

IN THE SUPREME COURT OF OHIO

THE CLEVELAND CLINIC
FOUNDATION, INC. AND
FAIRVIEW HOSPITAL,

Appellants,

vs.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO, *et al.*,

Appellees.

CASE NO. 08 -0411

Board of Tax Appeals
Case Nos. 2005-V-1726, 2006-V-9,
and 2006-H-117

MEMORANDUM OF APPELLEE, RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO, IN RESPONSE TO JUNE 6, 2008 ORDER
REGARDING PUBLIC RECORDS ISSUES

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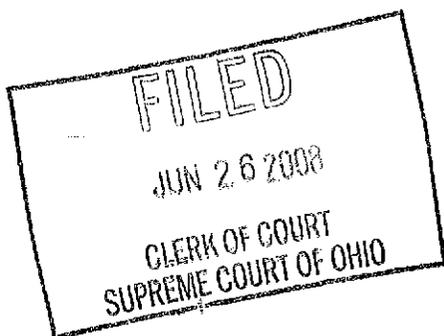
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MEMORANDUM

I. INTRODUCTION

This matter is before the Court on appeal from a January 25, 2008, order issued by the Board of Tax Appeals (hereinafter “the BTA”) in three matters pending before it regarding the exempt status of real property owned by Appellant The Cleveland Clinic Foundation, Inc. and its affiliated hospital, Fairview Hospital, (collectively, “the Clinic”) from ad valorem real property taxes pursuant to R.C. 5709.12 and R.C. 5709.121. The Order, which incorporates (with slight modification) Stipulation and Confidentiality agreements between the Clinic and the Beachwood City School District Board of Education and the Cleveland Municipal School District Board of Education (hereinafter “BOE”), compels the production of discovery to the BOE (and if it joins in the agreement, to the Tax Commissioner) subject to a protective order. Although the Clinic sought to have the discovery sealed as trade secrets pursuant to R.C. 1333.61, the BTA declined to do so. Instead, after taking testimony from a Clinic executive, but without an *in camera* review, the BTA found that the discovery documents “may qualify as confidential information” (Order at 8) and that a protective order was appropriate at the discovery stage of the proceedings. Accordingly, the BTA restricted the parties in their use and dissemination of discovery received from the Clinic, provided a mechanism for challenging the Clinic’s claim to confidentiality on given documents and, by incorporating the Stipulation and Confidentiality agreements, also provided a mechanism for the Clinic to defend any public records requests for the discovery that might be directed to the two public entities by the general public. (While the terms of the protective order originally only apply to the BOE and Clinic, the BTA invites the Tax Commissioner to join in if he desires to receive copies of the documents and the latter has agreed to do so.)

Before discovery could commence, the Clinic appealed to this Court apparently arguing that the protective order does not go far enough when it stopped short of finding the discovery documents to be trade secrets and then sealing them. The Tax Commissioner has moved to dismiss the appeal due, in part, to the interlocutory nature of the January 8th Order. On June 6, 2008, the Court issued an Order staying merit briefing and ordering the parties to file memoranda addressing two issues:

- 1.) When a public office as a litigant obtains documents through civil discovery, do those documents become “public records” that the agency must disclose upon request, or do those documents qualify as “trial preparation records” that are exempt from public records disclosure pursuant to R.C. 149.43(A)(1)(g)?
- 2.) After *State ex rel. WBNS TV v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, does a protective order issued by a tribunal in discovery constitute an exception from mandatory disclosure of the discovered documents as public records pursuant to the “catch all” exception at R.C. 149.43(A)(1)(v), where the tribunal has not ruled that specific documents are confidential under specific provisions of law?

The Court has therefore raised questions as to the interplay between the Public Records Act and civil discovery. This memorandum is being submitted pursuant to the Court’s instructions.¹

II. AS A GENERAL RULE, COURTS DISFAVOR THE PUBLIC DISSEMINATION OF DISCOVERY MATERIAL.

Before discussing the specific questions presented, it should be noted that because formal discovery is a coercive process, occurring only because the parties are in litigation and pursuant to court supervision under the Rules of Procedure (see Ohio Civil Rules 26 through 37),² courts have repeatedly held that discovery in general is a private matter and that public exposure would

¹ This memorandum is confined to the context of discovery materials solely in the possession of the litigants. This is the context for the protective order at issue in the instant case. Discovery that is filed with the BTA/Court for various reasons or is introduced as evidence would be subject to a different inquiry. If the Court desires input on the impact of the Public Records Act on any potential future filings of discovery with the BTA, the Tax Commissioner would so respond.

² Per Ohio Admin. Code 5717-1-11, the BTA has adopted the Ohio Civil Rules for discovery purposes.

actually be injurious to the process by discouraging the free exchange of often-times sensitive and/or private information necessary to pursue the litigation. Thus, in *Seattle Times Co. v. Rhinehart* (1984), 467 U.S. 20, 81 L. Ed. 2d 17, the U.S. Supreme Court, in addressing civil discovery in the State of Washington in the face of a First Amendment challenge to a discovery protective order, noted that the rules of civil discovery:

do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties. ¹⁶ If a litigant fails to comply with a request for discovery, the court may issue an order directing compliance that is enforceable by the court's contempt powers.

Id. at 30. The Court went on to note that:

Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 (1979), and, in general, they are conducted in private as a matter of modern practice. See *id.*, at 396 (BURGER, C. J., concurring); Marcus, *Myth and Reality in Protective Order Litigation*, 69 *Cornell L. Rev.* 1 (1983). Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Id. at 33. Concluding that the only way in which the litigants came by the information was through the trial court's discovery processes, that a litigant has no First Amendment right of access to information gained solely to pursue litigation, and that there is a great potential for abuse to allow dissemination of information gathered under such coercive circumstances, the Court upheld the protective order.

The *Seattle Times* logic has been cited with favor numerous times, including by this Court in *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St. 3d 350, 354. “We agree with the foregoing that discovery should be encouraged and that public disclosure would have a chilling effect on the parties’ search for and exchange of information pursuant to the discovery rules.” See also *Adams v. Metallica, Inc.* (1st Dist. 2001), 143 Ohio App. 3d 482, 487-489; *United States v. Anderson* (11th Cir. 1986), 799 F. 2d 1438, 1441; *Courier-Journal v. Marshall* (6th Cir. 1987), 828 F. 2d 361, 383-364; *Marshall v. Bramer* (6th Cir. 1987), 828 F. 2d 355, 360; *Weimer v. Honda* (S.D. Ohio, 2007), Case No. 2:06-CV-844, 2007 U.S. Dist. LEXIS 77490, unreported at 7-8; *Proctor and Gamble Co. v. Bankers Trust Co.* (S.D. Ohio 1995), 900 F. Supp 193, 196.

III. THE COURT HAS ALSO OPINED THAT DISCLOSURE OF PUBLIC RECORDS UNDER THE PUBLIC RECORDS ACT IS AN ABSOLUTE ESSENTIAL TO THE PROPER WORKING OF A DEMOCRACY.

The Court has equally found that there is a strong purpose behind Ohio’s Public Records Act, R.C. 149.43, in maintaining open government as an absolutely essential component of democracy. *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d at 354; *White v. Clinton Cty. Bd. Of Commrs.* (1996), 76 Ohio St. 3d 416, 420. As stated in *Kish v. Akron*, 109 Ohio St. 3d 162, 2006 Ohio 1244, at ¶¶15-17,:

“In a democratic nation * * * it is not difficult to understand the societal interest in keeping governmental records open.” *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 81, 526 N.E.2d 786. A fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government’s work and decisions. See, e.g., *Barr v. Matteo* (1959), 360 U.S. 564, 577, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (Black, J., concurring); Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective* (2003), 59 N.Y.U. Ann. Surv. Am. L. 247, fn.1, citing 9 *The Writings of James Madison* 103 (Hunt Ed. 1910) 103. As Thomas Jefferson wrote, “The way to prevent [errors of] the people is to give them full information of their affairs [through] the channel of the public papers, and to contrive that those papers

should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right.” *Id.*, quoting 11 *The Papers of Thomas Jefferson* (Boyd Ed.1955) 49.

Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. See, e.g., *State ex rel. Gannett Satellite Information Network, Inc. v. Petro* (1997), 80 Ohio St. 3d 261, 264, 1997 Ohio 319, 685 N.E.2d 1223; *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155, 157, 1997 Ohio 349, 684 N.E.2d 1239. Public records afford an array of other utilitarian purposes necessary to a sophisticated democracy: they illuminate and foster understanding of the rationale underlying state decisions, *White*, 76 Ohio St.3d at 420, 667 N.E.2d 1223, promote cherished rights such as freedom of speech and press, *State ex rel. Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St.2d 457, 467, 75 O.O.2d 511, 351 N.E.2d 127, and “foster openness and * * * encourage the free flow of information where it is not prohibited by law.” *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St.3d 168, 172, 1997 Ohio 386, 680 N.E.2d 956.

Not surprisingly then, our founders rejected the English common law and property theories that curtailed citizens’ access to governmental information. See *Natl. Broadcasting Co.*, 38 Ohio St.3d at 81, 526 N.E.2d 786; *Wells v. Lewis* (1901), 12 Ohio Dec. 170; Moyer, 59 *N.Y.U. Ann.Surv.Am.L.* at 247-248. Instead, our legislators, executives, and judges mandated and monitored the careful creation and preservation of public records, *White*, 76 Ohio St.3d at 419, 667 N.E.2d 1223, and codified the people’s right to access those records. Such statutes, including those comprising *R.C. Chapter 149*, reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor. See, e.g., *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 623, 1994 Ohio 5, 640 N.E.2d 174; *Wertheim*, 80 Ohio St.3d at 157, 684 N.E.2d 1239; *Dayton Newspapers, Inc. v. Dayton* (1976), 45 Ohio St.2d 107, 109, 74 O.O.2d 209, 341 N.E.2d 576.

Consequently, the Court has concluded that the statute must be construed liberally to effectuate broad access to records. *Id.* at ¶19.

IV. THE COURT HAS OPINED ON AT LEAST ONE OCCASION THAT THE PURPOSE BEHIND THE CONFIDENTIALITY OF DISCOVERY UNDER THE RULES OF PROCEDURE IS CONSISTENT WITH AN EXCEPTION TO DISCLOSURE UNDER OHIO'S PUBLIC RECORDS ACT.

In reconciling the purpose behind the Rules of Procedure and the purpose behind the Public Records Act, the Court has ruled in favor of the former, at least in the context of the Criminal Rules of Procedure. Thus, in *Lowe*, the Court was faced with a public records request by the media to gain access to discovery provided by a county prosecutor to defense counsel pursuant to Rule 16 of the Criminal Rules of Procedure. In holding that discovery was a matter solely between the prosecutor and the defendant and that the discovery rules had not envisioned a third-party's access to the exchanged information, the Court opined that:

The purpose behind the Rules of Criminal Procedure "is to remove the element of gamesmanship from a trial." *State v. Howard* (1978), 56 Ohio St. 2d 328, 333, 10 Ohio Op. 3d 448, 451, 383 N.E.2d 912, 915. As such criminal discovery is a matter solely between the prosecutor and the defendant. See, generally, *Lakewood v. Papadelis* (1987), 32 Ohio St. 3d 1, 3, 511 N.E.2d 1138, 1140. The rules governing discovery do not envision a third party's access to the information exchanged. As the United States Court of Appeals for the Eleventh Circuit stated in *United States v. Anderson* (C.A. 11, 1986), 799 F.2d 1438, 1441:

"Discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-34, 104 S. Ct. 2199, 2207-08, 81 L. Ed. 2d 17[, 26-27] (1984) (pretrial interrogatories and depositions 'were not open to the public at common law'); *Gannett Co. v. DePasquale*, 443 U.S. 368, 396, 99 S. Ct. 2898, 2914, 61 L. Ed. 2d 608[, 632] (1979) (Burger, C.J., concurring) ('It has never occurred to anyone, as far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.'). Moreover, documents collected during discovery are not 'judicial records.' Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *Cornell L.Rev.* 1, 15 (1983).

“If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge. Litigants should not be discouraged from putting their discovery agreements in writing, and district judges should not be discouraged from facilitating voluntary discovery.”

We agree with the foregoing that discovery should be encouraged and that public disclosure would have a chilling effect on the parties’ search for and exchange of information pursuant to the discovery rules.

By contrast, the purpose of Ohio’s Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy. *White v. Clinton Cty. Bd. of Commrs.* (1996), 76 Ohio St. 3d 416, 420, 667 N.E.2d 1223, 1226-1227; see *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St. 3d 79, 81, 526 N.E.2d 786, 788. However, there are certain governmental activities that would be “totally frustrated if conducted openly.” *Press-Enterprise Co. v. California Superior Court* (1986), 478 U.S. 1, 8-9, 106 S. Ct. 2735, 2740, 92 L. Ed. 2d 1, 10. Criminal discovery is one of those governmental activities that would be frustrated if subjected to the required disclosure contemplated by R.C. 149.43. If all information exchanged is subject to complete public disclosure, then parties may cease open exchange. This would thwart entirely the objective of removing “the element of gamesmanship from a trial.” *Howard*, 56 Ohio St. 2d at 333, 10 Ohio Op. 3d at 451, 383 N.E.2d at 915. We therefore hold that information that a criminal prosecutor has disclosed to the defendant for discovery purposes pursuant to Crim.R. 16 is not thereby subject to release as a “public record” pursuant to R.C. 149.43.

Lowe, 77 Ohio St. 3d at 354-355.³ In *Adams v. Metallica, Inc.*, the First District Court of Appeals opined that the same logic applies equally to civil discovery. *Adams*, 143 Ohio App. 3d

³ Although this discussion appears to be more like a balancing test between two competing schemes, the Court subsequently in *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St 3d 406, 2004-Ohio-1487, at ¶38, seems to suggest a more harmonious interplay between the Rules of Procedure and the Public Records Act by stating that it simply was recognizing in *Lowe* what the Public Records Act already excluded from disclosure -- work product and trial preparation records. See further discussion of this in specific response to the “trial preparation” question below.

at 489. See also *Doe v. American Cancer Society, Ohio Div.* (1st Dist., 2001), 143 Ohio App. 3d 495, 499.

It is with this in mind that the Tax Commissioner will proceed to address the specific questions posited by the Court. For purposes of clarity the Tax Commissioner will break down the first question into two parts: a) whether discovery received by counsel for a public entity is a “record” and, if so b) whether it is otherwise exempted from disclosure as a “trial preparation record.”

V. WHETHER DISCOVERY IS A “RECORD” UNDER THE PUBLIC RECORDS ACT IS DEPENDENT ON WHETHER IT SERVES TO DOCUMENT THE ORGANIZATION, FUNCTIONS, POLICIES, DECISIONS, PROCEDURES, OPERATIONS, OR OTHER ACTIVITIES OF THE OFFICE.

Any analysis of whether discovery in the hands of a public agency is subject to disclosure under the Public Records Act must start with the question of whether it is even a “record” under the Act. R.C. 149.43(A)(1) defines a “Public record” to mean “**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 [3313.53.3] of the Revised Code.*”- (Emphasis added.) R.C. 149.011(G) defines “Records” as one which “includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in *section 1306.01 of the Revised Code*, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.”

In *Kish v. Akron*, the Court held that the definition of “records” is to be construed broadly:

We previously have held that the General Assembly's use of "includes" in *R.C. 149.011(G)* as a preface to the definition of "records" is an indication of expansion rather than constriction, restriction, or limitation and that the statute's use of the phrase "any document" is one encompassing all documents that fit within the statute's definition, regardless of "form or characteristic." *State ex rel. Cincinnati Post v. Schweikert* (1988), 38 Ohio St.3d 170, 172-173, 527 N.E.2d 1230. There can be no dispute that there is great breadth in the definition of "records" for purposes here. Unless otherwise exempted or excepted, almost all documents memorializing the activities of a public office can satisfy the definition of "record." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002 Ohio 7117, 781 N.E.2d 180, P13. Indeed, any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record. See *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30, 33, 20 OBR 279, 485 N.E.2d 706. So can any material upon which a public office *could* rely in such determinations. *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 40, 550 N.E.2d 464.

Kish, 109 Ohio St. 3d at ¶20. However, the Court has also held that not every document in the hands of a public agency meets this definition. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005 Ohio 4384 (holding that files containing the home addresses of state employees were not records as they were merely contact information and did not document the functions of the office.) And to the extent that an item does not serve to document the activities of a public office, it is not a public record and need not be disclosed. *State ex rel. Beacon Journal Publishing Co. v. Bond* (2002), 98 Ohio St. 3d 146, 149; *State ex rel. Fant v. Enright* (1993), 66 Ohio St 3d 186, 188.

Accordingly, the Court has looked at such indicia as whether the public agency **utilized and/or relied on** the items in question in carrying out its activities. See *Bond* at 186-187, P12 (finding that a court does not utilize responses to jury questionnaires collected by it in rendering its decision but instead collects them for the benefit of litigants in selecting an impartial jury and for administrative purposes of identifying and contacting individual jurors); *State ex rel Miami*

Valley Broadcasting Corp. v. Davis (2004), 158 Ohio App. 3d 98, 2004-Ohio-3860, at ¶¶8-12, (pleadings **are** utilized by a court in rendering its decision). As the Court stated in *State ex rel. Beacon Journal Publishing Co. v. Whitmore* (1998), 83 Ohio St. 3d 61, 64, in holding that letters received by a court in an attempt to influence sentencing were not utilized by a trial court and therefore not public records:

Just as R.C. 149.43(A)(1) “does not define a ‘public record’ as any piece of paper on which a public officer writes something,” *State ex rel. Steffen v. Kraft* (1993), 67 Ohio St. 3d 439, 440, 619 N.E.2d 688, 689, R.C. 149.43 and 149.011(G) do not define “public record” as any piece of paper received by a public office that might be used by that office. Cf. *Tax Analysts v. United States Dept. of Justice* (C.A.D.C.1988), 269 U.S. App. D.C. 315, 845 F.2d 1060, 1068 (“Of course, agency possession and power to disseminate a document are still insufficient by themselves to make it an ‘agency record.’ * * * **Agencies must use or rely on the document to perform agency business, and integrate it into their files, before it may be deemed an ‘agency record.’**”). A contrary conclusion would lead to the absurd result that any document received by a public office and retained by that office would be subject to R.C. 149.43 regardless of whether the public office ever used it to perform a public function. The plain language of R.C. 149.011(G), which requires more than mere receipt and possession of a document in order for it to be a record for purposes of R.C. 149.43, prohibits this result. *Wilson-Simmons*, 82 Ohio St. 3d at 41, 693 N.E.2d at 792-793.

(Emphasis added.)

In the context of discovery this raises issues that almost come down to an item by item analysis. There can be little doubt that a chief function of the Attorney General’s Office, a public office, is the handling of litigation on behalf of both the Attorney General herself and on behalf of her clients, themselves other public agencies. Exchanging discovery is part of this process. But, as the United States Supreme Court noted in the *Seattle Times* case, “[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action.” 467 U.S. 33. This is particularly true in complex business

litigation such as the one in question where massive amounts of financial documentation is exchanged and the utility of individual records may not be ordained until they are actually reviewed and/or tested in still further discovery efforts. Some of this material will never be utilized or relied upon in pursuing the litigation. To conclude that these documents are nonetheless “records” under the Public Records Act would require the broadest construction of the broad definition of “records” recognized in *Kish*. In fact it is only when discovery is filed with the court in support of motions or utilized at trial that there is any certainty that it is being utilized or relied upon in advancing the activities of the agency.

VI. EVEN IF IT CONSTITUTES A “RECORD” UNDER THE PUBLIC RECORDS ACT, DISCOVERY APPEARS TO BE EXCLUDED FROM PUBLIC RECORDS DISCLOSURE AS A “TRIAL PREPARATION RECORD” PURSUANT TO R.C. 149.43(A)(1)(g) AND R.C. 149.43(A)(4).

Even, if it meets the test for constituting a “record” under R.C. 149.011(G), civil discovery received by the attorneys representing a state agency still arguably could fit under the exception to “public records” set out in R.C. 149.43(A)(1)(g) for trial preparation records and defined in R.C. 149.43(A)(4) as:

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.

(Emphasis added). As with all exceptions, the language should be strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception.” *State ex re; Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041, at ¶16, citing *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St. 3d 396, 398. However, even with this restriction, the plain meaning of the definition would seem to fit discovery received during the pendency of litigation. The definition uses the term “any record.” It uses the

term “compiled” instead of such terms as “created” or “prepared”. Webster’s New World Dictionary, 2d Ed.(1980) defines the word “compile” as “to gather and put together in an orderly form.” Although it is not typically created or prepared in anticipation of or in defense of litigation, discovery is certainly “any record” and it is certainly gathered and put together in the course of litigation. Nor is it materially significant that the discovery information/documents received (as opposed to the discovery tools used to obtain them) are usually purely factual. The definition appears to include such documents as there is nothing limiting it to items that would be typically withheld from discovery as attorney work product such as an attorney’s independent thought processes and personal trial preparation. In fact, the latter is listed in the definition simply as one class of documents being included within “any record.”

Though the specific issue of whether discovery received by a state agency falls within this definition, has not yet been addressed by the Court, case law addressing “trial preparation records” in other contexts is beneficial but not definitive in reaching a resolution. In addressing information gathered by a prosecutor in a pending criminal proceeding, the Court in *State ex rel. Steckman v Jackson* (1994), 70 Ohio St. 3d 420, reversed a decade long trend of narrower interpretations of the exclusion in the context of criminal actions and found instead that, with the exception of routine incident reports:

It is difficult to conceive of anything in a prosecutor’s file, in appending criminal matter, that would be either material compiled in anticipation of a specific criminal proceeding or the personal trial preparation of the prosecutor.

Therefore we now hold that information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4)

Id at 431-432. Although the reference to discovery exchanged under Crim R. 16(B) in this language and in paragraph 3 of the syllabus seemed to suggest that records in the file of the prosecutor lost their character as “trial preparation records” if they had to been given to the defendant, see also *State ex rel Carpenter v. Tubbs* (1995), 72 Ohio St 3d 579, this issue was resolved, as noted above, in *State ex rel. WHIO-TV-7 v. Lowe, supra*, and in *State ex rel WLWT-TV5 v. Leis* (1997), 77 Ohio St. 3d 357, 359, with the Court responding in the negative.

In the *Leis* decision, (a case in which the media sought enforcement of a public records request of the contents of a prosecutor’s file on a sheriff’s union and its officers charged, among others, with violations of Ohio’s charitable solicitations laws), the Court also clarified *Steckman* by pointing out that more than just incident reports in a prosecutor’s file could fall outside “trial preparation.” After concluding that the majority of the file detailing the history of solicitation activities by the union was indeed trial preparation, Id. at 360-361, the Court did order the release some documents:

WLWT next asserts that respondents must disclose records which are clearly not exempt, e.g., the Patterson indictment. In general, most records contained in a prosecutor’s file in a pending criminal matter are exempt. *Steckman*, 70 Ohio St. 3d at 431-432, 639 N.E.2d at 92 (“It is difficult to conceive of anything in a prosecutor’s file, in a pending criminal matter, that would not be either material compiled in anticipation of a specific criminal proceeding or the personal trial preparation of the prosecutor.”). However, not every record contained within a prosecutor’s file is exempt. See, e.g., *State ex rel. Mayes v. Holman* (1996), 76 Ohio St. 3d 147, 149, 666 N.E.2d 1132, 1134; *State ex rel. Carpenter v. Tubbs Jones* (1995), 72 Ohio St. 3d 579, 580, 651 N.E.2d 993, 994. Certain records are unquestionably nonexempt and do not become exempt simply because they are placed in a prosecutor’s file. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St. 3d 374, 378, 662 N.E.2d 334, 338. An examination of the sealed records reveals the following nonexempt records: The Patterson indictment, copies of various Revised Code provisions, newspaper articles, a blank charitable organization registration statement form, the Brotherhood’s Yearbook and Buyer’s Guide, the

transcript of the Hornsby plea hearing, a videotape of television news reports, and a campaign committee finance report filed with the board of elections.

Id. at 361-362. But unlike formal discovery in a civil proceeding, none of these documents appear to be information necessarily gathered from the defendants. And unlike civil discovery, it is reasonable to conclude that this is not information that would come into the hands of counsel solely because of a discovery demand. Indeed, the documents appear to be of the type available within the public domain.

Additional guidance is provided by *State ex rel. Cincinnati Enquirer v. Hamilton County* (1996), 75 Ohio St. 3d 374, 378, cited in the *Leis* decision. In holding that 911 tapes contained in a prosecutor's file as evidence to be used in a criminal trial were disclosable to the media as a public record, the Court observed that:

From the foregoing, it is evident that 911 tapes are not prepared by attorneys or other law enforcement officials. Instead, 911 calls are routinely recorded without any specific investigatory purpose in mind. There is no expectation of privacy when a person makes a 911 call. Instead, there is an expectation that the information provided will be recorded and disclosed to the public. Moreover, because 911 calls generally precede offense or incident form reports completed by the police, they are even further removed from the initiation of the criminal investigation than the form reports themselves.

The moment the tapes were made as a result of the calls (in these cases--and in all other 911 call cases) to the 911 number, the tapes became public records. Obviously, at the time the tapes were made, they were not "confidential law enforcement investigatory records" (no investigation was underway), they were not "trial preparation records" (no trial was contemplated or underway), and neither state nor federal law prohibited their release. Thus, any inquiry as to the release of records should have been immediately at an end, and the tapes should have been, and should now and henceforth always be, released.

The particular content of the 911 tapes is irrelevant. Therefore, it does not matter that release of the tapes might reveal the identity of an uncharged suspect or contain information which, if disclosed,

would endanger the life or physical safety of a witness. Cf. R.C. 149.43(A)(1), 149.43(A)(2)(a) and (d). Further, although less likely to occur, it makes no difference that the disclosure of the tapes might reveal Social Security Numbers or trade secrets. Cf. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St. 3d 605, 640 N.E.2d 164; *State ex rel. Seballos v. School Emp. Retirement Sys.* (1994), 70 Ohio St. 3d 667, 640 N.E.2d 829.

In addition, the fact that the tapes in question subsequently came into the possession and/or control of a prosecutor, other law enforcement officials, or even the grand jury has no significance. Once clothed with the public records cloak, the records cannot be defrocked of their status. See *State ex rel. Carpenter v. Tubbs Jones* (1995), 72 Ohio St. 3d 579, 580, 651 N.E.2d 993, 994 (“Non-exempt records do not become ‘trial preparation records’ simply because they are contained within a prosecutor’s file”);

To the extent that the Court’s conclusion is premised on the fact that the 911 tapes themselves were not prepared in anticipation of litigation nor by or under the supervision of an attorney, would suggest that, despite the language of *Steckman*, the Court is actually adopting a more narrow interpretation of “trial preparation” more consistent with common law attorney work product.⁴ As stated above, the plain language of the definition does not seem to be as narrow. But certainly documents received in discovery often would fall within this description and would therefore be subject to disclosure if this is the Court’s sole test. But the Court also emphasizes that the 911 tapes were public records at the time they were created with no expectation by the caller of privacy. In this sense 911 tapes differ significantly from records obtained by the state from a private entity solely through formal discovery. While such information could include documents that the party intended for public dissemination at the time prepared (public regulatory filings for example) often such discovery is sought from the party for

⁴ To the same effect see In *State ex rel. The Beacon Journal Publishing Co. v. Maurer* (Jan. 26, 2000), 9th Dist. No. 99CA0026, 2000 Ohio App. LEXIS 178, wherein the Ninth District opined that the Supreme Court of Ohio has rejected an expansive reading of the trial preparation exception, citing *State ex rel. Coleman v. Cincinnati* (1991), 57 Ohio St. 3d 83, 83-84, and that “[r]eports authored by law enforcement officials as part of an investigation, but not initiated by or supervised by attorneys, or compiled with the involvement of counsel, are not subject to the exclusion”, citing *State ex rel Johnson v. Cleveland* (1992), 65 Ohio St. 3d 331, 332. Id at 6.

the very reason that it is not available from a public source. Moreover unlike the facts of the Enquirer case, the documents acquired through formal discovery are “compiled” pursuant to the personally constructed efforts of an attorney with full intent towards the pending litigation.

In *State ex rel. Nix v. Cleveland* (1998), 83 Ohio St. 3d 379, 384-385, the Court’s discussion of “attorney notes of trial proceedings, status reports concerning wiretapping cases, and legal research conducted by the law department”, traditional attorney work product, as “trial preparation records” appears to be confined to these very documents without any comparison as to what documents would not fall within the exclusion.⁵ In *State ex rel. Cincinnati Enquirer v. Dupuis* (2002), 98 Ohio St. 3d 126, 2002-Ohio-7041, at ¶18, the Court, in addressing whether a settlement agreement is a “trial preparation record”, concluded that “[a] settlement agreement is not a record compiled in anticipation of or in defense of a lawsuit. **It simply does not prepare one for trial.**” (Emphasis added.) In contrast, discovery usually does “prepare one for trial.”

Finally, after an extensive discussion of the privacy considerations that are inherent and vital to the process, the Court, in *Lowe* referenced discovery as one that “the sole purpose...is to assist trial preparation”, 77 Ohio St 3d 354, quoting *United States v. Anderson*, 799 F. 2d at 1441. The accuracy of this characterization in *Lowe* was later confirmed by the Court in *Dues* as a reference to “exemptions for work product and trial preparation records.” 101 Ohio St 3d at 413, ¶38.⁶ The *Lowe* characterization is again not definitive in the context of **civil** discovery

⁵ See *State ex rel. The Beacon Journal Publishing Co. v. Bodiker* (1999), 134 Ohio App. 415, wherein the media sought records detailing the time and money spent by the state Public Defender in a particular case. The latter asserted trial preparation as a basis for withholding. In rejecting this argument the Tenth District relying on the language of *Nix*, opined that the exemption “contemplates records containing materials such as attorney notes of proceedings, status reports and legal research conducted by a law department.” *Id* at 427. The court opined that “[t]he factual information relators seek does not bear directly on the Public Defender’s exercise of professional judgment on behalf of the indigent client.” *Id* . And that [r]outine office records, incident reports, and information discoverable under Crim. R. 16(B) do not become “trial preparation records” simply because they are contained within the attorney’s file.” *Id*. (Emphasis added.)

⁶ And, in so doing, apparently responding to the statement made in *Adams v. Metallica, Inc.*, 143 Ohio App. 3d at 488 that “[in *Lowe*] the court indicated that information already exchanged in discovery “ordinarily would not be

received by the state. Nevertheless, when one examines Crim R. 16(B) and the nature of what the Court has characterized as “trial preparation records”, it includes some remarkable similarities to the type of information a state might receive from an opposing party in civil litigation. This includes written or recorded statements made by the defendant, Crim R. 16(B)(1)(a), and documents in the possession of the state that were obtained from or belong to the defendant and are material to the preparation of the defense or will be used by the prosecutor at trial, Crim R. 16(B)(1)(c). Although there are obvious differences between civil and criminal actions, as the First District suggested in *Adams v. Metallica, supra*, there is no significant reason to treat public access to discovery much differently.

It is therefore, as is the situation with all of the Court’s charge, one of first impression for the Court to address.

VII WHETHER THE “CATCH ALL” PROVISION OF R.C. 149.43(A)(1)(v) WOULD PERMIT A TRIBUNAL TO PROTECT DISCOVERY FROM PUBLIC RECORDS DISCLOSURE IN THE ABSENCE OF AN EXPRESS FINDING THAT THE DOCUMENTS FALL WITHIN A SPECIFIC STATUTORY OR COMMON LAW PRIVILEGE OR CONFIDENTIALITY PROVISION IS DEPENDENT ON THE COURT’S INTERPRETATION OF THE NATURE AND SCOPE OF RULE 26 OF THE OHIO RULES OF CIVIL PROCEDURE.

As its second question, the Court asks the parties to brief whether “[a]fter *State ex rel. WBNS TV v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, does a protective order issued by a tribunal in discovery constitute an exception from mandatory disclosure of the discovered documents as public records pursuant to the “catch all” exception at R.C. 149.43(A)(1)(v), where the tribunal has not ruled that specific documents are confidential under specific provisions of law? It is presumed that the Court is referring to a situation where discovery would not be otherwise excluded from disclosure either as not a “record” or not “trial preparation records” and

considered to be work product or trial preparation materials,” an apparent reference to the statutory exclusion for “trial preparation” found in R.C. 149.43(1)(g) and (4).

that the tribunal has not expressly found the documents to be subject to a privilege or confidentiality provision under statutory or common law. Under this scenario, the answer to the question involves the interplay between the Public Records Act and Rule 26(C) of the Ohio Rules of Civil Procedure.

R.C. 149.43(A)(1)(v), the so-called “catch-all” provision provides an exemption from disclosure under the Public Records Act for “[r]ecords the release of which is prohibited by state or federal law.” The provision has been applied by the courts to exclude a wide variety of documents. They range from documents that are covered under specific statutory confidentiality provisions such as trade secrets under R.C. 1333.61(D), *State ex rel. Carr v. City of Akron* (2006), 112 Ohio St. 3d 351, 2006 Ohio 6714; *State ex rel. Besser v. Ohio State Univ., supra*; or Medical Board investigations under R.C. 4731.22(C)1), *State ex rel. Wallace v. State Medical Board* (2000), 89 Ohio St. 3d 431, 2000 Ohio 213; *Degordon v. Ohio State Medical Board* (1992), 62 Ohio Misc. 2d 584; to documents covered under more subjective recognition of privacy concerns such as the qualified gubernatorial-communications privilege recognized in *Dann v. Taft* (2006), 109 Ohio St. 3d 364, 2006 Ohio 1825; or by the constitutional right of privacy and “good sense” rule recognized in *State ex rel. Keller v. Cox* (1999), 85 Ohio St. 3d 279, 1999 Ohio 264, for the names of officers’ family, telephone numbers and other personal information.

In *State ex rel. WBNS TV v. Dues, supra*, however, the Court was unwilling to extend the “catch-all” to a protective order issued by a trial court under its inherent authority and prohibiting the disclosure of a settlement agreement. Finding that the trial court wrongly relied upon the *Lowe* decision to conclude that it could “judicially create” exceptions to the Public Records Act, the Court concluded that “[a]lthough there may be good policy reasons to exempt

settlement [figures], these policy considerations cannot override R.C. 149.43 because the General Assembly is the ultimate arbiter of public policy.” Quoting *State ex rel. Cincinnati Enquirer* (2002), 98 Ohio St. 3d 126, 2002 Ohio 7041, P21.

That same inherent authority of the courts is the genesis of the Civil Rules of Procedure. However in 1968, the Modern Courts Amendment to the Ohio Constitution required the Ohio Supreme Court, subject to approval of the General Assembly, to “proscribe rules governing practice and procedure in all courts of the state.” Pursuant to Ohio Constitution Article IV, Section 5(B), such rules “shall not abridge, enlarge, or modify any substantive right,” and “all laws in conflict with such rules shall be of no further force and effect.” Pursuant to this authority, the Ohio Rules of Civil Procedure were adopted and include Rule 26 containing general provisions regarding discovery. Rule 26(A) provides that:

It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial **with that degree of privacy necessary** to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary’s industry or efforts.

(Emphasis added.) Rule 26(B)(1) further provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(C) then provides in pertinent part that:

Upon motion by any party or by the person from whom discovery is sought, and **for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:** (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) **that discovery be conducted with no one present except persons designated by the court;** (6) that a deposition after being sealed be opened only by order of the court; (7) **that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;** (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(Emphasis added.)

As stated above, the courts have long construed the discovery addressed in Rule 26 as a private matter. In *Lowe*, at 77 Ohio St 3d 354, this Court cited to an oft cited discussion of this principle by the U.S. Court of Appeals for the Eleventh Circuit in *U.S. v. Anderson* (1986), 799 F. 2d 1438, 1441. The Eleventh Circuit stated therein that :

Discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 2207-08, 81 L. Ed. 2d 17 (1984) (pretrial interrogatories and depositions “were not open to the public at common law”); *Gannett Co. v. DePasquale*, 443 U.S. 368, 396, 99 S. Ct. 2898, 2914, 61 L. Ed. 2d 608 (1979) (Burger, C.J., concurring) (“It has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.”). Moreover, documents collected during discovery are not “judicial records.” Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will

remain private. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *Cornell L. Rev.* 1, 15 (1983).

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge. Litigants should not be discouraged from putting their discovery agreements in writing, and district judges should not be discouraged from facilitating voluntary discovery.

The Court has applied the same analysis to its discussion of Rule 26. In *State ex rel. Citizens for Open, Responsive & Accountable Gov't. v. Register* (2007), 116 Ohio St. 3d 88, 92 this Court discussed a trial court's discretion in controlling discovery:

In resolving these motions, we note that courts have broad discretion over discovery matters. *State ex rel. Abner v. Elliott* (1999), 85 Ohio St.3d 11, 16, 1999 Ohio 199, 706 N.E.2d 765; *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, 458, 6 OBR 496, 453 N.E.2d 700. This discretion, which is consistent with Civ.R. 26(C) and 37(D), applies to rulings on motions for protective orders and motions for sanctions. *Ruwe v. Springfield Twp. Bd. of Trustees* (1987), 29 Ohio St.3d 59, 61, 29 Ohio B. 441, 505 N.E.2d 957; *Covington v. MetroHealth Sys.*, 150 Ohio App.3d 558, 2002 Ohio 6629, 782 N.E.2d 624, P24 (“The decision whether to grant or deny the protective order is within the trial court’s discretion, and will not be reversed absent an abuse of that discretion”); *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003 Ohio 2181, 787 N.E.2d 631, P 13, quoting *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 1996 Ohio 159, 662 N.E.2d 1, syllabus (“A trial court has broad discretion when imposing discovery sanctions”).

In *State ex rel. Grandview Hospital and Medical Center v. Gorman* (1990), 51 Ohio St. 3d 94, 95, the Court observed that::

Trial courts have extensive jurisdiction and power over discovery. This concept is reflected in the Staff Note to Civ. R. 26(C), which governs protective orders: “Rule 26(C) affirms current Ohio practice which recognizes the inherent power of a court to control

discovery. * * *” Further, in *State, ex rel. Pfeiffer, v. Common Pleas Court (1968)*, 13 Ohio St. 2d 133, 137, 42 O.O. 2d 362, 364, 235 N.E. 2d 232, 235, we noted: “Infrequently, but consistently, this court has relied upon the inherent powers of courts to do those things necessary to the preservation of judicial powers and processes. * * *” Lastly, *Civ. R. 37* reinforces this inherent authority by authorizing courts to impose sanctions upon those persons who unjustifiably seek or resist discovery.

The scope of pretrial discovery is broad. “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter * * *.” *Civ. R. 26(B)(1)*. Privilege must rest upon some specific constitutional or statutory provision. See *In re Story (1953)*, 159 Ohio St. 144, 50 O.O. 116, 111 N.E. 2d 385.

And while they are both grounded in sound public policy, it can be argued that the codification of the inherent right of courts to control discovery distinguishes protective orders issued under this rule from the trial court’s uncodified inherent right to seal settlement agreements at issue in *Dues*. Moreover, the authority to control discovery addresses documents still in the hands of the litigants as opposed to a document filed with the court as was the case in *Dues*. Thus *Dues* does not appear to be controlling on the question posited by the Court.

The Court has, in fact, recognized that procedural court rules can constitute an exception to the Public Records Act. Thus in *State ex rel. Beacon Journal Publishing Company v. Waters (1993)*, 67 Ohio St. 3d 321, 323-324, the Court was faced with a media request for subpoenas that were issued for grand jury proceedings and to a grand jury record book. Distinguishing *State ex rel Clark v. Toledo (1990)*, 54 Ohio St. 3d 55, 56-57, an earlier decision in which it had held that the Public Records Act cannot be abridged by Criminal Rule 16, the Court opined:

In *Clark*, the respondents attempted to use *Crim.R. 16(B)(2)* as a Public Records Act exception outside the criminal process, and in fact after the criminal process had been concluded. This argument should have been rejected on grounds that *Crim.R. 16(B)(2)* is essentially a discovery rule and has no application after the criminal process has concluded. *Crim.R. 6*, however, creates the basic procedure for the grand jury, and its provisions are not

dependent on the passage of time or changes of status of the parties.

Therefore, we hold that the statement in *Clark* that seemed to preclude court rules from ever contradicting substantive statutes was overbroad. The *R.C. 149.43(A)(1)* exception for other “state law” may include procedural court rules, and does include *Crim.R. 6(E)*.

Providing the limits of grand jury secrecy is an element of “practice and procedure,” under *Section 5(B), Article IV, Ohio Constitution*, and properly addressed by court rule. Although we have not previously construed *Crim.R. 6(E)* in this context, we have construed *Crim.R. 6(A)*, which provides that the grand jury shall consist of nine members. In *State v. Brown (1988)*, 38 *Ohio St.3d 305*, 528 *N.E.2d 523*, we held that the number of grand jurors is a procedural matter and thus suitable to be addressed by rule, citing *Wells v. Maxwell (1963)*, 174 *Ohio St. 198, 200*, 22 *O.O.2d 147, 148*, 188 *N.E.2d 160, 161*, which held:

“The manner by which an accused is charged with a crime, whether by indictment * * * or by information * * *, is strictly a matter of procedure * * *.”

While we have not defined practice and procedure under *Section 5(B), Article IV*, in *Krause v. State (1972)*, 31 *Ohio St.2d 132, 145*, 60 *O.O.2d 100, 107*, 285 *N.E.2d 736, 744*, we defined “substantive” as used in that section as “that body of law which creates, defines and regulates the rights of the parties.” Given this definition, we find that grand jury secrecy is a procedural matter rather than a substantive matter and, as such, properly a subject for court rule. Providing the degree of openness to be observed in grand jury matters is inherently procedural, and not a matter of creating, defining, or regulating rights. No one has a right to any particular degree of openness or secrecy, except as provided by law.

Crim.R. 6(E) is thus seen as a lawful procedural rule adopted pursuant to constitutional authority. As such, it is analogous to an administrative rule lawfully adopted. “Administrative rules enacted pursuant to a specific grant of legislative authority are to be given force and effect of law.” *Doyle v. Ohio Bur. of Motor Vehicles (1990)*, 51 *Ohio St.3d 46*, 554 *N.E.2d 97*, paragraph one of the syllabus. Properly adopted judicial rules have the same force and effect. *Section 5(B), Article IV* emphasizes this fact by stating:

“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”

Thus, even if *R.C. 149.43(A)(1)* did not contain an exception to the broad disclosure rights of *R.C. 149.43(B)* for disclosures prohibited by other state law, Section 5(B), Article IV provides the exception. As *Crim.R. 6(E)* is a lawful procedural rule, the conflicting *R.C. 149.43(B)* would be of no further force and effect. See *Clark, supra*, Holmes, J., dissenting. However, since *R.C. 149.43(A)(1)* explicitly provides for an exception for other state law, we read the statute and constitutional provision harmoniously rather than as conflicting. Accordingly, *R.C. 149.43(B)* grants appellants a substantive right to inspect and copy public records. However, it grants no right to records that are otherwise exempt by law from release as public records. *R.C. 149.43(A)(1)* excepts records whose disclosure is prohibited by state law from release as public records. *Section 5(B), Article IV, Ohio Constitution* and *Crim.R. 6(E)*, adopted thereunder, are state laws for this purpose. Together they create a valid exception to disclosure under *R.C. 149.43*.

Civil Rule 26 should arguably be given similar treatment. As noted above, like the Criminal Rules, the Civil Rules of Procedure trace their authority to the Ohio Constitution. Like the Criminal Rules, “all laws in conflict with such rules shall be of no further force and effect.” The Court, following the lead it set in *Waters*, should therefore recognize the “catch-all” provision as allowing it to harmonize the statute and constitutional provision. Cf. treatment of Juv. Rule 37(B); *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Co. Ct. of Common Pleas* 1995), 73 Ohio St. 3d 19; *State ex rel Plain Dealer Publishing Co. v. Floyd* (2006), 111 Ohio St. 3d 56, 2006 Ohio 4437.

However it should be noted that the Court has issued rulings that would suggest that not even judicially imposed limitations on discovery can create exceptions to the Public Records Act. Thus in *Gilbert v. Summit Co.* (2004), 104 Ohio St. 3d 660, 2004 Ohio 7108, Summit County attempted to withhold audit documents related to a federal civil action brought against it from a public records request made by opposing counsel. The county argued that the request would violate a discovery cut-off imposed by the court and that the latter fell within the “catch-

all”, relying on *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, wherein an analogous request by counsel for a criminal defendant had resulted in the Court finding that Criminal Rule 16 was the only means to get access to criminal discovery. This court disagreed, concluding that *Steckman* didn’t apply to civil proceedings and that the real reason for *Steckman* was that the defendant therein was seeking documents that were already protected as trial preparation records or confidential law enforcement investigatory records. Id at 662, ¶¶8-P9. The Court found that the attorney in *Gilbert* was seeking nothing more than what any member of the public could also obtain and therefore must be disclosed. Id. at ¶9.

The *Gilbert* case, of course, addresses a situation where a party did not actually seek to obtain access to discovery but instead tried to supplement discovery through an alternative means. Thus the Court has not previously addressed the situation where a member of the public actually makes a public records request of exchanged discovery during ongoing litigation and that discovery is the subject of a protective order. The Court could actually approach the issue in several ways. One, it could conclude that the long-standing judicial recognition that discovery is a private matter, set out in the case law cited above and codified in Rule 26, itself creates a privacy right protected by state law subject to judicial control and therefore excepted from disclosure under the “catch-all” provision. Two, the Court could conclude that even if discovery in general is not protected from disclosure, once a tribunal has acted to protect discovery from public disclosure under the “good cause” standard set out in Rule 26 (C), it constitutes a prohibition created under state or federal law, that would suffice to constitute a basis under the “catch-all” provision so long as “justice requires [it] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Or three, the Court could extend the *Dues* approach and require an independent basis for excluding the records, basically ruling that

the Public Records Act “trumps” the discovery rules and the ability of the tribunal to enforce them to assure privacy.

Where approaches two and three could merge would be in a situation like that in the present case where the claim for confidentiality is based on asserted trade secrets. Rule 26 (C)(7) expressly recognizes this claim as one dictating a protective order. By targeting this type of confidential material already protected by a specific statutory provision, i.e., R.C. 1333.61(D), a reasonable argument would be that the framers of the rule expected that a tribunal facing a claim of trade secrets could not issue a protective order limiting their disclosure under the general “good cause” standard without first applying the more specific test to ascertain whether they are actually trade secrets under the privilege. See *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St. 3d 396, 399-405, 2000 Ohio 207; *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.* (1997), 80 Ohio St 3d 513, 1997 Ohio 75

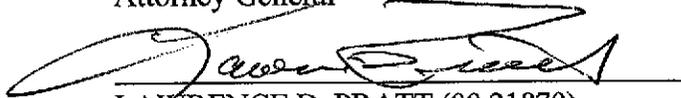
As stated above, there is no authority directly on point and this will come down to the Court’s own construction and balancing of the interests involved.

CONCLUSION

In summary, there are strong articulated policy reasons for the confidentiality of discovery. There are also strong public policy reasons for the broad application of the Public Records Act. Discovery arguably falls within an exception to the Act under the three scenario’s set out above dependent on how those provisions are construed. It is a case of first impression and the answer is not definitively laid out in either the language of the Act or the case law interpreting it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Memorandum was sent by regular U.S. Mail this 26th day of June, 2008, to: Charles M. Steines, Esq., and Stephen G. Sozio, Esq., Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114; and David H. Seed, Brinda McIntyre & Seed LLP, 1111 Superior Avenue, Suite 1025, Cleveland, Ohio 44114



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Assistant Attorney General

- App. 1 Ohio Admin. Code 5717-1-11
- App. 3 *Weimer v. Honda* (S.D. Ohio 2007), Case No. 2:06-CV-844, 2007 U.S. Dist. LEXIS 77490
- App. 6 Webster's New World Dictionary, 2d Ed.(1980)
- App. 9 *State ex rel. The Beacon Journal Publishing Co. v. Maurer* (2000), 9th Dist. No. 99CA0026, 2000 Ohio App. LEXIS 178

5717-1-11 Discovery.

(A) Discovery may be permitted by deposition upon oral examination or written questions; written interrogatories; production of documents or tangible things or permission to enter upon land or other property; and requests for admissions. The "Ohio Rules of Civil Procedure," effective July 1, 2006, shall be followed for discovery purposes to the extent they are not inconsistent with other board rules. The Ohio Rules of Civil Procedure are generally available at a public library, legal library, or on the web at www.sconet.state.oh.us/rules/civil. Discovery shall be subject to the following limitations:

(1) Discovery should be commenced by all parties promptly after the filing of a notice of appeal and should be completed as expeditiously as possible. Discovery should be completed not more than one hundred twenty days after the filing of the notice of appeal, which shall also be the last day for a party to seek involvement of the board in discovery matters. Upon motion and for good cause, the board may establish other specific times for completion of discovery or consideration of discovery motions.

(2) The board expects all counsel to provide for orderly, mutual discovery, freely exchanging discoverable information and documents. Counsel shall make all reasonable efforts to resolve discovery disputes by extra-judicial means, without intervention by the assigned attorney examiner. To the extent counsel may not resolve such disputes, then they may seek intervention of the attorney examiner to supervise discovery.

(3) Answers, objections or other responses to discovery requests shall be served within twenty-eight days after service of such requests unless the board orders or the parties agree to a different period of time. Depositions, interrogatories, and admissions shall not be filed with the board, unless the party intends to offer such discovery documents as evidence in a hearing; and in such event, such discovery documents shall be filed at least one day prior to the hearing.

(4) Any motion concerning discovery shall include only those specific portions of the discovery documents necessary for resolution of the motion and include counsel's statement describing all extra-judicial efforts undertaken to effect discovery.

(5) An expert may not be permitted to testify if he or she has not been timely identified prior to hearing. The parties may mutually agree to the exchange of any written reports of expert witnesses to be relied upon by them. Additionally, an expert's report or portions thereof may be excluded from evidence if the report was not made available in a timely fashion to complete a mutually agreed exchange of reports. In all events, the identity of the expert shall be provided to counsel at least fourteen days prior to hearing, except as otherwise ordered by the attorney examiner, and the written valuation reports shall be provided to counsel at least seven days prior to hearing, except as otherwise ordered by the attorney examiner.

(B) No hearing will be continued for purposes of discovery unless good cause is shown.

(C) Cost of discovery shall be paid by the party requesting such discovery.

(D) Upon the motion of a party and for good cause shown, the board may issue a protective order restricting discovery of a trade secret or other confidential research, development or commercial information.

Effective: 06/15/2007

Promulgated Under: 5703.14

Statutory Authority: 5703.02, 5703.14

Rule Amplifies: 5703.02

Prior Effective Dates: 10/20/1977, 3/24/1989, 5/17/1990, 3/1/1996, 1/14/2005

LEXSEE 2007 US DIST. LEXIS 77490

JAMES A. WEIMER, Plaintiff, vs. HONDA OF AMERICA, MFG., INC., Defendant.

Civil Action 2:06-CV-844

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

2007 U.S. Dist. LEXIS 77490

October 17, 2007, Decided

October 17, 2007, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part, Request denied by *Weimer v. Honda of Am. Mfg.*, 2008 U.S. Dist. LEXIS 31853 (S.D. Ohio, Apr. 17, 2008)

COUNSEL: [*1] For James A. Weimer, Plaintiff: Gary A Reeve, LEAD ATTORNEY, Kennedy Reeve & Knoll, Columbus, OH.

For Honda of America MFG., Inc., c/o Statutory Agent Corporation, Defendant: Mary Ellen Fairfield, LEAD ATTORNEY, Vorys Sater Seymour & Pease - 2, Columbus, OH; Alycia N Broz, Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

JUDGES: Norah McCann King, United States Magistrate Judge. Judge Frost.

OPINION BY: Norah McCann King

OPINION

OPINION AND ORDER

This is an employment action in which plaintiff alleges that his suspension and eventual termination from employment violated the Family and Medical Leave Act, 29 U.S.C. §2601 et seq. ["FMLA"], and Ohio's law prohibiting retaliation for having pursued a Workers' Compensation claim, O.R.C. §4123.90. Plaintiff also asserts a claim of wrongful discharge in violation of Ohio's public policy. This matter is now before the Court on plaintiff's motion to compel production by defendant of its contracts with Health Partners, Ltd. ["Health Partners"], Honda's on-site health care provider. *Plaintiff's Motion to Compel*, Doc. No. 10.

The complaint alleges, *inter alia*, that plaintiff suffered a head injury at work. *Complaint*, P6. Plaintiff was ordered to attend an examination by Health [*2] Partners. *Id.*, P8. Health Partners "ordered him off of work. . .," *Id.*, P9, and assured plaintiff that it would take care of "Honda's necessary leave and medical certification paperwork." *Id.*, at P11. Plaintiff was suspended and eventually terminated from employment by defendant for "violating Family Leave." *Id.*, PP14 - 15. ¹

1 Defendant disputes many of the factual allegations contained in the *Complaint*. See *Answer*, Doc. No. 3

Plaintiff's motion to compel seeks production of "each and every document that shows or refers to the relationship, contractual o[r] otherwise, between Defendant and Health Partners." Request No. 12, *Plaintiff's First Request for Production of Documents*, attached to *Plaintiff's Motion to Compel*, Doc. No. 10. Although defendant takes the position that the request is not relevant to any claim or defense, defendant has offered to produce the requested documents pursuant to the terms of a protective order. Plaintiff has refused that offer.

*Rule 37*² of the *Federal Rules of Civil Procedure* authorizes a motion to compel, provided that the motion to compel includes a certification that the movant has in good faith conferred or attempted to confer with the party failing [*3] to respond to the requests. The Court is satisfied that the prerequisites to a motion to compel have been met in this case.

2 *Rule 37* reads in pertinent part:

If . . . a party, in response to a request for inspection submitted under Rule 34, fails to respond

that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.

Fed. R. Civ. P. 37(a)(2)(B).

Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Rule 34 of the Federal Rules of Civil Procedure provides for discovery of documents in the "possession, custody or control" of a party, provided that the documents "constitute or contain matters within the scope of Rule 26(b)." *Fed. R. Civ. P. 34(a).*

In turn, Rule 26(b) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . ." *Fed. R. Civ. P. 26(b)(1)*. Relevance for discovery purposes is extremely broad. *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 383 (W.D. Tenn. 1999). [*4] "The scope of [inquiry] permitted under Rule 26(b) is broader than that permitted at trial. The test is whether the [requested information] is reasonably calculated to lead to the discovery of admissible evidence." *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6th Cir. 1970).

Plaintiff alleges, in part, that defendant is estopped from denying him leave under the FMLA by virtue of the conduct of Health Partners. "Crucial to [this] determination . . . is that Health Partners was Honda's agent, i.e., that Health Partner[']s actions constitute actions of Honda." *Plaintiff's Motion to Compel*, at 4. Although defendant challenges the legal sufficiency of plaintiff's estoppel theory, the Court nevertheless concludes that plaintiff's document request is reasonably calculated to lead to the discovery of admissible evidence. See *Fed. R. Civ. P. 26(b)(1)*.

Defendant also argues that, even if discoverable, the information sought by plaintiff should not be produced except under terms of a protective order. Although a court is vested with broad discretion to grant or deny a protective order, that discretion is "limited by the careful dictates of *Fed. R. Civ. P. 26*." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). [*5] The burden of establishing good cause for a protective order rests with the party seeking the protection. *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001)(citing *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)).

Although defendant has not submitted a copy of the requested documents to the Court for its review, defendant characterizes those documents as containing "confidential, non-public, proprietary information." *Defendant's Memorandum in Opposition*, at 10. "[A]llowing public access to this information would place [defendant] at a competitive disadvantage. [Defendant's] manufacturing competitors would find the [Health Partners] contract useful in negotiating their own agreements with medical providers thereby diminishing [defendant's] competitive advantage." *Id.*

Rule 26(c)(7) of the Federal Rules of Civil Procedure authorizes a protective order where necessary to assure that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; . . ." Rule 26(c)(7) "has been interpreted to protect from disclosure material that would harm the disclosing party by placing it at a [*6] commercial disadvantage." 6 *Moore's Federal Practice* §26.105 [8][a](3d ed.).

Defendant proposed to plaintiff a protective order that would limit use of the documents to this litigation only and disclosure of the documents (as well as other documents denominated "confidential") to the parties to the litigation, their counsel, their experts and consultants, and to stenographers and court personnel. *Stipulated Protective Order*, PP(C), (D), attached to *Defendant's Memorandum in Opposition*.³ Although plaintiff agreed to redaction "of all purely monetary sections of the contracts," subject to further review by this Court, *Exhibit 6*, attached to *Plaintiff's Motion to Compel*, plaintiff refused to agree to further restriction on the production:

The agreements set forth in these documents potentially impact every associate at Honda, and I believe that Honda's attempt at secrecy in regards to contracts that bear on the treatment of its employees' workplace injuries and sickness is indefensible.

Exhibit 5, attached to *Plaintiff's Motion to Compel*.

3 The proposed protective order also contemplates resolution by the Court of any dispute regarding a party's designation of confidentiality. *Stipulated* [*7] *Protective Order*, P(H)(1).

A court may more readily impose restrictions on disclosure of documents not traditionally made public. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)(referring to information gathered in traditionally private pretrial civil discovery and not yet publicly disseminated); *Bank-*

ers Trust Co., 78 F. 3d at 225 (same). Discovery is conducted in private and restrictions on the public disclosure of such information is much more readily available. *Seattle Times Co.*, 467 U.S. at 33 n.19. "Private documents collected during discovery are not judicial records, and ... private litigants have protectable privacy interests in confidential information contained in such documents." *Howes v. Ashland Oil, Inc.*, 1991 U.S. App. LEXIS 10306, 1991 WL 73251,*7 (6th Cir. 1991) (unpublished)(citing *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) and *Seattle Times Co.*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17). In this regard, the "central issue ... is not the relatively slight right of public access in this context, but whether the protective order was an appropriate means of facilitating discovery while respecting the rights" of others. *The Courier Journal v. Marshall*, 828 F.2d 361, 367 (6th Cir. 1987)(dealing [*8] with a request to disclose the membership of a Ku Klux Klan organization). This is true even in instances involving subjects of undeniable public interest. *Seattle Times Co.*, 467 U.S. at 31 (upholding prohibition on public dissemination of information of non-public discovery even where "there certainly is a public interest in knowing about respondents"); *The Courier Journal*, 828 F.2d at 363 (protective order approved even where the proceedings were "of intense public concern.")

Plaintiff's articulated objection to the issuance of a protective order is apparently based on rather ill-defined public policy interests. However, plaintiff asserts his claim only on his own behalf; this litigation does not implicate the rights or claims of any other employee of defendant. Indeed, this litigation does not implicate the propriety of the relationship between defendant and Health Partners, nor does it call into question the quality of care provided by Health Partners to defendant's employees. Information relating to that relationship is relevant to the litigation, as even plaintiff concedes, only to

determine whether Health Partners' interactions with plaintiff are properly attributable to defendant. [*9] The Court therefore concludes that public policy does not preclude the imposition of restrictions on the discovery of such information. ⁴

4 The Court expresses no opinion, at this juncture, on the propriety of restriction of access to documents filed with the Court, at which point a strong right of public access attaches. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983).

That being said, however, the Court also concludes that defendant has failed to establish that the disclosure of the requested documents in redacted form, as proposed by plaintiff, would nevertheless place defendant at a competitive disadvantage. Although the burden on defendant at this stage is slight, the defendant must nevertheless meet that burden. See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d at 227. Defendant has failed to establish that the terms of its proposed protective order are reasonably necessary to preserve its legitimate interest in confidentiality,

WHEREUPON the Court concludes that *Plaintiff's Motion to Compel*, Doc. No. 10, is meritorious and it is therefore **GRANTED**, except that defendant may redact the requested documents to exclude information which, if publically [*10] disclosed, would place defendant at a competitive disadvantage.

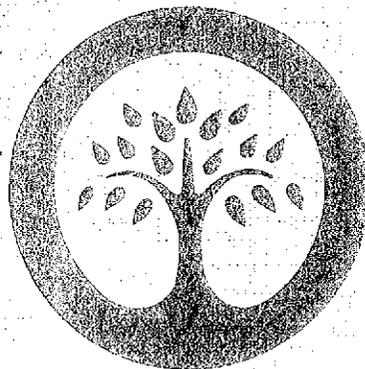
October 17, 2007

s/ *Norah McCann King*

Norah McCann King

United States Magistrate Judge

SECOND COLLEGE EDITION



NEW WORLD
DICTIONARY

OF THE AMERICAN LANGUAGE

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even hostility; emulation implies endeavor to equal or surpass in achievement, character, etc. another, usually one greatly admired
com-pet-i-tive (kəm pet'ə tiv) *adj.* of, involving, or based on competition; also **com-pet'i-to'ry** (-tōr'ē) —**com-pet'i-tive-ly** *adv.* —**com-pet'i-tive-ness** *n.*
com-pet-i-tor (-tōr) *n.* [L.] a person who competes, as a business rival

Com-plègne (kōn pyen'y) town in N France, on the Oise River; the armistices between the Allies & Germany (1918) & Germany & France (1940) were signed near here: pop. 24,000

com-pli-ca-tion (kām'pə lā'shən) *n.* [ME. *compilacioun* < L. *compilatio*, a pillaging, hence collection of documents < *compilatus*, pp. of *ff.*] 1. the act of compiling 2. something compiled, as a book, report, etc.

com-pile (kām pil') *vt.* -pled', -plī'ng [ME. *compilen* < OFr. *compiler* < L. *compilare*, to snatch together, plunder < *com-*, together + *pilare*, to compress, ram down] 1. to gather and put together (statistics, facts, etc.) in an orderly form 2. to compose (a book, etc.) of materials gathered from various sources

com-pla-cen-cy (kām plās'n sē) *n.* [LL. *complacencia* < L. *complacens*; see *ff.*] quiet satisfaction; contentment; often, specif., self-satisfaction, or smugness; also **com-pla'cence** (-plās'ns)

com-pla-cent ('nt) *adj.* [L. *complacens*, prp. of *complacere*, to be very pleasing < *com-*, intens. + *placere*, to please] 1. satisfied; esp., self-satisfied, or smug 2. affable; complaisant —**com-pla-cent-ly** *adv.*

com-plain (kām plān') *vt.* [ME. *compleinen* < OFr. *complaindre* < VL. *complangere*, orig., to beat the breast < L. *com-*, intens. + *plangere*, to strike] 1. to claim or express pain, displeasure, etc. 2. to find fault; declare annoyance 3. to make an accusation; bring a formal charge —**com-plain'er** *n.*

com-plain-ant (-ant) *n.* [ME. *compleinaunt* < prp. of OFr. *complaindre*; see *prec.*] Law a person who files a charge or makes the complaint in court; plaintiff

com-plaint (kām plānt') *n.* [ME. & OFr. *complainte* < *complaindre*] 1. the act of complaining; utterance of pain, displeasure, annoyance, etc. 2. a subject or cause for complaining; grievance 3. an illness; ailment 4. Law a formal charge or accusation

com-plai-sance (kām plā'sns, -s'ns; chiefly Brit. kām'pli zans') *n.* [Fr. < *ff.*] 1. willingness to please; disposition to be obliging and agreeable; affability 2. an act or instance of this

com-plai-sant (kām plā'snt, -s'nt; chiefly Brit. kām'pli zant') *adj.* [Fr., prp. of *complaire* < L. *complacere*; see *COMPLACENT*] willing to please; affably agreeable; obliging —**com-plai-sant-ly** *adv.*

com-pleat (kām plēt') *adj.* *archaic sp. of COMPLETE*
com-plect (kām plekt') *vt.* [L. *complecti*; see *COMPLEX*] [Archaic] to twine together; interweave

com-plect-ed (-plek'tid) *adj.* [altered < *COMPLEXIONED*] [Dial. or Colloq.] same as *COMPLEXIONED*

com-ple-ment (kām'plə mēnt; for *v.* -ment') *n.* [ME. < L. *complementum*, that which fills up or completes < *complere*; see *COMPLETE*] 1. that which completes or brings to perfection 2. the amount or number needed to fill or complete 3. a complete set; entirety 4. something added to complete a whole; either of two parts that complete each other 5. *Gram.* a word or group of words that, with the verb, complete the meaning and structure of the predicate (Ex.: *foreman, paid in he expects to get paid*) 6. *Immunology* any of a group of heat-sensitive proteins in the blood plasma that act with specific antibodies to destroy corresponding antigens, as bacteria or foreign proteins 7. *Math.* a) the number of degrees that must be added to a given angle or arc to make it equal 90 degrees b) the subset which must be added to any given subset to yield the original set 8. *Music* the difference between a given interval and the complete octave 9. *Naut.* the full crew of officers and men assigned to a ship —*vt.* to make complete; be a complement to

com-ple-men-tar-i-ty (kām'plə mēn'ter'ə tē) *n.* [*ff.* + *-ity*] the state or fact of being complementary; necessary interrelationship or correspondence

com-ple-men-ta-ry (kām'plə mēn'tar'ē) *adj.* 1. acting as a complement; completing 2. mutually making up what is lacking Also **com-ple-men'tal**

complementary angle either of two angles that together form a 90° angle

complementary colors any two colors of the spectrum that, combined in the right intensities, produce white or nearly white light

complement fixation *Immunology* the entering of complement into the product of an antigen-antibody reaction where it becomes inactive; used as an indicator in certain serological tests

com-plete (kām plēt') *adj.* [ME. & OFr. *complet* < L.

completus, pp. of *complere*, to fill up, complete < *com*, intens. + *plere*, to fill; for IE. base see *FULL*] 1. lacking no component part; full; whole; entire 2. brought to a conclusion; ended; finished 3. thorough; absolute [to have *com-plete* confidence in someone] 4. accomplished; skilled consummate —*vt.* -plet'ed, -plet'ing 1. to end; finish, conclude 2. to make whole, full, or perfect —**com-plet'ed-ly** *adv.* —**com-plete-ness** *n.*

SYN.—*complete* implies inclusion of all that is needed for the integrity, perfection, or fulfillment of something [a *complete* and *complete* control]; *full* implies the inclusion of all that is needed [a *full* dozen] or all that can be held, achieved, etc. [in *full* bloom]; *total* implies an adding together of everything without exception [total number] and is, in general applications, equivalent to *complete* [total abstinence]; *whole* and *entire* imply unbroken unity, stressing that not a single part, individual, instance, etc. has been omitted or diminished [the *whole* student body, one's *entire* attention]; *intact* is applied to that which remains whole after passing through an experience that might have impaired it [the *intact* left the barn *intact*] See also *CLOSE* —**ANT.** *partial, defective*

complete metamorphosis physical changes in the development of certain insects that include egg, larva, pupa, and adult stages, as in beetles, moths, bees, etc.

com-ple-tion (kām plē'shən) *n.* [ME. < L. *completio*] 1. the act of completing, or finishing 2. the state of being completed

com-plex (kām pleks'; also, and for *n.* always, kām'pleks) *adj.* [*com-* < L. *complexus*, pp. of *complecti*, to encircle, embrace < *com-*, with + *plectere*, to weave, braid] 1. consisting of two or more related parts 2. not simple; involved or complicated —*n.* 1. a group of interrelated ideas, activities, etc. that form, or are viewed as forming, a single whole 2. an assemblage of units, as buildings or roadways, that together form a single comprehensive group 3. *Psychoanalysis* an integration of impulses, ideas, and emotions related to a particular object, activity, etc., largely unconscious, but strongly influencing the individual's attitudes and behavior b) popularly, an exaggerated dislike or fear; obsession —**com-plex-ly** *adv.*

SYN.—*complex* refers to that which is made up of many elaborately interrelated or interconnected parts, so that much study or knowledge is needed to understand or operate it [a *complex* mechanism]; *complicated* is applied to that which is highly complex and hence very difficult to analyze, solve, or understand [a *complicated* problem]; *intricate* specifically suggests a perplexingly elaborate interweaving of parts that is difficult to follow [an *intricate* maze]; *involved*, in this connection, is applied to situations, ideas, etc., whose parts are thought of as intertwining in complicated, often disordered, fashion [an *involved* argument] —**ANT.** *simple*

complex fraction a fraction with a fraction in its numerator or denominator, or in both

com-plex-ion (kām plek'shən) *n.* [ME. *complexioun* < OFr. *complexion*, combination of humors, hence temperament < L. *complexio*, combination < *complexus*; see *COMPLEX*] 1. a) orig., the combination of the qualities of cold, heat, dryness, and moisture, or of the four humors, in certain proportions believed to determine the temperament and constitution of the body b) the temperament or constitution 2. the color, texture, and general appearance of the skin, esp. of the face 3. general appearance or nature, character; aspect —**com-plex-ion-al** *adj.*

com-plex-ion-ed (-shənd) *adj.* having a (specified) complexion [light-complexioned]

com-plex-i-ty (kām plek'sə tē) *n.* 1. the condition or quality of being complex 2. *pl.* -ties anything complex or intricate; complication

complex number a number expressed as the formal sum of a real number and a multiple of the square root of -1 (E.g., $a + b\sqrt{-1}$, when a and b are real)

complex sentence in traditional grammar, a sentence consisting of a main clause and one or more subordinate clauses

com-pli-a-ble (kām plī'ə b'l) *adj.* [Archaic] compliant

com-pli-ance (-əns) *n.* 1. a complying, or giving in to a request, wish, demand, etc.; acquiescence 2. a tendency to give in readily to others Also **com-pli'an-cy** —in **com-pli-ance** with in accordance with

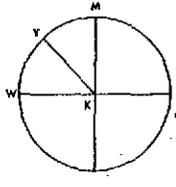
com-pli-ant (-ant) *adj.* complying or tending to comply; yielding; submissive —**SYN.** see *OBEDIENT* —**com-pli-ant-ly** *adv.*

com-pli-ca-cy (kām'pli kə sē) *n.* 1. the condition or quality of being complicated 2. *pl.* -cies anything complicated; complication

com-pli-cate (kām'plə kēt'; for *adj.* -kit) *vt.*, *vi.* -cat'ed, -cat'ing [*com-* < L. *complicatus*, pp. of *complicare*, to fold together < *com-*, together + *plicare*, to fold, weave < IE. base *plek-, to braid (< *pel-, to fold), whence *FLAX*] 1. to make or become intricate, difficult, or involved 2. [Obs.] to twist together —*adj.* 1. [Archaic] complicated 2. *Blat.* folded lengthwise, as some leaves or insects' wings

com-pli-cat-ed (-kāt'id) *adj.* made up of parts intricately involved; hard to untangle, solve, understand, analyze, etc. —**SYN.** see *COMPLEX* —**com-pli-cat-ed-ly** *adv.*

com-pli-ca-tion (kām'plə kā'shən) *n.* 1. the act of complicating, or making involved 2. a complicated condition or structure; complex, involved, or confused relationship of parts 3. a complicating factor or occurrence as in the plot of a story or in the unfolding of events 4. *Med.* a second disease or abnormal condition occurring during the course of a primary disease



COMPLEMENT
 (arc YM, complement of arc WY; angle YXM, complement of angle WXY)

LEXSEE 2000 OHIO APP. LEXIS 178

**STATE OF OHIO, ex rel. THE BEACON JOURNAL PUBLISHING COMPANY,
et al., Relators v. THOMAS G. MAURER, Respondent**

C.A. NO. 99CA0026

**COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, WAYNE
COUNTY**

2000 Ohio App. LEXIS 178

**October 7, 1999, Argued
January 26, 2000, Decided**

DISPOSITION: [*1] Relators' motion, granted in part, denied in part.

COUNSEL: RONALD S. KOPP, STEPHEN W. FUNK, Attorneys at Law, Akron, Ohio, For Relators.

EUGENE P. NEVADA, Attorney at Law, Columbus, Ohio and MARTIN FRANTZ, Wayne County Prosecuting Attorney, Wooster, Ohio, For Respondent.

JUDGES: LYNN C. SLABY, BATCHELDER, J., CONCURS, CARR, J., DISSENTS IN PART.

OPINION BY: LYNN C. SLABY

OPINION

ON APPLICATION FOR WRIT OF MANDAMUS

SLABY, Presiding Judge

Relators, the Beacon Journal Publishing Company and Marilyn Miller Roane, have petitioned this court for a writ of mandamus compelling the release of an unredacted incident report by Respondent, Wayne County Sheriff Thomas G. Maurer. This matter is before the court on Relators' motion for summary judgment and Respondent's cross-motion for summary judgment. For the reasons stated herein, Respondent's motion for summary judgment is granted in part and denied in part. Relators' motion, similarly, is granted in part and denied in part.

The parties stipulated to the following facts. An individual identified as Mr. Bob Huffman contacted the Wayne County Communications Center on February 28, 1999, indicating that he intended to force law enforcement [*2] officers to kill him. Mr. Huffman was shot and killed by an officer of the Wayne County Sheriff's

office later on that date. On March 4, 1999, and March 8, 1999, Relator Marilyn Miller Roane requested release of (1) an incident report created by the Wayne County Sheriff's office and (2) a report prepared by the Buckeye State Sheriff's Association for the Wayne County Sheriff. Ms. Roane formally requested the release of the records, pursuant to *R.C. 149.43*, on March 15, 1999. Another request was made on March 16, 1999. Copies of the incident report were provided to Relators on March 18, 1999, but all identifying references to law enforcement officers were redacted. Ms. Roane requested an unredacted version of the report on March 18, 1999. Martin Franz, Wayne County Prosecuting Attorney, denied the request the following day. On March 26, 1999, Relators petitioned this court to compel the release of an unredacted version. Both parties moved for summary judgment.

A writ of mandamus will only issue upon a determination (1) that the relator has a clear legal right to the requested relief; (2) that the respondent is under a clear legal duty to perform the [*3] act requested; and (3) that no adequate remedy is available at law. *State ex rel. Middletown Bd. of Edn. v. Butler Cty. Budget Comm. (1987)*, 31 Ohio St. 3d 251, 253, 510 N.E.2d 383, citing *State ex rel. Westchester v. Bacon (1980)*, 61 Ohio St. 2d 42, 399 N.E.2d 81, paragraph one of the syllabus. In cases involving access to public records pursuant to *R.C. 149.43*, however, the relator need not demonstrate the absence of an adequate remedy at law. *State ex rel. Findlay Publishing Co. v. Schroeder (1996)*, 76 Ohio St. 3d 580, 582, 669 N.E.2d 835. See, also, *R.C. 149.43(C)*.

Summary judgment is appropriate when:

(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that

reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the nonmoving party.

State ex rel. Howard v. Ferreri (1994), 70 Ohio St. 3d 587, 589, 639 N.E.2d 1189. The moving party must inform [*4] the court of the basis for the motion and must reference evidentiary materials, including "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any" that demonstrate that material facts are undisputed. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 292-293, 662 N.E.2d 264, quoting *Civ.R. 56(C)*.

R.C. 149.43(B) requires that:

all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

Public records include any record kept by any public office, but do not include the records described in *R.C. 149.43(A) (1) (a) through (p)*. *R.C. 149.43(A) (1)*. The party opposing disclosure bears the burden of demonstrating that the records in question are not subject to disclosure. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St. 3d 168, 169, 637 N.E.2d 911. [*5] Exceptions must be construed liberally in favor of disclosure. See *State ex rel. The Warren Newspapers v. Hutson* (1994), 70 Ohio St. 3d 619, 621, 640 N.E.2d 174.

While the burden remains on Relators to demonstrate that they have a clear legal right to the information requested, therefore, we must be mindful that our analysis must proceed with the assumption that the documents requested are public records subject to disclosure. To avoid disclosure, Respondent must demonstrate that the records are subject to one of the statutorily defined exceptions. Respondent has argued that the incident report in question, in its unredacted form, is excepted from disclosure as a confidential law enforcement investigation record. See *R.C. 149.43(A) (1) (h)*. In the alternative, Respondent has maintained that the records were created in preparation for trial. See *R.C. 149.43(A) (1) (g)*. These arguments are addressed in reverse order.

I.

Respondent has argued that the records are exempt from disclosure as a record kept in preparation for trial. See *R.C. 149.43(A) (1) (g)* and *R.C. 149.43* [*6] (B). This exclusion applies to "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." *R.C. 149.43(A) (4)*. Reports authored by law enforcement officials as part of an investigation, but not initiated or supervised by attorneys, or compiled with the involvement of counsel, are not subject to this exclusion. *State ex rel. Johnson v. Cleveland* (1992), 65 Ohio St. 3d 331, 332, 603 N.E.2d 1011. In addition, the Supreme Court of Ohio has rejected an expansive reading of the trial preparation exception, concluding that "general criminal investigations *** do not, as such, create investigative materials exempt from release as trial preparation records." *State ex rel. Coleman v. Cincinnati* (1991), 57 Ohio St. 3d 83, 83-84, 566 N.E.2d 151. Accordingly, *R.C. 149.43(A) (1) (g)* is inapplicable to this case.

II.

Respondent has also argued that the records at issue are exempt from disclosure as confidential [*7] law enforcement investigative records pursuant to *R.C. 149.43(A) (1) (h)*. In order to conclude that this exemption applies, this court must determine (1) that the records at issue are confidential law enforcement records, and (2) that access to the records would create a high probability that information described in *R.C. 149.43(B)* would be disclosed. See *State ex rel. Vindicator Printing Co. v. Watkins* (1993), 66 Ohio St. 3d 129, 136, 609 N.E.2d 551.

Although Relators have categorized the records at issue in this action as the "incident reports" prepared by responding officers, we note that the reports provided in their redacted form consist of two distinct types of documents: (1) the Ohio Uniform Incident Report form and (2) narrative/supplemental reports provided by responding officers and witnesses. On its face, Relators' petition requests only the incident report. This report constitutes a routine incident report subject to immediate disclosure. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, paragraph five of the syllabus. See, also, *State ex rel. Beacon Journal v. University of Akron* (1980), 64 Ohio St. 2d 392, 396, 415 N.E.2d 310 [*8] (characterizing incident reports as "routine factual reports *** fulfilling the duty imposed upon all law enforcement agencies to generate ongoing offense reports [and to] chronicle factual events reported to them"). The fact that the incident report involved an investigation of an officer's actions does not affect its characterization as an investigatory record. See *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1991), 57 Ohio St. 3d 77, 79-80, 566 N.E.2d 146 (concluding that investigations by the Cleveland Police Department of all incidents of deadly force involving police officers constituted confidential law enforcement records without respect to the outcome of the investigation). Because information was redacted from the incident report in con-

junction with the investigation, however, we must review the incident report in tandem with the narrative/supplemental reports.

Confidential law enforcement investigatory records not subject to disclosure include "any record that pertains to a law enforcement matter of a criminal *** nature," when release would create a high probability that the identity of an uncharged suspect would be disclosed. *R.C. 149.43* [*9] (A) (2). This exception governs the situation in which documents identify the subject of an ongoing investigation in which prosecution has not commenced. See *State ex rel. Outlet Communications v. Lancaster Police Dept.* (1988), 38 Ohio St. 3d 324, 328, 528 N.E.2d 175. "In order for law enforcement records to be subject to disclosure, *** some action beyond the investigatory stage where subjects have either been arrested, cited, or otherwise charged with an offense" is required. *State ex rel. Thompson Newspapers, Inc. v. Martin* (1989), 47 Ohio St. 3d 28, 30, 546 N.E.2d 939. This exception is not ameliorated by "the passage of time, the lack of enforcement action, or a prosecutor's decision not to file formal charges. *** It is thus not restricted to *current*, uncharged suspects." (Emphasis added.) *State ex rel. Master v. Cleveland* (1996), 75 Ohio St. 3d 23, 30, 661 N.E.2d 180. See, also, *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St. 3d 28, 546 N.E.2d 939, at paragraph two of the syllabus.

The narrative/supplemental reports in this case consist of narratives prepared by the responding officers after the fatal shooting. [*10] All identifying references to law enforcement personnel were redacted by Respondent. Respondent stated in his deposition that reports of this type are subject to "multiple supplements and investigations to follow." Shortly after the shooting, Respondent initiated an investigation by the Buckeye State Sheriff's Association, which reviewed the incident report and the narrative/supplemental reports in the course of its inquiry. The incident was also referred to the Wayne County Prosecutor, who decided not to pursue criminal charges against any officer. Respondent stated that the incident was investigated as a homicide. On the advice of the prosecuting attorney, the name of the officer who fired the fatal shots was redacted because he was a "suspect," and the names of the other officers were redacted "based on the probability that the other names would reveal the name of the suspect" by process of elimination or by contact with the named officers.

Disclosure of unredacted versions of the narrative/supplemental reports would reveal the identity of the officer who fired the fatal shot. Although charges were not filed against the officer, this fact would not remove the narrative/supplement [*11] reports from the scope of the exclusion provided in *R.C. 149.43(A) (2) (a)*. Consequently, they would not be subject to disclosure. Al-

though the Uniform Incident Report is not a confidential law enforcement investigatory record in and of itself, further investigation, as reflected in the narrative/supplemental reports, may have led to an investigation focused on a single suspect. As discussed *supra*, this information would create a high probability that the identity of the shooter would be disclosed. In this situation, *R.C. 149.43(A) (2) (a)* mandates that the incident report's exclusion from the definition of public records.

Although we are compelled by statute to reach this conclusion, we note that the implications of this result are incongruous with the policy interests underlying *R.C. 149.43*. The protection afforded by *R.C. 149.43(A) (2) (a)* avoids adverse publicity for an uncharged suspect who, but for the disclosure, may not have been identified with the investigation in any way. *State ex rel. Moreland v. Dayton* (1993), 67 Ohio St. 3d 129, 131, 616 N.E.2d 234. [*12] In addition, the exclusion protects the integrity of the investigative process by facilitating later efforts to reopen and solve an inactive case. *Id.* In this case, the shooting officer was identified by the incident reports filed immediately after the incident. As such, his identity was not placed in question. This case is not "unsolved" in the true sense of the word. Rather, the facts conclusively indicated that Mr. Huffman was killed as a result of gunfire from a known officer. Following a conclusion that the actions of the officer were justified, the prosecutor elected not to pursue charges. With respect to a determination of the shooter's identity, this investigation is not subject to reopening.

The incident underlying this petition involves one officer's response to circumstances that arose from the performance of his or her duties. This situation is readily distinguishable from investigation of an individual, or even an officer, whose actions are not related to a law enforcement function. An investigation of a fatal police shooting will always occur despite the fact that it may ultimately be determined that no crime has been committed. Nonetheless, the public derives a [*13] "manifest" benefit in scrutinizing work-related incidents of violence involving law enforcement personnel. *State ex rel. Olander v. French* (1997), 79 Ohio St. 3d 176, 180, 680 N.E.2d 962, citing *State ex rel. Multimedia, Inc. v. Whalen* (1990), 51 Ohio St. 3d 99, 100. ¹, 554 N.E.2d 1321 It is only appropriate that incidents involving the performance of law enforcement personnel that result in injury or death should be subject to public scrutiny.

1 In *Whalen*, 51 Ohio St. 3d 99, 554 N.E.2d 1321, the Ohio Supreme Court granted the relator's request for attorney's fees. The underlying writ in that case compelled the Hamilton County Sheriff to release records pertaining to a fatal shooting by a police officer. The respondent ar-

gued that the records were exempted from disclosure by executive privilege and that the relator could not establish a clear legal duty to disclose the records. The Court rejected both arguments. The respondent, however, did not raise the investigatory records exception and, accordingly, the Court did not address the issue. *Id.* at 100-01. Similarly, the Court in *State ex rel. Natl. Broadcasting Co. v. Cleveland*, *supra*, concluded that investigations of deadly force by police officers could qualify as confidential law enforcement records, but the uncharged suspect exception was not at issue in that case.

[*14] The legislature, however, has not created an "exception to the exception" governing this situation. The logical result of application of the uncharged suspect exception in these cases is that the public will not have access to the names of officers involved in violent confrontations with the public in the vast majority of cases in which the officers' conduct is investigated and determined to be justified and in which charges are never filed. We are not persuaded that this result furthers the purposes advanced by the legislature in carving out the uncharged suspect exception to disclosure. Nonetheless, we are constrained by the legislature's silence to reach this conclusion. To the extent that the identity of this officer was included in the Uniform Incident Report, by error, inadvertence, or neglect, it may be redacted on the incident report based on the characterization of the underlying narratives.

Relators' motion for summary judgment is granted in part and denied in part. Similarly, Respondent's motion is granted in part and denied in part. It is our determination that that the writ may issue for a fully unredacted version of the Uniform Incident Report to the extent that the [*15] actual shooter is not identified. Because Relators have been provided with a copy of the report prepared by the Buckeye State Sheriff's Association, that portion of the petition is moot.

Relators have also moved for attorney fees. Attorney fees are authorized, but not mandated, by *R.C. 149.43(C)*. *State ex rel. Akron Beacon Journal Publishing Co. v. Akron Metro. Hous. Auth.* (1989), 42 Ohio St. 3d 1, 2, 535 N.E.2d 1366, citing *State ex rel. Fox v. Cuyahoga Cty. Hosp. System* (1988), 39 Ohio St. 3d 108, 529 N.E.2d 443, paragraph two of the syllabus. In this case, Respondents pursued reasonable legal theories in this action and there is no indication that they acted in bad faith. See *State ex rel. Fox v. Cuyahoga Cty. Hosp. System*, 39 Ohio St. 3d at 112. The motion for attorney's fees is denied.

Judgment accordingly.

Judgment ordered as set forth above.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*.

Costs taxed [*16] to the relators.

Exceptions.

LYNN C. SLABY

FOR THE COURT

BATCHELDER, J.

CONCURS

CARR, J.

DISSENTS IN PART

CONCUR BY: CARR (In Part)

DISSENT BY: CARR (In Part)

DISSENT

DISSENTS IN PART, SAYING:

Because I would grant the writ in its entirety, I must respectfully dissent from those portions of the majority opinion that deny access to an unredacted version of the incident report.

The majority correctly observes that the policy rationale underlying the uncharged suspect exception is to "avoid adverse publicity for an uncharged suspect who, but for the disclosure, may not have been identified with the investigation in any way," but denies access to the incident report based on an expansive interpretation of the exception. This runs afoul of the general rule that *R.C. 149.43* must be construed liberally in favor of disclosure, and:

contravenes our duty to liberally construe *R.C. 149.43* *** in favor of broad access, with any doubt resolved in favor of disclosure of public records. *** [This conclusion] does not advance the preeminent purpose of *R.C. 149.43*, i.e., "to expose government [*17] activity to public scrutiny, which is absolutely essential to the proper working of a democracy."

(Citation omitted.) *State ex rel. Beacon Journal Co. v. Whitmore* (1998), 83 Ohio St. 3d 61, 65, 697 N.E.2d 640, Cook, J., dissenting.

For these reasons, I respectfully dissent.