

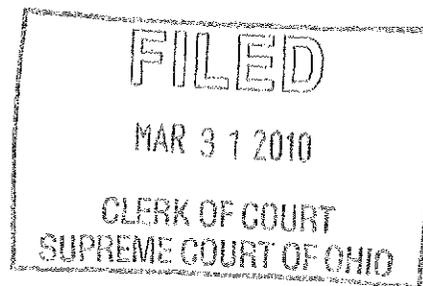
ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. BETH ROCKER, :  
 Relator-Appellant, : ON APPEAL FROM THE GUERNSEY  
 COUNTY COURT OF APPEALS  
 V. : FIFTH APPELLATE DISTRICT  
 GUERNSEY COUNTY SHERIFF'S :  
 OFFICE, : CASE NO. 2010-0057  
 Respondent-Appellee. : COURT OF APPEALS  
 : CASE NO. 09-CA-4

BRIEF OF RESPONDENT-APPELLEE

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## STATEMENT OF FACTS AND STATEMENT OF THE CASE

On October 1, 2008, Relator-Appellant (hereinafter, "Relator") served a public records request upon the Guernsey County Sheriff's Office (sometimes hereinafter, "Respondent") for "the entire contents of the investigative file and any documents reviewed during or related to the investigation" of Fr. Gary Zalenski. Guernsey County Prosecuting Attorney Daniel G. Padden, counsel for the Guernsey County Sheriff's Office, responded to Relator's request by letter dated November 7, 2008. The letter advised that the records were determined to be exempt from disclosure as the file was inextricably intertwined with the identity of an unnamed suspect such that redacting the name would fail to protect the identity of the suspect.

On January 8, 2009, Relator filed a Complaint for Writ of Mandamus in the Fifth District Court of Appeals. Upon request of the Fifth District Court of Appeals, the requested documents were filed under seal on March 17, 2009. The parties were ordered to brief the issue, and on December 2, 2009, a three-judge panel unanimously denied the Writ in its entirety, citing an exception to the public records laws and finding that none of the records were subject to disclosure. Relator filed a timely notice of appeal to the Ohio Supreme Court on January 12, 2010.

## ARGUMENT CONTRA RELATOR'S PROPOSITION OF LAW

Ohio Revised Code Section 149.43 states, in pertinent part:

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. ***"Public record" does not mean any of the following:***

\* \* \*

***(h) Confidential law enforcement investigatory records[.]***

\* \* \*

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) ***The identity of a suspect who has not been charged with the offense to which the record pertains,*** or of an information source or witness to whom confidentiality has been reasonably promised[.]

(Emphasis added).

When determining whether an item is a confidential law enforcement investigatory record (CLEIR), courts use a two-step test. First, the record must pertain to a criminal, quasi-criminal, civil, or administrative law enforcement matter. *State ex rel Multimedia, Inc. v. Snowden* (1995), 72 Ohio St. 3d 141. Second, the record must create a high probability of disclosing the identity of an uncharged suspect, the identity of a confidential source, investigatory techniques or procedures, investigatory work product, or information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source. *Id.*

To determine whether the record satisfies the first step, three questions must be answered affirmatively. First, was the investigation initiated upon specific suspicion of wrongdoing?

*State ex rel Polovischak v. Mayfield* (1990), 50 Ohio St. 3d 552. Second, does the alleged conduct violate the law? *Id.* Third, does the public office have the authority to investigate or enforce the law allegedly violated? *State ex rel Strothers v. Wertheim* (1997), 80 Ohio St. 3d 155.

Analysis of the second step is an “or” analysis. The record must satisfy only one of the following: (1) revealing the identity of an uncharged suspect, (2) revealing the identity of a confidential source, (3) endangering the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source, (4) revealing investigatory techniques or procedures, or (5) revealing investigatory work product.

An uncharged suspect is a person who has not been arrested or indicted for the offense to which the record pertains. *Snowden*, 72 Ohio St. 3d 141. Where the file is inextricably intertwined with the suspect’s identity such that redacting will fail to protect the identity, the entire file may be withheld. *State ex rel Master v. City of Cleveland* (1996), 76 Ohio St. 3d 340. Further, it has been held that just because the suspect has been accurately identified in the media, information identifying this person may still be withheld. *Id.*

Relator argues that the opinion of the Fifth District Court of Appeals “flies in the face” of this Court’s decision in *State ex rel. Beacon Journal Publishing Co. v. Maurer* (2001) 91 Ohio St. 3d 54. Relator argues that the records requested must be released because they have been “cloaked” as a public records and cannot therefore be “defrocked.” However, *Maurer* specifically addresses only incident reports and the accompanying narratives. In the case at bar, Respondent released the requested incident report to Relator more than one year ago. That specific holding of *Maurer* is not applicable to the other records requested in this case.

In the case at hand, the file requested falls clearly within the CLEIR exception. The record clearly pertains to a criminal enforcement matter. The investigation was initiated upon a specific allegation of wrongdoing made by Relator, the conduct alleged by Relator was in violation of the Ohio Revised Code, and the Guernsey County Sheriff's Office had the authority to investigate the alleged statutory violation.

In addition, the records in this case also easily satisfy the requirement that release of the records would reveal the identity of an uncharged suspect. In the case at hand, an investigation was conducted; however, the individual was never indicted. The uncharged suspect's name and identity are inextricably interwoven among the file, and therefore, the file should not be released.

#### ***A. Sheriff's Call Record***

In support of the argument that the Sheriff's Call Record should be released, Relator cites *State ex rel Martinelli v. Corrigan* (1991), 71 Ohio App. 3d 243 (8th Dist.). However, Relator's reliance upon this case is misplaced. In *Martinelli*, the court held only that records of arrest and records indicating transfer of an inmate to prison are not exempted. There is no discussion of a sheriff's call record. Insofar as the Sheriff's call record would indicate the name of an uncharged suspect, it is a CLEIR and the records should not be released.

#### ***B. Investigator Notes***

Relator argues that investigator notes are not trial preparation records, and should therefore be released. However, Relator fails to acknowledge that the same need not be made in preparation for trial if they are in fact part of a CLEIR. Under the above analysis, the file maintained by Respondent is a CLEIR, the release of which would reveal the name of an uncharged suspect, and therefore any investigatory notes contained therein are not public records and should not be released.

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

As to witness statements, the analysis provided above is again applicable. These statements relate to a criminal matter, and their release would reveal the name of an uncharged suspect. The records meet one of the exceptions; therefore, it is not necessary that they be specific investigatory notes or work product. Relator's reliance upon *Pinkava* is therefore in vain. *See* 64 Ohio App. 3d 499.

In addition, Relator relies upon *Maurer's* statement wherein statements that were attached to an incident report we found to be part of the incident report, and therefore subject to release. *See* 91 Ohio St. 3d 54 (2001). Respondent acknowledges that incident reports are public record by definition and the incident report in this case was previously released to Relator. However, there is no allegation that the statements requested were attached to the incident report and the statements in fact were NOT so attached. Therefore, as the release of the statements would reveal the name of an uncharged suspect whose identity is interwoven with the file, the statements should not be released.

***E. Complainant's Statement; and  
F. Complainant's Affidavit***

In requesting Complainant's Statement and Affidavit, Relator again relies upon *Pinkava*. However, Respondent would again point out that in *Pinkava*, the exemptions claimed were only those of work product and trial preparation. In the case *sub judice*, the exemption preventing the release of records that contain the name of an uncharged suspect applies and prevents the release of the requested records.

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

With regard to the correspondence, Relator puts forth no new argument other than to state that she believes the name of the uncharged suspect could be redacted. However, the identity of a person involves much more than his or her name. In the case at hand, the uncharged suspect's position and other information is inextricably intertwined throughout the correspondence. Therefore, the records should not be released.

### *J. Psychological Reports of Uncharged Suspect*

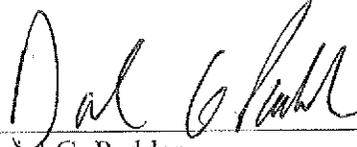
Relator argues that she is entitled to the psychological evaluation of the uncharged suspect based upon *State ex rel. Multimedia, Inc. v. Snowden* (1995), 72 Ohio St. 3d 141. However, the case at hand is easily and clearly distinguishable from *Snowden*. In *Snowden*, the person on whom the psychological evaluation was conducted was a public employee, and the Ohio Supreme Court held that the employment records of a public office were not exempt. *Id.* at 144-45. In the case at hand, the evaluation was not performed or requested by a public office; therefore, it should not be construed as an "employment record" under public records laws. The evaluation requested was done to aid a private party in making an employment determination. To the extent it may be in the possession of Respondent, it is classified as a CLEIR and the identity of an uncharged suspect is inextricably intertwined throughout the document. Therefore, the psychological evaluation should not be released.

**CONCLUSION**

Based upon the above arguments, Respondent believes that Relator is not entitled to any of the listed items as they are Confidential Law Enforcement Investigatory Records, the disclosure of which would reveal the identity of an uncharged suspect. In addition, various aspects of the uncharged suspects identity, including the individual's name and other identifying characteristics, are inextricably intertwined throughout the file, such that redaction is an insufficient safeguard against disclosure.

Contrary to Relator's Proposition of Law, the records at issue in the case at bar were exempt from the beginning, and were never "cloaked" as public records. Therefore, Respondent respectfully requests that this Court prevent the above-named documents from being released.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a true copy of the foregoing Brief of Respondent-Appellee, this 29<sup>th</sup> day of March, 2010, via regular U.S. mail, postage prepaid, upon the following:

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