

IN THE SUPREME COURT OF OHIO

ORIGINAL

State ex rel. Plunderbund Media, LLC,	:	Case No. 2013-0596
	:	
Relator,	:	Original Action in Mandamus
	:	
v.	:	
	:	
Thomas P. Charles, Director,	:	
Ohio Department of Public Safety,	:	
	:	
Respondent.	:	

MOTION OF RESPONDENT FOR JUDGMENT ON THE PLEADINGS

MICHAEL DeWINE
Ohio Attorney General

VICTORIA E. ULLMANN* (0031468)
*Counsel of Record
1135 Bryden Road
Columbus, Ohio 43205
614-253-2692
Victoria_ullmann@hotmail.com

Counsel for Relator

HILARY R. DAMASER* (0059190)
*Counsel of Record
WILLIAM J. COLE (0067778)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614-466-2980
866-354-4086 fax
Hilary.Damaser@OhioAttorneyGeneral.gov
William.Cole@OhioAttorneyGeneral.gov

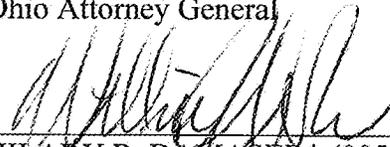
Counsel for Respondent

FILED
MAY 08 2013
CLEAN UP COURT
SUPREME COURT OF OHIO

Pursuant to S.Ct. Prac. R. 10.5(B) and Civ. R. 12(C), Respondent Thomas P. Charles, Director of the Ohio Department of Public Safety (“the Department”), moves for judgment on the pleadings. A supporting memorandum follows.

Respectfully submitted:

MICHAEL DeWINE
Ohio Attorney General



HILARY R. DAMASER* (0059190)

**Counsel of Record*

WILLIAM J. COLE (0067778)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614-466-2980
866-354-4086 fax
Hilary.Damaser@OhioAttorneyGeneral.gov
William.Cole@OhioAttorneyGeneral.gov

Counsel for Respondent

MEMORANDUM IN SUPPORT OF RESPONDENT'S
MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Relator Plunderbund Media, LLC's ("Plunderbund") owner made a public-records request to the Department for copies of investigations (open and closed) of threats made against Governor Kasich since he took office. The Department declined to produce the requested records because they are security records. After follow-up requests for the records were denied, Plunderbund sued in mandamus to compel the Department to provide copies of the requested records with redactions, if necessary.

Plunderbund cannot succeed on its mandamus suit. The Department's investigation records of threats against the Governor are by definition "security records" under R.C. 149.433(A)(3), because they contain information that is directly used for protecting or maintaining the security of the Governor's office against attack, interference, or sabotage. The statute makes no distinction between open and closed records. Under R.C. 149.433(B), security records are not public records and not subject to mandatory disclosure under the Public Records Act. Because a security record is not a public record, the Department has no clear legal duty to produce even redacted copies of its security investigations.

There are also constitutional grounds to deny a writ of mandamus. As the State's chief executive, Governor Kasich is uniquely exposed and susceptible to threats against his and his family's personal security. The Fourteenth Amendment guarantees individuals a clearly established and fundamental right to personal security. Compelling the Department to publicly disclose its investigation records, even if partially or wholly redacted, would increase the attendant risks and dangers to the Governor's personal security.

Accordingly, Plunderbund's mandamus suit should be dismissed.

PLUNDERBUND'S MANDAMUS COMPLAINT AND EXHIBITS

Plunderbund's complaint consists of ten paragraphs, an affidavit of Mr. Mismas, and eight exhibits. The exhibits document written communications preceding this action, between the Department and Mr. Mismas, Plunderbund, and their counsel. On August 14, 2012, Mr. Mismas asked the Department for a count and copy of investigations, both open and closed, that it conducted relative to threats against Governor Kasich. Complaint at ¶ 4 (first)¹ & Ex. 1.² The Department advised Mr. Mismas that it was withholding the requested records pursuant to R.C. 149.433, which exempts from disclosure security records and infrastructure records. *Id.* at Ex. 2.

Mr. Mismas modified his request, asking the Department to provide "cover sheets" to closed reports of past threats, which indicate that a case was opened, the nature of the case, and the resolution, with redactions for information the Department believes could pose a security threat. *Id.* at ¶ 5 Ex. 3. The Department again responded that the requested records are security records exempt from disclosure, and stated, "Security records are not limited to open investigations. No assurances can be made that the release of documents regarding previously-made threats will not constitute a security risk in the future." *Id.* at Ex. 4.

Mr. Mismas then asked the Department for the specific statutory citation the Department was using to deny his request, and for a copy of the Department's current public-record policy document. *Id.* at Ex. 6. The Department complied with these requests. *Id.*

¹ The mandamus complaint has two paragraph 4s. Also, there are no paragraphs numbered 7-12 in the complaint; paragraph 13 immediately follows paragraph 6.

² Plunderbund alleges Mr. Mismas requested "copies of any investigation files regarding threats against the governor or his staff." Complaint at ¶ 5. However, none of the communications between Mr. Mismas and the Department, which are documented in the complaint's exhibits, show or suggest that Mr. Mismas, Plunderbund, or their counsel ever requested reports of threats made against any member(s) of the Governor's staff.

On November 13, 2012, Plunderbund's counsel emailed a letter to the Department stating, inter alia, that some of the documents requested by Mr. Mismas fall outside R.C. 149.433, and that the Department should produce the documents after redacting security information. *Id.* at Ex. 7. She also asked the Department to produce the following:

- The content of the threat itself, and whether the threat was considered credible by the officer who made that determination;
- A copy of the threat, if the threat was in writing;
- Notes taken by the person who received the threat and materials regarding whether an investigation was opened, if the threat was by phone; and
- Copies of summary sheets or cover sheets providing a short recitation of the issue

Id. The Department advised counsel that "security records" include records that contain information directly used for protecting or maintaining the security of a public office, that the assessment and disposition relative to each threat "as it relates to the unique circumstances of a particular governor and his family" would show the relative strengths and weaknesses of that governor's security, and would thus pose a significant risk to Governor Kasich and his family.

Id. Accordingly, the Department advised that the requested records are security records that are not subject to disclosure, and that redaction does not apply. *Id.*

Plunderbund subsequently sued in mandamus to compel the Department to produce all responsive documents, redacted if necessary. Plunderbund also demands an award for statutory damages, costs, and attorney fees.

ARGUMENT

The Practice Rules of this Court permit the respondent in an original action to file a motion for judgment on the pleadings at the same time an answer is filed. S. Ct. Prac. R. 10.5(B). Such motions are specifically for resolving legal issues. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996). Dismissal is required when, after presuming the truth of all material factual allegations and making all reasonable inferences in the relator's favor, the relator is not entitled to the requested extraordinary relief. *State ex rel. Dist. 1199, Health Care & Soc. Serv. Union, SEIU, AFL-CIO v. Lawrence Cty. Gen. Hosp.*, 83 Ohio St.3d 351, 352 (1998). The Court may only consider the allegations in the pleadings and any material incorporated by reference or attached as exhibits to the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165 (1973).

For mandamus relief under the Public Records Act, a relator must allege and show both (1) a clear legal right to the relief sought, and (2) the respondent has a clear legal duty to perform the requested act. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983). For the reasons below, Plunderbund cannot show that it has a clear legal right to receive, or that the Department has a clear legal duty to produce, investigation records of threats made against the Governor.

A. The Department's investigation records of threats against the Governor are by definition security records because they contain security information set forth in R.C. 149.433(A)(3). Such records are not public records and not subject to mandatory disclosure under the Public Records Act.

The Department, through its Highway-Patrol division, is responsible for the Governor's security. R.C. 5503.02(E)(1)(a). At the Governor's direction, the Highway Patrol also provides security for other state and visiting government officials, as well as for state property. R.C. 5503.02(E)(1)(b)-(d). A "security record" is any record that "contains information directly used

for protecting or maintaining the security of a public office against attack, interference, or sabotage,” or is “assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism.” R.C. 149.433(A)(3)(a)-(b).³ Security records are not public records and not subject to mandatory release or disclosure under the Public Records Act. R.C. 149.433(B). The statute has no exception for closed investigations.

The Public Records Act does not define the terms “attack,” “interference,” or “sabotage,” though it provides that the term “act of terrorism” has the same meaning as in R.C. 2909.21 (*i.e.* an act that constitutes a specified offense, including a felony of violence and/or terroristic threat, that is intended to intimidate or coerce the civilian population, influence governmental policy by intimidation or coercion, and/or affect government conduct by the act. R.C. 2909.21(A)(1)-(3)). Accordingly, the terms must be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. “Attack” means “to make good on a *threat*.” (Emphasis added.) <http://thelawdictionary.org/attack>. “Interfere” means “to check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose.” Black’s Law Dictionary (6th ed.) 814 (1990). And, the definition of “sabotage” includes “the obstruction of an activity.” *Id.* at <http://thelawdictionary.org/sabotage>.

Based on the above statutes, the Department’s records of threats against the Governor are by definition security records under R.C. 149.433. Since “attack” means “to make good on a threat,” then an investigative record of a threat(s) against the Governor is a record that “contains information directly used for protecting or maintaining the security of a public office against attack,” regardless of whether the investigation is open or closed. R.C. 149.433(B)(1). Further, threats of violence, terrorism, or harm to the Governor necessarily interfere with the security of

³ “Security record” also includes a school safety plan. R.C. 149.433(A)(3)(c).

his public office. And, any demanded record kept or maintained by the Department to prevent, mitigate, or respond to acts of terrorism is a security record. *See* R.C. 149.433(A)(3)(b). Each investigation record that Plunderbund demands is by definition a security record. Such records are not public records and not subject to mandatory disclosure. R.C. 149.433(B).

While Plunderbund acknowledges at least some of the records it demands contain security information, it insists the Department must still provide the records, with redactions, if necessary. R.C. 149.43(B)(1) requires the public office or person responsible for a public record to make all non-exempt information *within the public record* available and notify the requester of any redaction. “Redaction” means obscuring or deleting any exempt information from an item that otherwise meets R.C. 149.011’s definition of a “record.”⁴ R.C. 149.43(A)(11). Standing alone, that statutory definition appears to support Plunderbund’s demand for records with security information therein redacted. However, *any record that contains security information* described in R.C. 149.433(A)(3)(a), or is a security record under R.C. 149.433(A)(3)(b) or (c), is *not a public record* and not subject to mandatory disclosure under the Public Records Act. R.C. 149.433(B). Since R.C. 149.43(B)(1) applies only to “public records,” the Department has no clear legal duty under the Public Records Act to provide Plunderbund with the records it demands, whether redacted or not.

Plunderbund cites *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, to support its redaction argument. That case, however, is distinguishable because it did not involve a statute like R.C. 149.433(B), which expressly provides that a security record is not a public record. Plunderbund also cites no legal authority and makes no argument to support

⁴ “Record” includes “any document, device, or item, regardless of physical form or characteristic . . . created or received by or coming under the jurisdiction of any public office of the state . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” (Ellipses added.) R.C. 149.011(G).

its conclusion that the Public Records Act's redaction rules apply to materials under R.C. 149.433. The plain language of that statute indicates that the redaction rules do not apply to security records. And Plunderbund's equally unsupported and conclusory statement that the Governor is "considerably less vulnerable than the police officers threatened in [*Craig*]" ignores the reality that the Governor is exposed to considerable threats and danger as the State's chief executive whose decisions and actions frequently affect millions in (and sometimes to those living outside) this State.

B. Disclosure of the Department's investigation records of threats against the Governor, even if partially or wholly redacted, could lead to bodily harm to the Governor or his family in violation of their clearly established constitutional right to personal security, and to which the State has a compelling interest to protect.

Under the Fourteenth Amendment to the United States Constitution, individuals have a clearly established and fundamental right to personal security and bodily integrity. *Kallstrom v. Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998); *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, ¶ 13. In *Kallstrom*, the court held that police officers "have a fundamental constitutional interest in preventing the release of private information when disclosure would create a substantial risk of serious bodily harm, and possibly even death, 'from a perceived likely threat,' so any such disclosure by the state should be measured under strict scrutiny." 136 F.3d at 1064. And, "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension.'" *Id.* at 1063 (quoting *Nishiyama v. Dickson Cty.*, 814 F.2d 277, 280 (6th Cir. 1987) (*en banc*)). The constitutional right is a "federal law" within R.C. 149.43(A)(1)(v)'s disclosure exception. *Craig*, 2012-Ohio-1999 at ¶ 13.

While Governor Kasich is not a police officer, as the State's chief executive he is uniquely exposed and susceptible to danger and personal threats. A governor's decisions and actions, sometimes unpopular or controversial, affect millions in (and sometimes to those living

outside) this State. Other state-wide officeholders may face similar threats to their and their families' security. Although the Governor is by law afforded considerably more security than other government officials and police officers, he still faces real and substantial security dangers. Accordingly, this Court should recognize that Governor Kasich has a fundamental constitutional interest in personal security that must be considered when deciding whether Plunderbund can establish a clear legal right to investigation records of threats made against him.

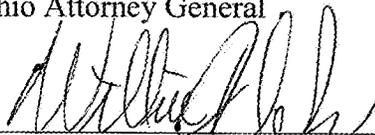
The Governor's constitutional interest in personal security is not adequately resolved by compelling the public disclosure of the demanded reports with redactions of personal information therein. The Highway Patrol may need to vary or flex the Governor's security at times depending on the Governor's personal and family logistics. Even public disclosure that reveals only the number of threats made against the Governor still potentially exposes security limitations and vulnerabilities. Therefore, this Court should not issue a writ of mandamus to compel the Department—the agency that is statutorily charged with protecting the Governor's security—to disclose publicly any investigation reports of threats made against the Governor. Otherwise, the reports may fall into the hands of the mentally ill, terrorists, "copy-cat" criminals, or others who would try to harm the Governor or his family.

CONCLUSION

For the foregoing reasons, Plunderbund's mandamus complaint should be dismissed.

Respectfully submitted:

MICHAEL DeWINE
Ohio Attorney General



HILARY R. DAMASER* (0059190)

**Counsel of Record*

WILLIAM J. COLE (0067778)

Assistant Attorneys General

Executive Agencies Section

30 East Broad Street, 26th Floor

Columbus, Ohio 43215

614-466-2980

866-354-4086 fax

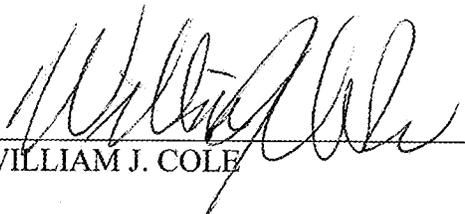
Hilary.Damaser@OhioAttorneyGeneral.gov

William.Cole@OhioAttorneyGeneral.gov

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular and electronic mail on May 8, 2013, upon Victoria E. Ullmann, 1135 Bryden Rd., Columbus, OH 43205.



WILLIAM J. COLE