IN THE SUPREME COURT OF OHIO

STATE EX REL. MARCELLUS GILREATH *Relator,* v. **CUYAHOGA JOB AND FAMILY SERVICES**, *et al.* *Respondents.*	Case No.: 2022-0824
REPLY IN SUPPORT OF RELATOR MARCELLUS GILREATH'S MERIT BRIEF	

ORIGINAL ACTION IN MANDAMUS

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LAW & ARGUMENT

I. Because there are no facts to support their contention that they have provided all responsive records, Respondents' first proposition of law fails.

A. Because Respondents admit they have not even searched for them, they cannot claim to have produced all records responsive to Dr. Gilreath's request.

As they did in their Answer, in their Answer to the Amended Complaint, in their first Motion for Judgment on the Pleadings, and in their second Motion for Judgment on the Pleadings, Respondents insist yet again in Proposition of Law #1 that this Court may not grant Dr. Gilreath's petition for mandamus because "Respondents have provided all responsive records." But despite all those attempts, Respondents still cannot point to any evidence actually supporting that contention. Instead, they offer affidavits from witnesses who disclaim any actual knowledge of what records exist and whether anyone has even bothered trying to find them.

Their claim that they possess no more responsive records relies exclusively on two pieces of evidence, but neither of those affidavits—individually or collectively—establishes that ODJFS has produced all responsive records: First, Respondents point to the Affidavit of Kelly Brogan, which says "ODJFS has no responsive records" for Item 4.[1] But Ms. Brogan has already admitted in her deposition that she actually has no way of knowing whether that is true: She never searched for those records herself, she has no recollection of anyone ever saying that they had searched for those records, and she's never seen any evidence suggesting that anyone had searched for those records.[2] Despite her representations to the contrary, then, Ms. Brogan has no personal knowledge on which to base her conclusion that "ODJFS has no responsive records."

[1] Respondents' Ex. B, ¶¶ 11–13.

[2] Deposition of Kelly Brogan, 36:25–38:5.

Second, Respondents point to the Affidavit of Chris Dickens.[3] But like Ms. Brogan, Mr. Dickens does not indicate that he looked for records responsive to Item 4. He asserts that Cuyahoga County would have those documents, but he does not say whether *ODJFS would also have them*—a distinct likelihood, given his admission that counties "reach out to ODJFS" for assistance with fraud investigations.[4] Notably, Mr. Dickens likewise never suggests he even attempted to determine whether ODJFS had assisted with the Gilreath investigation or otherwise looked for records responsive to Item 4, regardless of whether Cuyahoga County might have had those records, as well.

Still, Respondents claim that they are entitled to a presumption that they "have properly performed their duties" to search for and produce records, relying on *State ex rel. Toledo Blade Co. v. Seneca Cnty. Bd. of Commrs.*, 120 Ohio St.3d 372, ¶ 29 (2008).[5] But their quotation conveniently omits a key qualification, as *Toledo Blade* makes clear that that presumption only exists "in the absence of evidence to the contrary." Here, evidence to the contrary comes in the form of the admissions from ODJFS counsel that she never performed her duty to search for records responsive to Item 4 and that she knows of no one else who has.

Because ODJFS is not entitled to any presumption that it has properly searched for records responsive to Dr. Gilreath's request, and because it admits that it has no reason to believe that anyone has, Dr. Gilreath is entitled to a writ compelling Respondents to perform that search and produce whatever public records it discovers.

[3] Respondents' Ex. C, ¶¶ 6–7.
[4] Dickens Aff., ¶ 5.
[5] Respondents' Merit Brief, 8.

B. Because Respondents admit they have not produced the requested CRIS-E records on the same medium upon which they keep them, they have not produced all records responsive to Dr. Gilreath's request.

"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." Ohio Rev. Code § 149.43(B)(6).

Respondents admit that they have not provided Dr. Gilreath's CRIS-E file upon the same medium upon which ODJFS keeps it; they maintain those records as a "database,"[6] but they refuse to produce those records as anything other than screenshots.[7] Still, they argue Dr. Gilreath is not entitled to a writ of mandamus compelling their production in the database's tabular medium because CRIS-E records are not public records at all. They are mistaken.

1. Because state and federal law require Respondents to produce them upon request, the release of Dr. Gilreath's CRIS-E records is not prohibited by state or federal law.

The Ohio Public Records Act exempts from its mandate "[r]ecords the release of which is prohibited by state or federal law." For instance, in *State ex rel. Sch. Choice Ohio, Inc. v. Cincinnati Pub. Sch. Dist.*, 147 Ohio St. 3d 256 (2016), a nonprofit sought access to a school district's student directory, but the school district refused to release it, saying that it was protected under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. This court granted a writ of mandamus, holding that although FERPA "broadly prohibits the release of education records," its exceptions brought the nonprofit's specific request back within the scope

[6] Respondents' Merit Brief, 14 ("Here, that form is the CRIS-E database.").

[7] Respondents' Merit Brief, 14 ("When CRIS-E records are requested, screenshots of the … computer screen are taken and sent to a requester..").

of the Ohio Public Records Act, and that as long as an exception applies, the release of those records "is not prohibited by federal law."[8]

Respondents argue that providing Dr. Gilreath a copy of his CRIS-E case history is prohibited by both state and federal law, i.e., 7 C.F.R. 272.1 and Ohio Rev. Code § 5101.27. But the opposite is true; rather than prohibiting the disclosure of those records to Dr. Gilreath, both of those laws *mandate* that ODJFS turn them over.

Although there are many cases in which it limits access to these records, 7 C.F.R. § 272.1(c)(3) makes perfectly clear that in a case like this one, where "there is a written request by a person acting on [a recipient's] behalf to review material and information contained in its casefile," ODJFS is required to release all the material and information in the casefile.

And because 7 C.F.R. § 272.1(c)(3) requires ODJFS to release this information, the disclosure limitations in Ohio Rev. Code § 5101.27(A) have no application to this request, as they do not apply to disclosures "required by federal law." And even if it did control, Section 5101.27(D) does not prohibit the release of Dr. Gilreath's CRIS-E case file to Dr. Gilreath himself; it *requires* it, mandating that ODJFS "shall provide access to information regarding a public assistance recipient" when the request comes from the recipient himself, his authorized representative, his legal guardian, or his attorney.[9]

The analysis of this request therefore runs parallel to that in *School Choice Ohio*: Both 7 C.F.R. 272.1 and Ohio Rev. Code § 5101.27 impose general limits on disclosure of Dr. Gilreath's CRIS-E case file, but they include exceptions that create cases—such as this one—in which the release is not only permitted but required.

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[8] *State ex rel. Sch. Choice Ohio, Inc. v. Cincinnati Pub. Sch. Dist.*, 147 Ohio St. 3d 256, 264, ¶ 30 (2016).
[9] Dr. Gilreath's request through counsel satisfies the first two criteria and the final one. Dr. Gilreath's counsel has written authorization complying with Section 5101.272, and Respondents do not dispute this fact.

Because Respondents do not dispute that Dr. Gilreath's request for his own records falls squarely into those exceptions, neither 7 C.F.R. 272.1 nor Ohio Rev. Code § 5101.27 prohibits their release.

2. Because the Act requires Respondents to produce records upon the medium upon they keep them, Respondents may not force Dr. Gilreath to accept a screenshot of his requested records instead.

Unable to rely on any statutory exemption to disclosure, Respondents fall back on a series of thinly supported alternative arguments for their refusal to produce the CRIS-E case file upon the same medium upon which they keep it. Each of those arguments fails.

First, Respondents suggest that Dr. Gilreath consented to receiving his CRIS-E records as screenshots. But Dr. Gilreath did no such thing; he asked to *inspect* the records in their native electronic format, but consented to receiving *copies* of those same records (i.e., his CRIS-E case file in its native electronic format) if it was not possible to arrange an inspection. But Respondents never suggest—let alone offer any evidence—that it was impossible to arrange for an inspection of the records in their native electronic format.

Second, Respondents seem to suggest that perhaps screenshots are, in fact, the original electronic medium upon which they maintain CRIS-E case files, because those records normally "appear on the accessor's computer screen."[10] But Dr. Gilreath did not request access to the record as it appears on a screen; he requested access to the record upon the medium upon which ODJFS "keeps it," which is exactly what the Act entitles him to. Indeed, Respondents' logic would permit public offices to deny access to the native version of literally every other digital record. Spreadsheets, memos, and photographs all "appear on the accessor's computer screen" when opened, but a screenshot is not native electronic format of those files; instead, just as with

[10] Respondents' Merit Brief, 14.

tabular information stored in the CRIS-E database, taking a screenshot of those files deprives the requester of the value of the native file by making it harder to analyze, manipulate, repurpose, or edit. As the Court of Claims has acknowledged, refusing to produce records in their "native format" permits public offices to "deliberately impair the value of records created with taxpayer dollars, on equipment purchased with taxpayer dollars, using software licensed with taxpayer dollars, on a template and in a format used by the office as an integral part of its record-keeping function."[11]

Third, Respondents argue that they cannot be required to provide access to "the proprietary software program of CRIS-E,"[12] relying on *State ex rel. Gambill v. Opperman*, 135 Ohio St. 3d 298, ¶ 25 (2013), where this Court held that a requester was not entitled to data from mapmaker ESRI's copyrighted database because it would be impossible to "separate the requested raw data from the exempt Esri software files." But *Gambill* bears little relationship to this case, as Respondents have offered no evidence whatsoever to establish that CRIS-E is protected by copyright, that it is "proprietary," or that Dr. Gilreath's CRIS-E case file is inextricably intertwined with exempt material.

Finally, Respondents advance a novel argument that "the burden is on the Relator to ensure Respondents understand his request."[13] But no court has ever held that a relator is entitled to no records unless he forces the respondent to understand his request. Indeed, none of the cases Respondents cite to purport to impose any such burden on requesters. Instead, they merely require that the requester "identify with reasonable clarity the records at issue."[14] Here, there is

[11] Parks v. Webb, 2018-Ohio-1578, ¶ 17 (Ct. Cl.)

[12] Respondents' Merit Brief, 14.

[13] Respondents' Merit Brief, 15.

[14] State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cnty. Fiscal Officer, 963 N.E.2d 1288, 1302 (Ohio 2012)

no dispute that Dr. Gilreath identified the CRIS-E records at issue with reasonable clarity, as Respondents produced them, albeit not in the medium upon which they keep them. Nor should there be any dispute that Dr. Gilreath identified his preferred medium with reasonable clarity. He requested to receive the case file in its "native electronic format," and Respondents do not purport to be ignorant of what that means; they simply don't want to provide it.

C. Because Respondents admit they are unable to access their e-mails to comply with requests for records, Dr. Gilreath is entitled to a writ of mandamus compelling them to properly organize and maintain their records.

The Ohio Public Records Act obligates government offices and officials to "organize and maintain public records in a manner that they can be made available for inspection or copying" upon request.[15]

As laid out in Dr. Gilreath's merit brief, Respondents do not organize and maintain their own e-mail records at all; instead, they outsource that function to the Department of Administrative Services, which may or may not cooperate with fulfilling requests for public records.[16] Respondents complain that these admissions—eight separate instances in which various ODJFS employees admitted that the Department does not maintain these records—are "cherry-picked, out-of-context statements," but they offer no additional context to cast them in a different light.[17]

While they do attempt to address one admission, that explanation falls flat. Although Chief Inspector Steven Johnson testified that Mark Smith, the top IT official at ODJFS, cannot access agency e-mails, Respondents now argue that Mr. Johnson—their own expert on "DAS's e-mail system and servers," actually has no idea what he's talking about, claiming that he "did

[15] Ohio Rev. Code § 149.43(B)(2).
[16] Relator's Merit Brief, 6–7.
[17] Respondents' Merit Brief, 17.

not actually know whether Mr. Smith has such ability."[18] Mr. Johnson never actually said that, but more importantly, Mr. Smith himself admits that that when Dr. Gilreath submitted his request, "ODJFS did not have the ability to directly search and retrieve ODJFS emails."[19]

Mr. Smith does suggest that DAS eventually "began expanding access" to these records in February 2023, but he makes no representation that ODJFS is actually able to access those records today.[20] And Mr. Johnson confirmed at his deposition—taken two months after that purported expansion—that he is still stuck relying on DAS to retrieve e-mails for him,[21] and he is unaware of anyone at ODJFS actually being able to search for records without DAS intervention.[22]

Because Respondents admit that they do not maintain and organize their e-mails in a manner that they can be made available for inspection or copying upon request, Dr. Gilreath is entitled to a writ of mandamus ordering them to do so.

D. Because e-mails about an investigation are plainly within the scope of a request for records of an investigation, Dr. Gilreath is entitled to a writ of mandamus compelling their production.

If a requester makes an ambiguous request, a public office may deny the request, but only after providing 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."[23]

[18] Respondents' Merit Brief, 17, fn. 4.
[19] Affidavit of Mark Smith, ¶ 10. Respondents' Ex. D.
[20] Affidavit of Mark Smith, ¶ 13.
[21] Deposition of Steven Johnson, 16:2–9.
[22] Deposition of Steven Johnson, 26:10–27:6.
[23] Ohio Rev. Code § 149.43(B)(2).

"When faced with vague or overly broad records requests, a records custodian is under an obligation to alert requestors that their request is vague or overly broad, inform them about the methods of records storage to assist requesters in narrowing requests, and to provide them with an opportunity to refine their request."[24]

Here, Respondents have not produced any records responsive to Item 4 in Dr. Gilreath's request, claiming it is too vague to fulfill. Ms. Brogan testified that upon receiving the request in February 2022, she was unable to discern what kinds of records it was seeking and produced no records,[25] and Respondents now complain that Dr. Gilreath "had an obligation to make his request with reasonable clarity for Respondents to be able to reasonably identify the responsive records."[26]

Dr. Gilreath does not dispute that he had that obligation. And although he does dispute the contention that his request was vague—as the request explicitly mentions e-mails, and Mr. Johnson testified that e-mail is a normal way to document investigations[27]—that obligation is beside the point, because even if his request was too vague, that would only have triggered Respondents' duty to provide him with an opportunity to refine his request.

Respondents seek to wriggle out of this obligation by pointing to an e-mail they sent to Dr. Gilreath's counsel, but even that e-mail does not lay out "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." Respondents complain further about the response to that e-mail, alleging that they weren't aware Dr. Gilreath was seeking e-mails until he amended his Complaint.[28] But they

[24] *State ex rel. Dissell v. City of Cleveland*, 2021-Ohio-2937, ¶ 25 (8th Dist).
[25] Brogan Dep., 33:2–7.
[26] Respondents' Merit Brief, 18.
[27] Johnson Dep., 9:22–10:9.
[28] Respondents' Merit Brief, 18–19.

cannot credibly claim to have been sandbagged in litigation when they sat on Dr. Gilreath's request for months and then did nothing to respond to it until after litigation began.

Moreover, their complaint rings quite hollow when they still refuse—even today, when they are fully aware that Dr. Gilreath is seeking e-mails—to search their e-mail server.

Because Dr. Gilreath asked for e-mails, because ODJFS knows that it documents investigations in e-mails, and because ODJFS admits that it has known for months that Dr. Gilreath is looking for e-mails, the Court should grant a writ of mandamus ordering Respondents to search for and produce any responsive e-mails.

II. Because they do not dispute that they acted arbitrarily or that they still have not searched for e-mails, Respondents' third proposition of law fails.

"A relator in a public-records mandamus action is entitled to court costs only if (1) the court orders relief or (2) the court determines that the public office acted in bad faith by voluntarily making records available for the first time after the relator commenced the mandamus action."[29]

Because bad faith encompasses more than malice and dishonesty, merely pleading "bad judgment or negligence" that leads a defendant to believe they are in compliance with the law is insufficient to avoid a finding of bad faith. As this Court held with respect to an insurer that concluded without factual basis that it had satisfied its obligations in handling a claim in *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 188 (1949), "such a belief may not be an arbitrary or capricious one. The conduct … must be based on circumstances that furnish reasonable justification therefor."[30]

[29] *State ex rel. Howson v. Del. Cty. Sheriff's Office*, 2023-Ohio-1440, ¶ 26.
[30] *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 188, 87 N.E.2d 347, 349 (1949).

Respondents do not dispute that the *Hart* standard applies here. They do not dispute that their failure to fulfill Dr. Gilreath's request was arbitrary and without reasonable justification. And they make no effort to distinguish their conduct with the conduct at issue in *Hart*.

While their failure to address this issue is sufficient grounds for the Court to conclude they acted in bad faith, the Court may also look at the remainder of their conduct following Ms. Brogan's allegedly negligent failure to fulfill Dr. Gilreath's request. Respondents do not dispute that they stopped processing the request after receiving unspecified legal advice from their deputy chief counsel.[31] Respondents do not dispute that Dr. Gilreath sought an update on his request months later.[32] They do not dispute that they did not even respond to that follow-up for weeks, until after Dr. Gilreath filed suit.[33] They admit that they were "placed on notice of their purported failure to produce such emails when Relator filed his Amended Complaint" in December,[34] but nonetheless still "have not searched for emails related to Relator's alleged theft of food stamps," even today[35]

Respondents therefore admit that they sat on Dr. Gilreath's request for no apparent reason, and that they refuse to search for records they know he wants. Based on this evidence, the Court should conclude that Respondents acted in bad faith.

CONCLUSION

Respondents' conduct in this case has been a model of various flavors of bad faith. They arbitrarily stopped processing Dr. Gilreath's request without any valid basis. They ignored his follow-up requests for weeks. And even now, months after litigation began, they still refuse to

[31] Brogan Dep. 56:23–57:2.
[32] Teets Dep., 18:7–9.
[33] Teets Dep., 19:3–6.
[34] Respondents' Merit Brief, 18.
[35] Respondents' Merit Brief, 29.

even search for records they know he wants. The Court should grant Dr. Gilreath's petition for a writ of mandamus and compel Respondents to perform a reasonable search for responsive records, produce whatever public records it finds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 1, 2023, this document was served on opposing counsel as provided by Civ. R. 5(B)(2)(f).

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