ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. DONALD CASTER	:	
	:	**CASE NO. 2014-1621**
Relator,	:	
	:	
vs.	:	
	:	**ORIGINAL ACTION IN**
CITY OF COLUMBUS, OHIO, et al.	:	**MANDAMUS (Public Records)**
	:	
Respondents	:	

RELATOR'S MEMORANDUM IN RESPONSE TO RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Frederick M. Gittes (0031444)
fgittes@gitteslaw.com
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
THE GITTES LAW GROUP
723 Oak Street
Columbus, OH 43205
(614) 222-4735/Fax: (614) 221-9655
Attorneys for Relator Donald Caster

Paula J. Lloyd (0033419)
pjlloyd@columbus.gov
Assistant City Attorney
Richard C. Pfeiffer, Jr., City Attorney
77 N. Front Street
Columbus, OH 43215
(614) 645-0808/Fax: (614) 645-6949
Attorney for Respondents City of Columbus
and Chief Jacobs

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I. Introduction

The Relator's petition for mandamus asks this Court to re-examine and update its public records jurisprudence as applied to records of a criminal prosecution. Based on overly broad language in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, agencies like the Respondents now simply issue blanket denials in response to any public records request seeking information beyond routine offense and incident reports, no matter who requests it or how long it has been since a criminal prosecution ended. In light of the recent major revisions to Rule 16 of the Ohio Rules of Criminal Procedure, this has led to scenarios in which information subject to the criminal discovery process is treated as secret, even in the absence of any specific, applicable statutory exception to disclosure under the Public Records Act.

The Respondents' Motion for Judgment on the Pleadings fundamentally mischaracterizes the nature of this case. The Relator does *not* argue that all materials in the files of prosecutors or police departments related to a prosecution must be disclosed as public records, or even that all materials produced in criminal discovery must also be disclosed to the general public. Instead, the Relator contends that the revisions to Rule 16 have rendered obsolete the specific public policy concern underlying the judge-made rule announced in *Steckman*: that criminal defendants might use public records requests to obtain materials that are not subject to discovery.

Instead of permitting all records related to criminal prosecutions to be covered by blanket claims of confidentiality, the Relator asks this Court to hold that, especially after a trial has already occurred and the direct appeals have been completed, records of criminal prosecutions must be treated the same as any other records, and are subject to the same requirements and exceptions as all other records.

II. Factual Allegations

The Relator adopts the statement of facts in his Memorandum in Support of his petition. For purposes of this motion, the key facts can be summarized as follows. The Relator submitted records requests to the Respondents in September 2013 related to the murder prosecution of Adam Saleh. The Relator does not represent Mr. Saleh, directly or indirectly through the Ohio Innocence Project ("OIP"). Instead, OIP is simply investigating Mr. Saleh's case, independently, to determine whether it is a candidate for OIP's intervention. (Affidavit of Donald Caster).

The Respondents initially responded to the request by providing no records, citing *Steckman* and a blanket "CLEIRS exception," and stating that the responsive records would be released at the conclusion of Mr. Saleh's prosecution. (Id.). Per the exhibits to the Respondents' Answer, an identical exchange occurred in October 2013. When the Relator renewed his request in November 2013, and explained that Mr. Saleh's prosecution and direct appeals were complete, the Respondents failed to respond at all. (Caster Affidavit). On October 14, 2014, over a year after the initial request and 17 business days after the filing of the Relator's petition, the Respondents provided documents it concedes are public, such as the routine incident and offense reports concerning Saleh's case, which were covered by the requests at issue. (Answer, at ¶ 10).

III. Argument

The question in this case is whether records should be deemed subject to the "confidential law enforcement investigatory record" (or "CLEIR") exception to the Public Records Act, on a blanket basis, solely because they pertain to a criminal prosecution, or whether, instead, such records should be subject to disclosure unless the specific concerns addressed by the CLEIR exception actually apply. In *Steckman*, this Court essentially adopted the former approach, based on three concerns: the danger of witness intimidation, the risk of delay to pending criminal trials,

and the prospect that defendants could otherwise use public records to avoid reciprocal discovery and unduly shift the balance of information in criminal proceedings. After twenty years and a fundamental revision to Ohio Rule of Criminal Procedure 16, governing discovery, the Relator asks that this Court recognize that the three concerns underlying *Steckman* have been rendered obsolete, and that in the absence of those concerns, the ordinary principles and presumptions governing the Public Records Act and its exceptions should apply to records of criminal matters.

A. The Policy Concerns Underlying the Judge-Made Rule in *Steckman* No Longer Apply; It Should be Overruled, and Blanket Denials of Records without a Specific Need for Confidentiality Should Not Be Permitted.

Divisions (A)(1)(h) and (A)(2) of Revised Code Section 149.43 comprise the "confidential law enforcement investigatory record" (CLEIR) exception to the Ohio Public Records Act, which protects any record from disclosure that:

> pertains to a law enforcement matter of a criminal *** 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.

R.C. 149.43(A)(2) (emphasis added).[1]

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[1] Although *Steckman* also addressed the "trial preparation" exception in division (A)(1)(g), it is not at issue here, where the records were requested from a police department, not a prosecutor.

Like all exceptions to the Act's strong presumption in favor of disclosure, the CLEIR exception is ordinarily "strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception [by proving] that the requested records fall squarely within the exception." *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, at ¶ 23. The established test for meeting this burden is a two-step process, by which the law enforcement agency must show not just that the record pertains to a "law enforcement matter of a criminal *** nature," but also that its release would create a high risk of disclosure of one of the four items listed in division (A)(2). *Id.* at ¶ 25. In other words, under this Court's ordinary public records jurisprudence, an agency cannot just assert, as the Respondents have, that the requested records relate to a prosecution. It must go further and prove that the withheld records would result in the release of information the Act protects, such as the identity of a confidential witness or a secret police technique.

Steckman and its progeny have resulted in a total reversal of these presumptions in criminal cases. Relying on the judge-made rule in *Steckman*, records custodians assume every record related to a criminal prosecution falls within the scope of the CLEIR exception unless the requester proves it is an incident or offense report or one of the other narrow categories designated in *Steckman* as subject to disclosure. *Steckman* justified such a sweeping departure from this Court's ordinary public records jurisprudence, and the resulting blanket withholding of police and prosecutorial records related to criminal cases, based not on the language of the statute—which the Court acknowledged was unclear, 70 Ohio St. 3d at 434—but rather, on three policy concerns: the danger of witness intimidation; the delay in prosecutions caused by disputes over public records; and the informational imbalance between prosecutors and defendants that would result if defendants could obtain records beyond those permitted by Rule 16. *Id.* at 428-29.

As described at length in the Relator's memorandum in support of his petition, these concerns are no longer valid because Rule 16 now amounts to "open-file discovery," which was not true at the time of *Steckman*. *Id.* at 428 ("Suffice it to say that [Rule 16] does not provide for what is often called 'full,' 'complete' or 'open file' discovery."). Unlike the former version, the new Rule 16 requires the production of witness statements, investigative reports, and tangible evidence, without requiring that they are exculpatory or "material to the preparation of [the defendant's] defense," and without the prior catch-all exclusion of "reports, memoranda, or other internal documents" and "statements made by witnesses or prospective witnesses to state agents." Compare Crim. R. 16(B) with prior Crim. R. 16(B)(1)(c)-(f) and (B)(2).

This means that, while the *Steckman* Court may have had a legitimate concern about witness intimidation, that concern has been rendered moot by Rule 16's requirement that witness statements be turned over in discovery, subject to certain protections in the rule that parallel the narrow protections in Section 149.43(A)(2). E.g., Crim. R. 16(D)(1) (permitting prosecutors to withhold information that would endanger witnesses, victims, or third parties). Resorting to the ordinary protection the CLEIR exception provides to the identity of truly confidential witnesses and sources would pose no additional danger for witnesses, as it would require no more disclosure than the criminal discovery rule now requires.

Similarly, though the delays decried in *Steckman* may have been substantial in some cases at the time, trials under the new Rule 16 cannot be delayed by public records requests, as any records available through such requests are now subject to ordinary discovery. Notably, in post-conviction cases, any delay due to a records dispute could prejudice only a wrongfully convicted defendant: the status quo (incarceration) is maintained during such a dispute, and the only negative effect of delay would be to slow any efforts to review or overturn the conviction.

The last of the *Steckman* Court's concerns, reciprocity, is also no longer compelling. Under Rule 16(H), a request for open-file criminal discovery triggers a reciprocal duty for the defendant. This Court has recently held that this duty can be triggered either by an ordinary request for discovery or through a public records request. See *State v. Athon*, 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, at ¶ 21 (holding that "when an accused directly or indirectly makes a public records request for information that could have been obtained from the state through discovery, the public records request is the equivalent of a demand for discovery and the accused owes a reciprocal duty of disclosure to the state as contemplated by Crim.R. 16").[2]

Recognizing that the concerns underlying *Steckman* no longer apply in light of the revisions to Criminal Rule 16 and *Athon*, particularly after a trial has already concluded, this Court should not rely on *Steckman* in examining the Relator's petition and the Respondents' blanket refusal to provide records. Instead, the Court should follow the long line of cases requiring particularized proof by a records custodian that an exception to disclosure applies. The Respondents cannot meet this burden, and they should be ordered to produce the records at issue.

B. The Relator's Requests Cannot Be Answered with a Blanket Denial Now that the Policy Concerns Underlying *Steckman* No Longer Warrant Such Denials.

Without the protection they claim based on *Steckman*'s obsolete public policy concerns, the Respondents' blanket denial of the Relator's requests would fall short of their obligations under the Public Records Act. According to the principles in *Miller, supra*, and many other

[2] While a truly independent third-party request would not trigger reciprocal discovery, it would also not raise the fairness issues discussed in *Steckman* and *Athon*. A third party (like a news outlet) would not be expected to coordinate collection of records with a criminal defendant, and if it did so, the *Athon* rule would trigger reciprocal disclosure. Of course, in post-trial situations like this, concerns about gamesmanship and reciprocity are no longer present at all: a criminal defendant who delayed issuing public records requests until after a conviction and failed appeal would simply deny himself the best means of preventing or challenging his conviction.

public records cases, the Respondents can meet the first part of the CLEIR test: the requested records obviously pertain to a criminal law enforcement matter. But they have done nothing to satisfy the second part of the test by showing that the disclosure of any particular record would implicate the concerns in division (A)(2).

Instead, the Respondents withheld all the requested records. Over a year later, weeks after this action was filed, they turned over a small selection of unquestionably public records that should have been provided immediately under any interpretation of the law. E.g., *Steckman*, 70 Ohio St. 3d 420, para. 5 of syllabus. In the absence of *Steckman*, the presumptions applied in *Miller* and other cases would forbid this approach: records are presumed public unless the custodian affirmatively proves that the specific withheld records would reveal the identity of an uncharged suspect, a confidential source, or a secret police procedure, or would endanger an officer, source, witness, or victim.

The Relator does not argue that the statutory CLEIR exception should be revised or invalidated in any way. Nor does he ask that the Respondents be ordered to disclose any specific records it can show are protected under division (A)(2). The Relator simply asks that the Court treat this request like any other, using the presumptions in *Miller* and other public records cases. Items like forensic reports, recorded interviews and written statements of witnesses or sources who were not promised confidentiality, documentation (such as phone records) of the activities of the defendant or the victim, and many other items typically found in police investigative files, have no likelihood (much less a "high probability") of disclosing confidential or dangerous information, especially after a public trial and direct appeals are complete.

Even where there is such a likelihood, the Act generally permits redaction, not withholding of the entire record. See *State ex rel. Rocker v. Guernsey County Sheriff's Office*,

126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶¶ 11-15 (noting that division (A)(2)(a)'s protection of uncharged suspects "applies only to those portions of records that, if released, would create a high probability of disclosure of the suspect's identity," and reversing rulings that records listing suspect's name were subject to "blanket" protection instead of redaction).

Under an ordinary analysis of the CLEIR exception, the Relator's request should have resulted in the production of at least some records, redacted if necessary to protect alternate suspects or confidential sources. Instead, because of the Respondents' reliance on *Steckman*, they issued a blanket denial, producing no records and no explanation of how any of the withheld records fall within a statutory exception, either in their written responses or their pending motion.

C. The Fact that Records are Subject to Criminal Discovery Does Not Preclude Them from Disclosure Under the Records Act, as the Respondents Argue.

State v. Athon, discussed above, confirmed not only that public records requests can be treated as criminal discovery requests under Rule 16, but also that records subject to discovery may also be obtained through otherwise valid public records requests. 2013-Ohio- 1956, at ¶ 16 (stating that Section 149.43 "provides an independent basis for obtaining information potentially relevant in a criminal proceeding," and "our decision in *Steckman* does not bar an accused from obtaining public records that are otherwise available to the public"). But the Respondents cite *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St.3d 350, 673 N.E.2d 1360, for the proposition that producing materials in discovery does not subject them to disclosure as public records. These holdings are not inconsistent, and nothing in *WHIO* changes the analysis above.

In *WHIO*, the Court's basis for rejecting the petition was that the fear of public disclosure (and the resulting tainting of the jury pool) might deter prosecutors and defendants from cooperating in discovery. *Id.* at 355. This concern appears unfounded. It assumes prosecutors

and defense attorneys will ignore their legal and ethical obligations, risking consequences including reversal of any conviction or acquittal obtained through the violation. But whether valid or not, this concern is also not presented here, or in any other post-conviction situation. The trial has already occurred; to the extent there is a future retrial, any facts uncovered now could not taint the jury pool more than public knowledge of the defendant's original conviction.

Second, and as important, the Relator's argument, unlike that of the television station in *WHIO*, is not premised on the prior disclosure of the materials at issue through discovery. The television station's argument assumed that the discovery materials in that case would not have been public records because of *Steckman* if they had not been provided to the criminal defendant. But the station claimed the protection of *Steckman* was affirmatively waived when the prosecutor produced the materials in discovery. The Court disagreed, and held that the prosecutor's limited release of the records was not such a waiver.

Here, the Relator is not claiming *Steckman*'s protections have been waived through a prior disclosure. In fact, the documents the Relator seeks have likely never been disclosed. Instead, the Relator simply asks that the Court treat the requested records as it would treat any other records: subject to the CLEIR exception if they implicate the specific concerns in Section 149.43(A)(2); subject to disclosure if they do not.

For instance, in some criminal cases, Rule 16 might authorize discovery of records that would be excepted from Section 149.43 because they list the names of uncharged suspects. In such instances, the records could be publicly disclosed only in a redacted form, or withheld if they are inextricably linked to the identity of the suspect. *Rocker, supra.* The fact that criminal defendants may have acquired the records through Rule 16 does not, by itself, require a different result. But nor does the fact that records were included in a discovery packet mean they cannot

be deemed public records. If that were so, even routine incident and offense reports would be protected, since they are generally included in criminal discovery materials.

The significance of the changes in Rule 16 is not that its disclosure requirements are coextensive with those of Section 149.43. Rather, as discussed above, the significance of the changes is that by broadening records access for criminal defendants, the changes have obviated the discrete concerns about witness intimidation, delay, and gamesmanship that led the *Steckman* Court to grant *extra* protection to records related to criminal proceedings.

In other words, the television station in *WHIO* argued that, consistent with *Steckman*, all records pertaining to criminal matters should be subject to either blanket public disclosure or blanket protection from disclosure, depending on whether or not they have been produced to a defendant in discovery. Instead, consistent with the language of Section 149.43 and this Court's ordinary public records jurisprudence, the Relator here proposes that each record should be evaluated individually, based on the specific tests in the statute: whether the record would disclose a secret police technique or pose a real risk to victims, witnesses, or suspects.

D. There Is No Procedural Basis for Dismissing This Action

The Respondents raise or allude to four discrete procedural arguments in their motion, none of which justifies dismissal. First, they note that the caption of the Relator's petition did not name the State (on relation of Donald Caster) as the petitioner. To the extent this was a defect, it has been cured by the Relator's Motion to Amend. As noted in that motion, the original caption listed Mr. Caster as a relator (as opposed to a plaintiff), meaning there was no confusion regarding his status. If the Court grants the Relator's motion, the caption will also explicitly name the State of Ohio. This Court has previously approved such a procedure. *State ex rel. Rust v. Lucas County Bd. of Elections*, 100 Ohio St. 3d 214, 2003-Ohio-5643, 797 N.E.2d 1254, ¶ 6.

Second, the Respondents argue that pursuant to Section 149.43(B)(8), which governs public records requests by incarcerated persons, the petition should be dismissed "to the extent that Relator's request for public records is reasonably viewed as a request on behalf of Saleh, a person incarcerated pursuant to a criminal conviction" (Memorandum in Support of Respondents' Motion, p. 5). The Relator's filings make it clear that the requests at issue were not issued on behalf of Mr. Saleh, and neither the Relator nor his employer is representing Saleh or serving as his designee in order to provide him records. Instead, the requests were issued to further OIP's well-known mission, in the public interest, to investigate closed criminal cases in order to evaluate potential instances of wrongful convictions. Any factual allegation to the contrary by the Respondents is not a proper subject for their motion for judgment.[3]

Notably, the Respondents did not raise any such concern in issuing its blanket denial of the Relator's requests, and does not claim its response would have been different if it accepted the Relator's confirmation that he does not represent Saleh. The Respondent cites no authority for the argument that a public-interest organization requesting records for its own purposes is to be treated as a "straw person" for an incarcerated person it does not represent, and that it must request prior judicial approval any time it requests records relating to an incarcerated person.

Third, the Respondents make repeated reference to the lack of a "clear legal right" of the Relator to the records at issue. (Memorandum, pp. 1-2). Although a clear legal right to relief is

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[3] For instance, the Respondents claim the Relator "speaks for" Saleh by stating he "contends he could be exonerated," and faults the Relator for failing to include an affidavit to this effect from Saleh (who is not the Relator's client). Presumably, if such an affidavit had been provided, the Respondents would have claimed *that* was proof of an attorney-client relationship. Saleh's claim of innocence, which is a matter of public record as a result of his trial and appeal, is not central to the Relator's claim. If the Court were to disregard it, nothing about the case would change. It is included merely to explain OIP's reason for investigating Saleh's conviction, as there would rarely be any need to investigate the conviction of someone who has not claimed innocence.

generally a prerequisite in mandamus cases, this cannot mean that a Public Records Act petition cannot proceed if any prior case law supports an exception to the Act. If that were so, no relator could ever ask this Court to revisit a judge-made rule affecting public records law, as the relator's legal right would never be clear enough to warrant mandamus relief. The General Assembly recognized this by specifically authorizing mandamus as the proper means of compelling public records production. R.C. 149.43(C)(1). If a custodian had a good-faith basis in existing case law to withhold records, the statute provides for reduced attorneys' fees, but it offers no similar protection against the production of records. *Id.* at (C)(2)(c)(i). This indicates that mandamus is appropriate even if the relator seeks a re-examination or overruling of prior case law.

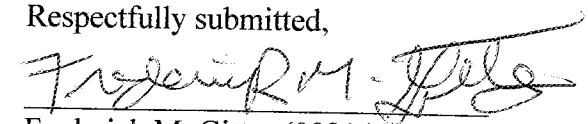
Finally, the Respondents point out that they were not required under the statute to provide an additional written response to the Relator's renewed request for the records. This is beside the point. The Relator's renewed request in November 2013, like the prior requests he authorized, was a valid request for records related to Saleh's conviction. The Respondents invited a renewed request upon the conclusion of the proceedings in Saleh's case, and the Relator's November request answered that invitation by informing the Respondents that all proceedings had concluded. But it does not matter here whether the Respondents' failure to respond to this new request, containing new information, was an independent violation of the Respondents' duties under R.C. 149.43(B)(3). The only significance of such a violation would be for purposes of attorneys' fees and/or statutory damages, both of which are warranted by the Respondents' failure, until weeks after this action was filed, to provide even the records it concedes are public.

IV. Conclusion

For the reasons stated above, the Relator requests that this Court deny the Respondents' Motion for Judgment on the Pleadings, grant a peremptory writ of mandamus in his favor, and

order an award of reasonable attorneys' fees and statutory damages pursuant to Revised Code Section 149.43(C).

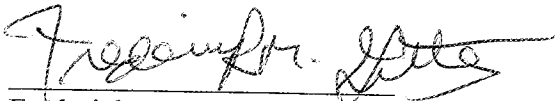
Respectfully submitted,



Frederick M. Gittes (0031444)
fgittes@gitteslaw.com
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
THE GITTES LAW GROUP
723 Oak Street
Columbus, OH 43205
(614) 222-4735
Fax: (614) 221-9655
Attorneys for Relator Donald Caster

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November 2014, a copy of the foregoing Relator's Memorandum in Response to Respondents' Motion for Judgment on the Pleadings was served by regular U.S. Mail upon Paula J. Lloyd, Assistant City Attorney, Office of Richard C. Pfeiffer, Jr., City Attorney, 77 N. Front Street, Columbus, OH 43215, Attorney for Respondents.



Frederick M. Gittes (0031444)