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IN THE SUPREME COURT OF OHIO
CASE NO. 2010-0057

STATE Ex Rel. BETH ROCKER	:	ON APPEAL FROM THE GUERNSEY COUNTY COURT OF APPEALS
Relator-Appellant	:	FIFTH APPELLATE DISTRICT
vs.	:	
GUERNSEY COUNTY SHERIFF'S OFFICE	:	COURT OF APPEALS CASE NO. 09-CA-4
Respondent-Appellee	:	

MERIT BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE AND FACTS

Relator, Beth Rocker, reported to Respondent that she is the victim of childhood sexual abuse perpetrated by Gary Zalenski. On October 1, 2008, after a grand jury refused to indict Zalenski, Relator, through counsel, requested in writing that Respondent provide "the entire contents of the investigative file and any documents reviewed during or related to the investigation" of Zalenski. (Affidavit of Konrad Kircher, ¶ 2 and Exhibit "A" thereto, attached to Complaint in Mandamus). Counsel followed up with Respondent's contact twice by email and once by voicemail, with no direct response. (Kircher Affidavit, ¶ 4). After considerable delay, the Guernsey County Prosecuting Attorney advised that only the first two pages of the initial incident report would be provided. (Kircher Affidavit, ¶ 5 and Exhibit "B" thereto). Respondent finally provided those pages on November 6, 2008. (Kircher Affidavit , ¶ 7 and Exhibit "C" thereto).

Relator filed a Complaint for Writ of Mandamus in the Fifth District Court of Appeals on January 8, 2009. Shortly thereafter, the Court of Appeals requested that all documents sought by Relator be provided to the Court under seal for an in camera inspection. Following receipt of those documents, the Court of Appeals issued a Judgment Entry on April 28, 2009, categorizing 14 types of documents submitted by Respondent. (Appendix A). The Court of Appeals requested further briefing specific to each category of document. In Relator's Brief, she acknowledged that three of the 14 categories do not constitute public records. The Court of Appeals issued its Opinion on December 2, 2009 denying the writ in its entirety. (Appendix B). Relator then timely perfected this appeal.

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

> **Proposition of Law:** Once clothed with the public records cloak, the records cannot be defrocked of their status, even if the release of those records might reveal the identity of an uncharged suspect.

The analysis for any public records request must begin with the premise that the disclosure of public records is favored. *State ex rel. Beacon Journal Publishing Co. v. University of Akron* (1980), 64 Ohio St.3d 392; *State ex rel. Multimedia, Inc. v. Whalen* (1990), 48 Ohio St.3d 41; *State ex rel. Cincinnati Post v. Schweikert* (1988), 38 Ohio St.3d 170. Exceptions to disclosure must be strictly construed against the custodian of the public records, and the burden to establish an exception is on the custodian. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168, 169. Moreover, R.C. §149.43 should be construed to further broaden access, and any doubt should be resolved in favor of disclosure of public records. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 621.

"Confidential law enforcement investigatory records" are excepted from the definition of "public record." R.C. 149.43(A)(1)(h). A "confidential law enforcement investigatory record" is defined as "any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the types of information set forth in subsection (a), (b), (c) and (d) of R.C. 149.43(A)(2)." *State ex rel. Musial v. N. Olmsted* (2005), 106 Ohio St.3d 459, 461-462. Subsection (a) of R.C. 149.43(A)(2) relates to the identity of a suspect who has not been charged with the offense to which the record pertains.

The Court of Appeals denied the writ, first finding that each of the categories of documents in dispute "is a record pertaining to a law enforcement matter which is criminal in

nature." (Opinion, ¶15). The Court then found that "[e]ach of these records will undoubtedly reveal the identity of the uncharged suspect. Not only do most of the records reveal the name of the suspect, they also reveal facts unique to him which would have a high probability of revealing his identity." (Opinion, ¶16).

The Court of Appeals decision flies in the face of this Court's reasoning in *State ex rel. Beacon Journal Publishing v. Maurer* (2001), 91 Ohio St.3d 54. In *Maurer*, a deranged individual pointed a gun at deputies, who then fired shots at the individual, killing him. A newspaper served a public records request for the incident report, including narrative statements. The sheriff refused to produce the documents, asserting that they identify the deputies who fired the shots and that the deputies were uncharged suspects. This Court first reiterated that incident reports which initiate criminal investigations are not part of the investigation. *Id.* at 56. Similarly, narrative statements attached to the report are public record. *Id.* This Court then explained:

> We rule this way despite the risk that the report may disclose the identity of an uncharged suspect. A deputy incorporated the typed narrative statements by reference in the incident report. He consequently incorporated them in a public record. He cannot now remove the "public records cloak." In *Cincinnati Enquirer* [*v. Hamilton Cty.* (1996), 75 Ohio St.3d 374, 378], we stated:
>
> "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. * * *
>
> * * * Once clothed with the public records cloak, the records cannot be defrocked of their status."

Id. at 57. The Court of Appeals seems to have bypassed a thorough analysis of the nature of each document, and instead focused on references within them to Zalenski. For the following

reasons, the documents categorized by the Court of Appeals are public records and cannot be defrocked of that status by the possibility that they might reveal the identity of Zalenski.

A. Sheriff's Call Record

The call record is not an exempted record. *See State ex rel. Martinelli v. Corrigan*, 71 Ohio App. 3d 243, 593 N.E.2d 364, 1991 Ohio App. LEXIS 945 (8th Dist.1991)(Sheriff's records of arrest and transferring an inmate to prison do not qualify as exempted records).

B. Investigator Notes

Investigation files are not exempt from disclosure as "trial preparation records" where they are not "specifically compiled" in anticipation of a criminal proceeding. *See State ex rel. Coleman v. Cincinnati*, 57 Ohio St. 3d 83 (1991). Only those records that are specifically compiled for or in anticipation of civil or criminal proceedings are "trial preparation records." *See Pinkava v. Corrigan*, 64 Ohio App. 3d 499 (8th Dist.1990). Respondent has never claimed that **any** of the additional documents withheld were "trial preparation records." *See* Exhibit B to Kircher Affidavit.

C. Witness Statements
and
D. Statement from Uncharged Suspect's Employer

Witness statements can be public records and subject to disclosure. *See Pinkava v. Corrigan*, 64 Ohio App. 3d at 499 (victim's statement reporting an offense to a police officer is a public record). The well-reasoned analysis of that Court applies to all statements. The Eighth District provided:

> [A] statement contains a factual description of the offense as related to a police officer and contains no subjective analysis of any sort by any investigating officer. Consequently, the victim's statement cannot be excepted as specific investigatory work product under R.C. 149.43(A)(2)(c).

> Nor does the statement constitute "trial preparation" as defined in the public records statute. Trial preparation records are records specifically compiled for or in anticipation of civil or criminal proceedings.
>
> Even though a victim's statement eventually may constitute the basis of a prosecution or civil proceeding, when the police record the facts of an offense, they are performing foremost a routine part of their law enforcement duties and are not compiling material specifically for litigation.

Id. (citations omitted); *see also State Ex Rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 2002 Ohio 67, *citing State ex rel. Beacon Journal Publishing Co. v. Maurer* (2001), 91 Ohio St. 3d 54, 57 ("[A] police incident report form, which incorporated attached narrative statements by witnesses and law enforcement officers, was a public record that must be released under the Ohio Public Records Act, R.C. 149.43, immediately upon request."). Accordingly, the statements are subject to disclosure.

E. Complainant's Statement

The Complainant's Statement is a public record and must be disclosed. *See Pinkava v. Corrigan*, 64 Ohio App. 3d at 499 (victim's statement reporting an offense to a police officer is a public record).

F. Complainant's Affidavit

The Affidavit, like the aforementioned statements, is also subject to disclosure for those same reasons.

G. Correspondence between Sheriff and Prosecutor
and
H. Correspondence between Prosecutor and Attorney for Uncharged Suspect's Employer
and
I. Correspondence between Sheriff and Advocacy Group

The correspondence is a public record. "A 'public record' is 'any record that is kept by any public office, including, but not limited to * * * county * * * units.'" *State ex rel.*

Cincinnati Enquirer v. Krings, 93 Ohio St. 3d 654, 657 (Ohio 2001); *see also Cincinnati Enquirer v. Cincinnati*, 55 Ohio App. 3d 26, 29 (1st Dist.1989)("...any record necessary to the execution of the responsibilities of a governmental unit is a 'public record' and 'required to be kept' within the meaning of R.C. 149.43. Absent any specific statutory exclusion, such record must be made available for public inspection.").

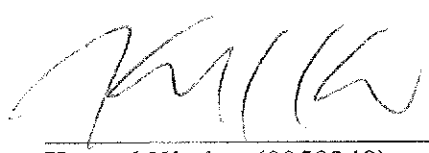
J. Psychological Reports of Uncharged Suspect

This Court has held that psychological reports garnered to assist in the evaluation of one's suitability for continued employment may not be excepted from disclosure under RC § 149.43. *See State ex rel. Multimedia, Inc. v. Snowden* (1995), 72 Ohio St. 3d 141, 144-45 (documents containing opinions of psychologists sought by a sheriff to assist him in making a decision as to an employee's suitability for continued employment were not medical records excepted from disclosure).

CONCLUSION

Relator respectfully requests that the Court review the sealed documents and find that they are public records which must be produced to Relator.

Respectfully submitted,



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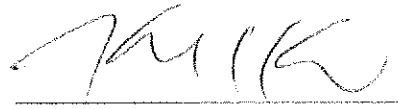
Counsel for Relator-Appellant

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Merit Brief has been served upon Daniel Padden, Esq., 139 Court House Square, P.O. Box 640, Cambridge, Ohio 43725-0640, Attorney for the Respondent-Appellee by ordinary U.S. Mail, postage prepaid, this 5th day of March, 2010.



Konrad Kircher
Counsel for Relator-Appellant

APPENDIX A

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
APR 28 2009
GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

STATE, EX REL., BETH ROCKER Relator -vs- GUERNSEY COUNTY SHERIFF'S OFFICE Respondent	:	CASE NO. 09-CA-4 JUDGMENT ENTRY

This matter came before the Court upon review of the documents provided under seal by Respondent. The parties shall submit briefs which shall include argument relative to whether the following categories of documents are subject to disclosure under the public records act: (1) Sheriff's Call Record, (2) Investigator Notes, (3) Witness Statements, (4) Complainant's Affidavit, (5) Complainant's Statement, (6) "Ohleg" Report for Uncharged Suspect containing criminal record and driver's license record, (7) Correspondence between Uncharged Suspect's Attorney and Prosecutor and Sheriff (8) Correspondence between Sheriff and Prosecutor, (9) Correspondence between Prosecutor and Attorney for Uncharged Suspect's Employer, (10) Statement from Uncharged Suspect's Employer, (11) Correspondence between Sheriff and advocacy group, (12) Psychological Reports of Uncharged Suspect, (13) Book Authored by Complainant, and (14) Grand Jury Testimony.

The Court orders the following briefing schedule:

Relator's brief shall be filed on or before May 29, 2009;

Respondent's brief shall be filed on or before June 29, 2009;

Relator's reply brief, if any, shall be filed on or before July 13, 2009.

IT IS SO ORDERED.

JUDGE

APPENDIX B

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

STATE, EX REL., BETH ROCKER	:	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. W. Scott Gwin, J. Hon. Patricia A Delaney, J.
Relator	:	
-vs-	:	
GUERNSEY COUNTY SHERIFF'S OFFICE	:	Case No. 09-CA-4
Respondent	:	OPINION

CHARACTER OF PROCEEDING: Complaint for Writ of Mandamus

JUDGMENT: Writ Denied

DATE OF JUDGMENT ENTRY:

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Farmer, P.J.

{¶1} Relator, Beth Rocker, has filed a Petition for Writ of Mandamus requesting Respondent, the Guernsey County Sheriff's Office, be compelled to release certain records which were requested pursuant to a public records request.

{¶2} "Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶6; R.C. 149.43(C). The Public Records Act implements the state's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶20. "Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶13." *State ex rel. Perrea v. Cincinnati Pub. Schools,* 2009 WL 2973196, 2 (Ohio, 2009).

{¶3} On October 1, 2008, Relator issued a public records request for the "entire contents of the investigative file and any documents reviewed during or related to the investigation". The investigation referenced in the request was based upon a criminal complaint made by a Relator. The matter was submitted to a grand jury who returned a no bill. In response to the request, Respondent provided certain items to Relator, however, other items were withheld based upon Respondent's determination the records were exempt from disclosure.

{¶4} "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the

burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus." *State ex rel. Perrea v. Cincinnati Pub. Schools,* 2009 WL 2973196, 3 (Ohio,2009).

{¶5} Pursuant to our order, Respondent provided this Court under seal all records which have not been turned over to Relator. The parties have filed briefs in support of their positions relative to the categories of documents which have been withheld. There are thirteen items which have not been disclosed to Relator. The parties agree three of those documents are not subject to disclosure, therefore, this Court will only address the remaining ten items in dispute which are: (1) The Sheriff's Call Record, (2) Investigator Notes, (3) Witness Statements, (4) Statement from Uncharged Suspect's Employer, (5) Complainant's Statement, (6) Complainant's Affidavit, (7) Correspondence between the Sheriff and the Prosecutor, (8) Correspondence between the Prosecutor and the Attorney for the Uncharged Suspect's Employer, (9) Correspondence between the Sheriff and an Advocacy Group, and (10) Psychological Reports of Uncharged Suspect.

{¶6} Respondent urges this Court to find the records which have not been disclosed are exempt as confidential law enforcement records the release of which would create a high probability of disclosure of the identity of an uncharged suspect.

{¶7} R.C. 149.43 governs the disclosure of public records. "R.C. 149.43(A)(1)(h) excepts '[c]onfidential law enforcement investigatory records' from the definition of '[p]ublic record' for purposes of the Public Records Act. R.C. 149.43(A)(2)

defines '[c]onfidential law enforcement investigatory record' as 'any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of' any of the types of information set forth in subsection a, b, c, and d." *State ex rel. Musial v. N. Olmsted,* 106 Ohio St.3d 459, 461-462, 835 N.E.2d 1243, 1247 (Ohio,2005). Sections (a),(b),(c), and (d) provide as follows:

{¶8} (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

{¶9} (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

{¶10} (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

{¶11} (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

{¶12} The Supreme Court has employed a two step test to determine whether records should be exempt from release under this section, "[W]e employ a two-step test to determine whether a record is exempt as a confidential law-enforcement record under R.C. 149.43:

{¶13} 'First, is the record a confidential law enforcement record? Second, would release of the record "create a high probability of disclosure" of any one of the four kinds of information specified in R.C. 149.43(A)(2)?' *State ex rel. Beacon Journal*

Publishing Co. v. Maurer (2001), 91 Ohio St.3d 54, 56, 741 N.E.2d 511, quoting *State ex rel. Polovischak v. Mayfield* (1990), 50 Ohio St.3d 51, 52, 552 N.E.2d 635." *State ex rel. Musial v. N. Olmsted*, 106 Ohio St.3d 459, 462, 835 N.E.2d 1243, 1247 (Ohio,2005).

{¶14} We note "[t]he uncharged-suspect exemption may still apply even though the accusation of criminal conduct is already public knowledge. *State ex rel. Master v. Cleveland* (1996), 76 Ohio St.3d 340, 342, 667 N.E.2d 974, 975-976." *State ex rel. Ohio Patrolmen's Benevolent Assn. v. Mentor,* 89 Ohio St.3d 440, 446-447, 732 N.E.2d 969, 976 (Ohio,2000).

{¶15} The first step of the test outlined supra requires us to determine whether the records sought to be exempted are confidential law enforcement investigatory records. Having reviewed the records under seal, we find the Sheriff's Call Record, Investigator Notes, Witness Statements, Statement from Uncharged Suspect's Employer, Complainant's Statement, Complainant's Affidavit, Suspect's Psychological Report, and all Correspondence to be Confidential Law Enforcement Investigatory Records. Each of these items is a record pertaining to a law enforcement matter which is criminal in nature.

{¶16} Next, we must determine whether the records create a high probability of disclosure of the uncharged suspect's identity pursuant to R.C. 149.43(A)(2)(a). Each of these records will undoubtedly reveal the identity of the uncharged suspect. Not only do most of the records reveal the name of the suspect, they also reveal facts unique to him which would have a high probability of revealing his identity. For this reason, we find all of the records provided by Respondent to be exempt.

{¶17} Because none of the records is subject to disclosure, Relator's Complaint for Writ of Mandamus is denied.

{¶18} COMPLAINT DENIED.

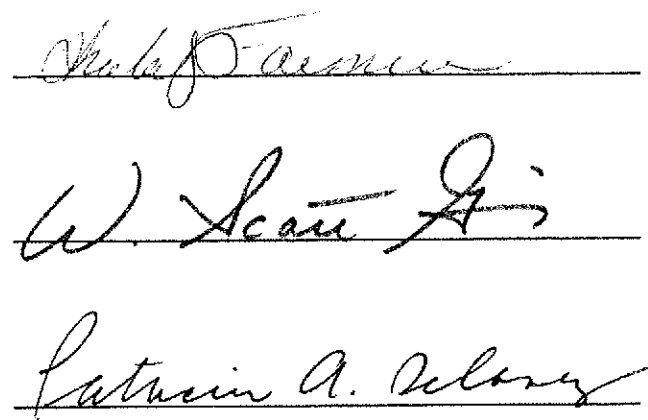
{¶19} COSTS TO RELATOR.

{¶20} IT IS SO ORDERED.

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.



JUDGES