

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER

Case No. 2013-0945

Appellee/Cross-Appellant,

vs.

On Appeal from the Twelfth District
Court of Appeals, Case No. CA2012-
06-0122

HON. MICHAEL J. SAGE, *et al.*

Appellants/Cross-Appellees.

BRIEF OF APPELLEE/CROSS-APPELLANT THE CINCINNATI ENQUIRER IN
OPPOSITION TO MERIT BRIEF OF APPELLANTS/CROSS-APPELLEES HON.
MICHAEL J. SAGE AND MICHAEL T. GMOSE AND MERIT BRIEF OF THE
CINCINNATI ENQUIRER

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STATEMENT OF FACTS

This is an appeal from a decision of the Twelfth District Court of Appeals (“Twelfth District”) granting in part, and denying in part, Appellee/Cross-Appellant The Cincinnati Enquirer’s (“The Enquirer”) Amended Complaint for Writ of Mandamus and Prohibition (“Complaint”) against Appellants/Cross-Appellees Michael T. Gmoser (“Gmoser”), and the Honorable Michael J. Sage (“Judge Sage”) (collectively “Respondents” or “Appellants”). The facts and circumstances relevant to this appeal center on Appellants’ successful efforts to prevent The Enquirer from obtaining a 9-1-1 recording made by the Butler County Sheriff’s Office (“BCSO”) Dispatch Center.

A. The 9-1-1 recording.

At 4:41 p.m. on June 17, 2012, BCSO 9-1-1 dispatcher Debra Rednour answered a 9-1-1 call from a frantic unidentified female caller (“First Call”). The following is a transcription of the recording of that call:

Ms. Rednour: Butler County 911.

Caller: (Inaudible) Please, he won’t die. Please come, please.

Ms. Rednour: What’s going on?

Caller: (Inaudible) My husband is hurt. Bryan (inaudible).

Ms. Rednour: What’s going on? How is he hurt?

Caller: (Inaudible.) Please come.

Ms. Rednour: Ma’am, how is he hurt?

Caller: Bryan, are you okay? Bryan. Bryan. Bryan.

Ms. Rednour: Ma’am?

Caller: Are you -- Bryan, Bryan. Oh, my God, Bryan.

Ms. Rednour: Ma’am?

Caller: Please come, my husband's hurt.

Ms. Rednour: Ma'am.

Caller: Please come, please come. Please come. There was an accident, please come.

Ms. Rednour: Ma'am, I'm sending somebody, but I need to know how he's hurt.

Caller: Send an ambulance, please come. Bryan, Bryan, stay with me. Please, Bryan, stay with me.

Ms. Rednour: Ma'am, is he breathing?

Caller: No. Stay with me, Bryan, stay with me. (Inaudible.)

Ms. Rednour: He's not breathing. Ma'am, how old is he?

Caller: (Inaudible.)

Ms. Rednour: Ma'am.

Caller: (Inaudible.) Please come.

(Tr. 35, Rednour Dep. 41:5-42:15, Aug. 20, 2012.) The First Call ended when the female caller abruptly hung up on Ms. Rednour. (*Id.* at 47:17-21.)

Because Ms. Rednour did not have "remotely enough information" to assist the first responders whom she had dispatched to the female caller's location, she called the number from which the First Call originated ("Unanswered Call"). (*Id.* at 47:22-48:9.) The Second Call went unanswered, so Ms. Rednour called the same number again ("Outbound Call"). (*Id.* at 49:25-50:22.) Ms. Rednour testified that making an outbound call to a number from which a dropped call originated was established BCSO Dispatch Center 9-1-1 procedure. (*Id.* at 34:20-35:7.) She further testified she made the Outbound Call because: (1) the female caller told her that her husband was not breathing and it was her duty to start CPR; and (2) because "she had deputies

and medics on the way, and [she] needed, for their safety and for their knowledge, to tell them what that person's condition was and what was going on with him." (*Id.* at 50:12-20.)

When Ms. Rednour made her Outbound Call, Michael Ray ("Ray") answered. Unbeknownst to Ms. Rednour when she made the Outbound Call, Ray had stabbed "Bryan," his step-father, with a hunting knife during a dispute. After Ray picked up the phone and said "Hello," Ms. Rednour immediately announced that she had help on the way. (*Id.* at 60:8-10.) She then told Ray that she was calling from the BCSO, and that she needed "to know what's going on." (*Id.* at 60:11) Ray responded that he was "a murderer," and that he needed to be arrested. (*Id.* at 60:9-13.) Ms. Rednour then proceeded to ask Ray his name, and a series of other questions, the only purpose of which was "to provide for the safety of the first responders and the safety of the victim." (*Id.* at 65:10-14. *See also id.* at 54:12-21.) When Ms. Rednour made the Outbound Call, she no information to suspect a crime had occurred, referring only to the cause of her husband's injuries as an "accident." (*Id.* 45:20-46:10.)

Ms. Rednour is not a law enforcement officer, and she has never received training in criminal investigation methods. (*Id.* at 32:3-16.) Furthermore, she handles neither police investigations nor prosecutor investigations in her role as a 9-1-1 dispatcher. (*Id.* 33:9-13.) When she is not taking 9-1-1 calls, she enters warrants, protection orders, and performs other similar clerical tasks. (*Id.* at 33:4-8.)

B. The Enquirer's public records request.

On June 17, The Enquirer, through its reporter Sheila McLaughlin ("McLaughlin"), sent a request to the BCSO Dispatch Center for a copy of a recording of the First Call. (Tr. 8, McLaughlin Aff. ¶ 1.) Appellant Gmoser, who had taken possession of the 9-1-1 recordings, initially denied The Enquirer's request, and threatened to "file a request for a protective order."

(*Id.* at Ex. 1.) Nevertheless, the BCSO provided The Enquirer with a recording of the First Call on June 19, two days later. (*Id.* at ¶ 3.)

Thereafter, it became apparent that there were other 9-1-1 calls related to June 17 incident. (*Id.* at ¶ 4.) The Enquirer therefore made another request on June 19 for “all 911 calls to or from Butler County dispatchers from 4:00 p.m. June 17 until 5:30 p.m. June 17” (“Second Request”). (*Id.*) Appellant Gmoser’s response to The Enquirer’s Second Request was that the Unanswered Call and Outbound Call were not “incident reports subject to release, but are trial preparation records under R.C. 149.43(A)(1)(g) and confidential law enforcement investigatory records under R.C. 149.43(A)(1)(h) and are thus not public records as defined in section R.C. 149.43(2) and R.C. 149.43(A)(4).” Appellant Gmoser also, once again, threatened to seek a protective order preventing their release. (*Id.* at Ex. 2.)

Following Mr. Gmoser’s response to the Second Request, The Enquirer (through counsel) delivered a third request via email and certified mail asking for the Unanswered and Outbound Calls (“Third Request”). (Tr. 9, Greiner Aff. dtd. June 27, 2012 (“Greiner Aff. I”), at Ex. 1.) Mr. Gmoser’s response to the Third Request provided:

While the subject remaining dispatch center recordings made at 16:42.47 hours and 16:43.59 hours are exempt from the Public Records Act as I earlier concluded, and without waiving those exemptions to the recording made at 16:43.59 hours, I am releasing and authorizing the Butler County Sheriff to release the recording made at 16:42.47 hours.

(*Id.* at ¶ 4.)

C. Appellant Gmoser moves for a protective order preventing disclosure of the Outbound Call in his criminal case against Ray.

The next day, Appellant Gmoser filed a motion for a protective order (“Motion”) in his criminal case against Ray seeking an order preventing disclosure of the Outbound Call. (Tr. 9, Greiner Aff. I, Ex. 2.) Rather than direct his Motion at discovery in the Ray criminal case, Mr.

Gmoser directed his Motion at the merits of an as-of-yet unfiled Enquirer mandamus action. (*Id.*) Specifically, he asserted in his Motion that: (1) the outgoing call involved the investigation of a 9-1-1 incident report and was, therefore, not subject to disclosure; and (2) the release would be “so lawfully prejudicial to any theory of innocence of the defendant, its disclosure to the public will prohibit any expectation of obtaining a fair and uninfluenced or unbiased (sic) jury in this venue – Butler County.” (*Id.*)

On June 25, 2012, Judge Sage held a hearing on Gmoser’s Motion. (Tr. 7, Geiger Aff., at ¶ 3.) Prior to the hearing, The Enquirer (through counsel) sent a letter to Judge Sage asking that he deny Gmoser’s Motion. (Tr. 9, Greiner Aff. I, at Ex. 3.)

At the hearing, Judge Sage (at Mr. Gmoser’s request) listened to the Outbound Call in chambers with Mr. Gmoser, and counsel for Ray, The Enquirer, and Cox Media. (Tr. 7, Geiger Aff., Ex. A, p. 12.) Judge Sage then allowed all counsel to present oral argument in favor and against the Motion. (*Id.*, Ex. A, at p.17-41.) After a short recess, Judge Sage issued a verbal order from the bench granting the Motion, followed by an entry to that effect on June 27 (“Protective Order”). (*Id.*, Ex. A, at p. 46; Appellants’ Merit Br. App’x, at 31.)

Judge Sage granted Mr. Gmoser’s Motion based solely on his finding that Ray’s “right to a fair trial would be prejudiced by publicizing the subject recording.”¹ (Appellants’ Merit Br. App’x, at 31.) He further found that providing a transcript of the call, redaction, and change of venue were not reasonable alternatives to closure. (*Id.*) Judge Sage’s Protective Order makes no mention of voir dire, continuances, jury instructions or sequestration of the jury as other alternatives to closure. (*Id.*) Additionally, neither Mr. Gmoser, nor Ray’s attorney, presented

¹ Judge Sage assumed for purposes of his Protective Order that the Outbound Call was otherwise a public record. (Appellants’ Merit Br. App’x, at 31.)

evidence in support of the Motion, other than the Outbound Call itself. (Tr. 7, Geiger Aff., Ex. A.)

D. Procedural history.

The Enquirer sued Respondents in the Twelfth District on June 28, 2012, seeking to compel disclosure of the Outbound Call. (Tr. 3, Compl. for Writ of Mandamus.) It filed its First Amended Complaint for Writ of Mandamus and Prohibition on July 9, 2012, adding a request for a writ prohibiting Judge Sage from enforcing the Protective Order. (Tr. 16, Amend. Compl. for Writ of Mandamus and Prohibition.)

On October 15, 2012, Judge Sage amended his Protective Order to release the Outbound Call to the public, just prior to its publication to the jury in Ray's criminal prosecution for murder. (Appellants' Merit Br. App'x, at 34.) Judge Sage then moved to dismiss the prohibition action against him on the ground of mootness ("Motion to Dismiss"), which the Twelfth District denied. (Tr. 26, Resp. Judge Sage's Motion to Dismiss.)

On June 3, 2013, the Twelfth District granted The Enquirer's petition for a writ of mandamus, but denied its request for writ of prohibition ("Decision"). (Appellants' Merit Br. App'x at 7.) The Twelfth District also awarded The Enquirer \$1,000 in statutory damages under R.C. 149.43, but denied its request for attorney's fees. (*Id.*) Respondent Gmoser appealed from the Twelfth District's Decision on June 11, 2013, and The Enquirer timely filed its Notice of Cross-Appeal on June 19, 2013. By its Cross-Appeal, The Enquirer asks that this Court reverse that part of the Twelfth District's Decision that denied its writ of prohibition, and denied its request for attorney's fees under R.C. 149.43.

ARGUMENT

RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW

Appellant's Proposition of Law No. 1:

When a 9-1-1 dispatcher acts as an agent of a county's sheriff's office by initiating an Outbound Call to a residence for investigative purposes, the Outbound Call does not constitute a 9-1-1 call subject to disclosure under the Ohio Public Records Act.

Issue Presented for Review and Argument:

Whether the court of appeals abused its discretion when it concluded that a recording made by a 9-1-1 system, and as a result of a call made to that same 9-1-1 system, was a public record not within any exemption.

This Court reviews a court of appeals' decision on a complaint seeking a writ of mandamus for abuse of discretion. *State ex rel. Hillyer v. Tuscarawas City Bd. of Comm'rs* (1994), 70 Ohio St. 3d 94, 97, 637 N.E.2d 311. "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* Thus, in applying this standard, "a reviewing court is not free to merely substitute its judgment for that of the [lower] court." *Id.*

Although Appellants correctly recite this Court's well-established standard for extraordinary relief in public records cases, they gloss over the substantial burden of proof they had in the court below. As this Court recently reiterated, "Exceptions to disclosure under the Public Records Act are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." *State ex rel. Miller v. Ohio State Hwy. Patrol* ("Miller") (2013), -- Ohio St. 3d ---, 2013-Ohio-3720, ¶ 23. "A custodian does not meet this burden if it has not proven that the requested records *fall squarely within the exception.*" *Id.* (emphasis added). Appellants have not met that burden here.

Appellants' first proposition of law rests upon the false premise that this Court must first determine whether the Outbound Call was a "9-1-1 call." That is not the correct inquiry.

Instead, the inquiry is simply whether the Outbound Call is contained on a 9-1-1 tape or other 9-1-1 recording medium. *See State ex rel. Cincinnati Enquirer v. Hamilton County* ("*Cincinnati Enquirer*") (1996), 75 Ohio St. 3d 374, 378, 662 N.E.2d 334 ("Nine-one-one tapes in general . . . are public records which are not exempt from disclosure and must be immediately released, upon request." (Emphasis added.)). *See also Miller*, -- Ohio St. 3d ---, 2013-Ohio-3720, ¶ 28 (referring to 9-1-1 recordings, rather than tapes, as public records). This is so because the tape or recording containing the call is the "record" for purposes of R.C. 149.43, not the 9-1-1 call itself.

Under *Cincinnati Enquirer*, whether a recording is a "9-1-1 recording" depends on whether the recording was made "as a result" of a call to 9-1-1. 75 Ohio St. 3d at 378, 662 N.E.2d 334 (holding that "[t]he 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"). The causation analysis is a product of the *Cincinnati Enquirer* Court's recognition that "911 calls generally precede offense or incident form reports completed by the police" and are therefore "even further removed from the initiation of the criminal investigation than the form reports themselves." *Id.*

From the *Cincinnati Enquirer* Court's reasoning it follows that—due to the consistent temporal relationship between 9-1-1 calls and the start of a criminal investigation—recordings made as a result of a 9-1-1 call will never fall within the "confidential law enforcement investigatory records" exemption, or the "trial preparation records" exemption. *Id.* Thus, unless the 9-1-1 recording is specifically exempt from disclosure under state or federal law, it is

otherwise a public record subject to disclosure under R.C. 149.43. *See id.* (noting that neither state nor federal law prohibited release of 9-1-1 tapes in that case).

The Twelfth District’s finding that the Outbound Call recording was made as a result of the First Call was not unreasonable, arbitrary, nor unconscionable, and should not be reversed. (*See* Decision, at 8 (“The Unanswered Call and the Outbound Call, while placed by Rednour, constituted a continuation of the First Call so that Rednour could obtain additional information to provide an emergency response that was both effective and safe.”)).

A. The statutory definition of “9-1-1 system” supports the Twelfth District’s conclusion that the recording of the Outbound Call was made as a result of a 9-1-1 call.

Although the statutory definition of “9-1-1 system” is not particularly pertinent to whether a recording is made “as a result” of a 9-1-1 call, the definition given in R.C. 5507.01(A) supports the Twelfth District’s conclusion. Appellants—who focus entirely on whether the Outbound Call is a “9-1-1 call”—ignore the fact that the 9-1-1 system definition specifically provides that “the personnel receiving the [9-1-1] call *must* determine the appropriate emergency service provider to respond at that location.” *Id.* (emphasis added).

Contrary to Appellants’ contention, the 9-1-1 system definition provided by R.C. 5507.01(A) expressly contemplates the callback procedure to which Ms. Rednour testified during her deposition. She testified that the purpose of her Outbound Call was to obtain information to help the victim, and to protect her first responders, i.e., to “determine the appropriate emergency service provider to respond.” When she made the Outbound Call, she knew nothing about the cause of the injury, or anything that could have informed her choice as to who to send to the location, beyond a medic. There was nothing said during the First Call to suggest a crime had occurred. Ms. Rednour made the Outbound Call solely to satisfy her duty to obtain sufficient information to assist the victim and first responders, and that call was therefore

a recording made as a result of a call into the 9-1-1 system. Indeed, it was an integral part of the functioning of the 9-1-1 system. The Twelfth District's finding that the Outbound Call was a continuation of the First Call fits perfectly within this definition of 9-1-1 system, which Appellants themselves tout. Appellants only half-heartedly argue otherwise.² Appellants' attempt to assign error to the court's failure to "mention, cite, and follow the clear definitions of a 9-1-1 call as contained in R.C. 5507.01" is therefore meritless.

B. The Outbound Call is a 9-1-1 recording because it was made as a result of a 9-1-1 call, and is thus a public record *per se* under *Cincinnati Enquirer*.

Appellants correctly observe in their Merit Brief that the *Cincinnati Enquirer* Court noted that "Nine-one-one calls that are received by HCCC are always initiated by the callers." (Appellants' Merit Br. at 9.) And the 9-1-1 call that caused the Outbound Call recording sought by The Enquirer in this case was likewise initiated by a caller, as opposed to the BCSO.

Appellants do not argue (nor could they) that Ms. Rednour would have made the Outbound Call if the First Call had not been made. Moreover, the Outbound Call would not have been recorded by the BCSO's 9-1-1 system had the First Call not been a call to 9-1-1. The recording of the Outbound Call was therefore "made as a result" of the inbound call to 9-1-1, and is thus a 9-1-1 tape, or recording, within the meaning of *Cincinnati Enquirer* and its progeny.

² Indeed, the primary purpose of Appellants' appeal is to convince this Court that it should overrule this Court's 17-year old decision in *Cincinnati Enquirer*. This is particularly ironic, given Mr. Gmoser's statement to Judge Sage during his oral argument in support of his protective order that his "whole interest in this thing has never been about depriving the media of 911 calls." (Tr. 7, Geiger Aff., Ex. A at p. 40:8.) Adopting the vague "totality of the circumstances" approach Appellants advocate in Proposition of Law No. 4 would give public officials unbridled discretion to determine what should and should not be released to the public, and accomplish precisely what Mr. Gmoser said he was not out to do, that is, deprive the media of 9-1-1 calls.

Because Appellants offer no evidence showing that the Outbound Call recording was not made as a result of the First Call, the inquiry ends there. “The particular content of the 911 tapes is irrelevant.” *Cincinnati Enquirer*, 75 Ohio St. 3d at 378, 662 N.E.2d 334.

Despite the irrelevance of the Outbound Call’s content, Appellants spend substantial time arguing that Ms. Rednour’s questions to Ray, and his so-called “testimonial” answers establish that the recording constitutes a “confidential law enforcement investigatory record.”

Appellants base this entire “police investigation” argument on the Supreme Court of the United States’ decision in *Davis v. Washington* (2006), 547 U.S. 813, 831, 126 S.Ct. 2266, 165 L. Ed. 2d 224. *Davis*, according to Appellants, stands for the proposition that “a 9-1-1 call can contain a police interrogation” where the statements recorded are “testimonial.” (Appellants’ Merit Br. at 11-12.) Appellant Gmoser assumes (without basis), that when the *Davis* Court used the term “interrogation,” it also meant “investigation.” From this assumption, Appellant Gmoser concludes that because the *Davis* Court suggested that 9-1-1 calls can sometimes include an “investigation,” this Court should hold that 9-1-1 calls can constitute “confidential law enforcement investigatory records” under R.C. 149.43. Assuming that the Court should even delve into the content of the 9-1-1 recording containing the Outbound Call (which it should not), *Davis* does not support Appellant Gmoser’s argument for at least two reasons.

First, the *Davis* Court held:

Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that *the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution*.

Davis, 547 U.S. at 822, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (emphases added). Although the *Davis* Court uses the term “interrogation,” the Court’s use of that term does not remotely suggest that it meant “investigation.” In fact, the opposite is true.

The standard the *Davis* Court sets out for distinguishing between testimonial and nontestimonial statements made during law enforcement “interrogation,” i.e., questioning, hinges on whether the declarant made the statement during an emergency, or whether the declarant made the statement in the context of an investigation. In other words, under *Davis*, “law enforcement interrogation” does not equal “law enforcement investigation.” Rather a “police interrogation” for the purpose of responding to an emergency is—under the *Davis* Court’s rationale—not a “police investigation.” And of course there is no exemption under R.C. 149.43 for records of “law enforcement interrogations,” only “confidential law enforcement *investigatory* records.” (Emphasis added.)

The second reason *Davis* does not support Appellants’ position is for the very simple reason that the “911 call” in *Davis* was also a callback. Justice Scalia explained,

The relevant statements in *Davis v. Washington*, No. 05-5224, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. ***She reversed the call***, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis . . .

Davis, 547 U.S. at 817, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (emphasis added).

More important, the issue the *Davis* Court set out to determine was “when statements made to law enforcement personnel ***during a 911 call*** . . . are ‘testimonial’ and thus subject to the requirement of the Sixth Amendment’s Confrontation Clause.” *Id.* (emphasis added). Thus, the *Davis* Court deemed the reversed call in that case a “911 call,” just as the Twelfth District did here. It further found that the 911 caller’s statements were nontestimonial, i.e., not made during

an investigation. Appellants' reliance on *Davis* to support reversal of the Twelfth District's Decision is therefore misplaced.

Moreover, in this Court's recent *Miller* decision, the Court observed, in dicta, that 9-1-1 recordings never constitute "specific investigatory work product" so as to fall within the confidential law enforcement investigatory record exemption. -- Ohio St. 3d ---, 2013-Ohio-3720, ¶ 26. Specifically, the *Miller* Court opined that specific investigatory work product "does not include ongoing routine offense and incident reports" and that "[r]ecords even further removed from the initiation of the criminal investigation than the form reports themselves, such as 9-1-1 recordings, are also public records." *Id.* (second emphasis added and internal quotations omitted) (quoting *Beacon Journal Publ'g Co. v. Maurer* ("*Beacon Journal*") (2001), 91 Ohio St. 3d 54, 741 N.E.2d 511). The *Miller* decision thus makes clear that records created while an incident is occurring, or shortly thereafter, do not fall within the confidential law enforcement investigatory record exemption. The Twelfth District's Decision is entirely consistent with this Court's recent affirmation of that principle.

C. The Twelfth District based its finding that the Outbound Call was a continuation of the First Call on Ms. Rednour's testimony and common sense, and is further supported by the statutory definition of "9-1-1 system" and *Davis*.

For their last argument that the Outbound Call recording is a "confidential law enforcement investigatory record," Appellants argue that "the Twelfth District's continuation theory is created from whole cloth." (Appellants' Merit Br. at 13.) This statement is particularly ironic, given that it immediately follows Appellants' discussion of the *Davis* decision, in which the U.S. Supreme Court characterized the 9-1-1 callback in that case as a "911 call."

Moreover, as previously explained, the inquiry this Court must undertake to determine whether the Outbound Call recording is a "public record" is not whether the Outbound Call is a

“911 call.” Rather, the inquiry is whether the record of that call, i.e., the recording, was made “as a result” of a 9-1-1 call. Under *Cincinnati Enquirer*, this is akin to asking whether the recording was made during an ongoing emergency, in contrast to a police investigation.

Since Appellants cannot deny the fact that there was an ongoing emergency when Ms. Rednour made the Outbound Call, Appellants suggest that the linchpin of this Court’s *Cincinnati Enquirer* decision is the fact that “[t]here is no expectation of privacy when a person makes a 911 call.” Applying that singular observation to this case, Appellants assert that Ray:

was not warned and did not have any way of knowing that he was being recorded, he had no expectation that his responses to investigatory questions would be released to the public, and there is no information that he knew the Butler County Sheriff’s Office was involved in an investigation of the murder at his home.

(Appellants’ Merit Br. at 16.)

Yet, Ms. Rednour’s first words to Ray after he said “Hello,” included the disclosure: “This is the Butler County Sheriff’s Office. I need to know what’s going on.” (Tr. 35, Rednour Dep. 60:10-11.) Given Ms. Rednour’s disclosure that she was a law enforcement representative, Ray could not have believed that Ms. Rednour would keep his incriminating statements confidential, even if he did not know they were being recorded. Moreover, he certainly knew that he was talking to a representative of the BCSO when he made his incriminating statements, as he told Ms. Rednour at the very beginning of their conversation: “you need to arrest me.” (*Id.* at 60:12-13.) Appellants’ contention that this case somehow implicates the privacy issue noted by the *Cincinnati Enquirer* Court is just not in accord with the facts. As such, it does not support reversal of the Twelfth District’s Decision.³

³ Appellants do not appear to argue in this appeal that the Outbound Call recording fell within the “trial preparation record” exemption as they did in the Court below, for good reason. *See Cincinnati Enquirer*, 75 Ohio St. 3d at 378, 662 N.E.2d 334 (holding that the fact that 9-1-1

Appellants' Proposition of Law No. 2:

The Twelfth District Court of Appeals abused its discretion when it found the Protective Order prohibiting the release of the Outbound Call to the media failed to satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*.

Issue Presented for Review and Argument:

Whether a trial court must make specific findings of fact based on clear and convincing evidence that there is a substantial likelihood that pretrial publicity will violate a defendant's Sixth Amendment right to a fair trial, and that closure is the least restrictive means to protect that right, before issuing a Protective Order preventing disclosure of a public record.

A. The Twelfth District did not err when it found that Judge Sage did not have sufficient evidence to conclude that Ray's Sixth Amendment right to a fair trial would be violated by release of the Outbound Call recording.

Appellants' second proposition of law seeks reversal of the Twelfth District's conclusion that Judge Sage's Protective Order barring release of the Outbound Call recording did not satisfy the requirements of the First Amendment to the U.S. Constitution. (Appellants' Merit Br. at 17.) In arguing their position, Appellants once again start from a faulty premise, this time, that "an individual's rights under the Sixth Amendment . . . will trump the First Amendment rights of the media." That is not the law.

Rather, as Chief Justice Burger explained nearly forty years ago, "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n v. Stuart* (1976), 427 U.S. 539, 561, 96 S.Ct. 2791, 49 L. Ed. 2d 683. Instead, as this Court recently held:

When there is a conflict between the First and the Sixth Amendment rights . . . the trial court is required to act to resolve that conflict by protecting both the First and

tapes come into the possession of a prosecutor after their creation has no bearing on whether they are subject to disclosure).

the Sixth Amendment rights when . . . that can be done in a reasonable and lawful way.

State ex rel. Toledo Blade Co. v. Henry County Court of Common Pleas (“*Toledo Blade*”) (2010), 125 Ohio St. 3d 149, 157, 2010-Ohio-1533, 926 N.E.2d 634. The *Toledo Blade* Court further held that a trial judge’s “refusal to accord equal importance and priority to the media’s First Amendment rights” is “plainly erroneous.”⁴ *Id.*

In light of this well-established precedent, it was not an abuse of discretion for the Twelfth District to “balance[e] Michael Ray’s Sixth Amendment right to a fair criminal trial against the media’s First Amendment right of access.” (Appellants’ Merit Br. at 17.) But balancing is not even what the Twelfth District did to reach its Decision granting The Enquirer’s request for a writ of mandamus.

What the Twelfth District did was find that Judge Sage did not have sufficient evidence to conclude that Ray’s Sixth Amendment right would be violated by release of the Outbound Call. (Decision at 10 (observing that “other than the recording itself, there was no evidence submitted to the common pleas court as to why disclosure of the Outbound Call recording would endanger Ray’s right to a fair trial”).) The court below also found that Judge Sage did not consider sufficient alternatives to closure before concluding that closure was the least restrictive alternative to protect Ray’s right to a fair trial. (Decision at 11.)

In making these findings, the court appropriately applied the two factor inquiry set forth in *State ex rel. Beacon Journal Publishing Co. v. Bond* (“*Bond*”) (2002), 98 Ohio St. 3d 146,

⁴ Notably, Appellants cite only United States Court of Appeals decisions for the proposition that a criminal defendant’s Sixth Amendment right trumps First Amendment rights, and ignore the *Nebraska Press Association* decision. Of course, precedent of federal appeals courts on constitutional issues does not bind this Court. See *State v. Burnett* (2001), 93 Ohio St. 3d 419, 424, 755 N.E.2d 857 (“we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court”).

2002-Ohio-7117, 781 N.E.2d 180. Under *Bond*, before denying access to a criminal proceedings, “a trial court must ‘(1) make specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the [information] and (2) consider whether alternatives to total suppression of the [information] would have protected the interest of the accused.’” (Decision at 10 (quoting *Bond*, 98 Ohio St. 3d at ¶ 30).)

1. The Twelfth District’s finding that Judge Sage’s Protective Order did not rest on clear and convincing evidence was correct.

Appellants contend that the Twelfth District “erred by overlooking the evidence in this case and imposing the burden of expert testimony that would somehow serve as the linchpin to show that releasing the Outbound Call would prejudicially impact Ray’s right to a fair trial.” (Appellants’ Merit Br. at 19.) The “evidence” Appellants refer to is the Outbound Call itself (which the Twelfth District mentioned), and the oral argument of Appellant Gmoser, Ray’s attorney, The Enquirer’s attorney, and Cox Media’s attorney. (See Appellant’s Merit Br. at 20 (“In deciding this issue, the trial court was given the opinions of multiple experienced trial attorneys, with extensive training in criminal law, constitutional law, and media law.”).)⁵

Although the Twelfth District did note the absence of testimony from individuals with knowledge “as to how pretrial disclosure of the Outbound Call recording would impact Ray’s right to a fair trial,” that was not the sole basis of the Court’s decision. (Decision at 10.) Instead, it was the utter absence of any evidence in the record, other than the Outbound Call. Contrary to

⁵ The Court should note Appellants’ attempt to mislead this Court into thinking Judge Sage heard expert testimony from multiple disinterested experienced trial attorneys, “with extensive training in criminal law, constitutional law, and media law.” In fact, Appellants’ reference in their brief to the “opinions” of these various experts referred to arguments of counsel for the parties. Moreover, none of the attorneys who argued at the hearing on the Motion even discussed whether they in fact had experience with pretrial publicity issues like those involved here, Appellant Gmoser included. (See Tr. 35, Geiger Aff., Ex. A, p. 17-24.)

Appellants' assertion, oral argument of interested counsel is **not** evidence. *See State v. Palmer* (1997), 80 Ohio St. 3d 543, 562, 687 N.E.2d 685 (“the arguments of counsel are not evidence”).

Nor is the expertise of the judicial officer considering a motion for closure. *See Evid.R.* 201(B) (“A judicially noticed fact must be one not subject to reasonable dispute . . .”). Despite this fact, Appellants urge this Court to adopt a rule that would make a trial judge’s “expertise” on the prejudicial impact on pretrial publicity conclusive evidence of whether in fact such prejudice would result. (Appellants’ Merit Br. at 20.) Yet Appellants do not suggest a procedure under which a trial court could fairly take judicial notice of, and thus consider and weigh its own expertise on a pretrial publicity issue in a way that would meet the requirements of *Bond*. Should the parties be able to cross-examine the judge on his experience with high-profile criminal matters? Under what standard of review would a court of appeals review the trial judge’s admission of his own testimony as evidence? Appellants should have to answer these questions before advocating that this Court dispense with the evidentiary requirements set by its decision in *Bond*.

Finally, with respect to the evidentiary value of the Outbound Call itself, the Twelfth District’s conclusion on this point was also sound. The Twelfth District noted, correctly, that Judge Sage could not presume or assume unfair prejudice would result from release of the Outbound Call simply because it contained admissions of guilt. *Cf. Toledo Blade*, 125 Ohio St. 3d at 158, 2010-Ohio-1533, 926 N.E.2d 634 (holding that the absence of evidence submitted to the court showing that pretrial publicity would lead to an unfair trial demonstrated that trial judge impermissibly relied on conclusory, speculative assertions in violation of the U.S. Constitution).

For a Sixth Amendment violation to occur, the public access must lead to an “unfair” trial. *See State v. Carter* (1995), 72 Ohio St. 3d 545, 556, 651 N.E.2d 965 (rejecting defendant’s

argument that trial court should have ordered a change of venue due to pretrial publicity because prospective veniremen exposed to that publicity “affirmed they would judge the defendant solely on the law and evidence presented at trial”). “Pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial.” 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 39 (internal quotations and original formatting omitted). Moreover, the government must show by clear and convincing evidence that “the prejudicial effect of the publicity generated by public access to the [records] . . . would prevent [the defendant] from receiving a fair trial.” *State ex rel. Vindicator Printing Co. v. Wolff* (“*Vindicator*”) (2012), 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d89, ¶ 34.

As the Twelfth District noted, Appellant Gmoser himself conceded that the Outbound Call recording would likely be admissible at trial and published to the jury. (Decision at 11.) And this was not a case involving the release of inadmissible, inflammatory evidence, that had a substantial likelihood of resulting in a prospective juror pre-judging Ray unfairly. Thus, the Court did not abuse its discretion in concluding that Judge Sage’s finding that pretrial publicity would result in an unfair prejudice lacked sufficient evidentiary support.

2. The Twelfth District’s conclusion that Judge Sage did not adequately consider alternatives to closure is in accord with this Court’s precedent.

Appellants argue that Judge Sage was only obligated to consider some reasonable alternatives to closure, rather than determine that closure was the least restrictive means to protect Ray’s Sixth Amendment right to a fair trial. (Appellants’ Merit Br. at 23-24.) This is completely inaccurate. Because the general public’s First Amendment right of access was implicated by the closure order, Judge Sage had to find that “reasonable alternatives to closure [could not] adequately protect [Ray’s] fair trial rights.” *Bond*, 98 Ohio St. 3d at 155, 2002-Ohio-

7117, 781 N.E.2d 180 (internal quotations omitted) (quoting *Press-Enterprise v. Superior Court* (“*Press-Enterprise II*”) (1986), 478 U.S. 1, 14, 106 S.Ct. 2735, 92 L. Ed. 2d 1). *See also* Sup.R. 45(E)(3) (“When restricting public access to a case document or information in a case document . . . the court shall use **the least restrictive means available** . . .” (emphasis added)).

In *Vindicator*, this Court provided a list of reasonable alternatives to closure. On that list were the traditional methods of voir dire, continuances, changes of venue, jury instructions, and sequestration of the jury. 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 35. Thus, for Judge Sage to conclude that the only way to protect Ray’s fair trial right was to withhold the record, he needed to conclude that none of these reasonable alternatives would work. The Twelfth District correctly concluded that Judge Sage failed to do this. (Decision at 11.) And indeed, Judge Sage’s Protective Order mentions only one of the *Vindicator* methods, change of venue. He also fails to explain why that method would have been insufficient to protect Ray’s fair trial rights.

Thus, because Judge Sage clearly failed to rule out other less restrictive means before issuing his protective order, Appellants’ assignment of error to the Twelfth District’s holding that Judge Sage’s Protective Order was invalid is without merit.

B. Appellants’ suggestion that Crim.R. 16 should control whether an otherwise public record is exempt from disclosure must be rejected under *Cincinnati Enquirer*.

Appellants suggest that the Court should make new law that would allow a prosecutor to defrock a public record of its status as such, merely by designating it “counsel only” under Crim.R. 16(C). Although Appellants characterize this as an “issue of first impression,” it is not. The *Cincinnati Enquirer* Court unequivocally dispensed with the idea that a county prosecutor could control this determination. 75 Ohio St. 3d at 378, 662 N.E.2d 334. That Court explained that “the fact that the [9-1-1] tapes in question subsequently came into the possession and/or

control of a prosecutor, or other law enforcement officials, or even the grand jury has no significance.” *Id.* In other words, “[o]nce clothed with the public records cloak, the records cannot be defrocked of their status.” *Id.* (citing *State ex rel. Carpenter v. Tubbs Jones* (1995), 72 Ohio St. 3d 579, 580, 651 N.E.2d 993, 994). This includes designation of a public record as “counsel only.”

Allowing a county prosecutor to defrock a public record exempt from disclosure merely by designating it “counsel only” under Crim.R. 16 would effectively make the Public Records Act beholden to the whims of prosecutors, and subvert the open government principles for which the act stands. *See State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga County Fiscal Officer* (2012), 131 Ohio St. 3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 26 (“The Public Records Act reflects the state’s policy that open government serves the public interest and our democratic system.” (Internal quotations omitted.)). *See also State ex rel. Vindicator Printing Co. v. Watkins* (1993), 66 Ohio St.3d 129, 135, 609 N.E.2d 551 (holding that Crim.R. 16 does not apply to non-parties to a criminal case), *overruled on other grounds by, State ex rel. Streckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83.

Additionally, the Court need not consider Appellants’ Crim.R. 16(C) argument for the first time here, because Appellants failed to raise it in the court below. Although Appellants’ Merit Brief mentions Crim.R. 16, Appellants did not argue that it could be used to make a public record otherwise subject to disclosure exempt from disclosure “under state law.” Rather, Appellants invoked that rule merely as a jurisdictional basis for Judge Sage’s Protective Order. (Tr. 56, Resp.’s Merit Br. at 16.) As such, the Twelfth District did not consider this argument, and should not have its decision reversed on that basis.

Appellants' Proposition of Law No. 3:

Even if this Court finds the Outbound Call to be a 9-1-1 call, this Court's outdated per se rule that all 9-1-1 calls are public records subject to disclosure frustrates the ends of justice, conflicts with the Ohio criminal rules, is disfavored and in direct contravention with the modern stance taken by other jurisdictions, and thus, should be revisited and reversed or modified.

Issue Presented for Review and Argument:

Whether this Court should overrule *Cincinnati Enquirer* and its bright line rule that 9-1-1 calls are, in general, public records, and adopt a vague standard that would increase the frequency and cost of public records litigation in this State.

It is often said that "bad facts make for bad law." Appellants seize upon this case's "bad facts" and attempt to convince this Court that it should make "bad law" by overruling *Cincinnati Enquirer*'s bright-line rule governing the treatment of 9-1-1 recordings under the Public Records Act. The facts of this case do not indicate the need for a change in the law, however. Nor is this Court's seventeen-year old decision in *Cincinnati Enquirer* "outdated." Accordingly, the Court should reject Appellants' invitation to breed uncertainty into a clear area of the law and, effectively, start over from scratch.

Appellants first argue that the problem with the Court's *per se* rule that 9-1-1 recordings are, "in general," public records, is that "per se rules are inflexible and do not allow courts to consider individual situations and scenarios." (Appellants' Merit Br. at 28.) But what Appellants really mean is that the Court's definition of 9-1-1 recording does not allow custodians of government records to devise suspect reasons for withholding 9-1-1 recordings when it suits them to do so. Of course, adoption of a "totality of the circumstances" standard would permit custodians of government records to do just that.

Moreover, the *Cincinnati Enquirer* decision did nothing more than determine that recordings made as a result of 9-1-1 calls could never be "confidential law enforcement

investigatory records” or “trial preparation records” because of the inherent temporal relationship between an emergency call, and any subsequent criminal investigation. It is clear, however, that the *Cincinnati Enquirer* rule is not so inflexible as to exclude the possibility that state or federal law might prohibit the release of a 9-1-1 recording. The *Cincinnati Enquirer* Court expressly recognized this in its decision. First by noting that “neither state nor federal law prohibited” the release of the tapes involved in that case, and second, by qualifying its holding with the words “in general.” 75 Ohio St. 3d at 378, 379.

Appellants suggest that one of the reasons this Court should overrule *Cincinnati Enquirer* is that it would “release the citizens of Ohio from the Sophie’s choice of either maintaining their privacy during an emergency or summoning emergency services.” Putting aside Appellants’ hyperbole, they offer no evidence that Ohio citizens refrain from calling 9-1-1 in emergencies due to privacy concerns. Moreover, if this were a serious public policy concern, it would be within the province of the Legislature to amend the Public Records Act to address it.

Notably, the Legislature has amended the Public Records Act since the *Cincinnati Enquirer* decision, and has not seen a reason to abrogate it. *See, e.g.*, 2012 Am.Sub.S.B. No. 314. It would certainly be within the Legislature’s power to create the “personal privacy” exemption Appellants advocate here, if the Legislature believed that such a concern outweighed the open government policy R.C. 149.43 promotes. It is not the role of this Court, however, to make that policy determination in the Legislature’s stead. *See Groch v. GMC* (2008), 117 Ohio St. 3d 192, 230, 2008-Ohio-546, 883 N.E.2d 377 (“It is not this court’s role to establish legislative policies or to second-guess the General Assembly’s policy choices.”).

Appellants also argue that, under the U.S. Supreme Court’s *Davis* decision, the Court’s *per se* rule “needs modification to fit the expanding role of 9-1-1 calls, the dual functioning of 9-

1-1 calls, the realization that testimonial statements that [sic] can be contained in 9-1-1 calls, and the new discovery rules that clearly conflict with mandatory disclosure.” (Appellants’ Merit Br. at 42.) Yet once again, Appellants offer no evidence that the role of the 9-1-1 call is expanding, or that they have a dual function. Certainly in this case, Appellants failed to present any serious argument that Ms. Rednour’s Outbound Call had a dual function beyond assisting the victim and the first responders.

Likewise, the mere fact that a record contains a “testimonial statement” should not be the linchpin of whether the record is subject to disclosure under R.C. 149.43. Appellants offer no proof that disclosure of public records containing testimonial statements impairs the functioning of the justice system, or causes the public harm. To adopt this argument without such evidence is to engage in pure speculation, and make policy choices that are purely within the province of the Legislature. By way of analogy, this Court has considered the public policy concerns associated with the release of a public record containing an uncharged suspects’ identity more than once, and determined that this mere fact is insufficient alone to warrant exemption under the statutory scheme adopted by the Legislature. *See Beacon Journal*, 91 Ohio St. 3d at 57, 741 N.E.2d 511 (citing *Cincinnati Enquirer*, 75 Ohio St. 3d at 378, 662 N.E.2d 334)). Specifically, *Beacon Journal* Court held that the fact that a police incident report contained the name of an uncharged suspect did not place it within the “confidential law enforcement investigatory records” exemption because such reports precede the investigatory stage. *Beacon Journal*, 91 Ohio St. 3d at 56-57, 741 N.E.2d 511 This Court just recently reaffirmed that principle in *Miller*, -- Ohio St. 3d ---, 2013-Ohio-3720, ¶ 26.

And as for Appellants’ contention that the Public Records Act is incompatible with discovery rules for criminal proceedings, this is likewise a matter for the Legislature to resolve.

Like the personal privacy exemption for which Appellants' advocate, there is a policy choice the Legislature has made between open government, and the ability of county prosecutors to conduct their affairs in secret. To date, the Legislature has chosen open government. This Court should not accept a county prosecutor's self-serving invitation to overrule that choice.

Proposition of Law No. 4:

The Twelfth District abused its discretion when it awarded Appellee/Cross-Appellant statutory damages in the maximum amount allowable by law. No statutory damages should be awarded.

Issue Presented for Review and Argument:

Whether Appellant Gmoser had a proper legal justification for denying The Enquirer's request for the Outbound Call.

The Twelfth District awarded The Enquirer the maximum statutory damages allowable under R.C. 149.43(C)(1), \$1,000, upon finding that Appellant Gmoser denied The Enquirer's request for the Outbound Call without a proper legal justification. (Decision at 19.) Appellant Gmoser contends that this \$1,000 award was an abuse of discretion, and seeks reversal.

Appellant Gmoser first argues that The Enquirer "failed to maintain throughout the original action its claim for statutory damages, and has therefore waived entitlement to them." (Appellants' Merit Br. at 43.) This is not accurate. The Enquirer requested statutory damages under R.C. 143.43(C)(1) in its Merit Brief at 18, and argued that such an award was justified because Appellant Gmoser violated the Public Records Act. The Enquirer's argument in support of its request for attorney's fees was equally applicable to an award of statutory damages, as R.C. 149.43(C)(1)(a) & (b) are identical to R.C. 149.43(C)(2)(c)(i) & (ii). Appellant Gmoser offers no reason why The Enquirer needed to make the same argument twice, and certainly does not justify the extreme finding of waiver.

Second, Appellant Gmoser claims that The Enquirer's failure to transmit its "initial" public records request by certified mail precludes recovery of statutory damages. It nevertheless concedes, however, that The Enquirer did make a public records request via certified mail on June 21, 2012. (Appellants' Merit Br. at 44-45.) Yet nowhere in R.C. 149.43(C)(1) does it say the "initial" public records request must be made by certified mail for statutory damages to be proper.

The only case Appellant Gmoser cites in support of this argument stands for the proposition that an award of statutory damages is improper where the public official satisfies the request before receiving a copy via certified mail. (Appellants' Merit Br. at 46 (citing *State ex rel. Petranek v. Cleveland*, 8th Dist. No. 98026, 2012-Ohio-2396, ¶ 8).) The remaining argument Appellant Gmoser offers on these points has no support in either the language of the statute itself, or case law.

And finally, Appellant Gmoser argues that "it was reasonable for [him] to believe that the recording at issue was exempt from being labeled a 'public record' that required disclosure," and thus, statutory damages were inappropriate under R.C. 149.43(C)(1)(b). (Appellants' Merit Br. at 48.) Yet, Appellant Gmoser's act in seeking a protective order from the Court, rather than merely denying the request as R.C. 149.43 permits, belies this contention. Rather, Gmoser's improper action in seeking a protective order to bolster his claim that the Outbound Call recording was exempt from disclosure under state law shows that he did not believe he had proper justification for denying The Enquirer's request. Thus, this Court should affirm the Twelfth District's award of statutory damages to The Enquirer.

MERIT BRIEF OF THE CINCINNATI ENQUIRER

Proposition of Law No. I:

Appellant Gmoser's Motion for Protective Order raised non-justiciable matters on which the trial court had no jurisdiction to rule.

To be entitled to a writ of prohibition, a relator must establish that: (1) the respondent is about to exercise judicial or quasi-judicial powers; (2) the exercise of the power is unauthorized by law; and (3) "the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists." *State ex rel. Henry v. McMonagle* (2000), 87 Ohio St. 3d 543, 544, 721 N.E.2d 1051. The only question presented here is whether Judge Sage exercised power unauthorized by law in issuing his Protective Order upon Appellant Gmoser's Motion.

A court has no jurisdiction to issue declaratory relief concerning a public record request when there is no justiciable controversy. *Berger Brewing Co. v. Liquor Comm'n.* (1973), 34 Ohio St.2d 93, 98, 296 N.E.2d 261. A justiciable controversy does not exist if the person suing does not need "speedy relief" for "the preservation of rights which might otherwise be impaired." *Arbor Healthcare Co. v. Jackson* (1978), 39 Ohio App.3d 183, 530 N.E.2d 928 (10th Dist.).

The Twelfth District denied The Enquirer's request for a writ prohibiting Judge Sage from enforcing his Protective Order on justiciability grounds, holding merely that "[t]he motion for protective order is not a declaratory judgment action and is not subject to declaratory judgment action analysis." (Decision at 16.) Yet, the Twelfth District glossed over the fact that Judge Sage's Protective Order targeted potential issues in an as-of-yet unfiled case, and made a declaration as to how those issues should be resolved. Moreover, there was no dispute between Appellant Gmoser and Ray's attorney over the handling the Outbound Call recording in the criminal proceeding, thus obviating the propriety of the Protective Order.

It is axiomatic that when a government office denies a public records request, nothing happens. The government office keeps the record, and need not produce it until the requestor obtains a writ commanding release. All such issues relating to that release should be resolved through the procedure set forth in the Public Records Act, not in parallel litigation.

Although Appellant Gmoser characterized his Motion as one for a “protective order,” there is no such procedure under the Ohio Criminal Rules for such a motion, or order. Under Crim.R. 16(D)(3), a prosecutor need not disclose materials if he or she believes that “[d]isclosure will compromise an ongoing criminal investigation or confidential law enforcement technique.” In order to take advantage of this rule, the prosecutor need only “certify to court that the prosecuting attorney is not disclosing the material.” Crim.R. 16(D). The prosecutor does not need to file a motion, and in fact, the criminal rules do not contemplate such a motion.

What Appellant Gmoser was really requesting was a protective order under Civ.R. 37. Although Crim.R. 57(B) permits a court to apply the Civil Rules “when no procedure is specifically prescribed by Criminal Rule,” the Criminal Rules do prescribe a procedure for when a prosecutor wishes to withhold information. That is Crim.R. 16(D). Accordingly, the fact that Appellant Gmoser’s motion was invalid under the Criminal Rules, illustrates that fact that Appellant’s Gmoser was really a complaint for declaratory relief, and the Twelfth District should have treated it as such in its review.

Had it treated Appellant Gmoser’s Motion as a petition for declaratory relief, it would have been clear that no justiciable controversy existed, and that the “relief” the Protective Order granted was improper. *See, e.g., Huntsville-Madison County Airport Auth. v. Huntsville Times*, 564 So.2d 904, 905 (Ala. 1990) (“Anticipation of future litigation is insufficient to support a declaratory judgment action.”). Moreover, the Twelfth District would have been

obligated to consider this Court's admonition in *State ex rel. Albright v. Court of Common Pleas of Delaware County* (1991), 60 Ohio St.3d 40, 43, 572 N.E.2d 1387, that "it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings." Although mandamus actions are not "special statutory proceedings" when initiated in a court of appeals or this Court, it is clear that disputes concerning the disclosure of government records are to be resolved in accordance with R.C. 149.43. Appellants' attempts to circumvent that scheme were thus invalid, and Judge Sage's Protective Order had no force of law. Accordingly, the Enquirer was entitled to the writ of prohibition it requested.

Proposition of Law No. II:

The Twelfth District abused its discretion in denying The Enquirer's request for its reasonable attorney's fees.

This Court reviews a court of appeals' denial of a request for attorney's fees under R.C. 149.43(C)(2)(b) for abuse of discretion. *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St. 3d 312, 314, 750 N.E.2d 156. "An abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude." *Id.*

The criteria for an award of attorney's fees is set forth in R.C. 149.43(C)(2). Under that subsection, "the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c)." A court may make reduction to fees based on the reasonableness of the government's actions. Under the reasonableness test,

The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

- (i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would

believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible or the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

R.C. 149.43(C)(2)(c). In addition, the party requesting attorney fees must show a public benefit, as opposed to a private benefit, resulting from the production of the records. *See State ex rel. Cincinnati Enquirer v. Heath* (“Heath”), 183 Ohio App. 3d 274, 280, 2009-Ohio-3415, 916 N.E.2d 1090 (12th Dist.) (citing *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518, 2006-Ohio-1215, ¶ 31, 844 N.E.2d 1181). This Court has previously held that a request that would enable to a newspaper to provide “complete and accurate news reports to the public” confers a public benefit sufficient to justify an award of fees. *Beacon Journal*, 91 Ohio St. 3d at 58, 741 N.E.2d 511 (original formatting omitted).

The Enquirer satisfied all of the necessary requirements to be entitled to an award of attorney’s fees under R.C. 149.43(C)(2), as set forth by this Court in *State ex rel. Pennington v. Gundler* (1996), 75 St.3d 171, 661 N.E.2d 1049. Specifically, The Enquirer: (1) made a proper request for public records pursuant to R.C. § 149.43; (2) the Records were not turned over in response to that request; and (3) The Enquirer was therefore forced to file a mandamus action to obtain the Records. *Id.* Moreover, the Court found that The Enquirer’s request, had it been granted, would have conferred a significant public benefit. (Decision at 18-19 (“there is certainly a public benefit from a disclosure of the Outbound Call recording as it will inform the public as to the functioning of the 911 emergency system and the criminal justice system”).) Under

Beacon Journal, this is precisely the kind of public records case in which an award of attorney fees is appropriate.

Because The Enquirer satisfied all of the criteria to justify an award of attorney fees, the court below could reduce or eliminate the fee award only upon a showing that established the factors in both R.C. 149.43(C)(2)(c)(i) and (ii). Because appellants established neither, the court below thus abused its discretion in denying The Enquirer its fees.

As to subsection (i), the Twelfth District expressly held that Appellant Gmoser had no “proper legal justification” for denying The Enquirer’s request. (Decision at 19.) Given this finding, no well-informed public servant would reasonably believe that Appellant Gmoser complied with his duties under the Public Records Act.

And the Twelfth District’s finding on (i) essentially answers the inquiry into (ii). No well-informed public servant would reasonably believe that withholding records absent a proper legal justification would serve the public policy underlying the Public Records Act.

Pursuant to the plain language of the Public Records Act, the court below had no basis to reduce or eliminate the attorney fee award due The Enquirer.

Moreover, the court’s stated rationale for not awarding fees—that Appellant Gmoser acted in “good faith” to protect Ray’s right to a fair trial—is a wholly inadequate basis for its ruling. The purpose of R.C. 149.43(C)(2)(c)(i) and (ii) is to apply an objective standard to the attorney fee question.

Thus, the issue is not what an individual public servant was thinking, but rather, what a “well-informed” public servant should have done, based on the established law. Where, as here, a court finds that a public servant withheld records with no “proper legal justification,” that person’s subjective good faith is irrelevant.

Because the Twelfth District denied The Enquirer's request for attorney fees solely based on Appellant Gmoser's subjective "good faith," it abused its discretion.

Given the Twelfth District's finding that Appellant Gmoser had no legal justification for denying The Enquirer's request, and its clearly erroneous application of the objective standard governing awards of attorney fees under R.C. 149.43, there can be no question that the Twelfth District abused its discretion in denying The Enquirer's request. *See Ohio Civil Rights Comm'n v. Kent State Univ.* (1998), 129 Ohio App. 3d 213, 244, 717 N.E.2d 745 (11th Dist.) ("An abuse of discretion occurs when the court's attitude in making its decision is unreasonable, arbitrary or capricious, which includes drawing improper, foundationless inferences from the facts presented."). Accordingly, this Court should reverse the Twelfth District's Decision denying The Enquirer's request for attorney fees, and award it the full amount of its reasonable attorney fees incurred in bringing this action.

CONCLUSION

For the reasons set forth in its response to Appellants' Merit Brief, and for those set forth in its own Merit Brief, The Enquirer respectfully requests that the Court affirm the Twelfth District's Decision granting its request for writ of mandamus and award of statutory damages; and reverse the Twelfth District's Decision denying its writ of prohibition and its request for its reasonable attorney's fees.

Respectfully submitted,

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APPELLANT THE CINCINNATI ENQUIRER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT THE CINCINNATI ENQUIRER IN OPPOSITION TO MERIT BRIEF OF APPELLANTS/CROSS-APPELLEES HON. MICHAEL J. SAGE AND MICHAEL T. GMOSE AND MERIT BRIEF OF THE CINCINNATI ENQUIRER was served via regular U.S. Mail, postage prepaid, this 13th day of September, 2013, upon the following:

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APPENDIX

RULE 37. Failure to Make Discovery: Sanctions

(A) Motion for order compelling discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

(1) Appropriate court. A motion for an order to a party or a deponent shall be made to the court in which the action is pending.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or 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 an order compelling inspection in accordance with the request. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(B) Failure to comply with order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

(2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) Expenses on failure to admit. If a party, after being served with a request for admission under Rule 36, fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

(D) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

(E) Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section.

(F) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The court may consider the following factors in determining whether to impose sanctions under this division:

- (1) Whether and when any obligation to preserve the information was triggered;
- (2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
- (3) Whether the party intervened in a timely fashion to prevent the loss of information;
- (4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
- (5) Any other facts relevant to its determination under this division.

[Effective: July 1, 1970; amended effective July 1, 1994; amended effective July 1, 2008.]

RULE 57. Rule of Court; Procedure Not Otherwise Specified

(A) Rule of court. (1) The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.

(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

[Effective: July 1, 1973; amended effective July 1, 1994.]

APPENDIX

Sup.R. 45E(3)

RULE 45. Court Records – Public Access.

(E) Restricting public access to a case document

(3) When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

- (a) Redacting the information rather than limiting public access to the entire document;
- (b) Restricting remote access to either the document or the information while maintaining its direct access;
- (c) Restricting public access to either the document or the information for a specific period of time;
- (d) Using a generic title or description for the document or the information in a case management system or register of actions;
- (e) Using initials or other identifier for the parties' proper names.

Evid.R. 201(B)

RULE 201. Judicial Notice of Adjudicative Facts

(B) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER :

Case No. 2013-0945

Appellee/Cross-Appellant,

vs.

On Appeal from the Twelfth District
Court of Appeals, Case No. CA2012-
06-122

HON. MICHAEL J. SAGE, *et al.*

Appellants/Cross-Appellees.

NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT THE
CINCINNATI ENQUIRER

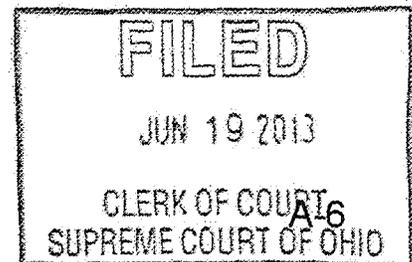
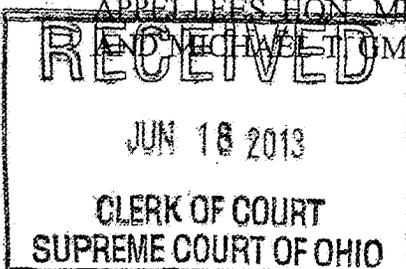
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AND MICHAEL T. Gmoser



**NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT THE
CINCINNATI ENQUIRER.**

Appellee/Cross-Appellant The Cincinnati Enquirer, hereby gives notice of cross-appeal to the Supreme Court of Ohio from the judgment of the Twelfth District Court of Appeals entered in Court of Appeals Case No. CA2012-06-122 on June 3, 2013.

This case originated in the Court of Appeals as an action in mandamus and prohibition, and is therefore appealable to this Court as of right.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Notice of Cross-Appeal* was served via regular U.S. Mail, postage prepaid, this 17th day of June, 2013, upon the following:

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AND MICHAEL T. Gmoser

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IN THE COURT OF APPEALS

JUN 03 2013 TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, ex rel.
THE CINCINNATI ENQUIRER,

Relator,

CASE NO. CA2012-06-122

JUDGMENT ENTRY

- VS -

HON. MICHAEL J. SAGE, et al.,

Respondents.

FILED BUTLER CO.
COURT OF APPEALS

JUN 03 2013

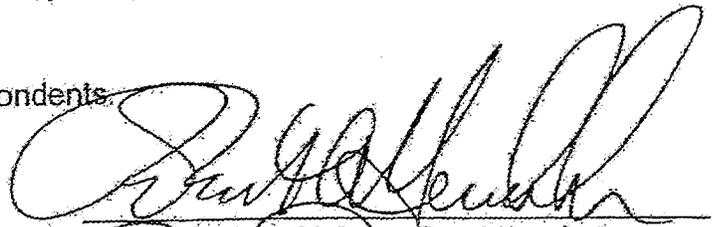
MARY L SWAIN
CLERK OF COURTS

This matter is before the court on a petition for a writ of prohibition and a writ of mandamus filed by Relator, The Cincinnati Enquirer.

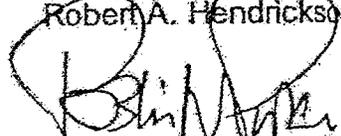
Upon due consideration of the foregoing, and pursuant to the Opinion issued the same date as this Judgment Entry, the petition for writ of mandamus is GRANTED, and the petition for writ of prohibition is DENIED.

Pursuant to the Opinion, Relator's prayer for attorney fees is DENIED and Relator's prayer for statutory damages is GRANTED. \$1,000.00 in statutory damages shall be paid to Relator by Respondent Gmoser in his capacity as Butler County Prosecutor.

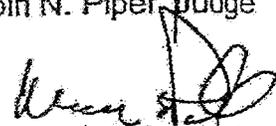
Costs to be taxed to Respondents.



Robert A. Hendrickson, Presiding Judge



Robin N. Piper, Judge



Mike Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO ex rel. THE
CINCINNATI ENQUIRER,

Relator,

- vs -

HON. MICHAEL J. SAGE, et al.,

Respondents.

CASE NO. CA2012-06-122

OPINION
6/3/2013

ORIGINAL ACTION IN PROHIBITION AND MANDAMUS

Graydon Head & Ritchey, LLP, John C. Greiner, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202, for relator

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for respondents

M. POWELL, J.

{¶ 1} This is a case in which relator, the Cincinnati Enquirer (the Enquirer), a newspaper of general circulation in southwestern Ohio, seeks a writ of mandamus and a writ of prohibition compelling respondents, Butler County Prosecutor Michael Gmoser and Butler County Common Pleas Judge Michael Sage, to release an audio recording of a telephone

conversation between a Butler County 911 operator and a murder suspect.¹

FACTUAL BACKGROUND

{¶ 2} On June 17, 2012, the Butler County Sheriff's Office Dispatch Center received a 911 call at 4:41 p.m. (the First Call). The female caller informed Sheriff's Office Operator Debra Rednour that her husband was hurt, there had been an accident, and her husband was not breathing. The call then ended abruptly. Rednour dispatched emergency personnel and placed a return call to the telephone number which made the original 911 call. This return call was not answered (the Unanswered Call). Rednour made a second return call (the Outbound Call).

{¶ 3} This call was answered by a male who identified himself as Michael Ray. Ray immediately told Rednour that he was a murderer and needed to be arrested. Rednour asked Ray what had happened. Ray told her that he had been caught drinking his father's beer, his father got mad at him, and he (Ray) just snapped and stabbed his father. In response to further questioning by Rednour, Ray told her he had stabbed his father in the chest with a hunting knife, he had removed the knife from his father's chest, and the knife was now laying on Ray's bedroom floor. The call was disconnected with the arrival of the police to the residence.

{¶ 4} In her deposition, Rednour testified it is her duty to make a return call if a 911 call is dropped so that she can find out what is going on, and that if a weapon is involved, she will make a point to find out its type and location. Rednour testified it was her duty to make a return call after the First Call was dropped because she did not have enough information to ensure a proper medical response and the safety of those responding to the emergency. All she knew after the First Call was dropped was that someone was not breathing. Rednour

1. Gmoser and Judge Sage will be referred collectively as respondents when necessary.

stated she had no idea that a crime had been committed when she placed the return call and that it was not her intention in making the return call to investigate a crime. Rather, the questions she asked during the Outbound Call were solely to provide for the safety of the first responders and the victim.

{¶ 5} On the day of the incident, Sheila McLaughlin, a reporter for the Enquirer, made a request to the Butler County Sheriff's Office for the recording of the First Call. Gmoser denied the request. Gmoser advised the reporter that he would not release the recording prior to the conclusion of the investigation and any trial of the matter, and that he would seek a protective order against such release. Notwithstanding Gmoser's denial, the sheriff's office released the recording of the First Call to the Enquirer on June 19, 2012. Upon receipt of the recording, the Enquirer realized there were recordings of other calls relating to the incident. Consequently, the Enquirer made a request for "all 911 calls to or from Butler County dispatchers from 4:00 p.m. June 17 until 5:30 p.m. June 17."

{¶ 6} On June 20, Gmoser denied the request on the ground the recordings of the Unanswered Call and the Outbound Call were both trial preparation records under R.C. 149.43(A)(1)(g) and confidential law enforcement investigatory records under R.C. 149.43(A)(1)(h), and therefore not public records. Gmoser further stated, "Independent of this basis for refusing your requests * * * , it is my firm belief that the interest of justice outweighs any public interest in one of the two subject recordings and I shall proceed to ask for a protective order from the court regarding release of that recording in further criminal proceedings."

{¶ 7} By letter dated June 21, 2012, the Enquirer, through its legal counsel, reiterated its request for "all 911 calls to or from Butler County dispatchers from 4:00 p.m. June 17 until 5:30 p.m. June 17." On June 22, Gmoser notified the Enquirer's legal counsel that he would release the recording of the Unanswered Call, but remained steadfast in his refusal to

release the recording of the Outbound Call. That same day, pursuant to Crim.R. 16(C), Gmoser filed a motion for protective order in the Butler County Common Pleas Court (the common pleas court) in the case of *State v. Ray*.² In the motion, Gmoser asserted that the Outbound Call was part of an investigation of a 911 incident report. Gmoser reasserted his claim that the Outbound Call recording was both a trial preparation record and a confidential law enforcement investigatory record, and therefore not subject to disclosure as a public record. Gmoser further stated that the recording of the Outbound Call is "so lawfully prejudicial to any theory of [Ray's] innocence" that its disclosure would endanger Ray's right to a fair trial.

{¶ 8} On June 25, a hearing was held on the motion before Judge Sage. Present at the hearing were Gmoser, the Enquirer's counsel, and Ray's criminal defense counsel. The recording of the Outbound Call was played for Judge Sage in his chamber in the presence of Gmoser, the Enquirer's counsel, and Ray's counsel. The recording was neither offered nor received into evidence. Following this in camera hearing, the parties argued the motion in open court without the submission of additional evidence. Following argument, Judge Sage orally granted the protective order from the bench.

{¶ 9} A judgment entry reflecting the granting of the motion was journalized on June 27, 2012. Judge Sage found that because the recording of the Outbound Call contained statements by Ray that related to precipitory circumstances and evidence, were "highly inflammatory," and were "highly prejudicial" to Ray, Ray's right to a fair trial would be prejudiced by the disclosure of the recording. Judge Sage considered alternatives to the closure of the Outbound Call recording, specifically providing a complete or redacted

2. Ray was indicted for the murder of his father sometime between June 17 and June 22, 2012. In their brief, respondents state Gmoser filed the motion for protective order on the day Ray was indicted for the murder of his father.

transcript of the Outbound Call recording, but rejected those alternatives.

{¶ 10} The Enquirer subsequently filed a complaint in this court for a writ of mandamus against respondents. Specifically, the Enquirer sought orders that the protective order issued by Judge Sage be vacated, the Outbound Call recording be released to the Enquirer, and Gmoser be ordered to pay statutory damages and attorney fees for his failure to comply with R.C. 149.43. The Enquirer subsequently filed an amended complaint for a writ of mandamus and a writ of prohibition.

{¶ 11} While substantially similar to the original complaint, the amended complaint also sought to prevent the common pleas court from enforcing its June 27, 2012 judgment entry granting the motion for protective order. The amended complaint also alleged that Judge Sage lacked jurisdiction to issue a protective order "in a public records dispute where the record is not before him in the underlying criminal proceeding." In his answer to the amended complaint, Judge Sage denied that the recording of the Outbound Call was subject to disclosure, denied that he had no jurisdiction to issue the protective order prohibiting disclosure of the Outbound Call recording, and set forth various affirmative defenses.

{¶ 12} On October 11, 2012, Judge Sage issued an amended protective order. That order authorized the release of the Outbound Call recording "immediately preceding its admission and publication to the jury in open court at [Ray's murder] trial." Pursuant to the amended protective order, Gmoser delivered the Outbound Call recording to the Enquirer on October 15. Consequently, respondents moved to dismiss the Enquirer's action in mandamus and prohibition as moot. On November 28, 2012, this court denied the motion.

{¶ 13} This case involves the disclosure, pursuant to R.C. 149.43, Ohio's Public Records Act, of the recording of an outbound call made by a 911 operator. For the reasons that follow, we hold that the Outbound Call constitutes a 911 call which is a public record not exempt from disclosure.

THE MANDAMUS ACTION

{¶ 14} To prevail on a petition for a writ of mandamus, "relator must establish (1) a clear legal right to the relief requested, (2) that respondents have a clear legal duty to perform the act or acts requested, and (3) that relator has no plain and adequate remedy [at law]." *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415, ¶ 11 (12th Dist.), citing *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490 (1994).³ Mandamus is the appropriate remedy to seek compliance with R.C. 149.43. *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 23. The Public Records Act "must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 8. "[I]nherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it." *State ex rel. Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171 (1997). The government "bears the burden of establishing that the requested information is exempt from disclosure." *Bond* at ¶ 8.

{¶ 15} The Ohio Supreme Court has held that "911 [recordings] in general *** are public records which are not exempt from disclosure." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376 (1996); *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685. In ruling that 911 recordings are public records, the supreme court noted certain indicia of 911 calls, including: (1) 911 calls are automatically recorded; (2) 911 calls are always initiated by the callers; (3) 911

3. However, persons seeking public records under R.C. 149.43 need not establish the lack of an adequate remedy at law in order to be entitled to a writ of mandamus. *State ex rel. Dist. 1199, Health Care & Soc. Serv. Union, SEIU, AFL-CIO v. Lawrence Cty. Gen. Hosp.*, 83 Ohio St.3d 351, 354 (1998); *State ex rel. Doe v. Tetrault*, 12th Dist. No. CA2011-10-070, 2012-Ohio-3879, ¶ 21.

recordings are not prepared by attorneys or other law enforcement officials; (4) 911 recordings are not made to preserve evidence for criminal prosecution; and (5) rather, 911 calls are routinely recorded without any specific investigatory purpose in mind. *Cincinnati Enquirer* at 377-378. "The particular content of the 911 [recordings] is irrelevant." *Id.* at 378.

{¶ 16} The supreme court further noted that 911 operators (1) do not act under the direction of a prosecutor or other law enforcement official when receiving or responding to a 911 call, (2) are not employees of a law enforcement agency, (3) are not trained in criminal investigation, and (4) simply compile information and do not investigate. *Id.* at 377. The fact that 911 recordings subsequently come into the possession and/or control of a prosecutor or other law enforcement official "has no significance. Once clothed with the public records cloak, the records cannot be defrocked of their status." *Id.* at 378.

{¶ 17} Respondents first aver that the Outbound Call is not a 911 call, and therefore not subject to the supreme court's holding in *Cincinnati Enquirer*, because (1) it was an outbound call, as opposed to an incoming call; (2) Rednour, the 911 operator placing the outbound call, was an employee of a law enforcement agency; (3) when Rednour dispatched emergency personnel to the scene of the emergency after receiving the First Call, the basic purpose of the 911 emergency system had been fulfilled; and (4) the questions asked by Rednour were, objectively, the same questions that would be asked by a criminal investigator. Rather, respondents assert that the recording of the Outbound Call is both a trial preparation record under R.C. 149.43(A)(1)(g) and a confidential law enforcement investigatory record under R.C. 149.43(A)(1)(h).

{¶ 18} There are factual distinctions between this case and the 911 call indicia noted by the supreme court in *Cincinnati Enquirer*. First, Rednour is an employee of a law enforcement agency (i.e., the Butler County Sheriff's Office). However, we find this distinction to be insignificant in the resolution of whether the Outbound Call is a 911 call.

Rednour testified that although she is employed by the Butler County Sheriff's Office, she is a civilian employee neither trained in criminal investigation nor tasked with criminal investigation duties.

{¶ 19} The other significant distinction advanced by respondents is that the Outbound Call was initiated by Rednour. We decline to accept this distinction. The Outbound Call was initiated when the First Call was abruptly ended. The Unanswered Call and the Outbound Call, while placed by Rednour, constituted a continuation of the First Call so that Rednour could obtain additional information to provide an emergency response that was both effective and safe. When Rednour placed the Outbound Call, she had no idea a crime had been committed, and had no investigatory intent beyond what was necessary to provide an effective emergency response.

{¶ 20} Likewise, respondents' other assertions do not convert the essential nature of the Outbound Call into something other than a 911 call. That Rednour dispatched emergency responders after the First Call did not satisfy her duty as a 911 operator. As already mentioned, it was imperative that Rednour obtain additional information as to the nature of the injury so that she could tell emergency responders and let them respond appropriately and expeditiously and be apprised of any danger that might confront them. Additionally, although Rednour's questions to Ray may be useful in prosecuting him, their purpose, and Rednour's intention in asking them, were only to accomplish her duty as a 911 operator.

{¶ 21} Accordingly, we find that the Outbound Call is a 911 call.

{¶ 22} In *Cincinnati Enquirer*, the Ohio Supreme Court also addressed whether 911 recordings qualify as trial preparation records or confidential law enforcement investigatory records under R.C. 149.43. The supreme court held that they did not:

The moment the [recordings] were made as a result of the calls A-17

(in these cases-and in all other 911 call cases) to the 911 number, the [recordings] became public records. Obviously, at the time the [recordings] 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.

Cincinnati Enquirer, 75 Ohio St.3d at 378.

{¶ 23} We therefore find that the Outbound Call is not exempt from disclosure either as a trial preparation record or a confidential law enforcement investigatory record.

{¶ 24} Respondents also aver that the Outbound Call recording should not be released because the release would compromise Ray's Sixth Amendment right to a fair trial due to potential jury prejudice. Respondents assert the Outbound Call recording is, pursuant to R.C. 149.43(A)(1)(v), a "record, the release of which is prohibited by state or federal law," and is therefore exempt from disclosure. Based upon this concern, Judge Sage granted Gmoser's motion for protective order which prohibited public dissemination of the Outbound Call recording.

{¶ 25} It is well-settled that while the First Amendment guarantees the public and press a right of access, such right of access is not absolute. *Bond*, 2002-Ohio-7117 at ¶ 15, 17. The "presumption of openness * * * may be overcome 'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at ¶ 17, quoting *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508, 104 S.Ct. 819 (1984) (*Press-Enterprise I*). In balancing the Sixth Amendment right to a fair trial and the First Amendment right of access, the United States Supreme Court set forth a two-part inquiry to determine whether the presumption of openness has been rebutted.

{¶ 26} Specifically, if closure is sought on the ground that disclosure would jeopardize "the right of the accused to a fair trial," closure shall be ordered "only if specific findings are

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made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14, 106 S.Ct. 2735 (1986) (*Press-Enterprise II*). In applying these standards, a trial court must "(1) make specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the [information] and (2) consider whether alternatives to total suppression of the [information] would have protected the interest of the accused." *Bond* at ¶ 30.

{¶ 27} The case at bar presents a situation similar to that before this court in *Heath*, 2009-Ohio-3415. The issue in *Heath* concerned the release of records from a preliminary hearing in a murder case. After the records were ordered to be sealed by a common pleas court, a newspaper filed a complaint for a writ of mandamus seeking vacation of the sealing orders. This court granted the writ of mandamus. This court found that the lower court's sealing orders did not satisfy the criteria for closure recognized by the United States Supreme Court in *Press-Enterprise I* and *Press-Enterprise II*, and applied by our supreme court in *Bond*, 2002-Ohio-7117.

{¶ 28} The protective order in this case did not satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*. First, other than the recording itself, there was no evidence submitted to the common pleas court as to why disclosure of the Outbound Call recording would endanger Ray's right to a fair trial. There was no testimony from psychologists, sociologists, communications experts, media experts, jury experts, experienced trial lawyers, former judges, or others as to how pretrial disclosure of the Outbound Call recording would impact Ray's right to a fair trial. Prejudice cannot be assumed or presumed simply because the Outbound Call recording includes admissions by

Ray.

{¶ 29} Furthermore, there is nothing to suggest that Ray's statements to Rednour would not have been admissible at trial and submitted to the jury for its deliberations. In fact, Gmoser asserted at the hearing on the motion for protective order that the Outbound Call recording would be admissible evidence. That the Outbound Call recording would eventually be submitted to a jury certainly mitigates any adverse impact upon Ray's right to a fair trial which might result from its pretrial disclosure.

{¶ 30} Moreover, Ray's statements to Rednour do not contain salacious or horrific details that might arouse an emotional response in the community against Ray. In fact, Ray's statements include expressions of remorse.

{¶ 31} Finally, there was no mention or consideration of why continuances, voir dire, change of venue, cautionary jury instructions, and other protective measures would not have preserved Ray's right to a fair trial. See *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶ 35. Rather, Judge Sage only considered two alternatives, a complete transcript of the Outbound Call or a redacted version, before rejecting them and noting there were no other reasonable alternatives.

{¶ 32} Respondents have also submitted no other material to this court addressing the evidentiary deficiencies noted above from which this court can conclude that the pretrial disclosure of the Outbound Call recording would jeopardize Ray's right to a fair trial, or that total suppression of the Outbound Call recording is the least restrictive alternative to protect Ray's right to a fair trial.⁴

{¶ 33} We therefore find the presumption of openness has not been overcome in this

4. As this is an original action, the parties may submit evidence to this court. The evidentiary material submitted by the parties include the transcript of the hearing on the motion for protective order, Rednour's deposition, Gmoser's motion for protective order, the protective order and the amended protective order, a recording of the First Call and the Unanswered Call, a transcript of the Outbound Call, and affidavits from counsel (including email and other correspondence between the parties) and Enquirer reporter Sheila McLaughlin.

case. Accordingly, we grant the writ of mandamus.

THE PROHIBITION ACTION

{¶ 34} The Enquirer also seeks a writ of prohibition against Judge Sage.⁵

{¶ 35} To warrant a writ of prohibition, the relator must establish that "(1) the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is clearly unauthorized by law, and (3) denial of the writ will cause injury for which there is no adequate remedy in the ordinary course of law." *State ex rel. Cincinnati Enquirer v. Bronson*, 191 Ohio App.3d 160, 2010-Ohio-5315, ¶ 10 (12th Dist.).

{¶ 36} The Enquirer argues that Judge Sage did not have jurisdiction to issue the protective order because (1) the Outbound Call recording was not before Judge Sage and therefore not subject to his jurisdiction; (2) the mandamus remedy provided in R.C. 149.43(C) is the only mechanism for resolving a public records dispute; (3) a public official may not respond to a request for a public record by seeking declaratory relief from a court regarding the availability of the record; and (4) there is no justiciable controversy to support declaratory relief. We will address the Enquirer's arguments separately.

A. The Outbound Call recording was not before Judge Sage and therefore not subject to his jurisdiction.

{¶ 37} The Enquirer avers that Judge Sage was without jurisdiction to consider and grant the protection order because the Outbound Call recording was not before him. That is, the Enquirer claims Judge Sage has jurisdiction to make orders solely with regard to documents that have been submitted to his court as filings, evidence or otherwise, and are subject to his direct control. The Enquirer is correct that the Outbound Call recording was not

5. The Enquirer posits this issue in the context of a declaratory judgment. Gmoser did not seek a declaratory judgment from the court and Judge Sage did not grant one. Except where the Enquirer's argument is applicable only with regard to a declaratory judgment, the court will address the argument within the context of the protection order proceedings.

before Judge Sage in the sense it was not filed with the common pleas court or offered into evidence. However, at the very least, the Outbound Call recording was discovery material over which the trial judge assigned to the case has significant authority. See Crim.R. 16(C), (D), (F), and (L).

{¶ 38} Gmoser filed the motion for protective order pursuant to Crim.R. 16(C). This rule allows a prosecutor to designate certain discovery material as "counsel only." "'Counsel only' material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way." Crim.R. 16(C). Pursuant to Crim.R. 16(F), "[u]pon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of 'counsel only' material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating." (Emphasis sic.)

{¶ 39} Without question, the protective order was not issued in strict compliance with the procedure contemplated by Crim.R. 16(C). Nonetheless, it is clear that Gmoser implicitly designated the Outbound Call recording as "counsel only," defense counsel did not object to that classification, Judge Sage further sanctioned that classification when he issued the protective order, and the designation means that the material is not to be disseminated to anyone other than defense counsel and his or her agents. See *State v. Hebdon*, 12th Dist. Nos. CA2012-03-052 and CA2012-03-062, 2013-Ohio-1729 (oral nondisclosure certification requirement satisfied during a hearing).

{¶ 40} Furthermore, separate and apart from Crim.R. 16, criminal courts have inherent authority to enter orders to preserve the integrity of their proceedings, including closure orders and orders restricting the litigants and their counsel from disclosing certain information relative to the litigation. See *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, *State*

v. Bush, 76 Ohio St.3d 613 (1996) (trial judges are at the front lines of the administration of justice in our judicial system, responding to the rights and interests of the prosecution, the accused, and victims. A court has the inherent power to regulate the practice before it and protect the integrity of its proceedings).

{¶ 41} The Enquirer complains that Judge Sage improperly issued the protection order because there was no evidence before him to support its issuance, and Judge Sage failed to consider alternatives to a total suppression of the Outbound Call recording. However, prohibition does not lay where there is merely an imperfect exercise of jurisdiction, but rather where there is an ultra vires exercise of jurisdiction. Here, there is not "a patent and unambiguous restriction on the jurisdiction of [Judge Sage nor] a complete and total want of jurisdiction which clearly places the pertinent controversy outside the court's jurisdiction." *State ex rel. Lester v. Court of Common Pleas, Div. of Domestic Relation, Butler Cty.*, 12th Dist. No. CA91-05-080, 1991 WL 219669, *2 (Oct. 28, 1991), citing *State ex rel. Aycock v. Mowrey*, 45 Ohio St.3d 347 (1989).

B. The mandamus remedy provided in R.C. 149.43(C) is the only mechanism for resolving a public records dispute.

{¶ 42} Our decision in *Heath* makes it clear that an order of a court in a criminal matter ordering closure or sealing of certain records does not mean that those records are beyond the reach of a writ of mandamus sought pursuant to R.C. 149.43(C). Likewise, that a record may be subject to a public records request, and therefore a R.C. 149.43 mandamus action, does not divest a court of jurisdiction to determine whether the record ought to be sealed in other litigation pending before it.

{¶ 43} As already stated, mandamus is an appropriate remedy to resolve a public records dispute. A dispute regarding the availability of a record under R.C. 149.43 ought to be resolved pursuant to the procedure set forth therein. In such a proceeding, a closure or

sealing order may be evidence that the record is one "the release of which is prohibited by state or federal law" pursuant to R.C. 149.43(A)(1)(v).

C. A public official may not respond to a request for a public record by seeking declaratory relief from a court regarding the availability of the record.

{¶ 44} The Enquirer cites the case of *State ex rel. Fisher v. PRC Pub. Sector, Inc.*, 99 Ohio App.3d 387 (10th Dist. 1994), in support of its claim that Gmoser could not do an "end around" of his responsibility to respond to a public records request by asking a court to determine if the record was subject to disclosure. In *Fisher*, the Tenth Appellate District held that:

As an initial matter, we note that the court is the *final* arbiter regarding disclosure of public records under R.C. 149.43. *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 385. Determination of an application for disclosure under R.C. 149.43 must first be made on an *ad hoc* basis by the governmental body holding the requested information. *Id.* See, also, *State ex rel. Toledo Blade Co. v. Telb* (1990), 50 Ohio Misc.2d 1, wherein the court held that governmental bodies could not invoke the court's function as final arbiter in order to avoid their duty to make records available. Declaratory relief may not be used to circumvent the duty to make the initial determination of whether materials are subject to disclosure under R.C. 149.43.

(Emphasis sic; parallel citations omitted.) *Fisher* at 391.

{¶ 45} *Fisher* is factually distinguishable from this case in two important respects. First, Gmoser did not seek to avoid his responsibility to determine the availability of the Outbound Call recording by filing the motion for protective order. The communications between Gmoser and the Enquirer are clear and unambiguous: Gmoser was denying release of the recording pending completion of the criminal investigation and the commencement of Ray's trial. Second, the protective order was issued as an incident within the context of a separate and independent proceeding (i.e., the *State v. Ray* criminal case) that, in turn, was not commenced for the sole purpose of determining the availability of the record in dispute.

{¶ 46} Furthermore, there is authority that a trial court ought to be involved in

determining whether information subject to the control of the court or the litigants and their counsel should be disclosed where such disclosure may jeopardize the right of an accused to a fair trial. In such a case, "[t]hese issues should be determined by the trial court, not merely by a custodian of the record ***." *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 733 (1st Dist.2001) (granting a writ of mandamus but staying its issuance for ten days to give the trial court an opportunity to determine whether the release of the material would be unfair to the defendant in that case).

D. There is no justiciable controversy to support declaratory relief.

{¶ 47} The motion for protective order is not a declaratory judgment action and is not subject to declaratory judgment action analysis.

{¶ 48} The writ of prohibition is denied.

ATTORNEY FEES, STATUTORY DAMAGES, AND COURT COSTS

{¶ 49} The Enquirer seeks an award of attorney fees under R.C. 149.43(C)(2)(b) and statutory damages under R.C. 149.43(C)(1). These provisions allow a court to order a person who has failed to provide a public record, to pay statutory damages and attorney fees to the party who has prevailed in obtaining a writ of mandamus for the production of a public record.

{¶ 50} With regard to statutory damages, R.C. 149.43(C)(1) provides that the amount of statutory damages "shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with [R.C. 149.43(B)], beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars." However, the court may reduce an award of statutory damages or not award statutory damages if it determines both of the following:

That, based on the ordinary application of statutory law and case

law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with [R.C. 149.43(B)] and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with [R.C. 149.43(B)];

That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

R.C. 149.43(C)(1)(a) and (b).

{¶ 51} R.C. 149.43(C)(2)(b) governs a court's award of reasonable attorney fees. As with statutory damages, a court may reduce an award of attorney fees or not award attorney fees if it makes both of the above findings. See R.C. 149.43(C)(2)(c)(i) and (ii). With the exception of R.C. 149.43(C)(2)(c)(i) and (ii) (which mandate an award of attorney fees when there is no timely response to a public records request or there is a failure to provide access to the requested records within a prescribed period of time), an award of attorney fees in public records cases is discretionary. *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶ 30-32. A court may consider the reasonableness of a public officer's failure to comply with the public records request in determining whether to award attorney fees. *Id.* at ¶ 34.

{¶ 52} *Doe* involved a police chief's refusal to release records relating to the arrest of a juvenile for aggravated arson after the police chief was notified that the juvenile court had sealed the records relating to the incident. An Ohio citizen (relator) filed a complaint for a writ of mandamus in the Court of Appeals for Clermont County. The court of appeals granted the writ. The relator sought \$16,875 in attorney fees. The court of appeals awarded \$2,000 in

attorney fees.

{¶ 53} The supreme court upheld the court of appeals' attorney fees award. The supreme court found that the police chief (1) had provided "a statutorily sufficient reason for the denial of the request," (2) had acted reasonably and in good faith based upon his reliance on the advice of counsel and the juvenile court's letter instructing the police department not to release information concerning the juvenile, and (3) reasonably believed that his refusal to produce the requested records would serve the public policy underlying the juvenile court's sealing order to protect the welfare of juveniles. *Doe*, 2009-Ohio-4149 at ¶¶38-40.

{¶ 54} In the case at bar, Gmoser and Judge Sage acted in good faith to protect Ray's right to a fair trial. The pretrial disclosure of a murder suspect's confession raises legitimate issues under the Sixth Amendment guarantee of a fair trial. Gmoser further acted reasonably in promptly bringing the issue to the attention of the common pleas court by seeking the protection order. Additionally, Gmoser had ethical concerns pursuant to Prof.Cond.R. 3.6. The facts confronting Gmoser and Judge Sage were unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating statements from a murder suspect. Gmoser and Judge Sage reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused's right to a fair trial.

{¶ 55} The Ohio Supreme Court has also recognized that a determination as to whether to award attorney fees in a public records case ought to include some consideration of the public benefit conferred by the issuance of the writ of mandamus. *Doe*, 2009-Ohio-4149 at ¶¶ 33, 43 (in granting or denying attorney fees under R.C. 149.43(C), courts can consider the degree to which the public will benefit from release of the records in question). In the case at bar, there is certainly a public benefit from a disclosure of the Outbound Call

recording as it will inform the public as to the functioning of both the 911 emergency system and the criminal justice system. It will also raise public awareness of domestic violence and substance abuse.

{¶ 56} On the other hand, in this domestic violence case, by the time the Outbound Call was disconnected, the perpetrator had been identified and was quickly apprehended shortly after. The immediate disclosure of the Outbound Call recording would not have enhanced public safety or public awareness of an ongoing threat. Further, this is not a case in which Gmoser was refusing to disclose the Outbound Call recording under all and any circumstances. Rather, Gmoser was delaying disclosure until completion of the criminal investigation and the commencement of Ray's trial. The public benefit from an immediate disclosure of the Outbound Call recording, as opposed to its delayed disclosure, is, at best, marginal.

{¶ 57} Based upon the foregoing, we find that an award of attorney fees is not warranted and we overrule the Enquirer's prayer for the same. However, because disclosure of the Outbound Call recording was denied without a proper legal justification, we award the maximum statutory damages to the Enquirer in the sum of \$1,000 pursuant to R.C. 149.43(C)(1).

{¶ 58} Court costs are ordered to be paid by Gmoser. Court cost and statutory damages shall be paid by Gmoser in his capacity as county prosecutor.

HENDRICKSON, P.J. concurs.

PIPER, J., concurs separately.

PIPER, J., concurring separately.

{¶ 59} I concur with my colleagues. The law in regard to matters decided today is inflexible, yet reasonable application of R.C. 149.43(C) would prevent us from awarding

attorney fees. While both sides of this controversy have genuine concerns, the actions and arguments of counsel reveal shortcomings in the interaction of R.C. 149.43 with the criminal justice system.

{¶ 60} In the pivotal case of *Cincinnati-Enquirer*, Hamilton County had a blanket policy of automatically denying all public records requests for 911 recorded calls. See 75 Ohio St.3d 374 (1996). While Hamilton County and the Cincinnati Post proposed to the Supreme Court the adoption of a case-by-case, content-based approach to disclosure, the Supreme Court pronounced a per se rule requiring immediate disclosure regardless of content. Among those reasons discussed in our majority opinion today, the court in *Cincinnati Enquirer* determined that 911 calls preceded incident reports and thus could not be considered to be a part of a criminal investigation thereby deserving no confidentiality or exemption pursuant to R.C. 149.43.

{¶ 61} Prosecutor Gmoser, as well as defense counsel, considered the Outbound Call to be crucial evidence in the criminal case and its public dissemination to be highly prejudicial to the defendant in receiving a fair trial from an impartial jury.⁶

{¶ 62} We know today that, depending on the circumstances, the judge presiding over a criminal case may determine that certain evidence disclosed to defense counsel must not be disseminated. Crim.R. 16. The recent amendment to Crim.R. 16 permits a prosecutor in discovery to disclose evidence only to opposing counsel. Despite the demands of due process and constitutional rights that an individual possesses when confronting the

6. The defendant's right to an impartial jury within the venue where the offense occurred is constitutionally derived, and if denied, may improperly infringe upon the individual's due process rights. *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688. See also *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417 (1963) (finding that a video interview played repetitively on television irreversibly tainted the jury pool); and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507(1966) (finding failure of a judge to protect the defendant from prejudicial publicity deprived the defendant of a fair trial consistent with due process).

government at trial, such rights may nevertheless be regulated.⁷

{¶ 63} Even though not officially filed with the court, prosecutor Gmoser did submit the Outbound Call to Judge Sage for review. Prosecutor Gmoser also gave a copy of the recording to defense counsel as discovery material. "Information that a criminal prosecutor has disclosed to the defendant for discovery purpose * * * is not thereby subject to release as a 'public record' pursuant to R.C. 149.43." *State ex rel. Vindicator Printing v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶ 28, quoting *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350 (1997). Yet the per se rule of *Cincinnati Enquirer* requires immediate release regardless of any intended uses or unintended consequences.⁸ There appears no room to balance fundamental principles.

{¶ 64} Similarly, if there is clear and convincing evidence establishing that a defendant's right to a fair trial would be violated, a judge, after considering alternatives, may seal records in a criminal case overriding the presumption of openness. See *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415 (12th Dist.); and *State ex rel. Vindicator Printing*, 2012-Ohio-3328 (decided upon rules of superintendence). Yet again, neither R.C. 149.43 nor the holding in *Cincinnati Enquirer* permit room for deliberation or the weighing of competing interests. Relator urges us to find Prosecutor Gmoser acted in "bad faith" and was deliberately attempting to sabotage the media's request. The evidence suggests the contrary. As a minister of justice carrying the responsibility to see that each and

7. With the increase of gang intimidation and organized crime, Crim.R. 16 was also modified to permit the withholding of witness names when a prosecutor is concerned for the witnesses' safety, with judicial review seven days before trial. Crim.R. 16(F).

8. For example, in *State v. Adams III*, 12th Dist. No. CA2009-11-293, 2011-Ohio-536, this court affirmed the defendant's conviction for aggravated murder after he was found guilty of killing a man labeled "a snitch." The victim was riding in a car that was being pursued by the police, and the driver jumped from the car and was not apprehended. The victim surrendered to police, and while in the back of the police cruiser, was videotaped identifying the driver of the car to police officers. The videotape was copied and disseminated within the community, and the victim was murdered for talking to the officer.

every defendant is accorded justice, Prosecutor Gmoser is prohibited from contributing to even the appearance of impropriety in causing unfair prejudice to a defendant. See Prof.Cond.R. 3.8 comment.⁹

— ¶ 65} Concerned with privacy interests, Justice Pfeifer has consistently suggested the need to balance rights in considering the dissemination of 911 recordings. *State ex rel. Dispatch Printing Company v. Monroe County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685; *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374 (1996). Equally important to the public's right to information is the public's interest in protecting individual constitutional rights in the course of administering criminal justice.

¶ 66} There is no doubt that the public's right to be aware of governmental workings is monumentally important. The press must be empowered to protect the public's interests with a complete and full opportunity to keep the public informed. In this case, Prosecutor Gmoser was not attempting to suppress information about the workings of government or otherwise defeat public awareness, but rather sought guidance from the court to determine the proper timing of such disclosure. The prosecutor, in a timely manner, sought a very brief delay in disclosure so that the trial court could determine if dissemination of records into the public domain would infringe upon the defendant's constitutional rights. Even when the concern is genuine, R.C. 149.43 and established precedent prevent a prosecutor from attempting to protect an individual's constitutional rights. This is inconsistent with a prosecutor's responsibilities in administering justice.

9. It places a prosecutor between a rock and a hard place to suggest public records should be released because a change of venue might fix the prejudice created by disseminating information into the media mainstream before trial. This, in essence, requires a prosecutor to engage in the misconduct of creating the prejudice only to force the defendant to give up his original, and proper, venue. If a prosecutor deliberately created prejudice to a defendant so that he would be forced to select a different venue, it would undoubtedly be labeled prosecutorial misconduct. See *State v. Depew*, 38 Ohio St.3d 275 (1988), wherein the dissent criticized the prosecutor for the misconduct of expressing a lack of concern for the defendant's fair trial during pretrial proceedings. A prosecutor's responsibilities in seeking that which is just are more than those of an advocate. Prof.Cond.R. 3.8 comment.

{¶ 67} The legislature continues to deny attention where needed.¹⁰ Justice Kennedy recently urged the Commission on Rules of Practice and Procedure to examine the dysfunction between Crim.R. 16 and R.C. 149.43. *State v. Athon*, Slip Opinion No. 2013-Ohio-1956. Similarly, the commission on the Rules of Practice and Procedure should carefully review Crim.R. 16 and make appropriate recommendations so that various interests may be addressed. The dissemination of 911 recordings, and other public records to be used in the criminal proceedings, could be subject to immediate judicial review and disclosure as determined reasonable and appropriate in order to protect everyone's interest. Otherwise, a prosecutor is forced to engage in conduct contrary to the real ethical concern for the preservation of individual rights by disseminating public records. If we expect prosecutors to fulfill ethical responsibilities beyond those of an advocate, we should empower them as well as the media.

10. Justice Pfeifer expressed concerns and invited the legislature to review R.C.149.43 over 10 years ago in *Cincinnati Enquirer*.