

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF RESPONDENT

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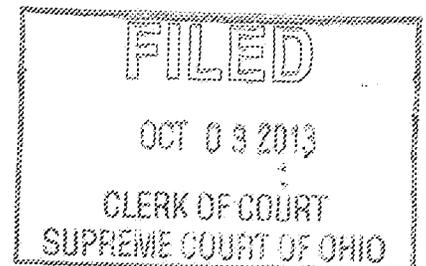


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INTRODUCTION

The safety and security of the Governor and other state officials has always been a matter of paramount concern. The General Assembly in its wisdom explicitly provided for a security detail for the Governor, R.C. 5503.02(E)(1)(a), security details for state buildings (including the Moyer Judicial Center), R.C. 5503.02(E)(1)(d), and, upon direction of the Governor, personal security details for other state officials. R.C. 5503.02(E)(1)(b). At a time of increased security threats to public officials, it is vitally important to safeguard security records concerning threats made against state officials. These types of security records by their very nature contain information that the Ohio State Highway Patrol (“OHSP”) uses for protecting or maintaining the security of a public office and the safety and security of the public official against attack, interference, or sabotage. Yet Relator Plunderbund Media, LLC (“Plunderbund”) demanded from the Ohio Department of Public Safety its investigation records of threats made against the current Governor dating back to the time that he took office (“the Records”). The Department properly withheld the Records because they are security records pursuant to R.C. 149.433—and are therefore not public records—and out of concern for the safety of public officials, their families and employees, and members of the public who attend events involving the Governor.

As “security records,” the Records are not public records and, pursuant to R.C. 149.433(B), they are not subject to disclosure, with or without redaction, under the Public Records Act. In addition, public disclosure of security records of threats made against the Governor increases the risk to his personal security and safety, contrary to the decisions in *Kallstrom v. Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998), and *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243.

The Records are “security records” under R.C. 149.433. The statute defines a “security record” to include any record held by a public office that “contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage” or “is assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism.” Based on the law and the evidence before the Court, which includes affidavits from experts in protecting the Governor’s safety and security, “maintaining the security of” the “public office” of the Governor of Ohio, and protecting it against acts of terrorism, logically and necessarily includes the Governor himself, and not just the physical buildings, rooms, and facilities of the office. The evidence also shows overwhelmingly that investigation records of threats against the Governor by their very nature contain information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage, and/or are maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, as set forth in R.C. 149.433(A). Pursuant to R.C. 149.433(B), security records are not public records and not subject to mandatory release and disclosure under the Public Records Act, R.C. 149.43. Therefore, the Department has no legal duty to provide Plunderbund with copies of the records, whether redacted or not.

Additionally, the Department’s decision to withhold the records is consistent with the clearly established and fundamental right to personal security and bodily integrity guaranteed by the Fourteenth Amendment to the United States Constitution. This Court has held that, under Ohio’s Public Records Act, release of records that would undermine this right is prohibited by law. The government’s release of personal information that places an individual at substantial risk of serious bodily harm or death from a perceived likely threat would be at odds with this precedent. The evidence submitted in this case shows that Governor Kasich is uniquely subject

to threats regarding his and his family's personal security, and that public disclosure of threat information will substantially increase his vulnerability to harm and the risks to his (and others') personal security and safety. Plunderbund has submitted no evidence to the contrary.

The State has an undeniably strong interest in protecting the safety and personal security of its chief executive from attack, intimidation, interference, threats, violence, and terrorism. Because disclosure of threat investigation records, even if redacted, presents an unacceptable risk of compromising the Governor's safety and security, the Department's investigation records concerning threats to public officials are not subject to disclosure.

Plunderbund cannot demonstrate a clear legal right to that which is not public, such as the Records at issue in this case. Accordingly, its request for a writ of mandamus should be denied.

STATEMENT OF THE CASE AND FACTS

The facts in this case are not in dispute. The parties agree that, Joseph Mismas, Plunderbund's co-owner and managing editor, emailed the Department a request for a count and copies of investigations that it conducted relative to threats made against Governor Kasich. Complaint, ¶ 4 (first),¹ 5 & Ex. 1; Answer, ¶ 4; Agreed Fact No. 1. The Department denied the request, advising Mr. Mismas that it was withholding the Records pursuant to R.C. 149.433(B). Complaint, ¶ 13 & Ex. 2; Agreed Fact No. 2. Mr. Mismas emailed the Department again, requesting confirmation of the denial and clarifying his request. Complaint, Ex. 3; Agreed Fact No. 3. The Department emailed Mr. Mismas and reiterated that it was withholding the Records pursuant to R.C. 149.433(B), and also advised that there are no records responsive to his request for a "count" of the number of investigations related to threats against Governor Kasich. Complaint, Ex. 4; Agreed Fact No. 4.

Plunderbund's legal counsel subsequently emailed the Department, asking it to provide (a) the requested Records, after redacting security information therein; (b) the content of the threat itself, and whether the threat was considered credible by the officer who made that determination; (c) a copy of the threat, if the threat was in writing; (d) notes taken by the person who received the threat and materials regarding whether an investigation was opened, if the threat was by phone; and (e) copies of summary sheets or cover sheets providing a short recitation of the issue. Complaint, Ex. 7; Agreed Fact No. 5. The Department advised Plunderbund's counsel that "security records" include records that contain information directly used for protecting or maintaining the security of a public office, that the assessment and disposition relative to each threat "as it relates to the unique circumstances of a particular

¹ The mandamus complaint has two paragraphs numbered "4."

governor and his family” would show the relative strengths and weaknesses of that governor’s security, and would thus pose a significant risk to Governor Kasich and his family. Complaint, Ex. 8; Agreed Fact No. 6. Accordingly, the Department advised that the Records are security records not subject to disclosure, and that redaction does not apply. *Id.*

Plunderbund now seeks a peremptory writ of mandamus to compel the Department to produce the Records, redacted if necessary, as well as statutory damages, costs, and attorney fees. The Department answered the mandamus complaint and moved for judgment on the pleadings. A divided Court granted an alternative writ (two justices voted to dismiss the case). *07/24/2013 Case Announcements, 2013-Ohio-3210, p. 1.*

The parties jointly filed an agreed statement of facts and separately filed their own evidence. Plunderbund’s evidence consists of (1) an affidavit from Mr. Mismas concerning a prior request by him for reports of incidents in the Statehouse garage, and (2) an affidavit from its legal counsel regarding a 2006 information technology bulletin from the Ohio Department of Administrative Services (“DAS-IT bulletin”), entitled “Public records requests regarding agency information and telecommunications systems and infrastructure,” a copy of which is attached as an exhibit to counsel’s affidavit.

In its Presentation of Evidence, the Department submitted affidavits executed by John Born, Director of the Ohio Department of Public Safety, Paul Pride, Superintendent of OSHP, Richard Baron, Executive Director of Ohio Homeland Security, and Patrick Kellum, OSHP Staff Lieutenant and member of Governor Kasich’s security team. In these affidavits, these witnesses explain that the OSHP is charged with the security of all state offices, including both the facilities and the office holders themselves as well as their families. Affidavit of John Born (Born Aff.), ¶ 4-5; Affidavit of Paul Pride (“Pride Aff.”), ¶ 7. Statewide elected officials,

particularly the Governor, are especially vulnerable to threats and harm. Born Aff., ¶ 6; Affidavit of Richard Baron (“Baron Aff.”), ¶ 9. The investigative reports that the OSHP produces in response to a threat against a state office holder contain information that reveals security and safety vulnerabilities. Born Aff., ¶ 7. The OSHP then uses these reports to help design the security details protecting the state office holders. Baron Aff., ¶ 11. Thus, public disclosure of the content of the reports of threats made against the Governor would reveal the content and credibility of the threats as well as suggest the measures that the OSHP takes to protect the Governor. Born Aff., ¶¶ 8-9; Baron Aff., ¶ 11. In addition, the OSHP shares threat information with the United States Secret Service and other law enforcement organizations. Pride Aff., ¶ 6; Affidavit of Patrick Kellum (“Kellum Aff.”), ¶ 14. Disclosing the OSHP’s threat information to the public would discourage these other law enforcement organizations from sharing their own threat information in the future for fear of it becoming public once in OSHP’s control. Pride Aff., ¶ 6; Kellum Aff., ¶ 14. This lack of other law enforcement organizations’ threat information would further endanger the Governor and other state office holders. Pride Aff., ¶ 6; Kellum Aff., ¶ 14.

Moreover, Governor Kasich in particular presents a unique set of security circumstances, rendering security plans and details more vulnerable to compromise through disclosure to the public. Pride Aff., ¶ 8. Governor Kasich lives in his own residence, rather than the state-owned governor’s residence. Pride Aff., ¶ 8. Governor Kasich has a more hands-on leadership style relative to difficult and controversial public issues facing the state and, as a result, he is more vulnerable to potential harm. Kellum Aff., ¶ 6. He is more well-known on a national scale than other previous Ohio governors. Kellum Aff., ¶ 7. Because there are two locations where Governor Kasich resides or holds meetings and events, security details are more vulnerable to

breach. Kellum Aff., ¶ 7. Further, Governor Kasich and his wife appear in public and in written media more often than previous Ohio governors, making threat assessments more difficult to analyze and investigate. Kellum Aff., ¶ 11. Revealing the reports of threat investigations would reveal a picture of how the Governor travels, conducts meetings, schedules his day, and visits various in-state and out-of-state locations. Pride Aff., ¶ 10; Baron Aff., ¶ 11; Kellum Aff., ¶ 10. This in turn would allow someone to figure out what types of threats the OSHP deems credible and how it protects against such threats being born out. Kellum Aff., ¶ 12.

The content, number, or treatment of prior or current threats to the Governor, his family, and state buildings, offices, and facilities, contain information that, if disclosed, could be used to commit terrorism, intimidation, or violence. Baron Aff., ¶ 13. Terrorists use fragments of information from various sources to develop a complete picture of their intended target, including vulnerabilities and risk assessments. Baron Aff., ¶ 13. Further, revealing a threat, even an insignificant or non-credible threat, may require the OSHP to change its tactics, especially if the person making the threat changes his or her plan based on the disclosure. Kellum Aff., ¶ 11.

Because the evidence supports the conclusion that these records of threat investigations are security records, they are not public records and disclosure is not required. Accordingly, this Court should deny the requested writ.

ARGUMENT

For mandamus relief under the Public Records Act, a relator must allege and show both (1) a clear legal right to the relief sought, and (2) the respondent has a clear legal duty to perform the requested act. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983). The relator must show entitlement to the writ by clear and convincing evidence. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16.

Plunderbund does not have a clear legal right to receive, and the Department is under no legal duty to provide, records that are not “public” under Ohio law. Additionally, even if these records were “public” records, the disclosure of the records, even if partially or wholly redacted, would violate the Governor’s fundamental constitutional right to personal security and bodily integrity, which the State has a compelling interest to protect.

The Department has provided this Court with sworn affidavits from individuals with extensive knowledge, experience, training, and/or education in security matters, including protecting the Governor and other State officials. The testimony of these experts amply supports the Department’s position that (1) the investigation records are security records under R.C. 149.433, and (2) any public disclosure of the records will increase the risks to the safety of the Governor and his family, in violation of his constitutional right to personal security and bodily integrity.

Respondent's Proposition of Law No. 1:

Pursuant to R.C. 149.433, the Department's investigation records of threats made against the Governor are security records, which are exempt from mandatory release and disclosure under the Public Records Act.

- A. The “public office” of the Governor of Ohio necessarily includes the Governor himself, and not just the physical buildings, rooms, and facilities of the office.**

Protecting public offices and the safety of the individuals who work in them is vitally important to ensuring the proper functioning of our government. Thus, Ohio's public records law exempts from disclosure “security records,” which are defined as “(a) [a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage; (b) [a]ny record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, . . . [;] or (c) [a] school safety plan adopted pursuant to [R.C. 3313.536].” R.C. 149.433(A)(3). Security records are not public records and are not subject to mandatory release or disclosure under the Public Records Act. R.C. 149.433(B). In contrast to the public-records exception provided for confidential law enforcement investigatory records, R.C. 149.433 has no exception for records of closed matters.

R.C. 149.433 separately defines classes of records that are exempt from public-records disclosure. Records containing information about threats against the Governor are used for protecting his office and maintaining his security. (Kellum Aff. ¶ 11). They are therefore “security records” as defined by R.C. 149.433. While Plunderbund is partially correct that “infrastructure records” are a *type* of record exempted from disclosure, such records are not at issue in this case and Plunderbund's reliance on the federal Critical Infrastructure Protection Act, 42 U.S.C. 5195c, is misplaced. Under R.C. 149.433, “security records” (defined in R.C.

149.433(A)(3)) are a separate type of record from “infrastructure records” (defined in R.C. 149.433(A)(2)). 42 U.S.C. 5195c addresses only infrastructure records.

The safety of people who work in a public office is inextricably intertwined with the safety of the office itself. Ohio law does not require release of records that contain information that could jeopardize personal safety, while exempting records that protect buildings. Although statutory exceptions to public-records disclosure must be strictly construed, R.C. 149.011(A)’s definition of “public office” includes more than physical property, structures, and facilities. Instead, “[t]he most frequent occasions to use the word [office] arise with reference to *a duty and power conferred on an individual by the government*; and, when this is the connection, ‘public office’ is a usual and more discriminating expression.” (Emphasis added.) <http://thelawdictionary.org/office>.

From a security perspective, the “public office” of the Governor necessarily and logically includes the Governor himself. Baron Aff., ¶ 16; Pride Aff., ¶ 7 (“For purposes of OSHP executive protection, the term ‘public office’ logically and necessarily refers to the Office of the Governor, which includes the decision-making, the operation of the Governor’s business, as well as the safety of the Governor himself, his family, staff, or cabinet.”). That the term “public office” refers to the office holder rather than only a physical structure is further evidenced in criminal statutes. *See e.g.* R.C. 2921.41 (barring a public official who pleads or is found guilty of theft in office from forever holding any public office in Ohio); R.C. 2929.12 (for felony sentencing, court considers whether the offender held a public office or position of trust in the community); R.C. 2961.02(B) (barring individuals who plead guilty to certain felony offenses from holding public office). To argue otherwise is to argue that Ohio law protects only the physical space that people occupy, rather than the people who occupy them. This interpretation

is unjust, illogical, and not in accordance with R.C. 149.433. *See* R.C. 1.47(C) (“In enacting a statute, it is presumed that . . . a just and reasonable result is intended[.]”).

It is illogical to assert, as Plunderbund has, that Ohio law protects public office buildings, but not the people who work in them. Under Plunderbund’s interpretation of R.C. 149.433, the Department would have to release records that reveal the number of officers assigned to a public official’s protective detail and where they are physically positioned while protecting the official. In contrast, according to Plunderbund, the Department would not have to release records related to the physical office in which the public official works, including those related cameras and other security systems.

The Records sought by Plunderbund contain information directly used for protecting or maintaining the security of the Office of the Governor against attack, interference, sabotage, and acts of terrorism. Public disclosure of such threats increases the vulnerability and security risk to the Governor and could jeopardize his safety. *Kellum Aff.*, ¶¶ 10-11. They are not, as Plunderbund claims, simply “routine” law enforcement reports. Rather, they are records that, if released, could diminish the effectiveness of the Executive Protection Unit, the Governor’s protective detail. *Kellum Aff.*, ¶ 13. The General Assembly recognizes the need for special protection of the Governor and other state officials and provided for such protection in R.C. 5503.02(E)(1)(a)-(b), as well in R.C. 149.433’s disclosure exemption for “security records.”

B. Public disclosure of the threat records subjects the Governor and his Office to attack, interference, sabotage, and acts of terrorism.

The Public Records Act does not define the terms “attack,” “interference,” or “sabotage,” as those terms appear in R.C. 149.433(A)(3)(a). Accordingly, these terms must be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. *Black’s Law Dictionary* defines “attack” to include “to make good on a *threat*.” (Emphasis added.)

<http://thelawdictionary.org/attack>. “Interfere” means “to check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose.” Black’s Law Dictionary (5th ed.) 730 (1979). “Sabotage” means “[T]he intentional and deliberate destruction of property or the obstruction of an activity.” <http://thelawdictionary.org/sabotage>.

R.C. 149.433(A)(1) provides that the term “act of terrorism,” as used in the statute, has the same meaning as in R.C. 2909.21. Under that criminal statute, an act of terrorism means an act that constitutes a specified offense, including a felony of violence and/or terroristic *threat*, which is intended to intimidate or coerce the civilian population, influence governmental policy by intimidation or coercion, and/or affect government conduct by the act. *See* R.C. 2909.21(A)(1)-(3).

Disclosing the nature and content of threats made against the Governor will reveal the protective measures taken in response. Baron Aff., ¶ 11. Disclosing the response to such a threat could also reveal security vulnerabilities and allow someone to circumvent protective measures designed to overcome those vulnerabilities. Baron Aff., ¶ 11, 13. OSHP provides security for the Governor as well as all state offices, buildings, and facilities. OSHP also provides security for the office holders themselves and foreign dignitaries. R.C. 5503.02(E)(1); Born Aff., ¶ 4-5; Pride Aff., ¶ 7; Baron Aff., ¶ 4; Kellum Aff., ¶ 6, 8, 9, 13, 14. Statewide elected officials, particularly the Governor, are especially vulnerable to threats of and actual harm. Born Aff., ¶ 6; Baron Aff., ¶ 9, Kellum Aff., ¶ 6-8. The investigation reports that OSHP creates in response to a threat against a State office holder reveal security and safety vulnerabilities. Born Aff., ¶ 7. OSHP uses these reports to help design the security details protecting the state office holders. Baron Aff., ¶ 11. Thus, public disclosure of the content of the reports of threats made against the Governor would reveal the content and credibility of the

threats as well as suggest the measures that OSHP takes to protect the Governor. Born Aff., ¶ 8-9; Baron Aff., ¶ 11.

In addition, OSHP shares threat information with the United States Secret Service and other law-enforcement organizations. Pride Aff., ¶ 6; Kellum Aff., ¶ 14. Publicly disclosing threat information would discourage these organizations from sharing their own threat information in the future for fear of it becoming public once in OSHP's possession. Pride Aff., ¶ 6; Kellum Aff., ¶ 14. This lack of access to other threats would further endanger the security of Governor and other State office holders. Pride Aff., ¶ 6; Kellum Aff., ¶ 14.

The Department's evidence shows that the Records sought by Plunderbund "contain[] information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," or are "assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism." R.C. 149.433(A)(3)(a)-(b). Since "attack" means "to make good on a threat," an investigative record of a threat against the Governor is a record that "contains information directly used for protecting or maintaining the security of a public office against attack." R.C. 149.433(B)(1). Threats of violence, terrorism, or harm to the Governor interfere with the security of his public office. The Records at issue in this case contain information directly used to protect and maintain the security of that office.

C. Because the Records contain security information described in R.C. 149.433(A)(3)(a), they are security records, which the Department has no legal duty to produce, redacted or not.

The Department has no obligation to provide redacted security records to Plunderbund, when the Records are, by law, not "public records." R.C. 149.433(B) expressly and unambiguously provides, inter alia, that a security record—including a record that contains information described in R.C. 149.433(A)(3)(a)—kept by a public office "is not a public record"

and “is not subject to mandatory release and disclosure under [the Public Records Act].” Because the records are not “public,” the Department has no obligation to release the records, *at all*, much less in a redacted form. *See* R.C. 149.433(B). If the General Assembly meant to exempt from public disclosure only the security *information* within a record, it would not have used the record-exemption language in R.C. 149.433(B). *See also* R.C. 1.47(B) (statutory interpretation presumes the “entire statute is intended to be effective[.]”).

The Records demanded by Plunderbund by their very nature contain information that is directly used to protect and maintain the security of a public office. Thus, pursuant to R.C. 149.433(B), the Records in their entirety—not just the security information within them—are not “public” and are not subject to release.

Notwithstanding the above provision, Plunderbund contends that it is entitled to receive redacted² records based on R.C. 149.433(A)(3)(b)(i), which applies to certain “portions of records.” R.C. 149.433 nowhere requires the public custodian to redact security information from a security record in response to a public record request. R.C. 149.433(B) makes clear that security records themselves are not subject to the Public Records Act.

In addition, the Department is not legally required by its own public-records policy to provide Plunderbund with redacted security records. An agency policy, which is neither a statute nor a rule in the Administrative Code, does not create clear legal rights and duties enforceable in mandamus. *See State ex rel. Sziraki v. Admr., Bur. of Workers’ Comp.*, 10th Dist. No. 10AP-267, 2011-Ohio-1486, ¶ 44; *State ex rel. Bd. of Trustees of Butler Twp. v. Ohio State Empl. Relations Bd.*, 10th Dist. No. 08AP-163, 2008-Ohio-5617, ¶ 33 (10th Dist.). Further, the Department’s policy does not define, or address requests for, security records as set forth in R.C.

² “Redaction” means obscuring or deleting any exempt information from an item that otherwise meets R.C. 149.011’s definition of a “record.” R.C. 149.43(A)(11).

149.433. The Department has no need to define “security records” in its policy, because R.C. 149.433(A)(3) already does. The Department also has no need or duty to establish a security-records protocol within its public-records policy because, under R.C. 149.433(B), security records are not public records. Plunderbund fails to show how the Department’s public-records policy creates any clear legal duty to produce redacted copies of security records it keeps and maintains.

Also inapplicable to Plunderbund’s request is R.C. 149.43(B)(1), which was enacted in 1963, and generally requires the public office or person responsible for a public record to make all non-exempt information *within the public record* available and notify the requester of any redaction. This statute does not apply because the Records that Plunderbund seeks are not public records under R.C. 149.433(B). Even if the two statutes are deemed irreconcilable, R.C. 149.433(B) prevails because it was enacted more recently (2003) than R.C. 149.43, and it more specifically applies to the subject records. “[A] specific statute, enacted later in time than a preexisting general statute, will control where a conflict between the two arises.” *Davis v. State Personnel Bd. of Review*, 64 Ohio St.2d 102, 105, 413 N.E.2d 816 (1980).

Finally, Plunderbund suggests that the Department could provide incident summary statements (Records Information Management System printouts, or “RIMS” printouts), as demonstrated in its Presentation of Evidence, Affidavit of Joseph Mismas, Exhibit 2. However, because these reports document general incidents occurring on state property and not specific threats made against a public office or official, they are not security records and therefore the comparison is inapposite.

D. The DAS-IT bulletin is limited to providing an action plan to State entities for public-records requests for information-technology, telecommunications systems, and infrastructure information.

In order to provide State entities with an action plan for responding to public-records requests regarding information technology systems, telecommunications systems and systems infrastructure the Ohio Department of Administrative Service issued an Information Technology Bulletin (“DAS-IT bulletin”). Affidavit of James Christian Selch (“Selch Aff.”), ¶ 5; Affidavit of David Brown (“Brown Aff.”), ¶ 7. Plunderbund does not allege that it requested any of the types of records covered in the bulletin. Rather, it expressly asserts that the Records for which it is seeking a writ of mandamus relate to threats against the Governor. Brief for Relator, pp. 2, 5; Complaint, ¶ 5, Ex. 1. Thus, the DAS-IT bulletin raised by Plunderbund is completely irrelevant to the Records at issue.

Even if it were relevant, the DAS-IT bulletin was not intended to be an authoritative legal opinion or interpretation regarding the scope or applicability of R.C. 149.433. Selch Aff., ¶ 6; Brown Aff., ¶ 8. It does not, and cannot, expand the Department of Administrative Services’ authority beyond information-technology and into binding legal authority. Brown Aff., ¶ 9. Even so, the bulletin itself states that the types of information identified in the action plan are non-exhaustive: “Information *such as but not limited to* configurations, schematics, IP addresses, systems administration, security controls, business continuity, and incident response may not constitute information subject to mandatory disclosure.” (Emphasis added.). Plunderbund’s reliance on the DAS-IT bulletin is misplaced and further shows a failure to understand the nature of the records at issue.

Respondent's Proposition of Law No. 2:

Public disclosure of security records of threats made against the Governor substantially increases the risks to his (and others') personal security and safety, contrary to Kallstrom v. Columbus, 136 F.3d 1055 (6th Cir. 1998), and State ex rel. Cincinnati Enquirer v. Craig, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243.

“Among the historic liberties long cherished at common law was the right to be free from ‘unjustified intrusions on personal security.’” *Kallstrom v. Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998), citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Such common-law liberties are preserved by the Fourteenth Amendment to the United States Constitution. *Id.*, citing *Meyer v. Neb.*, 262 U.S. 390, 399 (1923). Under the Amendment’s Due Process Clause, individuals have a clearly established and fundamental right to personal security and bodily integrity. *Id.* at 1063; *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 13. “[I]t goes without saying that an individual’s ‘interest in preserving her life is one of constitutional dimension.’” *Kallstrom*, 134 F.3d at 1063, quoting *Nishiyama v. Dickson Cty.*, 814 F.2d 277, 280 (6th Cir. 1987) (en banc). Accordingly, where disclosure of personal information places an individual at substantial risk of serious bodily harm or death, “from a perceived likely threat,” such disclosure should be measured against strict scrutiny. *Craig*, 2012-Ohio-1999 at ¶ 14, quoting *Kallstrom*, 136 F.3d at 1064.³

Neither *Kallstrom* nor *Craig* had the same facts in this case; they concerned the disclosure of personal information contained within police officers’ personnel and other files. And a subsequent, divided panel from the Sixth Circuit emphasized the limits of *Kallstrom*’s holding in *Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007). Nevertheless, the fundamental right to personal security and bodily integrity comes not from the Sixth Circuit or this Court, but

³ Although the Department did not give constitutional grounds in denying Plunderbund’s request, it is not limited to the explanation it previously gave for denial, and it may rely on additional reasons or legal authority in defending a mandamus action. *See* R.C. 149.43(B)(3).

from the Fourteenth Amendment. It is against this backdrop that this Court should determine whether public disclosure of investigation records of threats made against the Governor infringes upon that interest.

As set forth below, ample expert evidence shows that public disclosure of the requested security records, even if redacted, would substantially increase the danger of harm and risks to the Governor's (and others') safety and personal security. Plunderbund, despite having been put on notice of the Department's constitutional defense (*see* Answer, ¶ 18; Motion for Judgment on the Pleadings, pp. 8-9), presents no evidence to the contrary. Under the unique circumstances of this case, the State has a compelling interest in protecting the Governor's safety and security that necessarily outweighs the public interest in accessing its government's records. Plunderbund has not shown that it has a clear legal right to the records, or that the Department has a clear legal duty to produce them.

A. Ample expert evidence shows that public disclosure of investigation records of threats made against the Governor substantially increases both his vulnerability to harm and the risks to his (and others') personal security and safety.

The Governor of Ohio, by virtue of his position, is uniquely vulnerable to harm. *Born Aff.*, ¶ 6; *Baron Aff.*, ¶ 9. The decisions the Governor makes and the actions he takes, sometimes unpopular or controversial, can affect millions in (and outside) Ohio. Accordingly, OSHP has an Executive Protection Unit to protect the Governor, as well as to provide security to other State elected officials, federal officials, foreign officials and dignitaries, the Capitol Square, and other state property and facilities. *Pride Aff.*, ¶ 4. Although the Governor has a security detail, he still faces significant threats and dangers to his personal security and safety. *Baron Aff.*, ¶ 13; *Kellum Aff.*, ¶ 11.

It is irrelevant that the requesting party itself poses no security threat to the Governor. “[D]isclosure of personal information, even to a benevolent organization posing no apparent threat to the safety of the officers or their families, increases the risk that the information will fall into the wrong hands.” *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 371, 725 N.E.2d 1144 (2000), citing *Kallstrom*, 136 F.3d at 1064. This is particularly so with Plunderbund, which provides an on-line media blog. Complaint, ¶ 2. Security information that Plunderbund receives could be posted on the internet and transmitted to millions of people, including terrorists and others who might use such information to try to harm the Governor or his family. Kellum Aff., ¶ 11.

Governor Kasich in particular presents a unique set of security circumstances, rendering security plans and details more vulnerable to compromise through public disclosure. Pride Aff., ¶ 8. Governor Kasich lives in his own residence, rather than the State-owned governor’s residence. Pride Aff., ¶ 8. He has a more hands-on leadership style relative to difficult and controversial public issues facing Ohio and, as a result, he is more vulnerable to potential harm. Kellum Aff., ¶ 6. He is more well-known nationally than other previous Ohio governors. Kellum Aff., ¶ 7. Because there are two locations where Governor Kasich resides or holds meetings and events, security details are more vulnerable to breach. Kellum Aff., ¶ 7. Further, Governor Kasich and his wife appear more in public and written media than previous Ohio governors, making threat assessments more difficult to analyze and investigate. Kellum Aff., ¶ 11.

Publicly releasing records of threat investigations against the Governor would reveal a picture of how the Governor travels, conducts meetings, schedules his day, and visits various in-state and out-of-state locations. Pride Aff., ¶ 10; Baron Aff., ¶ 11; Kellum Aff., ¶ 10. This in

turn would allow someone to figure out what types of threats OSHP deems credible and how it protects against such threats being born out. Kellum Aff., ¶ 12. Revealing a threat—even if insignificant or non-credible—may require OSHP to change its tactics, especially if the person making the threat changes his or her plan based on the disclosure. Kellum Aff., ¶ 11. Accordingly, those who are experienced and knowledgeable in protecting the Governor’s security believe that publicly disclosing investigation records of threats made against the Governor would substantially increase the risks to his personal security and safety, and to the safety and security of his family, staff, cabinet, the public (some of who attend public events with the Governor present), and those who are assigned to protect the Governor. Born Aff., ¶ 11; Pride Aff., ¶ 10, 11; Baron Aff., ¶ 11, 13, 19, Kellum Aff., ¶ 10-13.

B. Providing investigation records with the security information redacted is not sufficient because such disclosure still exposes security limitations and vulnerabilities.

The Governor’s constitutional interest in personal security is not adequately resolved by compelling the public disclosure of the demanded reports with redactions of personal information therein. As noted supra, the Records are not public records and are not subject to redaction. That said, public disclosure that reveals only limited or no threat information (such as providing wholly-redacted copies of all requested Records) still exposes security limitations and vulnerabilities. Born Aff., ¶ 8; Pride Aff., ¶ 10; Baron Aff., ¶ 11-13. Terrorists often use fragments of information from various sources to develop a complete picture of their intended target, including vulnerabilities and risk assessments. Baron Aff., ¶ 13. The content, number, or treatment of prior or current threats to the Governor, his family, and state buildings, offices, and facilities, contain information that, if disclosed, could be used to commit terrorism, intimidation, or violence. Baron Aff., ¶ 13.

Citing *State ex rel. Cincinnati Enquirer v. Craig*, Plunderbund argues the appropriate way to protect information in public documents from disclosure is through redaction, and it chides the Department for “scrupulously avoiding” that precedent. In *Craig*, however, it appears the City of Cincinnati *willingly* provided redacted copies of the requested records, including police officers’ personnel files. 2012-Ohio-1999 at ¶ 6-8. Nothing in the opinion indicates the city ever argued that the records should be withheld in their entirety from disclosure. Thus, the withhold-versus-redact issue was not before the *Craig* Court.

C. On balance, the requested records should be withheld.

The *Kallstrom* court assumed, and the Department believes, that the public’s interest in accessing its government records is generally compelling. 134 F.3d at 1065. An unlimited right of inspection, however, may lead to substantial and irreparable harm. *See Carlson v. Pima Cty.*, 687 P.2d 1242, 1245 (Ariz. 1984). And here, it is unclear how public disclosure of records concerning threats to a public official would provide a public benefit. Accordingly, the Court must consider the State’s countervailing interests. *Id.* The State has a compelling interest in protecting the safety and security of its public offices and publicly-elected officials—particularly its chief executive—from attack, intimidation, interference, threats, violence, and terrorism. That government interest is at least as strong as the public’s interest in disclosure, regardless of who is Governor.

As the evidence submitted in this case abundantly shows, public disclosure of threat investigation records, even with sensitive information redacted, poses a substantial and unacceptable risk to the Governor’s and others’ personal security. Born Aff., ¶ 9, 11; Pride Aff., ¶ 10-11; Baron Aff., ¶ 10-11, 13, 19; Kellum Aff., 10-14. In other words, investigation records

of threats against the Governor cannot be disclosed publicly without compromising essential security and safety. For this case, the balance tips toward withholding records.

Plunderbund has not shown that it has a clear legal right to receive, or that the Department has a clear legal duty to produce, the requested Records. Accordingly, Plunderbund's request for a writ of mandamus should be denied.

Respondent's Proposition of Law No. 3:

Even if Plunderbund prevails on its mandamus claim, it should not be awarded statutory damages or attorney fees. A well-informed public body reasonably would believe that the Department followed the law and that its conduct serves the public policy underlying the Department's authority.

Because its mandamus claim lacks merit, Plunderbund is not entitled to statutory damages or attorney fees. *See State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 34. But even if this Court finds that Plunderbund is entitled to mandamus relief, it should still deny Plunderbund's demands for statutory damages and attorney fees for the following reasons:

A. Plunderbund did not send its records request by hand-delivery or certified mail. Therefore, it is not entitled to statutory damages.

Under the Public Records Act, statutory damages may only be awarded if the relator had transmitted a written request by hand-delivery or certified mail. R.C. 149.43(C)(1). Plunderbund transmitted its request by email. Agreed Fact No. 1. Therefore, it is not entitled to statutory damages. *See State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 59; *State ex rel. DiFranco v. S. Euclid*, 8th Dist. No. 97823, 2012-Ohio-5158, ¶ 3.

B. Plunderbund is also not entitled to attorney fees. A well-informed public office would reasonably believe the Department’s conduct does not violate the Public Records Act and serves the public policy underlying the Department’s authority.

Attorney-fee awards under the Public Records Act are governed by R.C. 149.43(C). To recover discretionary attorney fees,⁴ the relator must show that the release of public records is more of a public benefit than a private benefit. *Dawson*, 2011-Ohio-6009 at ¶ 34; *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 31. “[E]ncouraging and promoting compliance with the Ohio Public Records Act and . . . subjecting the [respondent] to public exposure, review, and criticism” are not sufficient “because any and all public records requests would provide these minimal benefits.” *State ex rel. Petranek v. Cleveland*, 8th Dist. No. 98026, 2012-Ohio-2396, ¶ 8. Here, it is unclear how public disclosure of records concerning threats to a public official would provide a public benefit.

Further, under R.C. 149.43(C)(2)(c), a court may deny or reduce an award of attorney fees where a well-informed public office reasonably would believe that the respondent’s conduct (i.e. denial) (i) did not violate the Public Records Act, based on the ordinary application of statutory law and case law as it existed at the time of the conduct; and (ii) serves the public policy underlying the authority that is asserted as permitting that conduct. *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 34.⁵

In this case, a well-informed public office reasonably would believe that the Department’s withholding of threat investigation records (versus production of redacted records) did not violate the Public Records Act. R.C. 149.433 provides that a security record, which is any record that “contains information directly used for protecting or maintaining the security of a

⁴ Plunderbund does not seek mandatory attorney fees, which may be awarded only when the public office failed to (1) timely respond to a public records request or (2) fulfill a promise to permit inspection or deliver copies. R.C. 149.43(C)(2)(b).

⁵ The same criteria apply to awarding statutory damages. *See* R.C. 149.43(C)(1)(a)-(b).

public office against attack, interference, or sabotage” or is “assembled, prepared, or maintained to prevent, mitigate, or respond to acts of terrorism,” is not a public record and not subject to mandatory release and disclosure under the Public Records Act. The arguments set forth in the Department’s preceding propositions of law provide a reasonable basis for withholding the records from production. Also, the paucity of case law⁶ interpreting R.C. 149.433 further refutes Plunderbund’s contention that the Department acted unreasonably.

Also, a well-informed public office reasonably would believe that the Department’s action serves the public policy underlying its authority. The Department, through OSHP, is statutorily charged with protecting the Governor. R.C. 5503.02(E)(1). Withholding investigation records of threats made against the Governor from public disclosure is consistent with the security-policy rationale behind the statute, particularly where public disclosure could reveal security limitations and vulnerabilities. *See* Born Aff., ¶ 8; Pride Aff., ¶ 10; Baron Aff., ¶ 11-13.

Accordingly, Plunderbund is not entitled to attorney fees.

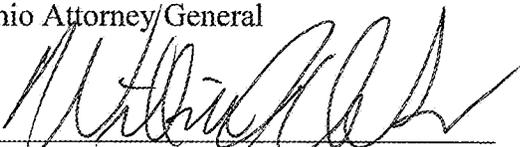
⁶ The Department found only two cases that even mention R.C. 149.433: *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, and *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504 (10th Dist.). *Data Trace* summarily indicates that the county fiscal officer had not established that master CDs that “document the daily procedure and operation of the recorder’s office of making backup copies of digital images of all instruments recorded every day on compact discs” were security records as defined in R.C. 149.433(A)(3). *State ex rel. Data Trace Info. Servs., L.L.C.* at ¶ 65. *Bardwell* denied a writ of mandamus for production of certain email records of the Ohio Attorney General’s Office, including one that contained a state trooper’s cell-phone number, and another email asking whether the Attorney General should attend an event, both of which were deemed to be security records under R.C. 149.433(A)(3)(a) or (B). *State ex rel. Bardwell* at ¶ 69, 70, 78.

CONCLUSION

For the foregoing reasons, Plunderbund's request for a writ of mandamus and additional relief should be denied.

Respectfully submitted:

MICHAEL DeWINE
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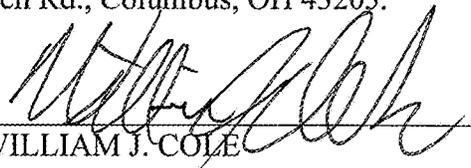
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by regular and electronic mail on October 3, 2013, upon Victoria E. Ullmann, 1135 Bryden Rd., Columbus, OH 43205.



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