsible for the public records. This division *shall not be construed as creating a presumption that the public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order described in this division*.

(Emphasis added.) There is no presumption that the public office acted in bad faith if it provides the public records after the commencement of a mandamus action. *Id*. Instead, "'bad faith' generally implies something more than bad judgment or negligence.'" *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81, quoting *State v. Tate*, 5th Dist. Fairfield No. 07-CA-55, 2008-Ohio-3759, ¶ 13. Bad faith """imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."" *Id.*, quoting *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983), quoting *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962), paragraph two of the syllabus, overruled on other grounds, *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), paragraph one of the syllabus. This Court has declined to find bad faith when the failure to produce records was a "product of oversight, not bad faith." *See State ex rel. Horton*, 167 Ohio St.3d 413, 2022-Ohio-205, 194 N.E.3d 288, at ¶ 35.

Relator neither alleged that Respondents acted in bad faith nor alleged any facts suggesting they acted in bad faith in his Amended Complaint. *See* Am. Compl. He cannot now ask this Court

to find that Respondents acted in bad faith when he failed to allege it. *See State ex rel. McDougald v. Greene*, 161 Ohio St.3d 130, 2020-Ohio-3686, 161 N.E.3d 575, ¶ 26 (denying court costs when requester did not allege any facts to suggest the respondent acted in bad faith).

Even if Relator had alleged bad faith, which he did not, the evidence in the record demonstrates that while Respondents were dilatory in ultimately producing the responsive records to Relator, they did not act in bad faith. Mr. Teets immediately confirmed receipt of Relator's request, which shows that Respondents did not simply ignore Relator. *See* Teets Aff. at ¶ 4; Respondents' Ex. A-3. Ms. Rose checked CRIS-E and Ohio Benefits and pulled the responsive records first thing the next business day. *See* Respondents' Ex. B-2; Brogan Aff. at ¶ 8; Relator's Ex. 2 (02/28/22 08:22 C ROSE). But Respondents admit, and have admitted throughout the course of this litigation, that due to a miscommunication among ODJFS staff, no one sent these responsive records to Relator. No one explicitly said that they would send the records nor that someone else should send the records. *See* Respondents' Exs. B-1 & B-2. Ms. Brogan, who had been at ODJFS only three months when Relator made his request, *see* Brogan Aff. at ¶ 3; Brogan Dep. at 26:9–11, thought Mr. Cunningham or someone from the ODJFS helpdesk had sent the responsive records, but they had not. *See id.* at ¶ 9. This was simply an oversight by Ms. Brogan.

It was not until after Relator's counsel followed-up and Ms. Brogan reviewed her emails that she realized no one had sent the records to Relator's counsel. Brogan Aff. at ¶ 10; *see also* Respondents' Exs. B-3 & B-7. Ms. Brogan acknowledged Relator's request the business day after she received Mr. Teets's follow-up email and told Relator's counsel that she was working to get him a response to his request as soon as possible. *See* Brogan Aff. at ¶ 10; Respondents' Ex. B-4. Ms. Rose and Mr. Dickens quickly responded to Ms. Brogan's requests to them to search for records. *See* Respondents' Exs. B-5, B-6 & B-7. Ms. Brogan was able to send Relator's counsel a

response the next day, *see* Respondents' Ex. B-8, meaning the time between Ms. Brogan realizing her mistake on July 15, 2022, and producing the responsive records to Relator's counsel on July 19, 2022, was only two business days.

Additionally, Mr. Teets did not know that this action had been filed when he acknowledged Relator's follow-up email, so he did not act in bad faith when forwarding it. *See* Teets Aff. ¶ 5. And Ms. Brogan did not know this action had been filed until July 19, 2022, which was also after she acknowledged Relator's request and asked Ms. Rose and Mr. Dickens to search for responsive records. *See* Brogan Aff. ¶ 14. *See also* Respondents' Exs. B-4, B-5, B-6, & B-7. By then, the search for records was finished and all that was left was for Ms. Brogan to send the records to Relator's counsel, which she did that same day. *See* Respondents' Ex. B-8.

This miscommunication among ODJFS staff and quick correction once it was realized—which was before those staff even knew this mandamus action had been filed—does not demonstrate that Respondents acted in bad faith when they voluntarily made the records available to Relator for the first time after he commenced this mandamus action, but before this Court issued any order. Accordingly, Relator is also not entitled to court costs under R.C. 149.43(C)(3)(a)(ii). This Court should thus deny an award of court costs.

1. Relator's Proposition of Law #5 should be denied because Respondents did not act in bad faith when they voluntarily made the records available to Relator for the first time after he commenced this action.

Relator attempts to demonstrate that he is entitled to court costs under R.C. 149.43(C)(3)(a)(ii) by arguing that Respondents acted in bad faith, which they did not. As an initial matter, this Court cannot consider Relator's evidence as to the issue of bad faith that was obtained during discovery. The Public Records Act expressly prohibits discovery on the issue of bad faith. R.C. 149.43(C)(3)(b)(iii) ("No discovery may be conducted on the issue of the alleged bad faith

of the public office or person responsible for the public records."). Yet Relator ignored this express prohibition and, over Respondents' objections, conducted discovery as to bad faith anyway. Relator now attempts to introduce evidence that he impermissibly obtained through discovery and asks this Court to use it to conclude that Respondents acted in bad faith. This Court cannot consider this evidence, since it was obtained in violation of the express prohibition in the Public Records Act. *See* R.C. 149.43(C)(3)(b)(iii).

Even if this Court were to consider this evidence, which it should not because doing so would contravene the express language of the Public Records Act, Relator's evidence does not meet the high burden of showing that Respondents acted in bad faith. Relator's arguments consistently ignore almost all of the Public Records Act's provision on bad faith. The mere fact that "the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with division (B)" of the Public Records Act does not, on its own, demonstrate bad faith. R.C. 149.43(C)(3)(b)(iii) ("This division shall not be construed as creating a presumption that the public office or the person responsible for the public records acted in bad faith . . ."). Contrary to Relator's arguments, this Court cannot consider only the words "bad faith" while ignoring the limitations that follow it. *See Stiner v. Amazon.com, Inc.*, 162 Ohio St.3d 128, 131, 2020-Ohio-4632, 164 N.E.3d 394, ¶ 14, citing *Vossman v. AirNet Sys., Inc.*, 159 Ohio St.3d 529, 2020-Ohio-872, 152 N.E.3d 232, ¶ 14 ("When interpreting a statute, we must consider the text in its entirety and not just isolated words or phrases."). Relator's arguments concerning other instances in which he alleges Respondents acted in bad faith are irrelevant to this Court's bad-faith analysis.

Relator makes three arguments in an attempt to demonstrate bad faith, and, to the extent this Court can even consider them, none of them have merit.

i. Respondents' privileged emails do not support an inference of bad faith.

Relator's first argument concerns a string of emails between three ODJFS attorneys (Ms. Alexander, Ms. Brogan, and Mr. Cunningham) that were redacted for attorney-client privilege prior to being turned over during discovery. *See* Relator's Ex. 3. Relator wildly speculates as to what was redacted from these emails, and he then argues that his speculation justifies a finding of bad faith against Respondents. Relator's Brief at 11–13. It does not.

First, these emails were produced during discovery, so their redaction cannot be considered in the bad-faith analysis concerning Respondents' response to Relator's request. *See* R.C. 149.43(C)(3)(b)(iii). Additionally, these emails were sent months before this mandamus action was commenced and thus are irrelevant to whether Respondents acted in bad faith when responding to Relator's request after this action had been filed.

Second, Relator's conjecture as to what was redacted from these emails is nothing more than that, and conjecture is not enough to demonstrate bad faith. *See State ex rel. Horton*, 167 Ohio St.3d 413, 2022-Ohio-205, 194 N.E.3d 288, at ¶ 36 (refusing to assign bad faith based on requester's speculation). Contrary to his assertion, Relator's speculation is not the "natural inference" to be drawn. *See State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14 (1953) (holding that "in the absence of evidence of the contrary, public [offices] . . . will be presumed to have properly performed their duties . . . regularly and in a lawful manner"). If Ms. Alexander had instructed Ms. Brogan and Mr. Cunningham not to work on Relator's request, as Relator claims, *see* Relator's Brief at 12, it does not make sense that Mr. Cunningham would still have forwarded Ms. Alexander and Ms. Brogan the records Ms. Rose found after

receiving such an instruction. *See* Respondent's Ex. B-2. Ms. Brogan's responses to Mr. Teets's follow-up email on July 15, 2022, claiming fault and stating she would get records to Relator's counsel as soon as possible, also would not make sense. *See* Respondents' Ex. B-3. Rather, the "natural inference," had Ms. Alexander given such an instruction, would be that Ms. Alexander or Ms. Brogan would have replied to Mr. Teets's follow-up email stating that ODJFS was not responding to Relator's request. These are only some of the obvious fallacies with Relator's speculation—which Respondents state for the record is wrong—and Respondents will file the emails in question under seal for this Court to inspect in camera, if so ordered.

Relator also misunderstands attorney-client privilege. Not all work performed by an in-house attorney, like Ms. Brogan, is privileged. Rather the privilege only applies "'(1) *[w]here legal advice of any kind is sought* (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.'" (Emphasis added.) *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir.1998). Respondents did not treat all of Ms. Brogan's work as privileged when it is not. For example, Ms. Brogan asking another ODJFS employee to search for responsive records does not involve the request for or provision of legal advice and therefore is not privileged. That is why Respondents did not redact all of Ms. Brogan's emails, only those that expressly involved the request for or provision of legal advice. *See* Brogan Aff. at 12; Respondents' Ex. B-6. *See also* Relator's Ex. 3. Not redacting non-privileged emails does *not* waive privilege for other emails that are privileged (and Relator has cited no authority that it does), and thus the few emails containing privileged communications were properly redacted.

Finally, while Relator mentions in passing that Respondents failed "to resume work on [Relator]'s request until the morning of July 15, 2022, just after they were served the complaint in this action," *see* Relator's Brief at 13, this still falls short of showing bad faith. While Respondents were served on July 13, 2022, as already discussed, neither Mr. Teets nor Ms. Brogan actually knew about this action on July 15, 2022. *See* Teets Aff. ¶ 5; Brogan Aff. ¶ 14. Relator's counsel never asked Mr. Teets or Ms. Brogan during their depositions if they were aware of this mandamus action or when they became aware of it, *see generally* Teets Dep.; Brogan Dep., so Relator cannot present any evidence to contradict the statements in their affidavits. Relator has presented no evidence that Respondents acted in bad faith and has thus failed to meet his burden.

ii. Ms. Brogan's mistake does not evidence bad faith.

Relator's second argument is nothing more than his belief that Ms. Brogan's mistake in thinking that someone from the ODJFS helpdesk had sent the responsive records was unreasonable. *See* Relator's Brief at 13–14. This argument exclusively relies on evidence impermissibly obtained during discovery and should therefore not be considered. Moreover, even if Ms. Brogan's mistake was unreasonable, which it was not, that alone would not be enough to find that Respondents acted in bad faith. Ms. Brogan's mistake does not even come close to meeting any of the *Hoskins* criteria for bad faith: It did not import a dishonest purpose. It was not a moral obliquity. It was not a conscious wrongdoing. It did not breach a known duty through some ulterior motive or ill will partaking of the nature of fraud. It did not embrace actual intent to mislead or deceive. It was simply a mistake by someone who was still new at her job. Even if Ms. Brogan's mistake was "bad judgment," as Relator seems to claim, that is insufficient for a finding of bad faith. *See Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 81. Ms. Brogan's mistake was merely a "product of oversight, not bad faith," and this Court has declined to find bad

faith in such situations. *See State ex rel. Horton*, 167 Ohio St.3d 413, 2022-Ohio-205, 194 N.E.3d 288, at ¶ 35.

iii. Respondents have not refused to search for records.

Relator's final argument asserts that Respondents are acting in bad faith by refusing "to make any effort to comply with [Relator's] requests for Items 3 and 4." Relator's Brief at 14. This argument is unrelated to Respondents voluntarily making records available to Relator for the first time after he commenced this action and also relies on evidence impermissibly obtained during discovery. It is also frivolous.

As already discussed, it is clear from the evidence in the record that Respondents searched for records responsive to Item 3 and do not have any. *See* Dickens Aff. at ¶ 6; Respondents' Ex. B-6. As for Item 4, again as already discussed, Respondents have not searched for emails related to Relator's alleged theft of food stamps because Relator did not request such emails and because Respondents do not conduct such investigations; such investigations are handled by the county agencies. *See* Dickens Aff. at ¶ 4. Relator tries to muddy the latter by pointing to deposition testimony from Mr. Johnson concerning types of investigations *other than* theft of food stamps to imply that Respondents have such records when they do not. *See* Relator's Brief at 14–16. However, Mr. Johnson was specifically *not* talking about investigations into theft of food stamps when he testified regarding investigations during his deposition. Relator's counsel asked Mr. Johnson about food-stamp-theft investigations at the start of his deposition, and Mr. Johnson testified that is not his area and he is not familiar with them:

> Q. Okay. All right. So I can represent to you that he was charged with theft for failing to report a change in his VA benefits, which resulted, allegedly, in an overpayment of his -- yeah, food stamp benefits. Are you familiar with cases like that?
> A. No, not specifically. That's not my area of responsibility; no.

Q. Okay. Do you have any familiarity with how those types of cases are investigated?
A. No, not really. I've never been involved, directly involved with a case like that.

* * *

Q. All right. Do you know what an IPV is?
A. I assume it's an acronym, but I don't know what it stands for.
Q. Intentional program violation; does that sound familiar?
A. No.

Relator's Deposition of Steven Johnson ("Johnson Dep.") at 8:18–2:3; 11:12–17. Mr. Johnson *never* represented, as Relator errantly claims in his Brief, that ODJFS would have email records for investigations of IPVs like theft of food stamps. And any general testimony from him concerning emails in *other* unspecified types of investigations that are conducted by ODJFS is not clear and convincing evidence concerning food-stamp-theft investigations, which are the only type of investigation at issue in this case. Relator has introduced no evidence, let alone clear and convincing evidence, that any ODJFS employee sent or received any emails related to Cuyahoga County's investigation into his alleged theft of food stamps, and Respondents did not act in bad faith simply by not producing records they do not have. Also, as already discussed, Ms. Brogan was testifying during her deposition only as to her own personal knowledge; ODJFS's email systems and servers is not her area, *see* Brogan Dep. at 60:6–11, and her lack of personal knowledge as to such is not evidence of bad faith.

* * *

Because Relator is not entitled to a writ of mandamus and Respondents did not act in bad faith, Relator is not entitled to costs.

E. Respondents' Proposition of Law No. 4 and Response to Relator's Proposition of Law #6: Relator is not entitled to attorney's fees, and attorney's fees are not mandatory under the Public Records Act.

Relator is not entitled to an award of attorney's fees in this action. Relator asserts that

"[u]nder Ohio Rev. Code § 149.43(C)(3)(a), a relator is entitled to an award of attorney's fees if any of the following are true . . . ." Relator's Brief at 16. Relator mischaracterizes the law. The subsection to which he cites—(C)(3)(a)—makes no reference to attorney's fees at all. Rather, R.C. 149.43(C)(3)(a) states, in full:

> (3) In a mandamus action filed under division (C)(1) of this section, the following apply:
> (a)(i) If the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.
> (ii) If the court makes a determination described in division (C)(3)(b)(iii) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

This section mandates an award of *court costs* if certain requirements are met; it does not mandate attorney's fees. The Public Records Act treats courts costs and attorney's fees separately. *See*, *e.g.*, R.C. 149.43(C)(1)(b) (describing a mandamus action to obtain a judgment "that awards court costs and reasonable attorney's fees"); R.C. 149.43(C)(5) (stating if the court determines the mandamus action to be "frivolous conduct," "the court may award to the public office all court costs, expenses, and reasonable attorney's fees").

Attorney's fees are not mandatory under the Public Record Act, which states:

> 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 or if the court determines any of the following, the court *may* award reasonable attorney's fees to the relator, subject to division (C)(4) of this section[.]

(Emphasis added.) R.C. 149.43(C)(3)(b). Relator ignores the General Assembly's clear use of the discretionary "may" and makes a meritless argument that this Court is *mandated* by the Public Records Act to award attorney's fees. Relator's Brief at 17. It is well-established that the word "'[m]ay' is generally construed to render optional, permissive, or discretionary the provision in which it is embodied." *Smucker v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866,

¶ 14. And Relator even concedes that "[t]his Court has long construed attorney's fees as discretionary." Relator's Brief at 17. This Court should follow the plain language of the Act and not deviate from that path.

1. Historically, this Court has found attorney's fees to be discretionary.

Most significantly, this Court has consistently held that the award of attorney's fees under R.C. 149.43(C)(3)(b) is discretionary. *See, e.g.*, *State ex rel. Harm Reduction Ohio v. OneOhio Recovery Found.*, Slip Op. No. 2023-Ohio-1547, ¶ 40; *State ex rel. Summers v. Fox*, 164 Ohio St.3d 583, 2021-Ohio-2061, 174 N.E.3d 747, ¶ 13; *State ex rel. Hicks v. Fraley*, 166 Ohio St.3d 141, 2021-Ohio-2724, 184 N.E.3d 13, ¶ 26.

Despite Relator's argument to the contrary, the current version of the Public Records Act does not change this analysis. First, Relator references amendments to the Act without specifying to what amendments he is referring or when they were made. *See* Relator's Brief at 17. The language of R.C. 149.43(C)(3)(b) and (C)(4) has been unchanged since September 28, 2016. Prior to that date, the Act read:

> (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 . . . .

(Emphasis added.) R.C. 149.43(C)(2)(b), effective Sept. 8, 2016. The Public Records Act was then amended to include the language still in effect today: "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 or if the court determines any of the following, the court *may* award reasonable attorney's fees to the relator, subject to the provisions of division (C)(4) of this section . . . ."

(Emphasis added.) R.C. 149.43(C)(3)(b), effective September 28, 2016) (current version same[6]). R.C. 149.43(C)(3)(c) and (C)(4)(d) were also amended to their current forms at that time. As noted above, this Court has found attorney's fees under R.C. 149.43(C)(3)(b) to be discretionary as recently as earlier this year. *See State ex rel. Harm Reduction Ohio* at ¶ 40. Relator's arguments based upon years-old amendments to the Act are therefore unpersuasive.

The language used in both the prior and current versions of the Public Records Act demonstrates that the General Assembly is intentional with its use of "may" and "shall." The Act used to provide for both discretionary and mandatory fees, using both "may" and "shall" to differentiate between them. *See* R.C. 149.43(C)(2)(b), effective Sept. 8, 2016 ("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 . . . .") (Emphasis added.).[7] Now, too, the Act uses both "may" and "shall" to permit the award of attorney's fees, R.C. 149.43(C)(3)(b) (using "may"); mandate the purpose of fees and what must be included in their award, R.C. 149.43(C)(4) (using "shall"); and permit reduction of the fee award, R.C. 149.43(C)(4)(d) (using "may"). The continued use of "may" in R.C. 149.43(C)(3)(b), as this Court has held, means that attorney's fees are awarded at the discretion of the court.

[6] With the non-substantive exception that "the provisions of" was deleted in 2019. *See* R.C. 149.43(C)(2)(b), effective Apr. 5, 2019.

[7] Since 2016, the statute has permitted attorney's fees in enumerated circumstances, but it does not require them under any circumstances. *See* R.C. 149.43(C)(3)(b).

Attorney's fees under R.C. 149.43(C)(3)(b) are properly perceived as discretionary without rendering the simultaneous amendments to subsections (C)(3)(c) and (C)(4) "pointless," as Relator claims. *See* Relator's Brief at 19. Subsection (C)(3)(b) gives courts general discretion to award fees; however, subsection (C)(3)(c) explains when attorney's fees shall not be awarded, and subsection (C)(4) explains the requirements that apply to attorney's fees when a court has exercised its discretion to award them. These sections can be read together without construing the word "may" as the word "shall."

Relator also argues that the Act's characterization of fees as remedial rather than punitive means that fees must be mandatory. *See* Relator's Brief at 19–20. This argument is undercut by the prior versions of the Act, which have long stated—as the current version does—that "attorney's fees awarded under this section shall be construed as remedial and not punitive." *See, e.g.*, R.C. 149.43(C)(2)(c), effective Sept. 29, 2013. Relator's assertion that "[t]he Court's fee cases have for [sic] assumed for more than 30 years that 'attorney fees are regarded as punitive,'" Relator's Brief at 19, is contradicted by the plain language of the Act, both currently and previously.

Despite this Court's long history of construing attorney's fees as discretionary, and despite the statute's unambiguous and intentional use of the word "may," Relator still argues that the General Assembly most likely intended that attorney's fees be mandatory. If the General Assembly intended for attorney's fees to be mandatory, it would have said so in R.C. 149.43(C)(3)(b). *See Lake Shore Elec. R. Co. v. Pub. Util. Comm. of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (noting that if the General Assembly intended a particular meaning, "it would not have been difficult to find language which would express that purpose.") That is, if it intended for attorney's fees to be mandatory, it would have used "shall" instead of "may," as it did previously, when certain fee awards were mandatory. But it did not. Instead, the provision at issue states in

relevant part that "the court *may* award reasonable attorney's fees to the relator." (Emphasis added.) R.C. 149.43(C)(3)(b). Such fees are thus discretionary.

2. The General Assembly's intent is clearly expressed in R.C. 149.43(C)(3)(b).

Relator also points to two different subsections of the Public Records Act—(C)(3)(c) and (C)(4)(a)—and calls upon the *expressio usius* canon of statutory construction in an effort to convince this Court to go against its own precedent and ignore the common meaning of "may." Relator's Brief at 17–21. But, this Court does "not look to the canons of statutory construction when the plain language of a statute provides the meaning." *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶ 23. Relator does not contend that the Public Records Act is ambiguous and thus the plain language controls.

But Relator still contends that, rather than apply the plain language of the Public Records Act, this Court should look to *other* subsections of the Act to ascertain the legislative intent behind R.C. 149.43(C)(3)(b). Relator quotes only the second half of a sentence from this Court's opinion in *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, to support his theory that other subsections should be utilized in the statutory interpretation of subsection (C)(3)(b). Relator's Brief at 18–19.[8] However, the full sentence from which he quotes supports this Court's precedent that courts should look at the specific language of the statute rather than looking to other sources:

> *Further, this court 'must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein*, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act, and in the absence of any definition of the intended meaning of words or terms used

[8] Relator's Brief states, "When interpreting statutory language, 'the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.'" *Id.*

> in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.'

(Emphasis added.) *Id.*

This Court need not look further than the provision in question itself, which states that "the court *may* award reasonable attorney's fees to the relator." R.C. 149.43(C)(3)(b). The plain language of the Public Records Act clearly expresses the General Assembly's intent; thus, R.C. 149.43(C)(3)(b) may not be restricted, qualified, or changed at all. Because the word "may" must be given its common, ordinary, and accepted meaning, the General Assembly clearly expressed its intent to treat any award of attorney's fees as discretionary rather than mandatory.

Because attorney's fees are discretionary under the Public Records Act, this Court should deny Relator's Proposition of Law #6.

3. This Court should decline to award attorney's fees.

This Court should decline to award attorney's fees in this case because Relator failed to establish the existence of a sufficient public benefit with regard to his request. "'When considering whether to award attorney fees in public-records cases, a court may consider the presence of a public benefit conferred by a relator seeking the disclosure and the reasonableness and good faith of a respondent in refusing to disclose.'" *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 36, quoting *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 53. *See also State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 34 (declining to award attorney's fees because the public records "were primarily beneficial to [the requester] rather than the public in general"), citing *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 60

(finding a physician was not entitled to attorney's fees because any minimal benefit conferred by granting the writ was "beneficial mainly to [the physician] rather than to the public in general").

Here, Relator requested records that 1) pertain only to him, and 2) are confidential pursuant to R.C. 5101.27 and 7 C.F.R. 272.1(c). Not only does the general public have little interest in records that pertain to one specific individual, the general public has no right of access to these records because they are confidential. Relator cannot establish the existence of a sufficient public benefit in his confidential records, and as a result, he is not entitled to attorney's fees. To the extent Relator argues that a public benefit ensues from "investigating how government ineptitude is wrongfully turning food-stamp recipients into felons," Relator's Brief at 22, it was Cuyahoga County—not Respondents—who prosecuted Relator for theft of food stamps. *See* Am. Compl. at ¶ 12. So any such public benefit is inapplicable to Respondents.

This Court has also declined to award attorney's fees when doing so would be disproportionate to the case. *See State ex rel. Pool v. City of Sheffield Lake*, Slip Opinion 2023-Ohio-1204, ¶ 32. This Court has noted that "R.C. 149.43 is designed to ensure that public agencies and employees timely and reasonably respond to public-records requests, not to ensure a livelihood for attorneys who scour the state hoping for a failure to respond." *See also State ex rel. DiFranco v. City of S. Euclid*, 138 Ohio St.3d 378, 2014-Ohio-539, 7 N.E.3d 1146, ¶ 20 (interpreting a prior version of R.C. 149.43(C)(2)(b) to require that attorneys "provide a real service beyond the filing of a complaint").

This Court should also decline to award attorney's fees because awarding them here would be punitive rather than remedial. As already explained, Respondents' delay in providing the requested records to Relator was caused by a mistake, and Respondents remedied that mistake within two business days of realizing it had occurred. The filing of this action did not affect that

remedy: the involved ODJFS staff were made aware of their mistake by Relator's counsel's follow-up email, those employees did not yet know this action had been filed, and the search for responsive records was already completed by the time Ms. Brogan found out about this action (which was the same day she sent the responsive records to Relator's counsel). Respondents should not be penalized for their mistake by having to pay attorney's fees. An award of attorney's fees would be disproportionate based on the facts in this case, and this Court should decline to award them as it has done in other cases.

* * *

Attorney's fees are discretionary under the Public Records Act, and for all of the reasons discussed, this Court should decline to award them in this action.

IV. CONCLUSION

For the reasons set forth above, this Court should deny Relator's request for a writ of mandamus against Respondents, award Relator $1,000 in statutory damages, and deny Relator's requests for costs and attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to S.Ct.Prac.R. 3.11(D) and Civ.R. 5(B)(2)(f), a copy of the foregoing *Respondents' Merit Brief* was sent on May 25, 2023 via e-mail to the following:

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Counsel for Relator

/s/ Caitlyn Nestleroth Johnson
CAITLYN N. JOHNSON (087724)
Senior Assistant Attorney General

Ohio Revised Code

Section 149.43 Availability of public records for inspection and copying.

Effective: September 30, 2021
Legislation: House Bill 110

(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, to proceedings related to the imposition of community control sanctions and post-release control sanctions, or to proceedings related to determinations under section 2967.271 of the Revised Code regarding the release or maintained incarceration of an offender to whom that section applies;

(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 sections 3705.12 to 3705.124 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 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) Designated public service worker 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) In the case of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code or a review conducted pursuant to guidelines established by the director of health

under section 3701.70 of the Revised Code, records provided to the board or director, statements made by board members during meetings of the board or by persons participating in the director's review, and all work products of the board or director, and in the case of a child fatality review board, child fatality review data submitted by the 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 4751.15 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;

(cc) Information and records that are made confidential, privileged, and not subject to disclosure under divisions (B) and (C) of section 2949.221 of the Revised Code;

(dd) Personal information, as defined in section 149.45 of the Revised Code;

(ee) The confidential name, address, and other personally identifiable information of a program participant in the address confidentiality program established under sections 111.41 to 111.47 of the Revised Code, including the contents of any application for absent voter's ballots, absent voter's ballot identification envelope statement of voter, or provisional ballot affirmation completed by a program participant who has a confidential voter registration record, and records or portions of records pertaining to that program that identify the number of program participants that reside within a precinct, ward, township, municipal corporation, county, or any other geographic area smaller than the state. As used in this division, "confidential address" and "program participant" have the meaning defined in section 111.41 of the Revised Code.

(ff) Orders for active military service of an individual serving or with previous service in the armed forces of the United States, including a reserve component, or the Ohio organized militia, except that, such order becomes a public record on the day that is fifteen years after the published date or effective date of the call to order;

(gg) The name, address, contact information, or other personal information of an individual who is less than eighteen years of age that is included in any record related to a traffic accident involving a school vehicle in which the individual was an occupant at the time of the accident;

(hh) Protected health information, as defined in 45 C.F.R. 160.103, that is in a claim for payment for a health care product, service, or procedure, as well as any other health claims data in another document that reveals the identity of an individual who is the subject of the data or could be used to reveal that individual's identity;

(ii) Any depiction by photograph, film, videotape, or printed or digital image under either of the following circumstances:

(i) The depiction is that of a victim of an offense the release of which would be, to a reasonable person of ordinary sensibilities, an offensive and objectionable intrusion into the victim's expectation of bodily privacy and integrity.

(ii) The depiction captures or depicts the victim of a sexually oriented offense, as defined in section 2950.01 of the Revised Code, at the actual occurrence of that offense.

(jj) Restricted portions of a body-worn camera or dashboard camera recording;

(kk) In the case of a fetal-infant mortality review board acting under sections 3707.70 to 3707.77 of the Revised Code, records, documents, reports, or other information presented to the board or a person abstracting such materials on the board's behalf, statements made by review board members during board meetings, all work products of the board, and data submitted by the board to the department of health or a national infant death review database, other than the report prepared pursuant to section 3707.77 of the Revised Code.

(ll) Records, documents, reports, or other information presented to the pregnancy-associated mortality review board established under section 3738.01 of the Revised Code, statements made by board members during board meetings, all work products of the board, and data submitted by the board to the department of health, other than the biennial reports prepared under section 3738.08 of the Revised Code;

(mm) Except as otherwise provided in division (A)(1)(oo) of this section, telephone numbers for a victim, as defined in section 2930.01 of the Revised Code or a witness to a crime that are listed on any law enforcement record or report.

(nn) A preneed funeral contract, as defined in section 4717.01 of the Revised Code, and contract terms and personally identifying information of a preneed funeral contract, that is contained in a report submitted by or for a funeral home to the board of embalmers and funeral directors under division (C) of section 4717.13, division (J) of section 4717.31, or section 4717.41 of the Revised

Code.

(oo) Telephone numbers for a party to a motor vehicle accident subject to the requirements of section 5502.11 of the Revised Code that are listed on any law enforcement record or report, except that the telephone numbers described in this division are not excluded from the definition of "public record" under this division on and after the thirtieth day after the occurrence of the motor vehicle accident.

A record that is not a public record under division (A)(1) of this section and that, under law, is permanently retained becomes a public record on the day that is seventy-five years after the day on which the record was created, except for any record protected by the attorney-client privilege, a trial preparation record as defined in this section, a statement prohibiting the release of identifying information signed under section 3107.083 of the Revised Code, a denial of release form filed pursuant to section 3107.46 of the Revised Code, or any record that is exempt from release or disclosure under section 149.433 of the Revised Code. If the record is a birth certificate and a biological parent's name redaction request form has been accepted under section 3107.391 of the Revised Code, the name of that parent shall be redacted from the birth certificate before it is released under this paragraph. If any other section of the Revised Code establishes a time period for disclosure of a record that conflicts with the time period specified in this section, the time period in the other section prevails.

(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) "Designated public service worker" means a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, county or multicounty corrections officer, community-based correctional facility employee, designated Ohio national guard member, protective services worker, youth services employee, firefighter, EMT, medical director or member of a cooperating physician advisory board of an emergency medical service organization, state board of pharmacy employee, investigator of the bureau of criminal identification and investigation, emergency service telecommunicator, forensic mental health provider, mental health evaluation provider, regional psychiatric hospital employee, judge,

magistrate, or federal law enforcement officer.

(8) "Designated public service worker residential and familial information" means any information that discloses any of the following about a designated public service worker:

(a) The address of the actual personal residence of a designated public service worker, except for the following information:

(i) The address of the actual personal residence of a prosecuting attorney or judge; and

(ii) The state or political subdivision in which a designated public service worker 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 designated public service worker;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a designated public service worker by the designated public service worker's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the designated public service worker's employer from the designated public service worker'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 designated public service worker;

(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.

(9) As used in divisions (A)(7) and (15) to (17) of this section:

"Peace officer" has the meaning defined 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.

"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.

"County or multicounty corrections officer" means any corrections officer employed by any county or multicounty correctional facility.

"Designated Ohio national guard member" means a member of the Ohio national guard who is participating in duties related to remotely piloted aircraft, including, but not limited to, pilots, sensor operators, and mission intelligence personnel, duties related to special forces operations, or duties related to cybersecurity, and is designated by the adjutant general as a designated public service worker for those purposes.

"Protective services worker" means any employee of a county agency who is responsible for child protective services, child support services, or adult protective services.

"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.

"Firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

"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 meanings defined in section 4765.01 of the Revised Code.

"Investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

"Emergency service telecommunicator" has the meaning defined in section 4742.01 of the Revised Code.

"Forensic mental health provider" means any employee of a community mental health service provider or local alcohol, drug addiction, and mental health services board who, in the course of the employee's duties, has contact with persons committed to a local alcohol, drug addiction, and mental health services board by a court order pursuant to section 2945.38, 2945.39, 2945.40, or 2945.402 of the Revised Code.

"Mental health evaluation provider" means an individual who, under Chapter 5122. of the Revised Code, examines a respondent who is alleged to be a mentally ill person subject to court order, as defined in section 5122.01 of the Revised Code, and reports to the probate court the respondent's mental condition.

"Regional psychiatric hospital employee" means any employee of the department of mental health and addiction services who, in the course of performing the employee's duties, has contact with patients committed to the department of mental health and addiction services by a court order pursuant to section 2945.38, 2945.39, 2945.40, or 2945.402 of the Revised Code.

"Federal law enforcement officer" has the meaning defined in section 9.88 of the Revised Code.

(10) "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.

(11) "Community control sanction" has the meaning defined in section 2929.01 of the Revised Code.

(12) "Post-release control sanction" has the meaning defined in section 2967.01 of the Revised Code.

(13) "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.

(14) "Designee," "elected official," and "future official" have the meanings defined in section 109.43 of the Revised Code.

(15) "Body-worn camera" means a visual and audio recording device worn on the person of a peace officer while the peace officer is engaged in the performance of the peace officer's duties.

(16) "Dashboard camera" means a visual and audio recording device mounted on a peace officer's vehicle or vessel that is used while the peace officer is engaged in the performance of the peace officer's duties.

(17) "Restricted portions of a body-worn camera or dashboard camera recording" means any visual or audio portion of a body-worn camera or dashboard camera recording that shows, communicates, or discloses any of the following:

(a) The image or identity of a child or information that could lead to the identification of a child who is a primary subject of the recording when the law enforcement agency knows or has reason to know the person is a child based on the law enforcement agency's records or the content of the recording;

(b) The death of a person or a deceased person's body, unless the death was caused by a peace officer or, subject to division (H)(1) of this section, the consent of the decedent's executor or administrator has been obtained;

(c) The death of a peace officer, firefighter, paramedic, or other first responder, occurring while the decedent was engaged in the performance of official duties, unless, subject to division (H)(1) of this section, the consent of the decedent's executor or administrator has been obtained;

(d) Grievous bodily harm, unless the injury was effected by a peace officer or, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(e) An act of severe violence against a person that results in serious physical harm to the person, unless the act and injury was effected by a peace officer or, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(f) Grievous bodily harm to a peace officer, firefighter, paramedic, or other first responder, occurring while the injured person was engaged in the performance of official duties, unless, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(g) An act of severe violence resulting in serious physical harm against a peace officer, firefighter, paramedic, or other first responder, occurring while the injured person was engaged in the performance of official duties, unless, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(h) A person's nude body, unless, subject to division (H)(1) of this section, the person's consent has been obtained;

(i) Protected health information, the identity of a person in a health care facility who is not the subject of a law enforcement encounter, or any other information in a health care facility that could identify a person who is not the subject of a law enforcement encounter;

(j) Information that could identify the alleged victim of a sex offense, menacing by stalking, or domestic violence;

(k) Information, that does not constitute a confidential law enforcement investigatory record, that could identify a person who provides sensitive or confidential information to a law enforcement agency when the disclosure of the person's identity or the information provided could reasonably be expected to threaten or endanger the safety or property of the person or another person;

(l) Personal information of a person who is not arrested, cited, charged, or issued a written warning by a peace officer;

(m) Proprietary police contingency plans or tactics that are intended to prevent crime and maintain public order and safety;

(n) A personal conversation unrelated to work between peace officers or between a peace officer and an employee of a law enforcement agency;

(o) A conversation between a peace officer and a member of the public that does not concern law enforcement activities;

(p) The interior of a residence, unless the interior of a residence is the location of an adversarial encounter with, or a use of force by, a peace officer;

(q) Any portion of the interior of a private business that is not open to the public, unless an adversarial encounter with, or a use of force by, a peace officer occurs in that location.

As used in division (A)(17) of this section:

"Grievous bodily harm" has the same meaning as in section 5924.120 of the Revised Code.

"Health care facility" has the same meaning as in section 1337.11 of the Revised Code.

"Protected health information" has the same meaning as in 45 C.F.R. 160.103.

"Law enforcement agency" has the same meaning as in section 2925.61 of the Revised Code.

"Personal information" means any government-issued identification number, date of birth, address, financial information, or criminal justice information from the law enforcement automated data system or similar databases.

"Sex offense" has the same meaning as in section 2907.10 of the Revised Code.

"Firefighter," "paramedic," and "first responder" have the same meanings as in section 4765.01 of the Revised Code.

(B)(1) Upon request by any person 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 the requester at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request by any person, a public office or person responsible for public records shall make copies of the requested public record available to the requester 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, 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 requests 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 the requester to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the requester under this division. The public office or the person responsible for the public record shall permit the requester 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 requester 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 requester. Nothing in this section requires a public office or person responsible for the public record to allow the requester of a copy of the public record to make the copies of the public record.

(7)(a) 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.

(b) 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 division (B)(7) of this section. A public office that adopts a policy and procedures under division (B)(7) of this section shall comply with them in performing its duties under that division.

(c) In any policy and procedures adopted under division (B)(7) of this section:

(i) A public office may limit the number of records requested by a person that the office will

physically deliver by United States mail or by another delivery service 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;

(ii) A public office that chooses to provide some or all of its public records on a web site that is fully accessible to and searchable by members of the public at all times, other than during acts of God outside the public office's control or maintenance, and that charges no fee to search, access, download, or otherwise receive records provided on the web site, may limit to ten per month the number of records requested by a person that the office will deliver in a digital format, unless the requested records are not provided on the web site and 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.

(iii) For purposes of division (B)(7) of this section, "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, a public office, or person responsible for public records, having custody of the records of the agency employing a specified designated public service worker shall disclose to the journalist the address of the actual personal residence of the designated public service worker and, if the designated public service worker's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the

designated public service worker'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:

(i) 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;

(ii) Information about minors involved in a school vehicle accident as provided in division (A)(1)(gg) of this section, other than personal information as defined in section 149.45 of the Revised Code.

(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.

(10) Upon a request made by a victim, victim's attorney, or victim's representative, as that term is used in section 2930.02 of the Revised Code, a public office or person responsible for public records shall transmit a copy of a depiction of the victim as described in division (A)(1)(ii) of this section to the victim, victim's attorney, or victim's representative.

(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 do only one of the following, and not both:

(a) File a complaint with the clerk of the court of claims or the clerk of the court of common pleas under section 2743.75 of the Revised Code;

(b) 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)(2) 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.

(2) If a requester transmits a written request by hand delivery, electronic submission, 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 requester 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.

(3) In a mandamus action filed under division (C)(1) of this section, the following apply:

(a)(i) If the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(ii) If the court makes a determination described in division (C)(3)(b)(iii) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(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 or if the court determines any of the following, the court may award reasonable attorney's fees to the relator, subject to division (C)(4) of this section:

(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.

(iii) The public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with division (B) of this section. No discovery may be conducted on the issue of the alleged bad faith of the public office or person responsible for the public records. This division shall not be construed as creating a presumption that the public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order described in this division.

(c) The court shall 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 would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(4) All of the following apply to any award of reasonable attorney's fees awarded under division (C)(3)(b) of this section:

(a) The fees shall be construed as remedial and not punitive.

(b) The fees awarded shall not exceed the total of the reasonable attorney's fees incurred before the

public record was made available to the relator and the fees described in division (C)(4)(c) of this section.

(c) 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.

(d) The court may reduce the amount of fees awarded if the court determines that, given the factual circumstances involved with the specific public records request, an alternative means should have been pursued to more effectively and efficiently resolve the dispute that was subject to the mandamus action filed under division (C)(1) of this section.

(5) If the court does not issue a writ of mandamus under division (C) of this section and the court determines at that time that the bringing of the mandamus action was frivolous conduct as defined in division (A) of section 2323.51 of the Revised Code, the court may award to the public office all court costs, expenses, and reasonable attorney's fees, as determined by the court.

(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. A future official may satisfy the requirements of this division by attending the training before taking office, provided that the future official may not send a designee in the future official's place.

(2) 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.

The public office shall distribute the public records policy adopted by the public office under this division 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.

(G) A request by a defendant, counsel of a defendant, or any agent of a defendant in a criminal action that public records related to that action be made available under this section shall be considered a demand for discovery pursuant to the Criminal Rules, except to the extent that the Criminal Rules plainly indicate a contrary intent. The defendant, counsel of the defendant, or agent of the defendant making a request under this division shall serve a copy of the request on the prosecuting attorney, director of law, or other chief legal officer responsible for prosecuting the action.

(H)(1) Any portion of a body-worn camera or dashboard camera recording described in divisions (A)(17)(b) to (h) of this section may be released by consent of the subject of the recording or a representative of that person, as specified in those divisions, only if either of the following applies:

(a) The recording will not be used in connection with any probable or pending criminal proceedings;

(b) The recording has been used in connection with a criminal proceeding that was dismissed or for which a judgment has been entered pursuant to Rule 32 of the Rules of Criminal Procedure, and will not be used again in connection with any probable or pending criminal proceedings.

(2) If a public office denies a request to release a restricted portion of a body-worn camera or dashboard camera recording, as defined in division (A)(17) of this section, any person may file a mandamus action pursuant to this section or a complaint with the clerk of the court of claims pursuant to section 2743.75 of the Revised Code, requesting the court to order the release of all or portions of the recording. If the court considering the request determines that the filing articulates by clear and convincing evidence that the public interest in the recording substantially outweighs privacy interests and other interests asserted to deny release, the court shall order the public office to release the recording.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in R.C. 1.52(B) that amendments are to be harmonized if reasonably capable of simultaneous operation.

Ohio Revised Code

Section 5101.27 Restricting disclosure of information regarding public assistance recipients.

Effective: April 12, 2021

Legislation: House Bill 210 - 133rd General Assembly

(A) Except as permitted by this section, section 5101.273, 5101.28, or 5101.29 of the Revised Code, or rules adopted under section 5101.30 of the Revised Code, or when required by federal law, no person or government entity shall knowingly solicit, disclose, receive, use, permit the use of, or participate in the use of any information regarding a public assistance recipient for any purpose not directly connected with the administration of a public assistance program.

(B) To the extent permitted by federal law, the department of job and family services and county agencies shall do all of the following:

(1) Release information regarding a public assistance recipient for purposes directly connected to the administration of the program to a government entity responsible for administering that public assistance program;

(2) Provide information regarding a public assistance recipient to a law enforcement agency for the purpose of any investigation, prosecution, or criminal or civil proceeding relating to the administration of that public assistance program;

(3) Provide, for purposes directly connected to the administration of a program that assists needy individuals with the costs of public utility services, information regarding a recipient of financial assistance provided under a program administered by the department or a county agency pursuant to Chapter 5107. or 5108. of the Revised Code to an entity administering the public utility services program.

(C)(1) To the extent permitted by federal law and subject to division (C)(2) of this section, the department of job and family services shall release, for purposes directly connected to a public health investigation related to section 3301.531 or 5104.037 of the Revised Code, information regarding a public assistance recipient who receives publicly funded child care, so long as all of the following

conditions are met:

(a) The department of health or the tuberculosis control unit has initiated a public health investigation related to section 3301.531 or 5104.037 of the Revised Code and has assessed the investigation as an emergency.

(b) The department of health or the tuberculosis control unit has notified the department of job and family services about the investigation and has requested that the department of job and family services release the information for purposes of the investigation.

(c) The department of job and family services is unable to timely obtain voluntary, written authorization that complies with section 5101.272 of the Revised Code.

(2) If the conditions specified in division (C)(1) of this section are met, the department of job and family services shall release to the department of health or the tuberculosis control unit the minimum information necessary to fulfill the needs of the department of health or tuberculosis control unit related to the public health investigation.

(3) If the department of job and family services releases information pursuant to division (C) of this section, it shall immediately notify the public assistance recipient.

(D) To the extent permitted by federal law and section 1347.08 of the Revised Code, the department and county agencies shall provide access to information regarding a public assistance recipient to all of the following:

(1) The recipient;

(2) The authorized representative;

(3) The legal guardian of the recipient;

(4) The attorney of the recipient, if the attorney has written authorization that complies with section 5101.272 of the Revised Code from the recipient.

(E) To the extent permitted by federal law and subject to division (F) of this section, the department and county agencies may do both of the following:

(1) Release information about a public assistance recipient if the recipient gives voluntary, written authorization that complies with section 5101.272 of the Revised Code;

(2) Release information regarding a public assistance recipient to a state, federal, or federally assisted program that provides cash or in-kind assistance or services directly to individuals based on need or for the purpose of protecting children to a government entity responsible for administering a children's protective services program.

(F) Except when the release is required by division (B), (C), or (D) of this section or is authorized by division (E)(2) of this section, the department or county agency shall release the information only in accordance with the authorization. The department or county agency shall provide, at no cost, a copy of each written authorization to the individual who signed it.

(G) The department of job and family services may adopt rules defining "authorized representative" for purposes of division (D)(2) of this section.

Appendix C

7 CFR section where requirements are described	Current OMB control No.
	0584–0336
	0584–0339
272.2(d)	0584–0064
272.2(a), (c), (d), (e), (f)	0584–0083
272.5(c)	0584–0083
272.3(a), (b), (c)	0584–0083
272.6(g), (h)	0584–0025
273.2(a), (b), (c), (e), (f), (h)	0584–0064
273.5(b)	0584–0064
273.7(a), (d), (e)	0584–0339
273.7(c)	0584–0083
	0584–0339
273.8(b), (e)	0584–0064
273.9(d)	0584–0496
273.9(d) (c)	0584–0064
273.10(e), (g)(1)	0584–0064
273.11(b)	0584–0496
273.11(i)(1)–(4)	0584–0080
	0584–0081
273.11(i)(5)	0584–0081
273.11(i)(6)	0584–0080
	0584–0081
273.12(a), (b), (c), (d)	0584–0064
273.13(a), (b)	0584–0064
273.14(b)	0584–0064
273.16(a), (b), (d), (e), (f), (g), (h), (i)	0584–0064
273.18(h)	0584–0069
273.21(h)	0584–0064
273.24(f)	0584–0479
274.3(d)	0584–0069
	0584–0080
274.4(a)	0584–0080
274.4(b)	0584–0080
	0584–0081
274.6(a), (b) and (e)	0584–0080
	0584–0081
275.2(a)	0584–0010
	0584–0303
275.4(a)	0584–0010
	0584–0303
275.4(b)	0584–0010
275.4(c)	0584–0034
	0584–0074
	0584–0299
275.5(a), (b)	0584–0010
275.6(b)	0584–0010
275.8(a)	0584–0010
275.9(b), (g)	0584–0010
275.10(a)	0584–0074
	0584–0299
	0584–0303
275.11(a)	0584–0303
275.12(b), (c), (d), (e)	0584–0074
275.12(f), (g)	0584–0299
275.13(b), (d), (e)	0584–0034
275.14(c), (d)	0584–0034
	0584–0074
	0584–0299
275.16(b), (c), (d)	0584–0010
275.17(a), (b)	0584–0010
275.18(a), (b)	0584–0010
275.19(a), (b), (c)	0584–0010
275.20(a)	0584–0010
275.21(b)	0584–0034
	0584–0074
	0584–0299
275.21(c), (d), (e)	0584–0034
275.22(a), (b)	0584–0010
275.23	0584–0010
	0584–0034
	0584–0074
	0584–0299
277.18(a), (c), (d), (f), (i)	0584–0083
278.1(a), (b), (l)	0584–0008
278.5(c), (d), (f)	0584–0008
278.6(b)	0584–0008
278.7(b), (c)	0584–0008
278.8(a)	0584–0008
280.7(c), (d), (g)	0584–0336
280.9(b)	0584–0037
280.10(a)	0584–0336

[82 FR 2034, Jan. 6, 2017]

§ 271.9 Promotional activities.

No funds authorized to be appropriated under the Food and Nutrition Act of 2008, as amended, shall be used for recruitment or promotion activities as described in § 277.4(b)(5). No entity receiving funds under the Food and Nutrition Act of 2008, as amended, shall be permitted to perform activities described in § 277.4(b)(6) of this chapter.

[81 FR 92556, Dec. 20, 2016]

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

Sec.

AUTHORITY: 7 U.S.C. 2011–2036.

EDITORIAL NOTE: OMB control numbers relating to this part 272 are contained in § 271.8.

§ 272.1 General terms and conditions.

(a) *Coupons do not reduce benefits.* The coupon allotment provided any eligible household shall not be considered income or resources for any purpose under any Federal, State, or local laws

including, but not limited to, laws on taxation, welfare, and public assistance programs. No participating State or political subdivision shall decrease any assistance otherwise provided an individual or individuals because of the receipt of a coupon allotment.

(b) *No sales taxes on SNAP purchases.* (1) A State shall not participate in SNAP if State or local sales taxes or other taxes or fees, including but not limited to excise taxes, are collected within the State on purchases made with SNAP coupons. ''Purchases made with food coupons'' for purposes of this provision shall refer to purchases of ''eligible foods'' as defined in § 271.2. Where the total value of groceries being bought by the recipient is larger than the amount of coupons being presented by the recipient, only the portion of the sale made in exchange for SNAP benefits must be exempt from taxation in order for a State to satisfy the requirements of this provision. Although a SNAP recipient may use a combination of cash and SNAP benefits in making a food purchase, only the dollar amount represented by the food coupons needs to be exempt from taxation.

(2) State and/or local law shall not permit the imposition of tax on food paid for with coupons. FNS may terminate the issuance of coupons and disallow administrative funds otherwise payable pursuant to part 277 in any State where such taxes are charged. Action to disallow administrative funds shall be taken in accordance with the procedures set forth in § 276.4.

(3) A State or local area which taxes some, but not all, eligible food items shall ensure that retail food stores in that locale sequence purchases of eligible foods paid for with a combination of coupons and cash so as to not directly or indirectly charge or assign a tax to SNAP recipients on eligible food items purchased with coupons. Prohibited methods include, but are not limited to, the allocation of coupons first to non-taxable eligible items, and the application of cash, rather than coupons, to taxable eligible food.

(c) *Disclosure.* (1) Use or disclosure of information obtained from SNAP applicant or recipient households shall be restricted to:

(i) Persons directly connected with the administration or enforcement of the provisions of the Food and Nutrition Act of 2008 or regulations, other Federal assistance programs, federally-assisted State programs providing assistance on a means-tested basis to low income individuals, or general assistance programs which are subject to the joint processing requirements in § 273.2(j)(2).

(ii) Persons directly connected with the administration or enforcement of the programs which are required to participate in the State income and eligibility verification system (IEVS) as specified in § 272.8(a)(2), to the extent the SNAP information is useful in establishing or verifying eligibility or benefit amounts under those programs;

(iii) Persons directly connected with the verification of immigration status of aliens applying for SNAP benefits, through the Systematic Alien Verification for Entitlements (SAVE) Program, to the extent the information is necessary to identify the individual for verification purposes.

(iv) Persons directly connected with the administration of the Child Support Program under part D, title IV of the Social Security Act in order to assist in the administration of that program, and employees of the Secretary of Health and Human Services as necessary to assist in establishing or verifying eligibility or benefits under titles II and XVI of the Social Security Act;

(v) Employees of the Comptroller General's Office of the United States for audit examination authorized by any other provision of law; and

(vi) Local, State, or Federal law enforcement officials, upon their written request, for the purpose of investigating an alleged violation of the Food and Nutrition Act of 2008 or regulation. The written request shall include the identity of the individual requesting the information and his authority to do so, violation being investigated, and the identity of the person on whom the information is requested.

(vii) Local, State, or Federal law enforcement officers acting in their official capacity, upon written request by

such law enforcement officers that includes the name of the household member being sought, for the purpose of obtaining the address, social security number, and, if available, photograph of the household member, if the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or a high misdemeanor in New Jersey), or is violating a condition of probation or parole imposed under a Federal or State law. The State agency shall provide information regarding a household member, upon written request of a law enforcement officer acting in his or her official capacity that includes the name of the person being sought, if the other household member has information necessary for the apprehension or investigation of the other household member who is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole imposed under Federal or State law. The State agency must accept any document that reasonably establishes the identity of the household member being sought by law enforcement authorities. If a law enforcement officer provides documentation indicating that a household member is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole, the State agency shall follow the procedures in § 273.11(n) to determine whether the member's eligibility in SNAP should be terminated. A determination and request for information that does not comply with the terms and procedures in § 273.11(n) would not be sufficient to terminate the member's participation. The State agency shall disclose only such information as is necessary to comply with a specific written request of a law enforcement agency authorized by this paragraph.

(viii) Local educational agencies administering the National School Lunch Program established under the Richard B. Russell National School Lunch Act or the School Breakfast Program established under the Child Nutrition Act of 1966, for the purpose of directly certifying the eligibility of school-aged children for receipt of free meals under the School Lunch and School Breakfast programs based on their receipt of Supplemental Nutrition Assistance Program benefits.

(2) Recipients of information released under paragraph (c)(1) of this section must adequately protect the information against unauthorized disclosure to persons or for purposes not specified in this section. In addition, information received through the IEVS must be protected from unauthorized disclosure as required by regulations established by the information provider. Information released to the State agency pursuant to section 6103(l) of the Internal Revenue Code of 1954 shall be subject to the safeguards established by the Secretary of the Treasury in section 6103(l) of the Internal Revenue Code and implemented by the Internal Revenue Service in its publication, *Tax Information and Security Guidelines*.

(3) If there is a written request by a responsible member of the household, its currently authorized representative, or a person acting on its behalf to review material and information contained in its casefile, the material and information contained in the casefile shall be made available for inspection during normal business hours. However, the State agency may withhold confidential information, such as the names of individuals who have disclosed information about the household without the household's knowledge, or the nature or status of pending criminal prosecutions.

(d) *Information available to the public.* (1) Federal regulations, Federal procedures embodied in FNS notices and policy memos, State Plans of Operation, and corrective action plans shall be available upon request for examination by members of the public during office hours at the State agency headquarters as well as at FNS regional and national offices. State agency handbooks shall be available for examination upon request at each local certification office within each project area as well as at the State agency headquarters and FNS Regional offices. State agencies, at their option, may require other offices within the State to maintain a copy of Federal regulations.

(2) Copies of regulations, plans of operation, State manuals, State corrective action plans, and Federal procedures may be obtained from FNS in accordance with part 295 of this chapter.

(e) *Records and reports.* Each State agency shall keep such records and submit such reports and other information as required by FNS.

(f) *Retention of records.* Each State agency shall retain all Program records in an orderly fashion for audit and review purposes for no less than 3 years from the month of origin of each record. In addition:

(1) The State agency shall retain fiscal records and accountable documents for 3 years from the date of fiscal or administrative closure. Fiscal closure means that obligations for or against the Federal government have been liquidated. Administrative closure means that the State agency has determined and documented that no further action to liquidate the obligation is appropriate. Fiscal records and accountable documents include, but are not limited to, claims and documentation of lost benefits.

(2) Case records relating to intentional Program violation disqualifications and related notices to the household shall be retained indefinitely until the State agency obtains reliable information that the record subject has died or until FNS advises via the disqualified recipient database system edit report that all records associated with a particular individual, including the disqualified recipient database record, may be permanently removed from the database because of the individual's 80th birthday.

(3) Disqualification records submitted to the disqualified recipient database must be purged by the State agency that submitted them when the supporting documents are no longer accurate, relevant, or complete. The State agency shall follow a prescribed records management program to meet this requirement. Information about this program shall be available for FNS review.

(g) *Implementation.* The implementation schedule for any amendment to the regulations shall be specified in the amendment.

(1) *Amendment 132.* Program changes required by Amendment 132 to the SNAP regulations shall be implemented as follows:

(i) State agencies shall eliminate the purchase requirement for all households on or before January 1, 1979. The State agency shall designate the month the purchase requirement is to be eliminated. If the month designated is other than January 1979, the State agency shall obtain prior approval of FNS. FNS shall approve the designation of months prior to January 1979, if the State agency demonstrates that an accounting procedure for the new issuance system will be in place. The submission dates for the forms FNS–250 and FNS–256, stipulated in § 274.8(a), shall be effective with the reports for the first month of issuance without a purchase requirement. For example, if EPR is implemented in January, the FNS–250 and FNS–256 for January would be due by March 17, 1979. The FNS–259 shall be submitted in accordance with § 274.8(a)(3) starting with the quarter beginning January 1979.

(ii) State agencies may implement all eligibility rules contained in part 273 and all issuance rules contained in part 274 at the same time the purchase requirement is eliminated, but in no case shall eligibility and issuance rules be implemented prior to elimination of the purchase requirement. State agencies may also implement portions of part 273 and part 274 separately after the purchase requirement is eliminated, provided that the eligibility rules setting the income standards, the income deductions and the household allotment calculation are implemented at the same time, and all rules are implemented no later than 3 months after the purchase requirement is eliminated. However, if a State agency implements EPR after December 1, 1978, it shall implement the certification and other issuance regulations for all new applications and recertifications no later than March 1, 1979.

(iii) State agencies shall have up to 4 months following the first day that applications are taken under the new rules, to convert the current caseload to the new program. Households coming due for recertification during this