

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

ex rel. PLUNDERBUND MEDIA, LLC

CASE NUMBER 2013-596

Relator

V.

AN ORIGINAL ACTION

THOMAS P. CHARLES

DIRECTOR, OHIO DEPARTMENT OF PUBLIC SAFETY

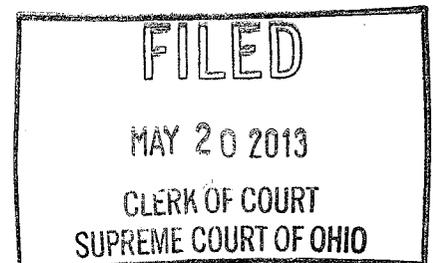
Respondent

MEMORANDUM CONTRA MOTION FOR JUDGMENT ON THE PLEADINGS

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This case presents the court with the opportunity to interpret section ORC 149.433 and to apply its holding in *Cincinnati Enquirer v. Craig* 132 Ohio St.3d 68, 2012-Ohio-1999 at the state level. The interpretations of both of these areas of law by the Department of Public Safety to deny records access is inconsistent with the language of the statute itself, past holdings of this court, the realities of state government and the development of Homeland Security procedures after 9/11.

1. Factual Background

In April of 2012, the governor's office refused to provide Governor Kasich's daily schedules to the Ohio Democratic Party citing security concerns and a large number of threats of some kind that the governor's office was claiming to be receiving. It was unclear whether these threats posed any sort of danger whatsoever to the governor. As a journalist, Joseph Mismas of *Plunderbund* wanted to determine whether there were threats, if they were actually threats of violence and whether they were in any way considered credible by law enforcement. After making an appropriate documents request and attempting to work with legal counsel for Public Safety to obtain a response, Public Safety denied all records stating they were security documents pursuant to ORC.149.433. They refused to even try to redact information in order to produce the documents.

In December of 2012, while Plunderbund's document request was being denied by Public Safety, WBNS was able to obtain some emails regarding death threats made to Ohio House members from those members. (See attached Exhibit 1, "GOP officials get death threats," *Columbus Dispatch*, 12/7/12.) There have been several threats against President Obama on social media, and even when the tweet is from a juvenile, information with regard to it is made

available to the press even when an investigation is still pending. (See attached Exhibit 2, "Teen tweeted threat against Obama")

This kind of threat against an individual, even a public official, is standard law enforcement data that should be handled as such. The extremely broad reading given to this R.C. 149.433 would allow the Department of Public Safety to withhold virtually any record regarding any government building, program or official in perpetuity. Neither the language nor the intent of the section supports this broad reading.

II. The Department of Public Safety has the burden to show that these documents fall within the exception for security records.

R.C. 149.011 (G) defines a record for the purposes of the act as "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." "Inherent in Ohio's Public Records Law is the public's right to monitor the conduct of government." *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 369, 725 N.E.2d 1144.

Threats towards public officials tend to fall into a variety of categories. Many contain accusations or threats of a political nature that involve no criminal intent or possibility of physical danger to anyone. Others are likely to be hoaxes or otherwise of no consequence. A third type is criminal in nature result in a criminal investigation. (See Rep Hottinger comments, Ex 1) Therefore, any letters or other communications received by the governor's office or other

state agencies containing threats of any type are public documents under the act. The processes and procedures used by the governor's office and the Department of Public Safety to sort, classify, investigate and draw conclusions regarding whether any action is necessary fall squarely within the "policies decisions, procedures, operations" of government.

Criminal investigations are in general public records. R.C. 149.43(A)(2) sets forth the situations in which these records are not public 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;

(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;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

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

Despite the fact that R.C. 149.43(A) (2) has long been used to govern these sorts of situations, the Department is claiming that these records are not public and are exempted from disclosure pursuant to ORC 149.433, which exempts any record that is a security record from the definition of public records. It reads as follows:

(3) "Security record" means any of the following:

(a) Any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage;

(b) Any record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, including any of the following:

(i) Those portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and communication codes or deployment plans of law enforcement or emergency response personnel;

(ii) Specific intelligence information and specific investigative records shared by federal and international law enforcement agencies with state and local law enforcement and public safety agencies;

(iii) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism.

The Department has the burden to demonstrate that the records in issue fall into this category. "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.

The Department's position requires the court to presume that 149.433 eviscerates R.C. 149.43(A)(2), and much of the public documents act for anything that Public Safety can claim is a somehow remotely related to some manner of security concerns. The General Assembly did not repeal R.C. 149.43(A)(2) or even reference R.C. 149.433 in the definitions section of Chapter 149. R.C. 149.433 was created as a separate and distinct section of the law.

III. R.C. 149.433 refers to strategic planning documents and critical infrastructure documents in both public and private control.

These security documents are set apart in a completely separate section, which leads to the logical conclusion here is that R.C. 149.433 refers to a very distinct type of document. Review of the materials available on line regarding Homeland Security, which in Ohio is part of the Department of Public Safety, clarifies that this section is designed to protect specific strategic planning documents. It refers to critical infrastructure plans and protocols mandated by the federal government as part of Homeland Security. This includes infrastructure in private as well as public control.

The Department of Homeland Security was established to provide increased security from foreign and domestic terrorist attack and also to be the emergency response agency for natural disasters. In order for this to operate in a consistent manner, each state and political subdivision was to set up a Homeland Security office. These offices worked together on the state level to develop strategic plans to ensure security and respond to terrorist threats. The current Ohio Homeland Security Plan is available on line at www.homelandsecurity.ohio.gov. Attached Exhibit 3 is page 7 of the Homeland Security Strategic Plan which discusses the necessity of protecting critical infrastructure. In Homeland Security planning, infrastructure is more than roads, bridges and buildings. It includes the vast computer and electrical grid which is largely in private control. The necessity of partnering with private industry regarding critical infrastructure is discussed in Exhibit 3.

Pursuant to its Homeland Security planning, the General Assembly passed 149.433 to protect this data system, which sets up protocols for large scale emergency responses and gathers large amounts of information from many sources, many of which are outside the state, in private

hands or belongs to the federal government. This system allows access to confidential federal national security information, propriety software information, and data from medical providers and other confidential information. It also contains infrastructure information from computer connections to bridges and government buildings. Much of this critical infrastructure, from railroads, to medical facilities to computers is in private control. These private companies are part of the nation wide and state wide strategic plan and confidentiality of their data has to be protected for trade secret and other reasons.

R.C. 149.433(A) is not a catch all provision allowing the Department of Public Safety to conceal any document it wants. It does not even refer to the government. It is designed to protect records of security measures of private companies that may be available to the government as part of the strategic plan but are not intended to become public. This is to protect, among other information, proprietary computer software that is used to protect computer systems and is a trade secret.

R.C. 149.433(B) uses the term "public office" not "public officer" because it is concerned with building plans and large scale emergency response logistics. Section (B) of the act covers documents in the hands of state agencies and other political subdivisions regarding building blueprints and security protocols. Examples of what are security documents appear in R.C. 3313.536 which sets forth requirements for overall safety planning in schools and R.C. 5502.281 (B)(2) which discusses deployment of volunteers in an emergency.

R.C. 149.433 refers only to strategic planning documents in public and private hands and does not apply at all to Plunderbund's request here. R.C. 149.43(A) (2) governs any of the threats that are referred to criminal prosecution and must meet those requirements to be withheld. Otherwise, all these documents are public records that need to be produced.

II. There is no generalized right of privacy that prevents public disclosure of any personal information.

The state also attempts to rely on *Kallstrom v. City of Columbus*, to argue that it created a broad 14th Amendment right to prevent disclosure of any personal information by the government. However, as the 6th Circuit explained in *Barber v. Overton*, 496 F.3d 449 (2007) “we belabor the discussion of *Kallstrom* to emphasize what it did *not* do: It did not create a broad right protecting plaintiffs' personal information. Rather, *Kallstrom* created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous *vis-a-vis the plaintiffs.*” at 456. *Barber* involved prisoners obtaining some personal information about state prison guards and then taunting them with the information. As the court further observed with regard to this information:

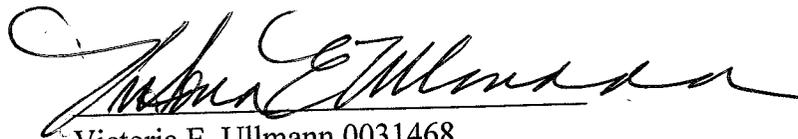
Voter registration records, county property records, and a plethora of other publically available sources exist through which persons can discover the residency of an individual and prisoners' accomplices have as ready access to them as any other citizen. The plaintiffs do not allege that this information allowed the prisoners to discover information that they would have been unable to otherwise. Therefore, this information does not rise to the level of sensitivity we found constitutionally significant in *Kallstrom, Id.*

In *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, this Court discussed a public document request made by the *Enquirer* to the Cincinnati Police to obtain information regarding serious threats to the lives of police officers by a dangerous motorcycle gang. This Court determined redaction was the proper method of protecting information in public documents involving threats to police officers and that the documents should otherwise be provided.

If any threats have occurred here, they are directly involved with John Kasich's very public persona and public service as governor. He has served in Congress and appeared frequently on Fox News. He is interviewed by the press frequently and has made hundreds of public appearances. He has written several books recounting very personal events in his life. His biography is on Wikipedia, he has an extensive web page both for his campaign, for his official page as governor, and a Twitter account. His wife, as first lady, has a web page and a Twitter account. Nothing in any threat letters or an investigation of them is private nor would it put them in any danger beyond what is always involved for a governor and public personage. If there is any legitimately private information in these materials, then they should be redacted and the balance of the materials provided.

The Department of Public Safety has provided this Court with no colorable reason that these documents cannot be provided, with redaction or otherwise. Therefore, there are ample grounds to grant the writ of mandamus ordering the respondent to produce the requested documents and other relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing memorandum contra was electronically served upon counsel for Thomas Charles on May 20, 2013.



Victoria E. Ullmann
Attorney for Relator

OHIO LAWMAKERS

GOP officials get death threats

Patrol probing letters sent to six in September

By Jim Siegel

The Columbus Dispatch Friday December 7, 2012 6:28 AM

The State Highway Patrol has been investigating death threats mailed to the homes of a half-dozen Republican Ohio House members this fall.

So far, there have been no arrests.

“For public officials and elected officials, it’s not uncommon to get a threatening letter or even a death threat,” said Rep. Jay Hottinger, R-Newark. “There is a range of seriousness — some are more benign and some have more specificity, so you take more caution.”

Each of the six lawmakers reportedly got the same letter, which also made threats against family members.

“I have been threatened lots of times,” said Hottinger, who has been a lawmaker for more than 15 years. “The nature of this letter was serious enough to warrant action and activity.”

An email written to House members and staff, obtained by WBNS-TV (Channel 10), noted that the “the letters contain an extremely aggressive and threatening language from a group calling itself the Army of the 12 Monkeys.”

The reference is likely to a 1995 film *12 Monkeys*, set in a post-apocalyptic future where a terrorist organization known as the Army of the 12 Monkeys is believed to have released a lethal virus.

The patrol declined to comment on the content of the letters, according to WBNS. No additional letters have been sent since the initial mailings in September.

The letters come as the patrol works with Capitol Square officials in an ongoing effort to beef up security at the Statehouse, potentially including metal detectors at the entrances.

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Email

Ads by Yahoo!

Free Code Generator
Generate database & reporting apps straight from your database! Try it
(www.ironspeed.com)

Be A MegaMillion Winner
This Is The February Surprise The Lotteries Are Trying To Avoid...
(www.secretmasterformula.com/cn/1.1)

Water Damage And Mold
through our instant info engine
(<http://search.thinktarget.com>)

Fire Alarm Contractor
Search For fire alarm contractor - Find fire alarm contractor Today
(Search4Search.com)

Exhibit 1

Teen tweeted threat against Obama

Secret Service investigating girl, 16

Sunday September 9, 2012 9:42 AM

Here's how to get into trouble in 140 characters or fewer:

Alyssa Douglas, a high-school girl from the Clarksville area, about 40 miles northeast of Cincinnati, appears to have sent out a tweet Thursday night, hours before President Barack Obama's convention speech, saying: "Someone needs to assassinate Obama ... like ASAP."

The Secret Service is investigating the posting on Twitter as a potential threat and will report its findings to the U.S. attorney's office for the Southern District of Ohio.

If it was a real threat, the legal consequences would likely be dire.

If it was simply the unconsidered words of a teenager with easy access to social media, the consequences might still be significant.

"We are fully investigating it," said Mark Porter, the agent in charge of the Secret Service's Cincinnati field office. "What will the outcome be? We'll just have to wait and see."

Threats against the president are punishable by a fine, up to five years in prison or both.

Mike Sander, superintendent of the Clinton-Massie Local School District, met with Douglas and her parents early Friday.

"The parents were not aware of it," Sander said. He said he explained to Douglas that "there are limits to the rights of free speech."

Sander told Douglas that something like this could hurt her in college applications or job searches or in the pursuit of scholarships.

"But 16-year-olds don't think that way," Sander said.
Email

Ads by Yahoo!

Transportation Software

Transportation and Logistics software including accounting
(omni-info.com)

Free Code Generator

Generate database & reporting apps straight from your database! Try it
(www.ironspeed.com)

Be A MegaMillion Winner

This Is The February Surprise The Lotteries Are Trying To Avoid...
(www.secretmasterformula.com/en/1.1)

Dispatch Software

Solutions for Your Small Business. Business Begins Here.
(www.business.com)

Exhibit 2

Ohio Homeland Security
STRATEGIC PLAN
Prevention Protection Response Recovery

Goal 3

Reduce risk to statewide infrastructure by implementing the National Infrastructure Protection Plan and each of the supporting Sector Specific Plans where applicable. Risk reduction programs will address cyber, human, and physical security.

OBJECTIVE 3.1	Partner with private industry to identify security goals for each federally identified critical infrastructure sector in the state of Ohio to build an integrated system of resilient sectors.
OBJECTIVE 3.2	Document information (e.g. global positioning system location, owner and contact information, and federal sector specifics) on current significant assets, systems, networks, and functions.
OBJECTIVE 3.3	Assess risks through consequence, vulnerability, and threat analyses.
OBJECTIVE 3.4	Develop and implement protective/resiliency programs.
OBJECTIVE 3.5	Evaluate the effectiveness of protective/resiliency programs.

Ohio's government works closely with private sector representatives throughout the state to coordinate programs that maintain the safety and security of our critical infrastructure. The National Infrastructure Protection Program sets national priorities, goals, and requirements for the effective distribution of resources to ensure that our economy and public services continue in the event of a terrorist attack or other disaster. Critical infrastructure resiliency is essential in a state with the nation's greatest number of miles of interstate highway and significant rail intersections. Ohio also has two maritime borders - a 158-mile international maritime border with Canada to the north and the Ohio River, which is the largest tributary to the Mississippi River, to the south. Cyber attacks often occur unnoticed, disrupting commerce and costing an estimated total of \$46-70 billion in losses across the U.S. This adverse economic impact requires coordination and collaboration across Ohio. Through risk analysis and protective programs, we are able to effectively detect, deter, and mitigate threats to Ohio's largely privately owned and operated critical infrastructure and key resources.

"Critical infrastructure resiliency is essential..."