

ORIGINAL

IN THE SUPREME COURT OF OHIO

J&C MARKETING, LLC, ET AL.,

Appellee,

vs.

TIMOTHY J. MCGINTY, CUYAHOGA
COUNTY PROSECUTOR,

Appellant.

Case No. **13-1963**

On Appeal from the
Cuyahoga County Court of Appeals
Eighth Judicial District

Court of Appeals Case No. 13 CA 99676

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR**

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Date-stamped copy of the Journal Entry and Opinion of the
Cuyahoga County Court of Appeals (October 31, 2013)

**EXPLANATION OF WHY THIS CASE IS A
CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The fundamental issue this case presents is whether information generated during the course of an undercover criminal investigation, including information identifying the subjects of the investigation, the law enforcement officers conducting the investigation, informants and cooperating witnesses, and the facts and evidence gathered, must be revealed to the very targets of the investigation, prior to indictment, just because they filed a *civil* lawsuit as clever means to seek *civil* discovery, fish for any evidence that law enforcement may have against them, and potentially forestall future criminal charges.

The decision of the Eighth District Court of Appeals in this case establishes for the first time that prospective criminal defendants may preemptively disrupt a criminal investigation by becoming civil plaintiffs ostensibly seeking a declaratory judgment. The fact that the undercover criminal investigation was *open* and *ongoing* was apparently insufficient reason, according to this decision, to prevent the premature disclosure of confidential information that is protected by the law enforcement investigatory privilege, the attorney work-product privilege, and the deliberative process privilege. Undercover criminal investigations cannot be conducted effectively if the confidential information and evidence gathered must be revealed prematurely. And they assuredly cannot be effective if the information must be revealed to the very targets of the investigation. Yet the Eighth District's decision in this case stands as an open invitation for this mischievous misuse of civil proceedings.

This decision should be reviewed because permitting such discovery would irreparably compromise the integrity of undercover criminal investigations. Requiring law enforcement to tip its hand prematurely will not serve the public interest but rather will only serve to educate the subjects of the investigation as to what information law enforcement does and does not have.

Moreover, the practical effect of this decision will require law enforcement officers to shift their resources away from investigating criminal activity and re-direct their resources to responding to civil discovery requests designed to disrupt an open and ongoing undercover criminal investigation. Beyond that, the use of the civil law to effectively obtain criminal discovery without regard to the Ohio Rules of Criminal Procedure presents a separate set of issues warranting further consideration.

While the Court of Appeals attempted to provide some protection by ordering the redaction of the investigating officers' names, that would not necessarily protect their *identity*, which may otherwise be revealed by surveillance video or other information that would tend to identify at least the identity used by the officer, regardless of whether it is the officer's true identity. In any case, no amount of redaction will can minimize the pernicious mischief that this case will cause unless it is reviewed by this Court.

For the reasons that follow, Appellant Timothy J. McGinty, Cuyahoga County Prosecutor, respectfully requests that this case be accepted for review.

STATEMENT OF THE CASE AND FACTS

In early 2012, law enforcement officers from several different agencies conducted an undercover criminal investigation in Cuyahoga County into numerous establishments that were attempting to conceal illegal gambling activities by presenting their gaming activities as supposed "sweepstakes." For a price, usually \$20.00, a customer would purchase Internet-usage time or long-distance pre-paid telephone cards in order to receive "credits" that would enable the customer to sign onto a computer terminal programmed to simulate a video slot machine, load the customer's credits into the computer, and begin playing games of chance in a casino-like environment. Depending on the player's luck, the player could win more credits that could then be redeemed for cash or more gambling time. In the course of conducting their undercover criminal investigation, law enforcement officers prepared reports summarizing the details of their investigation, including the identities of the officers conducting the investigation, the identities of the mini-casinos visited, the techniques and procedures used to conduct the investigation, the identities of persons providing information, and other information pertinent to the investigation.

On May 30, 2012, a Cuyahoga County grand jury indicted ten (10) individuals and seven (7) companies in a 70-count indictment for operating, or working in close cooperation with, the owners of an intricate internet gambling system known as "VS2." In an exercise of prosecutorial discretion, former Prosecuting Attorney William D. Mason decided not to seek indictments against the many other establishments that were engaged in similar activities but did not utilize the VS2 system. He instead elected to send those other establishments cautionary cease-and-desist letters indicating that the establishment had been identified as operating a sweepstakes gaming system and that gambling, even under the guise of a sweepstakes café, was illegal under Ohio law. The letters cautioned the recipients that if illegal gambling activities did not

discontinue voluntarily, then the pertinent facts would be presented to a grand jury for criminal prosecution and forfeiture.

Five (5) days later, plaintiff/appellee J & C Marketing, LLC, which operated establishments that did not utilize the VS2 system and received a cease-and-desist letter, filed the underlying civil action for declaratory and injunctive relief against then-defendant Mason.¹ In the days and weeks that followed, approximately thirty (30) more mini-casinos that had received cease-and-desist letters – including some that had started using the VS2 system but had not been indicted – moved to intervene in the underlying civil case. The trial court issued a series of temporary restraining orders in which the court made preliminary “findings” that the plaintiffs were sweepstakes establishments operating pursuant to Ohio law and that their business activity was not gambling and was not prohibited by Ohio law.

On June 28, 2012, the Prosecuting Attorney sought a protective order to prohibit discovery that would divulge the substance of the undercover criminal investigation. On July 2, 2012, the trial court denied that motion, declaring that it would not grant a comprehensive protection order and directing the parties to answer all discovery requests, noting and memorializing objections to those requests that the party reasonably believed were subject to a protective order.

The Prosecuting Attorney ultimately had to object to the vast majority of the propounded discovery requests because they sought privileged information concerning the open and ongoing undercover criminal investigation. Following motions to compel filed on behalf of several mini-casinos, the Prosecuting Attorney opposed those motions on January 16, 2013, reiterating its objections based on the confidential law enforcement investigatory privilege; the attorney work-

¹ After Appellant McGinty succeeded Mr. Mason as Prosecuting Attorney, he was substituted as the defendant pursuant to Ohio Civil Rule 25(D)(1).

product privilege; and the deliberative process privilege. The Prosecuting Attorney contemporaneously renewed his motion for a protective order.

Following submission to the trial court under seal of all known records pertaining to the undercover criminal investigation possessed by the Prosecuting Attorney, the trial court reviewed them *in camera* and thereafter sustained the Prosecuting Attorney's objections as to certain discovery requests but overruled every objection pertaining to the investigating officers' field reports that described in detail the facts and circumstances of their undercover criminal investigation, including the identities of the investigating officers, the individuals providing information, and the precise manner in which the investigation was conducted. See Bates stamp numbers CIV0001-CIV0307. The trial court additionally ordered the disclosure of a series of documents reflecting communications between the lead criminal investigator and the lead assistant prosecuting attorney as they were preparing cases for criminal prosecution. With regard to information sought by interrogatory requests, the trial court ordered the Prosecuting Attorney to answer a series of such requests that would again require him to disclose facts and information about the undercover criminal investigation, even as cases were being investigated and readied for grand jury presentation. The trial court did not provide any explanation for any of its rulings.

On interlocutory appeal pursuant to R.C. 2505.02(B)(4) (in which appellee J&C Marketing, LLC, was the only plaintiff participating as an appellee), the Eighth District Court of Appeals affirmed the trial court's order for the Prosecuting Attorney to produce the undercover investigators' field reports, albeit subject redacting the names of the undercover officers. The Court of Appeals thus sanctioned the release of the details of the open and ongoing undercover criminal investigation to the very targets of the investigation.

Appellant respectfully submits that the Eighth District's decision in this case is contrary to law and merits discretionary review by this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

APPELLANT'S PROPOSITION OF LAW NO. 1:

Records and information generated during the course of an open and ongoing undercover criminal investigation are not subject to disclosure based on the law enforcement investigatory privilege.

The Eighth District decision requiring that Appellant disclose records and information pertaining to an open and ongoing undercover criminal investigation of illegal gambling would require the Prosecuting Attorney to disclose matters that are protected by the law enforcement investigatory privilege. The appellee failed to make any showing sufficient to overcome this privilege, yet the Court of Appeals ordered the disclosure of records and information that would effectively compromise the undercover criminal investigation. Because the Court of Appeals' decision failed to give due regard to the interests implicated and instead ordered the disclosure of privileged information, that decision should be reversed.

The law enforcement investigatory privilege is a qualified common law privilege that protects civil as well as criminal law enforcement investigatory files from civil discovery. *See Davis v. Carmel Clay Schools*, 282 F.R.D. 201, 205 (S.D.Ind.2012); *Jones v. City of Indianapolis*, 216 F.R.D. 440, 443 (S.D.Ind.2003). In *In re Dep't. of Investigation of the City of New York*, 856 F.2d 481 (2nd Cir.1988), the Second Circuit Court of Appeals explained:

The purpose of [the law enforcement] privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.

Id. at 484.

The privilege is “rooted in common sense as well as common law,” for “law enforcement operations cannot be effective if conducted in full public view and the public has an interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources.” *Commonwealth of Puerto Rico v. U.S.*, 490 F.3d 50, 62-63 (1st Cir.2007), quoting *Black v. Sheraton Corp.*, 564 F.2d 531 (D.C.Cir.1977). *See also U.S. v. Cintolo*, 818 F.2d 980, 1002 (1st Cir.1987) (“[D]iscoverability of this kind of information will enable criminals to frustrate future government surveillance and perhaps unduly jeopardize the security of ongoing investigations.”) “An investigation need not be ongoing for the law enforcement privilege to apply as the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information is revealed.” *Aguillar v. Immigration and Customs Enforcement Div. of the U.S.*, 259 F.R.D. 51, 56 (S.D.N.Y.2009), quoting *Nat’l Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 88, 95 (S.D.N.Y.2000). *See also In re The City of New York*, 607 F.3d 923, 944 (2nd Cir.2010).

“Both Federal and State courts have recognized the qualified privilege for law enforcement investigatory information.” *In re Marriage of Daniels*, 240 Ill.App.3d 314, 330, 607 N.E.2d 1255 (1992), citing cases. *See also Ohio Bur. of Workers’ Compensation v. MDL Active Duration Fund, Ltd.*, S.D. Ohio No. 2:05-CV-0673, 2006 WL 3311514 (Nov. 13, 2006) at * 3 (confidential law enforcement privilege “has been recognized in both state and federal courts.”) In *Henneman v. City of Toledo*, 35 Ohio St.3d 241, 520 N.E.2d 207 (1988), the Supreme Court of Ohio recognized that law enforcement investigatory records, though not absolutely privileged, may be subject to a qualified privileged from civil discovery, particularly in an ongoing criminal investigation. *Id.* at 243, 520 N.E.2d 207, citing *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D.Pa.1973).

Only a compelling need for the privileged materials can override the privilege. *See In re City of New York*, 607 F.3d 923, 945 (2nd Cir.2010). The courts have recognized, moreover, that there is a strong legal presumption against lifting this privilege. In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir.1997), the court stated:

It seems to us, however, and not only to us, that there ought to be a pretty strong presumption against lifting the privilege. *Black v. Sheraton Corp.*, 564 F.2d 531, 545-547 (D.C.Cir.1977). Otherwise the courts will be thrust too deeply into the criminal investigative process. Unlike France, Italy, and other European countries in which judicial officers control the investigation of crimes, the United States places the control of such investigations firmly in the executive branch, subject only to such limited judicial intervention as may be necessary to secure constitutional and other recognized legal rights of suspects and defendants. The plaintiffs in these civil suits, who are seeking to obtain material from the government's criminal investigation, are not criminal suspects or defendants. Thus they have no definite legal right to the fruits of the FBI's investigative endeavors conducted in confidence; and it seems to us that neither should they have a right to force the government to tip its hand to criminal suspects and defendants by disclosing the fruits of the surreptitious (but presumably lawful) surveillance that the FBI conducted.

Id. at 1125. Confirming that there should be a “strong presumption against lifting the privilege,” the Second Circuit Court of Appeals similarly declared: “Determining that law enforcement materials are subject to disclosure *** intrudes into the province of the executive branch of federal, state, or local governments. We do not take making such an intrusion lightly.” *In re The City of New York*, 607 F.3d 923, 945, fn. 22 (2nd Cir.2010).

To rebut the presumption against lifting the privilege, the party seeking disclosure must show that (1) its suit is non-frivolous and brought in good faith; (2) the information sought is not available through other discovery or from other sources; and (3) it has a compelling need for the information. *See In re City of New York*, 607 F.3d 923, 945 (2nd Cir.2010).

In the instant case, the plaintiffs' discovery requests, and the trial court orders directing Appellant to answer them, would have required the disclosure of law enforcement techniques and procedures used to conduct this undercover criminal investigation. Disclosing such information would necessarily compromise the undercover nature of the investigation and confidentiality of sources, expose the identity of witness and law enforcement personnel, eviscerate the privacy of individuals involved in the investigation, and cause irreparable damage to the investigation. Appellant would have to reveal the identity of law enforcement personnel who conducted the investigation, the identity of anyone who provided information during the course of the investigation, the status of the investigation, and more. The interrogatories additionally asked the Appellant to disclose details concerning the investigating officers' investigatory techniques and procedures, including the subjects of the investigation, specific dates and times, and the identification of persons or entities who may have been contacted and/or furnished information during the course of the investigation. The document requests likewise sought confidential law enforcement investigatory reports generated during the course of this undercover criminal investigation.

The information sought by these discovery requests is precisely the kind of information that the law enforcement investigatory privilege was intended to protect – namely, an ongoing undercover criminal investigation and the specific techniques and procedures utilized during the course of that investigation. The Appellant received copies of investigatory reports conducted in the field by law enforcement officers, which were reviewed in connection with this undercover investigation and shared with the relevant criminal division prosecutors. The undercover criminal investigation had not concluded and was ongoing. The discovery sought thus met all of the criteria necessary for protection under the law enforcement investigatory privilege.

With the privilege indisputably applicable, the plaintiffs below bore the heavy burden of establishing an overriding need to interfere with this investigation by requiring its premature disclosure. They made no such showing. Indeed, they surely knew as well as anyone how their businesses supposedly operated. The mere fact that they filed a civil lawsuit in a preemptive attempt to prevent or at least interfere with any future law enforcement action did not entitle them to compromise the investigation by demanding its premature disclosure, particularly when no action had been taken against them beyond cautioning them through the May 30, 2012 cease-and-desist letters that unless illegal gambling operations were voluntarily discontinued, future law enforcement action would follow.

Any supposed “need” the plaintiffs had for this discovery was solely on account of their having filed the underlying civil lawsuit. If that were sufficient reason to require law enforcement to divulge the contents of undercover criminal investigations, then no investigation would be safe and would be open to scrutiny merely upon the filing of a civil lawsuit. Nothing in law or logic permits such an improper and ill-considered intrusion into criminal law enforcement.

For its part, the Court of Appeals mistakenly applied Ohio’s public records act, R.C. 149.43, to resolve this issue. In particular, the Court of Appeals looked to the definition of “confidential law enforcement investigatory record” under R.C. 149.43(A)(2). Despite the similarity of terms, the “law enforcement investigatory privilege” invoked by Appellant in this case – a qualified privilege developed through the common law – is analytically distinct from the statutory exemption for “confidential law enforcement investigatory records” that may be applicable in response to requests for public records. The Court of Appeals’ reference to Ohio’s public records act seemingly confuses these two (2) significantly different legal authorities.

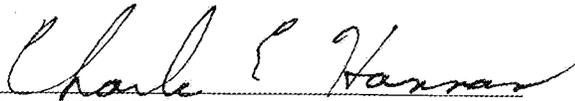
The decision by the Eighth District Court of Appeals failed to give due weight to the paramount governmental interest in preserving the integrity of an open and ongoing undercover criminal investigation. Because the information sought is protected by the law enforcement investigatory privilege, Appellant respectfully urges this Court to accept this case for review in order to address the important issues this case presents.

CONCLUSION

For the reasons set forth, appellant Timothy J. McGinty, Cuyahoga County Prosecutor, respectfully requests that the Court accept jurisdiction over this case.

Respectfully submitted,

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PROOF OF SERVICE

A true copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Timothy J. McGinty, Cuyahoga County Prosecutor was served this 13TH day of December 2013 by regular U.S. Mail, postage prepaid, upon:

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APPENDIX

OCT 31 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99676

J&C MARKETING, L.L.C.

PLAINTIFF-APPELLEE

VS.

**TIMOTHY J. McGINTY,
CUYAHOGA COUNTY PROSECUTOR**

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-784234 and CV-785188

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: October 31, 2013



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FILED AND JOURNALIZED
PER APP.R. 22(C)

OCT 31 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By SMH Deputy

EILEEN A. GALLAGHER, P.J.:

{¶1} Appellant Timothy J. McGinty, Cuyahoga County Prosecutor, appeals from the decision of the Cuyahoga County Court of Common Pleas that ordered the prosecutor's office to turn over certain materials and answer interrogatories in a declaratory judgment action. For the following reasons, we affirm, in part, and reverse, in part, and remand.

{¶2} This interlocutory appeal is taken from a declaratory judgment action brought by numerous businesses operating internet sweepstakes cafés within Cuyahoga County. Appellee J&C Marketing, L.L.C. is one such party who owns internet sweepstakes cafés within the county. Appellee, among others, received a cease and desist letter from the Cuyahoga County prosecutor on May 30, 2012, asserting that such cafés were operating in violation of several Ohio gambling laws, including R.C. 2915.02, 2915.03 and 2915.04. The letter directed the businesses to cease operation and threatened criminal prosecution for failing to comply.

{¶3} On June 4, 2012, appellee filed a declaratory judgment action against the prosecutor seeking a declaration that internet sweepstakes cafés are not subject to prosecution under R.C. Chapter 2915 et seq., and further seeking

temporary, preliminary and permanent injunctive relief.¹

{¶4} The question presently before this court is not the legality of internet sweepstakes cafés in Cuyahoga County. Recently in *Cleveland v. Thorne*, 8th Dist. Cuyahoga Nos. 98365, 98474, 98503, 98695, 98696, and 98697, 2013-Ohio-1029, 987 N.E.2d 731, this court upheld the convictions of certain proprietors of “cyber cafés” or “internet cafés” for sweepstakes ventures that this court found to constitute gambling in violation of Cleveland Codified Ordinances (“CCO”) 611.02(a)(2), 611.05 (operating a gambling house) and 625.08 (possession of criminal tools).

{¶5} Our role in the present appeal is not to judge the outcome of this case. Instead we are faced with a unique discovery dispute. The principal question posed by this appeal is the extent to which information and records compiled by law enforcement and a county prosecutor’s office are subject to discovery in a civil action. We are mindful of the sweeping implications of this case. The prosecutor asserts that appellee and other targets of the internet sweepstakes cafés possess a mischievous purpose in bringing the present declaratory judgment action. From the prosecutor’s point of view, this action is merely a thinly veiled attempt by targets of an ongoing criminal investigation

¹Numerous other internet sweepstakes café businesses operating within Cuyahoga County intervened as plaintiffs in appellee’s declaratory judgment action.

to preemptively obtain, through civil discovery, investigatory materials compiled by law enforcement and internal discussions of the prosecutor's office towards the purpose of stymying such investigation and hampering any criminal prosecution. Appellee asserts that pursuant to *Peltz v. S. Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967), a declaratory judgment action is the appropriate vehicle for testing the application of Ohio's gambling laws to its business and that the requested discovery of appellant's investigatory results is necessary to proceed with this civil action.

{¶6} Appellee and other sweepstakes cafés who have joined in this action have sought, through discovery, materials relating to the ongoing law enforcement investigation against the internet sweepstakes cafés in Cuyahoga County including investigative reports compiled by undercover police officers, email exchanges between the prosecutor's office and lead investigators and the identities of parties involved in the investigation, including experts.

{¶7} Appellant objected to such discovery and, in his three assignments of error, asserts that the trial court erred in ordering him to produce certain materials and answer certain interrogatories. Appellant argues that the trial court's discovery order violates the law enforcement investigatory privilege, the attorney work-product doctrine and the deliberative-process privilege. Because appellant's three assignments of error each apply in varying and overlapping parts to the discovery sought, we address them together for ease of discussion.

{¶8} Civ.R. 26(B) provides that parties may obtain discovery on any unprivileged matter that is relevant to the subject matter involved in the pending action. Although the information sought need not itself be admissible at trial, it should appear “reasonably calculated to lead to the discovery of admissible evidence.”

{¶9} Prior to delving into the specific discovery materials sought, we must appropriately define the law enforcement investigatory privilege, the attorney work-product doctrine and the deliberative-process privilege within the context of this unique case. We note that when a discovery issue involves an alleged privilege, it is a question of law that we review de novo. *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 13.

I. The Law Enforcement Investigatory Privilege

{¶10} The prosecutor contends that discovery of nearly all of the contested material is protected by the law enforcement investigatory privilege. The prosecutor primarily relies upon cases establishing the law enforcement investigatory privilege under federal law and laws of other states. We find reliance on these cases unnecessary. To understand this privilege under Ohio law, we must first consider R.C. 149.43 that, although not applicable in the present instance, provides important context to our understanding of the claimed privilege.

{¶11} R.C. 149.43 excludes confidential law enforcement investigatory

records from the definition of "public records" that must be made available for inspection. R.C. 149.43(A)(2) provides:

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

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

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

{¶12} Although records that qualify as confidential law enforcement investigatory records under R.C. 149.43(A)(2) are not subject to public disclosure pursuant to the statute, the Ohio Supreme Court, in *Henneman v. Toledo*, 35 Ohio St.3d 241, 520 N.E.2d 207 (1988), held that R.C. 149.43 operates only to exempt confidential law enforcement investigatory records from the requirement of availability to the general public and does not protect such records from a proper discovery request in the course of civil litigation, provided that such records are otherwise discoverable.

{¶13} In *Henneman*, the Ohio Supreme Court recognized that a qualified privilege exists for information that was compiled in the course of a police internal affairs investigation in the context of civil discovery. The court stated:

[W]e recognize that the public has an important interest in the confidentiality of information compiled in the course of police internal investigations. In many instances, disclosure of such information may work to undermine investigatory processes by discouraging persons with knowledge from coming forward or by revealing the identities of confidential sources. There may very well be an overriding need in particular cases for protecting the identities of members of the police force or of the general public who come forward with information about alleged police abuses. * * * Another equally important interest may exist in some cases: the need for concealing the identities of informants or citizens who participate in internal investigations.

Id. at 245-246.

{¶14} The *Henneman* court concluded that:

[R]ecords and information compiled by an internal affairs division of a police department are subject to discovery in civil litigation arising out of alleged police misconduct if, upon an in camera inspection, the trial court determines that the requesting party's need for the material outweighs the public interest in the confidentiality of such information. Of course, the request for such information is still subject to the normal standards of discovery. For example, if the files contain privileged medical records or if the request is vague or burdensome, a properly delineated protective order may be issued upon motion. But we reject the notion that an absolute privilege automatically protects internal investigation reports from a legitimate request for discovery.

Id. at 246.

{¶15} Since the *Henneman* decision, the rule established in that case has been extended to apply the *Henneman* balancing test to a school board's claim

that its discussions held in executive session were privileged from discovery. *Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. Pub. School Emp., Local 530*, 106 Ohio App.3d 855, 869-870, 667 N.E.2d 458 (9th Dist.1995), and the confidentiality of information about applicants and recipients of Medicaid. *Wessell Generations, Inc. v. Bonnifield*, 193 Ohio App.3d 1, 2011-Ohio-1294, 950 N.E.2d 989 (9th Dist.).

{¶16} Furthermore, in *State ex rel. Multimedia, Inc. v. Whalen*, 48 Ohio St.3d 41, 549 N.E.2d 167 (1990), the Ohio Supreme Court held that *Henneman* extended beyond protecting internal affairs documents but was applicable to “determine whether a litigant’s right to discovery outweighs the public interest in nondisclosure of an ongoing investigation.” *Id.* at 41. The court stated that the factors recognized in the leading federal case on the investigatory privilege, *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D.Pa.1973), had been adopted as part of the *Henneman* test. *Id.* at 41. The *Frankenhauser* factors include:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;
- (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluative summary;
- (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the police investigation has been completed;
- (7) whether any intradepartmental disciplinary proceedings have arisen or may

arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Frankenhauser at 344.

{¶17} Although the Supreme Court has not addressed a case postured precisely as the present case, we find the privilege established in *Henneman* to be applicable because the same concerns leading to the adoption of the privilege in that case exist in this case. We, therefore, apply the balancing test of *Henneman* to the materials the appellant claims are protected from discovery by the law enforcement investigatory privilege.²

II. The Attorney Work-product Privilege

{¶18} Attorney work product in Ohio is governed by Civ.R. 26(B)(3), which provides in relevant part: “a party may obtain discovery or documents and tangible things prepared in anticipation of litigation or for trial by or for another party or that party’s representative * * * only upon a showing of good cause therefor * * *.”

{¶19} The Ohio Supreme Court has addressed the standard of disclosure of work product. “Attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing

²We apply the *Henneman* balancing test with guidance from the *Frankenhauser* factors that we find useful to the *Henneman* analysis.

of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere.” *Squire, Sanders & Dempsey v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, paragraph two of the syllabus. The protection for intangible work product exists because “[o]therwise, attorneys’ files would be protected from discovery, but attorneys themselves would have no work product objection to depositions.” *Id.* at ¶ 58, quoting *In re Seagate Technology, L.L.C.*, 497 F.3d 1360 (Fed.Cir. 2007).

{¶20} The Ohio Supreme Court has explained that “the determination of whether materials are protected by the work-product doctrine and the determination of ‘good cause’ under Civ.R. 26(B)(3), are ‘discretionary determinations to be made by the trial court.’” *Sutton v. Stevens Painton Corp.*, 192 Ohio App.3d 68, 2011-Ohio-841, 951 N.E.2d 91, ¶ 12 (8th Dist.), quoting *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271, 452 N.E.2d 1314 (1983). Discretionary decisions are reviewed under an abuse of discretion standard of review. *Id.* It is an abuse of discretion if the court’s ruling is “unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

III. The Deliberative-Process Privilege

{¶21} Finally, the prosecutor asserts that the trial court’s discovery orders

intrude improperly into internal deliberations and prosecutorial discretion and, as such, violate the deliberative-process privilege.

{¶22} In *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, the Ohio Supreme Court described the deliberative-process privilege as follows:

[I]t allows the government to withhold documents and other materials that would reveal “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Predecisional and deliberative materials are protected, but documents that merely state or explain a decision that has already been made or contain purely factual information are not. The privilege extends beyond the chief executive officer of a governmental unit such as a president or governor. This category of executive privilege is grounded in judicial recognition of a “valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.”

(Citations omitted.) *Id.* at ¶ 34

{¶23} The deliberative-process privilege has been rarely recognized under Ohio law, and we are unaware of any case in Ohio applying the privilege to a county prosecutor. We note that most, if not all, of the materials the privilege would conceivably protect in this case would already be protected under the law enforcement investigatory privilege and the attorney work-product doctrine, rendering reliance on the deliberative-process somewhat redundant and unnecessary. Nonetheless, appellee asserts that the materials they seek in discovery are purely factual in nature rendering the deliberative-process

privilege inapplicable.

{¶24} Having established the various privileges and doctrines that appellant has invoked, we proceed to examine their application to the contested materials sought in discovery. We begin with the list of documents that the trial court marked “Y,” standing for “yes, the document is to be produced.”

{¶25} We affirm the trial court’s order to produce the police reports containing factual information gathered in the undercover investigation of the internet sweepstakes cafés within Cuyahoga County. These reports are directly relevant to the alleged conduct of the internet sweepstakes cafés involved in this case because any factual disputes regarding the nature of their business must necessarily be resolved prior to the ultimate resolution of the legal question at the heart of this declaratory judgment action. Specifically items with the following “bates” numbers are to be produced: #001-003, #005-252 and #254-307.

{¶26} The trial court’s order to produce items #004 and #253 is reversed. These materials contain primarily internal communications or investigative decisions and lack the factual content that the other reports contain. We find these materials lacking in relevant information to this civil action and, as such, are precluded from discovery pursuant to the law enforcement investigatory privilege.

{¶27} The trial court shall redact the names of the undercover

investigators from the police reports ordered to be produced. However, to the extent that appellant intends to rely on facts in any particular report or a factual account of a particular investigator, the appellant is obligated to disclose such investigator's name consistent with our holding on appellee's interrogatories regarding witnesses appellant intends to call at trial. *See, e.g., State v. Bragg*, 8th Dist. Cuyahoga No. 58859, 1991 Ohio App. LEXIS 3162 (June 27, 1991).

{¶28} We next consider a series of emails between the Cuyahoga County prosecutor involved with the investigation and a lead investigator on the case. These emails contain investigatory decisions, procedural discussions and exchanges of legal research and opinion. For the most part, the emails can be described as internal communications regarding how to proceed with the investigation. We are considerably reluctant to recognize a legal proposition whereby an individual or business involved in a criminal investigation could acquire the internal email discussions of a prosecutor by way of discovery in a preemptive civil action. Appellee argues that it is entitled to the thought process and legal theories of appellant in regards to the alleged illegality of internet sweepstakes cafés within Cuyahoga County. We are not aware of any authority for the proposition that appellant is obligated to conduct appellee's legal research for it. To the extent that appellee seeks a legal analysis applying a gambling law to an internet sweepstakes café, we direct appellee to our

decision in *Thorne*.

{¶29} We find that the vast majority of the emails are protected by the law enforcement investigatory privilege, and because they are completely lacking in factual content relevant to the present dispute, we hold that they are not subject to discovery. Even if such emails were not protected by the law enforcement investigatory privilege, we note that a significant number of such emails would also qualify as attorney work product.

{¶30} We reverse the trial court's order to produce the email items with the following "bates" numbers: 308, 315, 316, 318-324, 326, 330-332, 335-342, 344, 345, 347-354, 356-359, 361-363, 365-367, 369, 370, 379-382, 392-394, 419, 428, 434, 439, 442, 450, 451, 456-458, 461, 462, 467, 468, 473, 474, 477, 478, 484, 487-491, 493, 496, 498, 499, 504, 506, 507, 511-513, 520-522, 532, 534, 535, 539, 540, 559, 569, and 591-594. We affirm the trial court's order to produce the emails with the following "bates" numbers: 373-378, 486, 497, 524, 548, 561, 595.

{¶31} Finally, with regard to the interrogatories that the trial court ordered appellant to answer, we find that a significant number pose questions that are not relevant to the underlying declaratory action and unnecessarily intrude upon the investigative process. Some confusion exists as to the precise interrogatories the trial court's order compelled the appellant to answer. The order references both interrogatories and amended interrogatories. Both of the motions to compel filed by appellee and plaintiffs, Cyber Oasis, Page-Jaq and

New Heights, provide only amended interrogatories as attachments. To eliminate any confusion, we confine our review to appellee's amended set of interrogatories and the interrogatories of Tel-Connect. To the extent that any other interrogatories remain, the trial court shall order appellant to answer them consistent with the holding of this opinion.

{¶32} Regarding the amended interrogatories of appellee, the trial court's order is affirmed as to interrogatories 1 through 4 and 24 through 28. The trial court's order is reversed as to interrogatories 5 through 24 that we find protected pursuant to the law enforcement investigatory privilege and the attorney work-product doctrine. In regards to the Tel-Connect interrogatories, the trial court's order is affirmed as to interrogatories 1 through 4, 10, 11, 13, 14, 20 and 23. The trial court's order is reversed as to interrogatories 5 through 8, 12, 15 through 19 and 21.

{¶33} Appellant's assignments of error are sustained, in part, and overruled, in part.

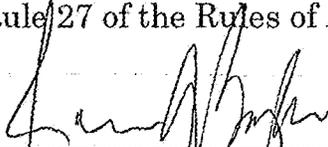
{¶34} The judgment of the trial court is affirmed, in part, reversed, in part, and the case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



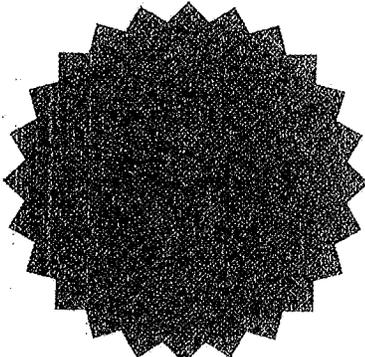
EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
TIM McCORMACK, J., CONCUR

The State of Ohio, }
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 10/31/13 CA 44476 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 10/31/13 CA 44476 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 31 day of October A.D. 20 13

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk