

ORIGINAL

Case No. 2014-1141

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**Supreme Court  
of the State of Ohio**

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STATE OF OHIO *ex rel.*  
OHIO REPUBLICAN PARTY,

Relator,

v.

EDWARD FITZGERALD, County Executive, County of Cuyahoga,

and

COUNTY OF CUYAHOGA and KOULA CELEBREZZE,

Respondents.

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**RELATOR'S MEMORANDUM OPPOSING  
RESPONDENTS' SECOND MOTION FOR PROTECTIVE ORDER**

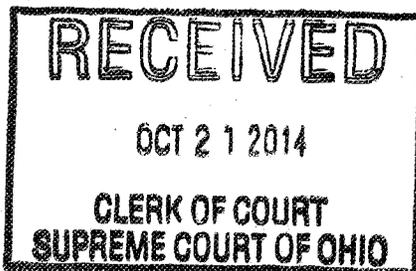
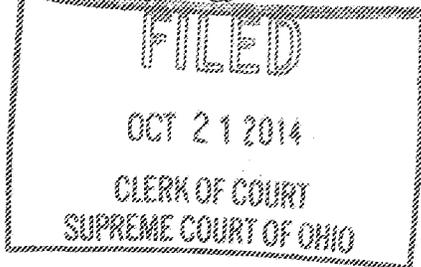
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# Supreme Court of the State of Ohio

STATE OF OHIO <i>ex rel.</i>	:	Case No. 2014-1141
OHIO REPUBLICAN PARTY,	:	
	:	
Relator,	:	
	:	
v.	:	RELATOR'S MEMORANDUM
	:	OPPOSING RESPONDENTS' SECOND
EDWARD FITZGERALD, <i>et al.</i> ,	:	MOTION FOR PROTECTIVE ORDER
	:	
Respondents.	:	

The State of Ohio, on relation to the Ohio Republican Party (hereinafter, "Relator"), hereby tenders the following memorandum in opposition to Respondents' latest effort to avoid complying with their discovery obligations. Having tendered as evidence herein an affidavit from a sheriff's deputy, Respondents now seek to avoid having the testimony of that deputy from even being subjected to cross-examination. Yet our long-established adversarial system does not allow one party to offer self-serving and conclusory assertions, and then avoid discovery efforts that might undermine or call into question those assertions. Having placed into evidence (and, thus, into issue) the entire content of that sheriff's deputy affidavit, Respondents cannot now seek to slam close the door which they themselves opened.

## MEMORANDUM IN SUPPORT

"Fair competition in the adversary system presumes, among other things, that attorneys will not employ obstructive tactics in the discovery procedure." *Columbus Bar Ass'n v. Finneran*, 80 Ohio St.3d 428, 431, 687 N.E.2d 405, 1997-Ohio-286 (1997). Yet, throughout these proceedings, Respondents and their counsel have undertaken any and all efforts to avoid compliance with even the basic requirements of discovery, seeking, instead, to undermine our

adversarial system by having this case decided solely upon their self-serving and one-sided evidence.

Having now offered as evidence in this action the testimony of Cuyahoga County Deputy Sheriff D. Paul Soprek (*see* Respondents' Evidence, filed herein on October 14, 2014), Respondents seek to have the self-serving and conclusory assertions therein stand alone and not be subject to any challenge through cross-examination.<sup>1</sup> But, as is well-recognized and accepted, “[c]ross-examination is one of the principal and most efficacious tests which the law has devised for the discovery of the truth.” *Smith v. Mitchell*, 35 Ohio St.3d 237, 240, 520 N.E.2d 213 (1988); *State v. Browning*, 98 Ohio App. 8, 10, 128 N.E.2d 173 (1st Dist. 1954)(“[c]ross-examination of a witness is perhaps the most effective means devised by the law for discovery of the truth, and is an accepted universal right”); *California v. Green*, 399 U.S. 149, 158 (1970)(describing cross-examination as “the greatest legal engine ever invented for the discovery of truth” (quoting 5 Wigmore, Evidence (3d ed. 1940))). Having voluntarily offered the testimony of Deputy Soprek, Respondents cannot now avoid having such testimony subjected to cross-examination.

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<sup>1</sup> In the already-tendered affidavit, Deputy Soprak identifies himself as the head of the Personal Protection Unit of the Cuyahoga County Sheriff's Office, which he describes as being “charged with the responsibility of protecting public officials in Cuyahoga County” since 2011. (Soprek Aff. ¶¶6 & 7.) Of course, a review of the statutory duties and responsibilities of county sheriffs, *see* O.R.C § 311.07, reveals no legal authority for the establishment of such a personal protection force.

Yet, this personal protection force appears designed more to protect County Executive FitzGerald from public exposure of his activities as a public official, as opposed to any personal threats against him. For if there truly was the need for such special security for Mr. FitzGerald as County Executive, it legitimately begs the question of where was such security, *e.g.*, when Mr. FitzGerald was at the Democrat National Convention in North Carolina in 2012, *see* [http://host-41.242.54.159.gannett.com/news/politics\\_government/article/259205/130/DNC-Russ-Mitchell-with-Ed-FitzGerald-overview](http://host-41.242.54.159.gannett.com/news/politics_government/article/259205/130/DNC-Russ-Mitchell-with-Ed-FitzGerald-overview); or when Mr. FitzGerald travelled to Ireland in 2012, *see* [http://www.cleveland.com/university-heights/index.ssf/2012/10/john\\_carroll\\_university\\_in\\_uni\\_7.html](http://www.cleveland.com/university-heights/index.ssf/2012/10/john_carroll_university_in_uni_7.html); or during the early morning hours of October 13, 2012, in Westlake, Ohio, *see* [http://www.cleveland.com/open/index.ssf/2014/08/call\\_about\\_suspicious\\_car\\_led.html](http://www.cleveland.com/open/index.ssf/2014/08/call_about_suspicious_car_led.html).

And while Respondents indicated a willingness to produce Deputy Soprak at a deposition, they sought, in advance of any such deposition, an absolute and universal guarantee that no inquiries whatsoever would be made of Deputy Soprak into the alleged threats against Mr. FitzGerald, notwithstanding the fact that Respondents already offering testimony from him on those particular matters. Relator's counsel expressed concern that he and opposing counsel might differ on what constituted an "inquiry into the alleged threats" and, thus, could not provide such a blanket assurance. Instead, though, Relator's counsel indicated that he was not concerned with the minutia of detail, *e.g.*, the specific individual supposedly making the threat, but that certain aspects of the threats, *e.g.*, how long ago such threats were supposedly made, would be pertinent.<sup>2</sup> Thus, Relator's counsel suggested that the appropriate course of action would be to proceed with the deposition and, if Respondents' counsel thought an inquiry was too intrusive, then an objection at that stage could be lodge and Deputy Soprak instructed not to answer. At least that process would allow a record to be developed for this Court to review and assess whether the line of questioning was necessary *vel non*; at present, though, Respondents seek a *carte blanche* protective order with no deposition question even being posed to Deputy Soprak.

Furthermore, Respondents also ignore their basic discovery obligations under the Rules of Civil Procedure. For "[t]he Civil Rules are designed and should be construed as an aid and not an impediment in the search for truth." *Normali v. Cleveland Ass'n of Life Underwriters*, 39 Ohio App.2d 25, 30, 315 N.E.2d 482 (8th Dist. 1974). Ohio R. Civ. P. 26 provides that any

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<sup>2</sup> For example, in the affidavit of Deputy Soprak already tendered herein, he makes the assertion that "as a former criminal prosecutor and FBI agent, Executive FitzGerald requires a heightened level of security protection based upon his law enforcement background." (Soprak Aff. ¶11.) But Mr. FitzGerald served as an FBI for only three years, back in the 1990s. Left currently unanswered is whether such threats against Mr. FitzGerald (over a decade-and-a-half ago) warrants the withholding of such records even though there was never a federal prosecution for any such threat. *See* 18 U.S.C. § 115.

party may obtain discovery on any matter that is relevant or reasonably calculated to lead to the discovery of admissible evidence. And, again, it was Respondents who put Deputy Soprak's testimony into issue at this case, *i.e.*, Respondents believe that Deputy Soprak's testimony is relevant. Having offered that putatively-relevant testimony, Respondents cannot frustrate the goals and purposes of the rules of discovery. "The purpose of the liberal discovery policy contemplated by the Ohio Rules of Civil Procedure is the narrowing and sharpening of the issues to be litigated." *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 56, 295 N.E.2d 659 (1973).

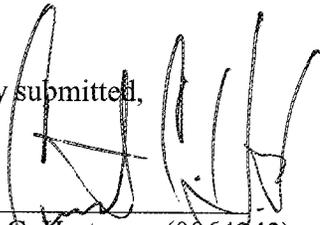
And one final issue raised by the Respondents' latest effort to hinder and obstruct discovery – the demand within the notice of deposition for offense-and-incident reports relating to Mr. FitzGerald – needs to be addressed. For Respondents have repeatedly failed to produce such records – be it pursuant to a separate public records request, a subpoena or inclusion in a notice of deposition. Yet, long-standing precedent of this Court has found that such reports are indisputably public records which must be promptly produced upon request. *E.g.*, *Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994)(syllabus ¶5)(“[r]outine offense and incident reports are subject to immediate release upon request”); *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 122, 760 N.E.2d 421 (2002)“we grant a peremptory writ to compel the mayor to provide access to the requested police incident report”); *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 861 N.E.2d 530, 2007-Ohio-609 ¶13 (2007)(“[r]outine offense-and-incident reports are not exempt work product and are normally subject to immediate release upon request”). For “incident reports initiate criminal investigations but are not part of the investigation.” *State ex rel. Beacon Journal Publishing Co. v. Maurer*, 91 Ohio St.3d 54, 56, 741 N.E.2d 511, 2001-Ohio-282 (2001). And “[o]nce clothed with the public records cloak, the records cannot be

defrocked of their status.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 662 N.E.2d 334. Thus, as Relator simply seeks that which is already a public record, there is no justification to warrant Respondents’ refusal to provide such records.

**Conclusions**

In Cuyahoga County, the creation of the Personal Protection Unit in the Cuyahoga County Sheriffs’ Office is clearly being used as a shield to protect County Executive FitzGerald, not from legitimate personal threats but, rather, from public exposure of his activities as a public official. Having continually refused to produce public records relating to Mr. FitzGerald’s activities, Respondents cannot hide behind their personal protection force. At a minimum, though, having already tendered an affidavit to justify the continued withholding of public records, Respondents cannot avoid having the testimony therein subject to cross-examination consistent with the rules of discovery. Accordingly, the Respondents’ Second Motion for Protective Order should be denied.

Respectfully submitted,



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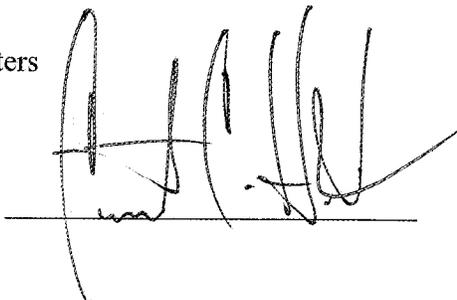
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon the following via regular mail on the 20th day of October 2014:

Majeed G. Makhlouf  
Robin M. Wilson  
Cuyahoga County Department of Law  
Cuyahoga County Administrative Headquarters  
2079 East Ninth Street, 7th Floor  
Cleveland, Ohio 44115

A handwritten signature in black ink, appearing to be "M. Wilson", is written over a horizontal line. The signature is stylized and cursive.