

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.
PLUNDERBUND MEDIA, LLC.,

CASE NUMBER 2013-0596

Relator

v.

AN ORIGINAL ACTION

JOHN BORN
DIRECTOR, OHIO DEPARTMENT
OF PUBLIC SAFETY

Respondent

MERIT BRIEF OF RELATOR PLUNDERBUND MEDIA, LLC

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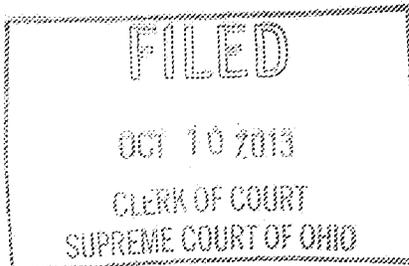


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I. Introduction

The Department of Public Safety is attempting to invalidate over 20 years of legal precedent regarding public availability of standard and routine records generated by law enforcement, including incident reports. They are struggling to create a undefined new exception to the record production requirements of R.C. 149.43 by using an unsupported and incredibly overbroad reading of the word "security" in R.C. 149.433. This sweeping reading of R.C. 149.433 has never been attempted in the 11 years of its existence and is plain and simply a fiat of this administration to gut the public records act. This Court has long held that any exception to R.C. 149.43 is to be read narrowly to promote disclosure. Allowing any government agency or any administration to manufacture huge exemptions to R.C. 149.43 with this kind of sweeping reading would gut the law, along with it the 1st Amendment rights of the press to gain access to government information.

The administration also attempts a peculiar argument that the redaction requirements that this Court has established for threats against police officers or other public employees who are private citizens should be expanded in the case of super important public figures. They argue that John Kasich is so famous and important he deserves more privacy rights than private citizens, despite the fact that there is not a shred of support for this argument. They argue that mere redaction is insufficient for the famous and they should be permitted to hide virtually any documents they want in their entirety. No court has ever held that higher level elected officials, all of whom are more famous than most people, have more privacy rights than most citizens. In fact the rule is that elected officials have reduced rights to privacy. The rule of law cuts against special privilege to be applied to certain elected officials and this would lead to completely arbitrary and capricious application of R.C. 149.43.

II. Factual materials presented

As discussed in relator's Motion to Strike, the affidavits presented by the Highway Patrol contain little in the way of actual factual materials beyond some credential information for the officers. Most of the material being presented as alleged expert opinion is without proper foundation or constitutes factual allegations that have no bearing on the issues presented here. They argue in these affidavits that John Kasich is the most famous governor ever. This opinion is not germane to this case as the document production requirements of R.C. 149.43 have no relationship whatsoever to the fame of any particular officer holder. That is the stuff of dictatorship not democracy. In the eyes of the law all governors of Ohio are equal, and none are more equal than others. The Public Documents Act should never be simply suspended for an office holder who thinks he is more important and special than his predecessors.

The second argument made in the affidavits is that the word "office" means a person. Maybe it does to the affiants but not in the Revised Code or normal usage which is the basis for normal statutory interpretation.

The third primary argument made in these affidavits is that revealing any material in the ever growing pile of alleged security documents, that were not even part of this document request, will somehow allow terrorists to get myriad types of secret information which they can use in attacks. This simply is not credible and the state presents no even hypothetical situation to support this. These affidavits are also disingenuous in trying to confuse these sorts of incident reports with top secret terrorism investigations. By no means does every threat constitute a terrorist threat and those are limited. These affidavits present no relevant probative or useful information for this Court.

Of course affidavits should be limited to factual materials and the affidavits presented by the agency contain little in the way of facts. These affidavits demonstrate that the refusal to produce these documents is completely arbitrary and not the response of a reasonable public servant. Mismas's request was for standard incident reports and public documents related to them. These affidavits are being presenting only to confuse and cloud the issues here.

III. Argument

In its brief and affidavits, the state relies on slippery slopes and straw men in an attempt to obfuscate the actual issues presented by this litigation. Mismas requested the standard documents involved in making state incident reports. But because, frankly, there is simply no defense for their failure to provide the documents, Public Safety argues against producing documents that were not even requested by Plunderbund. They ignore long standing holdings of this Court regarding the production of routine incident reports and other documents created by state employees and officials. They convolute the documents request in an awkward attempt to fit it into R.C. 149.433, which simply has nothing to do with the request here. They torture the redaction and privacy holdings into an unrecognizable jumble. This was a simple document request based upon established law.

Proposition of Law I: The Public Records Act should be construed liberally in favor of broad public access and any doubt should be resolved in favor of disclosure of public records

A. This Court has long held that it does not issue advisory opinions on the status of documents that were not part of the request in issue.

This Court does not issue advisory opinions and will issue rulings in public documents cases only with regard to the records requested. *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio- 3807 This *Plain Dealer* case dealt with police

photographs and this Court would not consider any other type of police records that were not part of the request. Here, Public Safety is all over the map, with a parade of horrors and fantasized documents that were never part of this request. This is part of the transparent scare tactics the agency has been using to stir the terrorism pot, whether or not any actual terrorism has anything to do with this. This request only involves the incident reports and related documents of threats against the governor and nothing more. It has nothing to do with infrastructure and computer security that is purpose of R.C. 149.433. Mismas never requested security information, such as security deployment information, much of which will never be reduced to written form anyway. He requested the standard incident report materials that are generated for any incident occurring on state property and standard interoffice materials found in the Department of Public Safety, and other state agencies. Public Safety is apparently basing its entire argument on records that were not actually what was requested.

Until the agency produces these documents in the request *in camera*, there is no proof that the documents they are hiding are anything more than the incident reports they are obligated to produce.

B. If a record is a public document at its creation, it can never lose that status.

If documents are public documents at their creation, moving them to a different file or using them for some confidential or even security purposes, does not change the documents status as a public record.

As this Court has observed with regard to 911 tapes, once a document is a public document, its character does not change depending upon how it is later used:

The 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. Obviously, at the time the tapes 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. Thus, any inquiry as to the release of records should have been immediately at an end, and the tapes should have been, and should now and henceforth always be, released. The particular content of the 911 tapes is irrelevant. Once clothed with the public records cloak, the records cannot be defrocked of their status. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374.

This Court has also held that deleted emails remain public records. “As long as these e-mails are on the hard drives of the commissioners’ computers, they do not lose their status as public records.” *State ex rel. Dispatch Printing Co. v. Columbus* (2000), 90 Ohio St.3d 39, 41, 734 N.E.2d 797 (“so long as a public record is kept by a government agency, it can never lose its status as a public record”).

If a threat comes into state offices as a letter or email, they are public documents just like any letter or email sent to a government official or to an agency office. If the threat is made by phone, the memorandum of the phone call by the employee that answered the phone will always be a public record. And just like the 911 calls discussed above, these are public documents and regardless of what they may be used for, their character does not change. Even if the materials may expose a witness to danger, this has no significance in the determination of whether it is a public document. *Id.*

Proposition of Law II: ODPS must provide the records Plunderbund Media, LLC requested because ODPS cannot meet its burden of showing the records fall within an enumerated exception.

A. Threats against the governor that are handled by the Highway Patrol are standard state law matters that begin with a routine incident report not an independent type of security document.

The request here was for routine incident reports and the standard documents that accompany those.¹ As this Court has held in *State ex rel. Rasul-Bey v. Onunwor* (2002), 94 Ohio St.3d 119:

we held that “[r]outine offense and incident reports are subject to immediate release upon request” and that “[i]f release is refused, an action in mandamus, pursuant to R.C. 149.43(C), will lie to secure release of the records.” We recently reaffirmed *Steckman* by holding that a police incident report form, which incorporated attached narrative statements by witnesses and law enforcement officers, was a public record that must be released under the Ohio Public Records Act, R.C. 149.43, immediately upon request. *State ex rel. Beacon Journal Publishing Co. v. Maurer* (2001), 91 Ohio St.3d 54, 57, 741 N.E.2d 511, 514. Offense and incident reports initiate criminal investigations but are not part of the investigation, and they are not exempt from disclosure under R.C. 149.43. *Id.* at 56-57, 741 N.E.2d at 514, citing *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374, 378, 662 N.E.2d 334, 337; and *State ex rel. Logan Daily News v. Jones* (1997), 78 Ohio St.3d 322, 323, 677 N.E.2d 1195, 1196.

The documents requested here fall directly within this category and no reasonable state official would deny any and all access to these documents. These incident reports remain public documents even if a confidential investigation is later instituted or if security measures are later considered necessary.² This agency refused to even provide copies of the incident report files that were closed without any action being taken at all.

Neither does the fact that these matters involve threats against a government official change the character of these documents from other than standard state law criminal or tortious conduct. The term “threat” can be used in many ways, from the threat of bringing a lawsuit, the threat to peacefully assemble at the Statehouse in protest, the angry threat to take unspecified

¹ The state appears to be arguing that any threat against such an important man as this famous governor is not routine. Counsel for relator worked for the state for 8 years. Threats of various types are not uncommon in state government and a standard incident report would be generated to document it or sometimes even just a note or memo. It will also be subject of office gossip, not a secret. If it is a bomb threat then everyone knows if the building is evacuated. The state’s position here makes no sense at all.

² These reports can be quite lengthy. Counsel has obtained one from the Patrol regarding a murder on state property that was at least 500 pages. They provided this even though the event itself was not routine because creating the report when any incident occurs is standard operating procedure.

action and the very rare actual terrorist threat from a bona fide terrorist. Since the Department of Public Safety has failed to issue any rules or policies regarding R.C. 149.433, it is impossible to ascertain what sort of threats they are alleging trigger the super top secret security designation. They simply refuse to provide anything at all. Any threat, even the most incredible or frivolous, or potentially merely political, can trigger this cloak and dagger response according to the state's arguments. They refuse to produce a single document of what are basic incident report files, that this Court has long held must be provided. This is a very dangerous attitude indeed. These documents are incident reports that must be produced and the attitude demonstrated by the agency here shows the danger of changing the rules arbitrarily.

Public Safety's argument is designed to produce the impression that all threats against John Kasich are terrorist threats and that the federal government and even Interpol are involved with writing a basic incident report, so this warrants a blanket exemption to R.C. 149.43. R.C. 2909.23 is the state law that prohibits making terrorist threats and prosecution would be in state court as any other state law. Nothing in that section states police incident reports regarding terrorist threats are not public record. In order to exempt a type of incident reports, which are indisputably public records, there must be a specific, clear and unambiguous exemption written explicitly into the law. R.C. 149.433 contains no exemption for basic incident reports. It cannot be used to hide these public documents. There is no basis for agency's refusal to respond to this very simple request.

C. Public Safety is bound to follow the law regarding redaction.

Public Safety cannot dodge the redaction requirement by arguing that they are only required to redact public documents and R.C. 149.433 says security records are not public records. This argument is simply frivolous. Redaction "means obscuring or deleting any

information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "**record**" in section 149.011 of the Revised Code, R.C. 149.43(11). (Emphasis added) "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. R.C. 149.011. Security records pursuant to R.C. 149.433 are records. There is no colorable argument that Public Safety is not obligated to redact information from records if that can be done to remove exempt information. But the documents here are public documents anyway.

Proposition of Law III. : Public officials have no right to privacy that would allow concealment of the records requested by Plunderbund here.

B. Providing these incident reports does not endanger anyone and no privacy interest is involved.

Public Safety's privacy argument fails to present any basis for exempting these public incident reports. They have not shown that a single item that this court has determined is entitled to privacy protection would be included in these reports, because there simply would be none. All Public Safety presents is unsupported conjecture. All records that they are trying to hide are records documenting government activity. They have presented no reasonable argument for what is a massive expansion of the law that is only tenuously related to the precedents of this Court in the privacy area.

All these bald allegations of exposure to danger, that is likely nonexistent, should be disregarded in its totality unless Public Safety produces the documents *in camera* and

demonstrates it is true. Since the respondents are refusing to produce the documents in question and will not even describe the documents in any understandable way, the only way this court will be able to determine if the refusal is reasonable is to review the documents that are responsive to Mismas request.

Public Safety's argument that giving redacted documents, even RIMS sheets that are so thoroughly redacted that all Mismas can see is how many threats were made, reveals vulnerabilities is the most disingenuous statement counsel has seen in 36 years of practice. That cannot possibly be true. Most threats have nothing to do with vulnerabilities anyway. They have to do with the person making them having issues. Incident reports of any threats, if they exist, they will not contain top secret information.³

Proposition of Law IV: Public Safety's justifications for refusal to provide these public documents are so contorted and disingenuous that they cannot be viewed as evidence of reasonableness which allows an officeholder to avoid the payment of attorney's fees.

It is premature to be discussing the availability of attorney's fees until the Court rules on the relator's pending motions to strike and for an *in camera* review of the documents. Both those issues will weigh on determination of reasonableness of the agency's actions here. As far as the award of \$1,000 in damages, the agency has waived any argument that certified mail of the request is required since they conducted an extensive discussion with Mismas and counsel by email.

³ Let's say the governor's office receives a letter or phone call that states a person is going to walk or drive into the Riffe or Statehouse garage and leave a bomb there to injure the governor. That document reveals no secret vulnerabilities. Every time counsel comes to the Court the Riffe Tower garage is visibly wide open for anyone to enter. An incident report regarding this letter will consist of the letter and the envelope, the date received, who opened it, condition of the letter when received. Maybe they will ask people if they saw any furtive strangers in the building. Maybe the report will indicate a search was conducted or the building evacuated. Both of these events will be well known and visible to many people. These will all be public documents. Until the agency produces actual evidence, as opposed to wild and unsupported conjecture, this argument needs to be wholly disregarded.

That said, the agency even at this point cannot argue that their position is reasonable. Their argument on redaction is completely without support. The department has presented no evidence whatsoever that the documents are anything more than the incident reports and accompanying documents that this court has repeatedly found to be public records permanently regardless of how they may be later used. Nothing in the statutory law as it exists now changes incident reports to security records or says any documents regarding threats of terrorism pursuant to R. C. 2909.23 are exempt from R.C. 149.43.

The Department of Public Safety has issued no rules or policies regarding R.C. 149.433 in eleven years and now they attempt to apply this section whimsically using broad irrational statements and undefined concepts to conceal public documents. They brandish the bugaboo of terrorism despite the fact that few threats fall into this category. The standard rules that this Court has developed to deal with government and law enforcement incident and investigation reports apply here as they would in any other law enforcement context. Public Safety's arguments have been manufactured of whole cloth and cannot be viewed as a reasonable response of well-informed government actors.

These arguments need to be seen for what they are, unsupported machinations posed for the sole purpose of harassing and exhausting the relator and needlessly increasing the cost of litigation. Positions taken by the agency regarding the status of incident reports and requirement to redact have no support whatsoever under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law. R.C. 149.433 has never been litigated, it's true. However, attempting to use it to hide the fact that the documents in question are nothing more than documents that are indisputably public documents is bad faith. It is not legitimate

legal creativity. When the court orders the production of the documents that were actually requested by Mismas, it will be obvious that factual contentions made by the agency have no evidentiary support. See R.C 2323.51. Attorney's fees are warranted here for a variety of reasons.

CONCLUSION

The agency's position here is completely without merit and the Court should order immediate production of these documents, award costs, damages and attorney's fees.

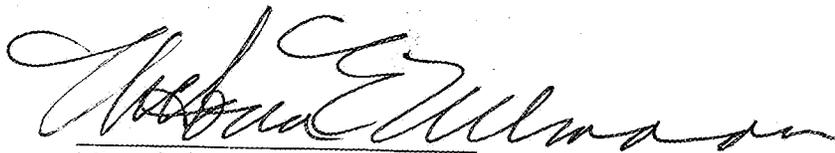
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply brief was served on attorneys for John Born by e mail on date of filing.



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