

ORIGINAL

In the
Supreme Court of Ohio

15-0390

STATE OF OHIO, *ex rel.*
CINCINNATI ENQUIRER
A Division of Gannett Satellite
Information Network, Inc.
312 Elm Street
Cincinnati, Ohio 45202

Case No.

15-0390

Relator,

vs.

MEMORANDUM IN SUPPORT
OF COMPLAINT
FOR WRIT OF MANDAMUS

OHIO DEPARTMENT OF
PUBLIC SAFETY
1970 West Broad Street
Columbus, Ohio 43223

and

JOHN BORN, in his
Official Capacity as Director
OHIO DEPARTMENT OF
PUBLIC SAFETY
1970 West Broad Street
Columbus, Ohio 43223

Respondents.

FILED
MAR 09 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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RECEIVED
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CLERK OF COURT
SUPREME COURT OF OHIO

Relator Cincinnati Enquirer, a Division of Gannett Satellite Information Network, Inc. (the “Enquirer”) submits this as its Memorandum in Support of its Complaint for Writ of Mandamus.

I. STATEMENT OF FACTS.

On January 29, 2015, Keith BieryGolick (“BieryGolick”) an Enquirer reporter, contacted Respondents and requested a copy of the dashboard camera video, incident/arrest report, and any 911 radio communications from a chase on Interstate 71 that started in Warren County before preceding into Hamilton County on January 22, 2015 (“the Records”).¹

That same morning, Bradley Shaw, an employee of the Ohio Department of Public Safety (“ODPS”), contacted Mr. BieryGolick on behalf of ODPS and denied Mr. BieryGolick’s Records request in its entirety. Mr. Shaw stated that “The Prosecutor has asked that we don’t release the video as this time.”²

Mr. BieryGolick then requested that Mr. Shaw conform to the legal requirements of the Ohio Public Records Act when denying his access to the Records in their entirety.³

The next day, on January 30, 2015, Mr. Shaw responded to Mr. BieryGolick’s request that Respondents comply with the Ohio Public Records Act and stated “[The Dashboard Camera Video] would fall under – **Confidential Law Enforcement Investigation Records** ORC 149.43(A)(1)(h) and ORC 149.43(A)(2).”⁴

On February 11, 2015, Eric S. Richmond, Assistant Public Records Manager, Ohio Department of Public Safety, sent a letter to Mr. BieryGolick that released the requested

¹ March 6, 2015 Affidavit of Keith BieryGolick (“BieryGolick Affidavit”), ¶1. A true and correct copy of Mr. BieryGolick’s request for the Records is attached as Exhibit 1 to the BieryGolick Affidavit.

² BieryGolick Affidavit, ¶2. A true and correct copy of Mr. Shaw’s response is attached as Exhibit 1 to the BieryGolick Affidavit.

³ BieryGolick Affidavit, ¶3. A true and correct copy of Mr. BieryGolick’s response is attached as Exhibit 1 to the BieryGolick Affidavit.

⁴ BieryGolick Affidavit, ¶4. A true and correct copy of Mr. Shaw’s response is attached as Exhibit 1 to the BieryGolick Affidavit.

arrest/incident report and 911 radio communications, but alleged that the Dashboard Camera Video is “a part of an open criminal case that pertains to a law enforcement matter of criminal, quasi-criminal, civil, or administrative nature and whose release would create a high probability of disclosure of specific investigatory work product.”⁵

Despite having a clear legal duty to promptly make the Dashboard Camera Video available to the Enquirer for inspection and copying, Respondents have refused to do so.

II. ARGUMENT.

A. **Respondents’ Failed to Prove that the Dashboard Camera Video Falls Squarely within the “Specific Investigatory Work Product” CLEIR Exemption.**

The Public Records Act, R.C. 149.43 (“PRA”) proscribes and prohibits certain conduct by public bodies. The provisions contained in R.C. 149.43 are not guidelines, they are hard and fast rules. R.C. 149.43(B) contains the following mandatory provisions:

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied.

When refusing to provide the Dashboard Camera Video, the ODPS must show that the Video falls squarely within a statutory exception.⁶ Exceptions to disclosure under the Public Records Act are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception.⁷ *A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.*⁸

⁵ BieryGolick Affidavit, ¶5. A true and correct copy of that letter is attached as Exhibit 2 to the BieryGolick Affidavit.

⁶ *State ex rel. Miller v. Ohio State Highway Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶23.

⁷ *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus, citing *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 25.

⁸ *Cincinnati Enquirer* at ¶ 7. (Emphasis added).

The exception the Patrol invokes in the March 20 letter is the "specific investigatory work product," exception, which is not in and of itself an exception, but an element of a larger exception.⁹ That exception is codified at R.C. 149.43(A)(1)(h), which excludes "confidential law enforcement investigatory records" from the definition of "public record." A "confidential law enforcement investigatory record" is defined in R.C. 149.43(A)(2) as

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:

* * *

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

(Emphasis added.)

Whether a particular record is a "confidential law enforcement investigatory record" is determined by a two-part test. "First, is the record a confidential law enforcement record? Second, would release of the record 'create a high probability of disclosure' of any one of the four kinds of information specified in R.C. 149.43(A)(2)?"¹⁰ Thus, the ODPS must establish that the withheld records pertain to a "law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature" whose release would create a "high probability of disclosure" of "specific investigatory work product."

Respondents denied Mr. BieryGolick's request for the Dashboard Camera Video and incompletely referenced a portion of the two-part test it has the burden to prove. Respondent's palpable failure to affirmatively prove that the Dashboard Camera Video falls squarely within the two-part "confidential law enforcement investigatory record" test, let alone (1) describe with

⁹ *Miller* at ¶24

¹⁰ *Miller* at ¶25, citing *State ex rel. Musial v. N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.2d 1243, ¶ 19, quoting *State ex rel. Beacon Journal Publishing Co. v. Maurer*, 91 Ohio St.3d 54, 56, 2001-Ohio-282, 741 N.E.2d 511 (2001), quoting *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 52, 552 N.E.2d 635 (1990).

any specificity what “specific investigatory work product” is revealed in the Dashboard Camera Video, or (2) consider whether a redaction would eliminate the risk of disclosing “specific investigatory work product,” is a per se violation of O.R.C. 149.43(B).¹¹

B. The Dashboard Camera Video is a Public Record Not Exempt from Disclosure.

The Dashboard Camera Video is not “specific investigatory work product” exempt from public disclosure under R.C. §149.43(a)(2)(c), nor does it qualify for any other exception listed in R.C. §149.43.

“Specific investigatory work product” is defined as “information assembled by law enforcement officials in connection with a pending or highly probable criminal proceeding.” *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St.3d 261, 266-267, 1997 Ohio 319, 685 N.E.2d 1223 (1997). It consists of “information, including notes, working papers, memoranda, or similar materials, assembled by law enforcement officials in connection with a probable or pending criminal proceeding.”¹²

However, “specific investigatory work product” does *not* include “ongoing routine offense and incident reports.”¹³ 9-1-1 recordings are also public records “because 911 calls generally precede offense or incident reports completed by the police” and are therefore “even further removed from the initiation of the criminal investigation than the form reports themselves,” such as 9-1-1 recordings, are also public records.¹⁴

¹¹ Even if a public record contains some material that is excepted from disclosure, the governmental body is obligated to disclose the nonexcepted material, after redacting the excepted material. *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc. 2d 1, 552 N.E.2d 243, 1990 Ohio Misc. LEXIS 1 (1990).

¹² *Maurer*, 91 Ohio St.3d at 56, citing *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 434, 639 N.E.2d 83 (1994).

¹³ *Id.*, paragraph five of the syllabus. See also *Beacon Journal* at 57; *State ex rel. Logan Daily News v. Jones*, 78 Ohio St.3d 322, 323, 1997-Ohio-32, 677 N.E.2d 1195 (1997).

¹⁴ *Beacon Journal, id.*, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 378, 1996-Ohio-214, 662 N.E.2d 334 (1996).

The Dashboard Camera Video, which upon information and belief was recorded by a continuously-recording dashboard camera, is no different from a 9-1-1 recording and therefore a public record subject to immediate disclosure under the Ohio Supreme Court's reasoning in the above case law. The Enquirer has a clear legal right of access to the Dashboard Camera Video and Respondents have a clear legal duty to promptly make said Video available to the Enquirer for inspection and copying. Respondents' failure to do so, and Respondents' generic refusal with to Mr. BieryGolick's January 29 request without sufficient proof, violates R.C. 149.43.

C. The Enquirer Is Entitled To Recover Its Attorney's Fees.

The Enquirer is entitled to its attorney's fees for enforcing its statutory right of access to the Records by way of this mandamus action. Respondents' refusal to grant access to the Records was contrary to R.C. §149.43(A)(2)(c) as delineated by precedential case law, and in no way did their conduct serve the public policy that public records are freely available. If this Court orders Respondents to grant access to the Records it may award reasonable attorney's fees, subject to reduction *only* if the court determines *both* of the following¹⁵:

“(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct ... a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records... would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.”¹⁶

As to criteria (i), there is no way that Respondents could have believed that their conduct did not violate Ohio's Public Records Act or supporting case law. The Dashboard Camera Video

¹⁵ R.C. §149.43(C)(2)(b), (c)(emphasis added).

¹⁶ R.C. §149.43(C)(2)(c)(i) & (ii).

is unmistakably equivalent to a 9-1-1 recording, which the supporting case law clearly identifies as a public record subject to immediate release.

As to criteria (ii), there is, similarly, no way that Respondents reasonably believed that their conduct served the public policy of the Ohio Public Records Act. The Enquirer has a statutory right to public records, including the Dashboard Camera Video Respondents have withheld. Respondents' interpretation of R.C. §149.43(A)(2)(c) essentially affords a blanket of impenetrable protection from disclosing *any record* they possess to the public— a far cry from the Ohio Supreme Court's narrow stance on withholding public records:

“The Rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same.”¹⁷

Respondents' actions ignore the plain letter and spirit of the Ohio Public Records Act. Their baseless refusal to grant access to the Dashboard Camera Video and remarkably scant justification for doing so indicates a clear disregard for the Enquirer's rights under the Ohio Public Records Act. This Court should award attorney's fees to the Enquirer as a remedial measure for this mandamus action to compel Respondents to obey the law and to grant the public access to records not otherwise exempt under R.C. §149.43.

III. CONCLUSION.

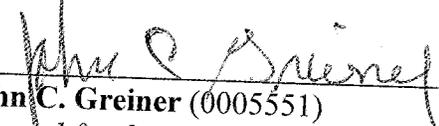
For the reasons set forth herein, the Court should issue a writ of mandamus compelling Respondents to produce the Dashboard Camera Video requested in accordance with R.C. §149.43.

¹⁷ See *Ohio Sunshine Laws, An Open Government Resource Manual*, at page iv, citing *Patterson v. Ayers*, 171 Ohio St. 369 (1960).

Respectfully submitted,

Of Counsel:

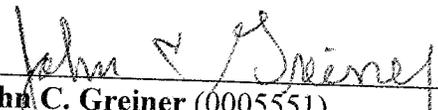
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PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this *MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS* along with the Summons and Complaint to the Respondents identified in the caption on page one via Certified Mail, return receipt requested.


John C. Greiner (0005551)