Supreme Court of Ohio Clerk of Court - Filed June 18, 2015 - Case No. 2014-1621

IN THE SUPREME COURT OF OHIO

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

BRIEF OF RELATOR DONALD CASTER

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I. SUMMARY OF ARGUMENT

Applying this Court's holding in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, and its progeny, the City of Columbus and its Division of Police have adopted a policy of denying virtually all public records requests related to criminal case files until the criminal defendant has been acquitted, has been released from prison, or has died. The question here is whether such automatic blanket denials are consistent with the "confidential law enforcement investigatory record" ("CLEIR") exception to the Public Records Act, or whether, like all other records of an Ohio public office, police investigative records should be presumed public unless the specific concerns delineated in the CLEIR exception actually apply.

Steckman justified the blanket withholding of police and prosecutorial records related to criminal cases, based not on the language of Section 149.43—which the Court acknowledged was unclear—but rather, on three policy 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. *Id.* at 428-29. Relator Donald Caster, an attorney with the Ohio Innocence Project, asks this Court to recognize that in the twenty years since *Steckman*, these three policy concerns have been rendered obsolete. In the absence of those concerns, the ordinary principles governing the Public Records Act and its exceptions should apply to criminal case files.

Due to developments in the law in the twenty years since *Steckman*—most notably, the dramatic liberalization of Ohio Rule of Criminal Procedure 16 in 2010—none of these policy concerns remains compelling. Rule 16 now provides for "open file" discovery, rendering the *Steckman* Court's concern over witness intimidation due to the disclosure of public records moot. Criminal defendants now have direct access to witness information through the discovery

process, with the exception of information that specifically satisfies the confidentiality concerns in Rule 16. Disclosure in response to public records requests would not alter that state of affairs.

The *Steckman* Court's second concern, the risk of delay in criminal trials, is similarly moot under the new version of Rule 16. For criminal trials that have already concluded, delay is never a concern; for those that remain ongoing, Rule 16 already provides an expedited avenue for disclosure without disrupting any trial schedule.

Third, in light of this Court's recent decision in *State v. Athon*, 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, holding that a public records request on behalf of a criminal defendant triggers the defendant's reciprocal duty of disclosure, public records requests no longer raise any possible concern over the balance of power between prosecutors and defendants.

Because the Public Records Act is subject to a 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. Yet for twenty years, *Steckman* has allowed law enforcement agencies to respond to nearly every public records requests with a blanket denial. Now that all three of the policy concerns in *Steckman* have been rendered obsolete, the time has come to overrule *Steckman*, or at least modify it, and restore the presumption of disclosure.

Deciding otherwise would preserve a judge-made blanket exception to the Public Records Act for no practical reason. It would also deny vital information to the public about one of the government's most important functions: convicting those who are guilty of crimes and exonerating those who are wrongfully accused. Until law enforcement agencies began relying

upon *Steckman* to issue blanket denials of public records requests, investigators and public-interest organizations like the Ohio Innocence Project were able to examine possible wrongful convictions using routine public records requests. In numerous cases, evidence uncovered through public records requests has resulted in the exoneration and release of wrongfully convicted prisoners. See Affidavits of Relator Donald Caster and Martin Yant. These exonerations have not weakened our system of justice; they have strengthened it, by providing another device for correcting the unavoidable missteps of a system that can never attain perfection, but should always strive for it.

The rule in *Steckman*, taken to its logical extreme by the Respondents and others, ensures that such information will be withheld until it is literally too late to make a difference. In some cases, even after a criminal defendant's death or release from prison, such information will never be disclosed to the public because of the routine destruction of records under agencies' records retention schedules.

II. STATEMENT OF FACTS

This mandamus action arises from public records requests under Section 149.43 of the Ohio Revised Code, made by and at the direction of Relator Donald Caster, an attorney with the Ohio Innocence Project ("OIP"). OIP is a program of the University of Cincinnati College of Law devoted to identifying cases in which individuals may have been wrongfully convicted of serious crimes, and taking action to exonerate those individuals. (Affidavit of Donald Caster; Agreed Statement of Facts, ¶¶ 1-2). The Respondents are the City of Columbus and its police chief, Kimberley Jacobs, the public office and individual responsible for the police records at issue. (Agreed Statement, ¶¶ 3-6).

The requests at issue here were made in the course of OIP's investigation of the case of Adam Saleh, who was convicted in 2007 of the murder of Julie Popovich. Mr. Saleh was convicted in part based on the testimony of several jailhouse informants, and he contends he could be exonerated upon a full examination of the case by OIP. Neither Relator Caster nor OIP represents Mr. Saleh; their interest at this point is not to advance Mr. Saleh's case, but to determine whether his claim of innocence is sufficiently supported to warrant their intervention. (Caster Aff., ¶ 5; Agreed Statement, ¶¶ 11-12). OIP cannot, and would not, intervene in every one of the thousands of cases it reviews; it has intervened in only a handful of these cases, with a high success rate among the cases it has actually taken on—including some cases where OIP has identified the true perpetrator. (Caster Aff., ¶¶ 2-3).

In response to the written request by OIP law student fellows, made at Mr. Caster's direction in September 2013, the Respondents issued a blanket refusal, citing this Court's determination in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, and the "confidential law enforcement investigatory record" exception in Section 149.43(A)(1)(h) of the Ohio Revised Code. The Respondents' letter indicated that the requested records would be provided "upon completion of the criminal case" and stated the request could be refiled "after the criminal investigation and all appeals have been exhausted." (Agreed Statement, ¶¶ 14-17, Exh. 1 & 2). No records from Mr. Saleh's file were provided in response—not even routine incident reports. (Id., ¶ 18). OIP's request was renewed in October 2013 and received an identical response. (Id., ¶¶ 19-23, Exh. 3 & 4).

In November 2013, Mr. Caster re-filed his request, this time informing the Respondents that all appeals had indeed been exhausted, as Mr. Saleh's direct appeal concluded in 2009, four

years prior to the initial request for the records. The Respondents received this request (which was filed by certified mail), but did not respond in any way. (Id., ¶¶ 24-26, Exh. 5).

On October 21, 2014, thirty-two (32) days after the commencement of this action, the Respondents provided some of the records requested by Mr. Caster related to Mr. Saleh's case, consisting of the missing person investigatory forms that initiated the criminal investigation, the Franklin County Coroner's report (with Social Security number redacted), newspaper articles, a press release, and subpoenas. The records comprise only 29 pages. (Id., ¶¶ 28-29, Exh. 6).

The Respondents have withheld the remaining records requested by Mr. Caster, including police reports, evidence reports, investigation notes, and other materials compiled by the Columbus Division of Police related to Mr. Saleh's arrest and investigation. (Id., ¶ 30). The Respondents are not withholding these records based on any specific content in Mr. Saleh's criminal case file. Instead, they are withholding the entire file pursuant to their general policy of withholding criminal case files regarding major crimes until the death or release of the convicted defendant, irrespective of the specific content of the files. The Respondents adopted this blanket refusal policy in approximately 2010. (Ludlow Affidavit, ¶¶ 1-3, Exh. A).

Prior to the Respondents' adoption of this policy, individuals and organizations investigating potential wrongful convictions could obtain closed criminal case files through routine public records requests. In some cases, wrongfully convicted prisoners were released based on evidence obtained from the Columbus Division of Police solely through such requests. (Yant Affidavit, ¶¶ 4-5 & 7 (describing exonerations of Sean Ennis and Wyman Castleberry through public records requests)).

III. ARGUMENT

Proposition of Law: In light of the revision of Ohio Rule of Criminal Procedure 16 and this Court's holding in *State v. Athon*, 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, the rule of law announced in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, no longer serves its intended purpose. The possibility of retrial does not exempt all records compiled by law enforcement officials in connection with a criminal proceeding from disclosure under the confidential law enforcement investigative records, work product, or trial preparation records exceptions to the Public Records Act.

A. *Steckman v. Jackson* Relied on the Prior Version of Criminal Rule 16 to Deny Access to Public Records in Pending Criminal Cases

In *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, this Court concluded that the criminal discovery rules, not the Ohio Public Records Act, should determine the scope of public access to records of criminal investigations. Accordingly, the Court held that criminal defendants and inmates seeking records under Section 149.43 were entitled only to those records they could obtain through the criminal discovery process. This holding was not based on specific statutory language (the Court even acknowledged that the term "work product," for instance, was not defined in either the Public Records Act or the Rules of Criminal Procedure, 70 Ohio St. 3d at 434); instead, it was premised on the public policies underlying discovery under Rule 16 of the Ohio Rules of Criminal Procedure, as it existed at the time.

Specifically, the Court reasoned that the criminal discovery process, as it then existed, would be undermined if Section 149.43 were interpreted to permit public access (and access by criminal defendants or their representatives) to the complete files of law enforcement agencies and prosecutors, including witness statements, tangible evidence, and investigative reports. Due to prior, overly permissive holdings, the Court stated, *id.* at 431,

> [C]ourts *** are regularly faced with demands to release the entire contents of a prosecutor's file and all the records accumulated and maintained by a police department in connection with a particular defendant and his or her criminal proceeding. Because of our cases,

> the exceptions to required disclosure found in R.C. 149.43(A)(2)(c) – 'specific investigatory work product'-- and R.C. 149.43(A)(4) -- 'trial preparation record' -- have virtually been rendered meaningless. Additionally, these cases have, for all practical purposes, just about written Rule 16 out of the Criminal Rules.

The Court's holding in *Steckman* was multi-pronged: it limited criminal defendants to obtaining information from prosecutors and the police through the criminal discovery process, *id.* at 429; it interpreted the terms "confidential law enforcement investigatory records" (in Section 149.43(A)(1)(h)), "specific investigatory work product" (in Section 149.43(A)(2)(c)), and "trial preparation record" (in Section 149.43(A)(4)) to cover literally every document in the files of prosecutors and law enforcement officers related to a criminal proceeding, at least while cases were pending, *id.* at 432, 435; and it extended these limitations beyond trial, to cover proceedings on direct appeals and even requests for postconviction relief. *Id.* at 432.

Subsequent lower court rulings have reinforced *Steckman* and even extended it to an extreme degree. In *Perry v. Onunwor* (8th Dist.), 2000 Ohio App. LEXIS 5893, at *7-8, relying on *Steckman*'s extension of its scope beyond direct appeals, to post-conviction review proceedings, the Eighth District Court of Appeals announced a rule closing criminal files and barring public records requests even if no proceedings at all are pending:

> [E]ven if a criminal defendant has been convicted and that conviction has been affirmed on appeal, the possibility of further proceedings and trials remain, and the confidential law enforcement investigatory records remain exempt from disclosure. The possibilities for further proceedings and trials are numerous, e.g., a postconviction relief petition, a motion to withdraw guilty plea, a motion for new trial based on newly discovered evidence, a new trial from a reversal on a successful application to reopen pursuant to App.R. 26(B), and federal habeas corpus proceedings. Thus, absent proof that no further proceedings are possible, **e.g., the defendant's death perhaps,** a custodian of confidential law enforcement investigatory records is under no duty to disclose them. (Emphasis added).

The result has been predictable: as in this case, law enforcement agencies and prosecutors have gradually begun to consider themselves to be immune to the Public Records Act, and respond to any requests, even those related to closed cases, with blanket denials. A prime example occurred here, as the Respondents issued a blanket denial without even providing the few pages of records that were unquestionably public, including routine incident reports and copies of newspaper articles, until a month after the filing of this action.[1]

B. The Revision of the Criminal Rules to Allow Open Discovery Has Eliminated the Concerns Addressed by *Steckman*

The determinations in *Steckman* and its lower court progeny arose from the *Steckman* majority's concern about three specific policy issues: the delay in prosecuting defendants caused by disputes over public records; the danger of witness intimidation; 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. These concerns were founded in Criminal Rule 16, as it existed at the time, and are no longer valid.

In particular, the Court feared that, contrary to the balance struck by Rule 16, "open file discovery" would become the *de facto* norm under a permissive view of the Public Records Act. *Id.* at 428 ("Suffice it to say that the rule does not provide for what is often called 'full,' 'complete' or 'open file' discovery. In order to avoid the results of Crim.R. 16, some defendants (more and more we find) are resorting to the use of R.C. 149.43 to, we believe, obtain information to which they are not entitled under Crim.R. 16 and (and we emphasize) to bring about interminable delay in their criminal prosecutions.").

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[1] Although it is ancillary to the vital public interest at issue in this action, there is no doubt that the Relator is entitled to relief under R.C. 149.43(C)(1) due to this delay in providing the few records even the Respondents must admit are public under any view of the law.

In 2010, this Court (with the consent of the General Assembly, pursuant to Article IV, Section 5 of the Ohio Constitution) implemented a substantial revision and expansion of Rule 16, essentially adopting the "open file discovery" described in *Steckman*. The rule's Staff Notes describe its purpose: "to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties." Crim. R. 16(A) Staff Notes. Rule 16(A) itself states, "This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large."

Specifically, Rule 16 now requires the production of witness statements, police and investigator reports, and tangible evidence without requiring that they be exculpatory or "material to the preparation of [the] 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 eliminates the concern in *Steckman* that, for fear of disclosure, "witnesses' names will not be catalogued and other memoranda will be absent from the 'official' files," creating "a situation where there is an incentive to engage in such conduct." 70 Ohio St. 3d at 434.[2]

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[2] The implications of this statement are powerful: the Court, on one hand, suggests officers cannot always be trusted to preserve the integrity of their own investigative files, but on the other hand, discounts the possibility that exculpatory evidence might be withheld in the course of a prosecution. The very notion that officers might be hesitant to disclose evidence underscores the purpose of postconviction relief, including the importance of taking a second look at criminal files after the most intense phase of the adversary process has ended. Examples of the way access to public records during the postconviction relief process can serve the interests of justice and even directly result in the exoneration of wrongfully convicted prisoners are discussed below in relation to the affidavit of private investigator Martin Yant.

Similarly, the Court's alarm that "[w]itness intimidation is now more real than imagined" has lost its persuasive value in light of the changes to Rule 16. Rule 16 now presumptively authorizes the disclosure of not just witnesses' identities, but their complete statements, where the prior rule presumptively withheld them from disclosure. To the extent there are witness safety concerns in particular cases, the Public Records Act still provides adequate protection to witnesses who would be endangered by the disclosure or who were promised confidentiality, e.g. R.C. 149.43(A)(2)(a), (b) and (d)—as does Rule 16, even in its current form. There is no need for *Steckman*'s authorization of blanket refusal to provide witness statements, especially in cases that have already proceeded through the trial and direct appeal process.

Finally, the *Steckman* Court expressed concern that "[c]riminal trials are now regularly being disrupted while R.C. 149.43 procedures are pursued. It would seem that the people *also* have a right to a speedy trial -- a speedy trial of an indicted defendant." 70 Ohio St. 3d at 429. This concern holds no weight under the new criminal discovery regime. For cases already proceeding under the new version of Rule 16, a public records request will not cause any delay at all, as any records available through such a request will already be subject to discovery in the ordinary course. In postconviction cases, any delay due to a dispute over public records could prejudice only a wrongfully convicted defendant: the status quo (incarceration) will be maintained during the pendency of the dispute, and the only negative effect of a prolonged dispute over records would be to slow any efforts to review or overturn the conviction.

One particular argument set forth in *Steckman* is particularly important to address here. The Court, after acknowledging that its holding "may seem harsh," noted that "we still are faced with the situation in which a defendant in a criminal case might be granted a new trial, on his or her petition for postconviction relief. Since the possibility of retrial remains, the defendant, who

has obtained records during postconviction proceedings, would have on retrial more information than she or he would be entitled to possess if limited to discovery pursuant to Crim.R. 16. This, of course, could present (at best) an anomalous result." The revision of Rule 16 means that such a result would not be anomalous at all. Instead, it would be consistent with the stated intention of Rule 16, to "provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts." Crim. R. 16(A).

C. The Court Should Clarify that Records Covered by Criminal Rule 16 Are Public Records and Cannot Be Withheld Until After the Death of a Convicted Criminal Defendant.

In light of the dramatic change in the scope of Rule 16 and its implications for the concerns expressed in *Steckman*, there is no longer a valid basis for agencies like the Columbus Division of Police to withhold records that are part of a criminal case file—especially where, as here, the defendant's direct appeal has ended and there are no proceedings pending. As this Court recently recognized in *State v. Athon*, 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, at ¶ 16, Section 149.43 "provides an independent basis for obtaining information potentially relevant in a criminal proceeding," though it is not a substitute for criminal discovery.

Athon held that a criminal defendant's reciprocal discovery obligations under Rule 16 are triggered by a public records request for discoverable information. *Id.* at ¶ 19. But it also explicitly and implicitly recognized two basic principles relevant here: that nothing in Rule 16 bars defendants or others from seeking records through Section 149.43, and that members of the public are entitled to the same records criminal defendants can obtain. *E.g.*, *id.* at 16 ("[O]ur decision in *Steckman* does not bar an accused from obtaining public records that are otherwise available to the public.").

The fundamental purpose of *Steckman* was to limit the scope of a defendant's access to public records to the confines of what was then a fairly limited discovery regime under Rule 16. Now that Rule 16 guarantees access to a far greater array of records, a decision of this Court barring public access to closed case files would result in the opposite effect: it would actually give defendants in pending criminal trials a broader right of access than Section 149.43 provides to the general public or even to defendants whose trials have long since ended. This would do nothing to prevent delay, protect witnesses, or ensure the integrity of investigations.

Meanwhile, it would undermine a core, explicit purpose of the new Rule 16: "to protect the integrity of the justice system and the rights of defendants." Crim.R. 16(A). This principle is no less important for those whose trials and appeals have ended than for those who are awaiting trial. The criminal justice system is not infallible. The appeal, postconviction review, and clemency functions are designed to reduce errors and, like Rule 16, protect the system's integrity. The work of the Ohio Innocence Project and others has demonstrated the value of public records in accomplishing that purpose, by using public records both to exonerate wrongfully convicted individuals and identifying the true perpetrators in many cases. Nothing in the language of Section 149.43, Criminal Rule 16, or the *Steckman* decision justifies the complete denial of public access to otherwise public investigative records in closed criminal files.[3]

This principle is exemplified by the affidavit of Martin Yant, a private investigator who repeatedly obtained public records of criminal investigations until the Respondents enacted their

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[3] None of these authorities justifies treating the Relator as if he were requesting records on behalf of an incarcerated individual and applying the resulting statutory restrictions on disclosure. As the Respondents now acknowledge in the parties' Agreed Statement of Facts, the Relator does not represent Mr. Saleh and neither he nor OIP is acting on behalf of Mr. Saleh or his family; rather, they are conducting an independent investigation to determine whether there is any evidence supporting Mr. Saleh's claim that he was wrongfully convicted.

blanket rejection policy enacted in approximately 2010. (See generally Yant, Ludlow Affidavits). For at least five wrongfully convicted individuals, Mr. Yant's public records requests directly uncovered exculpatory evidence that was not produced in discovery under the prior version of Rule 16. Two of them, Sean Ennis and Wyman Castleberry, were investigated by the Respondents, wrongfully convicted, and then imprisoned for a total of 15 years. If Mr. Yant had made his requests to the Respondents following their institution of a blanket policy of rejecting public records requests related to criminal cases, they would likely still be incarcerated. In another case, Mr. Yant's records requests helped free Clarence Elkins. If the Barberton Police Department had applied *Steckman* to its full extent and followed the Respondents' current policy, Mr. Elkins would still be serving life without parole, while the actual offender—who is now in prison—would never have been convicted.

Mr. Yant's affidavit highlights another problem as well, as he notes that he has requested records of closed cases only to find that they have already been destroyed. Applying *Steckman* as the Respondents propose could defeat not just the possibility of exoneration for wrongfully convicted individuals; it could defeat the public's interest in ever learning the truth about such cases. *Steckman* seemed to assume that all criminal case files would become subject to disclosure at some point—but by the time a criminal defendant has died or been released from a lengthy prison term, there is no guarantee the records will remain available. Nothing in the Public Records Act or this Court's jurisprudence currently requires public offices to set their records retention schedules so that all criminal case records will be preserved indefinitely.

D. The Use of a Blanket Rejection Policy is Fundamentally Inconsistent with the Ohio Public Records Act.

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. The Respondents have openly announced a blanket policy of rejecting public records requests related to closed criminal cases until a defendant has died or been released. (Ludlow Affidavit and Exh. A). They have submitted an affidavit from a public records officer, Jonathan Schirg, who describes a review of the file and a determination that it contains some unidentified volume of "confidential law enforcement investigatory records, including records of the specific confidential investigatory techniques, procedures, and specific investigatory work product in this homicide investigation," together with a list of other public records exceptions quoted verbatim from Section 149.43 or this Court's cases. (Schirg Affidavit). In light of the

Respondents' interpretation of the CLEIR exception, all Mr. Schirg's statement really means is that he confirmed that the records in the file relate to a homicide investigation and that the convicted defendant is still alive and remains in prison. He does not claim that all of the withheld records are exempted, does not describe the applicability of any specific exemption to any particular record, and he certainly does not opine or explain whether he would still consider any of the records confidential if *Steckman* were overruled or modified. Most important, his conclusory lay opinion as to the ultimate legal issues regarding the applicability of statutory exceptions cannot be credited, as it is for the Court to determine whether any exceptions apply here. To the extent this affidavit is simply intended to preserve the Respondents' ability to withhold particular portions of Mr. Saleh's case file—such as references to social security numbers in the file—despite a holding by this Court overruling *Steckman*, that determination can be made by the Court, if necessary, pursuant to an *in camera* inspection.

The *Steckman* Court endorsed these sorts of practices by law enforcement agencies knowing that they flew in the face of ordinary public records jurisprudence. It took this extreme step only because of what it deemed a crisis in the criminal justice system, and it premised its rule exclusively on the three policy bases addressed above. There is no question—because the Court said as much throughout its opinion—that if Rule 16's scope was as broad then as it is now, *Steckman* would have been decided differently. Now that Rule 16 no longer supports the rule in *Steckman* and all three of the policy concerns relied upon in *Steckman* have been rendered moot, this Court should restore the Public Records Act's presumption in favor of disclosure and repudiate policies that deny public access to records without any individualized review. This Court should overrule *Steckman*.

IV. CONCLUSION

For the reasons stated above and in the Relator's prior memoranda, the Relator requests that this Court grant a 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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2015, a copy of the foregoing Brief of Relator Donald Caster was served by regular U.S. Mail upon:

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Appendix to the Brief of Relator Donald Caster

Ohio Revised Code Section 149.43 1

Ohio Rule of Criminal Procedure 16 12

Former Ohio Rule of Criminal Procedure 16 20

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 149. Documents, Reports, and Records (Refs & Annos)
Records Commissions

R.C. § 149.43

149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

Effective: March 23, 2015
Currentness

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under sections 3705.12 to 3705.124 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

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Appendix 1

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

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(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division;

(cc) Information and records that are made confidential, privileged, and not subject to disclosure under divisions (B) and (C) of section 2949.221 of the Revised Code.

(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.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

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(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

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(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(9) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(9) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

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(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(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. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall

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not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

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(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

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If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, 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;

(b) 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.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

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(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, 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 as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

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(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

CREDIT(S)

(2014 H 663, § 1, eff. 3-23-15; 2014 H 663, § 3, eff. 3-23-15 (See Historical and Statutory Notes); 2013 S 23, eff. 3-20-15; 2013 H 59, eff. 9-29-13; 2012 S 314, eff. 9-28-12; 2012 H 487, eff. 9-10-12; 2011 H 64, eff. 10-17-11; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 10-16-09; 2008 S 248, eff. 4-7-09; 2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979 S 62; 130 v H 187)

Notes of Decisions (1561)

R.C. § 149.43, OH ST § 149.43
Current through 2015 Files 1 to 6 of the 131st GA (2015-2016).

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Baldwin's Ohio Revised Code Annotated
Rules of Criminal Procedure (Refs & Annos)

Crim. R. Rule 16

Crim R 16 Discovery and inspection

Currentness

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

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(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to

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defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

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(2) Results of physical or mental examinations, experiments or scientific tests;

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

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(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-10)

STAFF NOTES (JULY 1, 2010 AMENDMENTS)

Division (A): Purpose, Scope and Reciprocity

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

The Ohio criminal defense bar, by and through the Ohio Association of Criminal Defense Lawyers and prosecutors, by and through the Ohio Prosecuting Attorneys Association, jointly drafted the rule and submitted committee notes to the Commission on the Rules of Practice and Procedure. The Commission on the Rules of Practice and Procedure discussed, modified, and adopted the notes submitted in developing these staff notes.

Division (B): Discovery: Right To Copy or Photograph

This division expands the State's duty to disclose materials and information beyond what was required under the prior rule. All disclosures must be made prior to trial. This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule. Subject to several exceptions, the State must provide pretrial disclosure of all materials as listed in the enumerated divisions.

Division (C): Prosecuting Attorney's Designation of "Counsel Only" Materials

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as "Counsel Only" may be orally interpreted to the Defendant, or to counsel's agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to

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physically retain "Counsel Only" material, and to limit its dissemination. Counsel's duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the "Counsel Only" material.

Division (D): Prosecuting Attorney's Certification of Nondisclosure

This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is the prosecution's duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review.

A nondisclosure must be for one of the reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The certification process recognizes the unique nature of sex crimes against children. In the event of a certification of nondisclosure, defense counsel will have the right to inspect the statement no later than the seven-day review hearing provided in subsection (F), which is an improvement from the prior Criminal Rule 16(B)(1)(g).

Finally, the rule recognizes that not every eventuality can be anticipated in the text of a rule, and allows nondisclosure in the interest of justice.

Division (E): Right of Inspection in Cases of Sexual Assault

This division recognizes the intensely personal nature of a sexual assault, and provides a special mechanism for discovery in such cases. It represents an exception to division (B).

The compromise between the interests in the privacy and dignity of the victim are balanced against the right of the defendant to a thorough review of the State's evidence by permitting inspection, but not copying, of certain materials. Upon motion of the defendant, the court may, in its discretion, permit these materials to be provided under seal to defense counsel and the defendant's expert.

In cases involving the sexual abuse of a child under the age of 13, upon motion and for good cause shown, the trial court may order dissemination of the child's statement under seal and pursuant to protective order to defense counsel and the defendant's expert. This provision facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.

Division (E)(2) is intended to give sufficient time for an expert to evaluate the statement, and also to permit defense counsel to consult with the expert on the content of the statement and issues related to it. This division is designed to provide an exception to the nondisclosure procedure sufficient to permit the expert and defense counsel to effectively evaluate the statement. The protective order shall apply to defense counsel and defendant's experts and agents.

Division (F): Review of Prosecuting Attorney's Certification of Non-Disclosure

This division provides for judicial review at the trial court level of a prosecutor's certification of nondisclosure. As in many other executive branch decisions the standard for review, subject to constitutional protections, is an abuse of discretion--that is, was the prosecutor's decision unreasonable, arbitrary or capricious? The prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function.

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The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.

The review is conducted *in camera* on the objective criteria set out in division (D), seven days prior to trial, with defense counsel participating. If the Court finds an abuse of discretion, the material must be immediately disclosed to defense counsel. If the Court does not find an abuse of discretion, the material must nonetheless be disclosed no later than the commencement of trial. Further judicial review is provided by giving the prosecutor a right to an interlocutory appeal of an order of disclosure as provided for in Criminal Rule 12(K), which is amended to accommodate that process.

Upon motion of the State, the certification of nondisclosure or "Counsel Only" designation is reviewable by the trial judge in the *in camera* proceeding. The preferred practice is to record or transcribe the *in camera* review to preserve any issues for appeal and sealed to preserve the confidential nature of the information.

The *in camera* review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances.

Division (F)(4) seeks to protect victims of sexual assault who are still in their tender years.

Division (G): Perpetuation of Testimony

This division provides that if after judicial review the Court orders disclosure of evidence, the prosecutor upon motion to the Court is given a right to perpetuate testimony in a pretrial hearing as set forth in the subsection.

Division (H): Discovery: Right to Copy or Photograph

The previous rule allowed for disclosure of specified relevant evidence in the possession of defense counsel to the State upon the State's motion. This division expands defense counsel's duty to disclose materials and information beyond what was required under the prior rule. In this division a reciprocal duty of disclosure now arises upon defense counsel's motion for discovery without further demand from the State. This division requires the materials to be copied or photographed, as opposed to the prior rule that only allowed for inspection by the State. Subject to several exceptions covered in division (J), defense counsel must provide pretrial disclosure of materials as listed in the enumerated subsections. This division seeks to define the defense counsel's reciprocal duty of disclosure while respecting the constitutional and ethical obligations required in representing a client.

For the first time, defense counsel has a duty to provide the State with evidence that tends to support innocence or alibi. This allows the State to properly assess its case, and re-evaluate the prosecution. The Commission believes this provision will facilitate meaningful plea negotiation and just resolution.

Division (I): Witness List

This division imposes an equal duty on each party to disclose the list of witnesses that will be called at trial. It prohibits counsel from commenting on the witness lists but does not prohibit the commenting upon the absence or presence of a witness relevant to the proceeding. See, *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

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Division (J): Information Not Subject to Disclosure

This division clarifies what information is not subject to disclosure by either party for reasons of confidentiality, privilege, or due to their classification as documents determined to be work product. This division also references that the disclosure or nondisclosure of grand jury testimony is governed by Rule 6 of the Rules of Criminal Procedure.

Division (K): Expert Witnesses; Reports

The division requires disclosure of the expert witness's written report as detailed in the division no later than twenty-one days prior to trial. Failure to comply with the rule precludes the expert witness from testifying during trial. This prevents either party from avoiding pretrial disclosure of the substance of expert witness's testimony by not requesting a written report from the expert, or not seeking introduction of a report. This division does not require written reports of consulting experts who are not being called as witnesses.

Division (L): Regulation of Discovery

The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.

In cases in which a defendant initially proceeds *pro se*, the trial court may regulate the exchange of discoverable material to accommodate the absence of defense counsel. Said exchange must be consistent with and is not to exceed the scope of the rule. In cases in which the attorney-client relationship is terminated prior to trial for any purpose, any material designated "Counsel Only" or limited in dissemination by protective order must be returned to the State. Any work product derived from such material shall not be provided to the defendant.

The provisions of (L)(2) and (L)(3) are designed to give the court greater authority to regulate discovery in cases of a *pro se* defendant and addresses the problems that could arise if a defendant terminates the employment of his attorney and then demands everything in the attorney's file. This could frustrate the protections built into the rule to avoid release of material directly to the defendant in some cases.

Section (M): Time of Motions

This division requires timely compliance with all provisions of this rule subject to judicial review. Adherence to the requirements of this division will help to ensure the fair administration of justice.

Notes of Decisions (776)

Rules Crim. Proc., Rule 16, OH ST RCRP Rule 16
Current with amendments received through April 15, 2015.

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taken cannot bear the expense thereof, the court may direct that all deposition expenses, including but not limited to travel and subsistence of the defendant's attorney for attendance at such examination together with a reasonable attorney fee, in addition to the compensation allowed for defending the defendant, and the expenses of the prosecuting attorney in the taking of such deposition, shall be paid out of public funds upon the certificate of the court making such order. Waiver of counsel shall be as prescribed in Rule 44(C).

(E) How taken

Depositions shall be taken in the manner provided in civil cases. The prosecution and defense shall have the right, as at trial, to full examination of witnesses. A deposition taken under this rule shall be filed in the court in which the action is pending.

(F) Use

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or, that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of refreshing the recollection, or contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, any party may offer other parts.

(G) Objections to admissibility

Objections to receiving in evidence a deposition or a part thereof shall be made as provided in civil actions.

(Adopted eff. 7-1-73)

Crim R 16 Discovery and inspection

(A) Demand for discovery

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts. The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made

by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

(Adopted eff. 7-1-73)

Crim R 17 Subpoena

(A) For attendance of witnesses; form; issuance

Every subpoena issued by the clerk shall be under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in and file a copy thereof with the clerk before service.

(B) Defendants unable to pay

The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the presence of the witness is necessary to an adequate defense and that the defendant is financially unable to pay the witness fees required by subdivision (D). If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be taxed as costs.

(C) For production of documentary evidence

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are offered in evidence, and may, upon their production, permit them or portions thereof to be inspected by the parties or their attorneys.

(D) Service

A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, marshal, or a deputy of any, by a municipal or township policeman, by an attorney at law or by any person designated by order of the court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by reading it to him in person or by leaving it at his usual place of residence, and by tendering to him upon demand the fees for one day's attendance and the mileage allowed by law. The person serving the subpoena shall file a return thereof with the clerk. If the witness being subpoe-

naed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service, or otherwise.

(E) Subpoena for taking depositions; place of examination

When the attendance of a witness before an official authorized to take depositions is required, the subpoena shall be issued by such person and shall command the person to whom it is directed to attend and give testimony at a time and place specified therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible objects which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 16.

A person whose deposition is to be taken may be required to attend an examination in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(F) Subpoena for a hearing or trial

At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state.

(G) Contempt

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court or officer issuing the subpoena.

(Adopted eff. 7–1–73; amended eff. 7–1–78)

Crim R 17.1 Pretrial conference

At any time after the filing of an indictment, information or complaint the court may, upon its own motion or the motion of any party, order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or defendant's counsel at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and defendant's counsel. The court shall not conduct pretrial conferences in any case in which a term of imprisonment is a possible penalty unless the defendant is represented by counsel or counsel has been waived pursuant to Crim. R. 44. In any case in which the defendant is not represented by counsel, any pretrial conference shall be conducted in open court and shall be recorded as provided in Crim. R. 22.

(Adopted eff. 7–1–73; amended eff. 7–1–00)

Staff Notes

2000:

Rule 17.1 Pretrial Conference

The prior rule prohibited courts from conducting pretrial conferences in criminal cases until the defendant was represented by counsel. The amendment to Crim. R. 17.1 permits a court to conduct a pretrial conference with an unrepresented defendant in certain circumstances. Specifically, in cases in which a term of imprisonment is not a possible penalty, the court may conduct a pretrial conference with an unrepresented defendant when defendant has waived counsel pursuant to Crim. R. 44. In such a case, the pretrial conference must be conducted on the record in open court.

Crim R 18 Venue and change of venue

(A) General venue provisions

The venue of a criminal case shall be as provided by law.

(B) Change of venue; procedure upon change of venue

Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

(1) Time of motion. A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

(2) Clerk's obligations upon change of venue. Where a change of venue is ordered the clerk of the court in which the cause is pending shall make copies of all of the papers in the action which, with the original complaint, indictment, or information, he shall transmit to the clerk of the court to which the action is sent for trial, and the trial and all subsequent proceedings shall be conducted as if the action had originated in the latter court.

(3) Additional counsel for prosecuting attorney. The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

(4) Appearance of defendant, witnesses. Where a change of venue is ordered and the defendant is in custody, a warrant shall be issued by the clerk of the court in which the action originated, directed to the person having custody of the defendant commanding him to bring the defendant to the jail of the county to which the action is transferred, there to be kept until discharged. If the defendant on the date of the order changing venue is not in custody, the court in the order changing venue shall continue the conditions of release and direct the defendant to appear in the