ORIGINAL

IN THE SUPREME COURT OF OHIO

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

AMICUS CURIAE BRIEF OF THE OHIO COALITION FOR OPEN GOVERNMENT

Frederick M. Gittes (0031444)
fgittes@gitteslaw.com
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
THE GITTES LAW GROUP
723 Oak Street
Columbus, OH 43205
Telephone: (614) 222-4835
Facsimile: (614) 221-9655
Attorneys for Relator Donald Caster

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

David L. Marburger (0025747)
dmarburger@bakerlaw.com
Melissa A. DeGaetano (0080567)
mdegaetano@bakerlaw.com
BAKER & HOSTETLER LLP
PNC Center
1900 East 9th Street, Suite 3200
Cleveland, OH 44114-3482
Telephone: 216.621.0200
Facsimile: 216.696.0740
Attorney for Amicus Curiae
The Ohio Coalition
for Open Government

FILED
JUN 18 2015
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS 1

III. ARGUMENT 1

A. The only true societal interest of the "confidential law enforcement investigatory record" exemption is protecting the integrity of the investigation. 1

B. The integrity of a law enforcement investigation is no longer protected when its fruits are disclosed to the very person who could sabotage the investigation's goal. 4

C. Disclosure required by Criminal Rule 16 destroys the confidentiality necessary to support the Public Records Act's investigatory records exemption. 5

D. If society's only interest is gone, then there is no reason for the public records act to stand in the way of anyone seeking access to the files. 6

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Estate of Graves v. City of Circleville,
124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201 6

Lutwak v. United States,
344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953) 6

State ex rel. Master v. City of Cleveland,
75 Ohio St.3d 23, 1996-Ohio-228, 661 N.E.2d 180 3

State ex rel. Musial v. City of North Olmsted,
106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.2d 1243 3

Ohio Patrolmen's Benevolent Ass'n v. City of Mentor,
89 Ohio St.3d 440, 447, 2000-Ohio-214, 732 N.E.2d 969 2

State ex rel. Plain Dealer Publ'g Co. v. Lesak,
9 Ohio St.3d 1, 457 N.E.2d 821 (1984) (Celebrezze, C.J., concurring) 5

Steckman v. Jackson,
70 Ohio St.3d 420, 639 N.E.2d 83 (1994) 6, 7, 9

State ex rel. WHIO-TV-7 v. Lowe,
77 Ohio St.3d 350, 1997-Ohio-271, 673 N.E.2d 1350 ..... 7, 8

Statutes

O.R.C. 149.43(A)(2) 1, 5, 7

Other Authorities

Criminal Rule 16 ..... *passim*

I. INTRODUCTION

Amicus Curiae support the Relator and urge this Court to grant the Relator's request for a writ of mandamus. Amicus asks the Court to hold that if a criminal would have a right to records in the government's possession, then the public records act should not preclude their disclosure as public records.

II. STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS

The Ohio Coalition for Open Government is a nonprofit corporation whose members include Ohio newspapers, Ohio broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public offices to make their records available for public inspection and copying. The coalition was formed by the Ohio Newspaper Foundation, a nonprofit corporation controlled by most of Ohio's daily and weekly newspapers. Amicus agrees with Relator Donald Caster that the police records underlying the arrest and prosecution of Adam Saleh should not be exempt from disclosure under the Ohio Public Records Act.

III. ARGUMENT

<u>Proposition of Law:</u> If a criminal defendant would have a right to records in the government's possession, then the public records act should not preclude their disclosure as public records.

A. The only true societal interest of the "confidential law enforcement investigatory record" exemption is protecting the integrity of the investigation.

By definition, the confidential law enforcement investigatory records exemption to Ohio's public records act protects only confidential information from disclosure. R.C. 149.43(A)(2).

This Court has identified the rationale for the investigatory records exemption essentially as twofold. Release of the information might (a) "subject suspects to additional adverse publicity" and (b) "compromise" the investigation itself. *Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 447, 2000-Ohio-214, 732 N.E.2d 969.

The true reason, however, is (b) – the risk of compromising the investigation. Protecting an uncharged suspect, for example, from further adverse publicity can't be the real reason. Here's why.

First, the exemption is not mandatory. It does not *require* police to withhold anything. It merely gives police the option to withhold investigatory records at their discretion. So, for example, when an uncharged suspect is eluding police, they often publicize the suspect's photo and name, the crime for which suspect is wanted, and the suspect's criminal record. If the exemption's purpose really were to protect people from adverse publicity, then the exemption would bar police from publicizing that damaging information. It wouldn't give police the unfettered, unilateral discretion that they now enjoy to publicize it.

Second, the Ohio Supreme Court has decided that police waive the right to raise the investigatory records exemption when, for example, police unitarily disclose an uncharged suspect's identity. *Ohio Patrolmen*, 89 Ohio St. 3d at 447. If the exemption's purpose really included protecting that person from the damaging information of being a potential suspect or person of interest, then the police would not have the unconditional and unilateral right to waive that protection.

Third, and most remarkably, even when someone declares publicly that he or she is indeed a suspect, the police can still raise the exemption. *State ex rel. Musial v. City of North Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.2d 1243, ¶ 22, 25, 28; *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 1996-Ohio-228, 661 N.E.2d 180.

Police can redact uncharged suspects' names even though those suspects publicly unmask themselves and even if they ask the police to stop deleting their names from records that the police release. *State ex rel. Musial v. City of North Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.2d 1243, ¶ 22, 25, 28; *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 1996-Ohio-228, 661 N.E.2d 180.

Since protecting citizens from adverse publicity doesn't square with the investigatory records exemption's actual operation, the *only* genuine reason for the exemption is to give police full discretion to protect their own investigation against compromise. It exists so that law enforcement agencies conducting investigations may gather information without having the very purpose of their investigations frustrated by the premature disclosure of information.

The true purpose of the exemption is to give law enforcement agencies the discretion to disclose or withhold the product of their investigations based on their perceived law enforcement needs, regardless of whether their decision to disclose might subject even innocent citizens to adverse publicity.

That true purpose means that the objective of the exemption is to give police the discretion to withhold their investigatory work product where they believe that

disclosing it would aid someone in dodging police efforts to enforce the law, or to get away with committing a crime without detection or prosecution. The key is to prevent circumventing law enforcement..

B. The integrity of a law enforcement investigation is no longer protected when its fruits are disclosed to the very person who could sabotage the investigation's goal.

When the Rules of Criminal discovery require a prosecutor to disclose law enforcement work product to a criminal defendant, the prosecutor is disclosing it to the very person the investigatory exemption is designed to keep the information from – the citizen charged with violating the law.

Moreover, in requiring that disclosure, the Rules place no constraints on that criminal defendant or his counsel from sharing that information with anyone—including other wrongdoers, who have not been indicted, arrested, and whom police don't know about yet.

In 2010, the discovery process was amended in criminal cases. The rule now provides for "open file" discovery. Unlike the former version, the new Criminal Rule 16 requires the production of witness statements, investigative reports, and tangible evidence, without requiring that they are exculpatory or "material to the preparation of [the defendant's] defense," and without the prior catch-all exclusion of "reports, memoranda, or other internal documents" and "statements made by witnesses or prospective witnesses to state agents." Compare Crim. R. 16(B) with prior Crim. R. 16(B)(1)(c)-(f) and (B)(2).

Through its lawmaking, the legislature has thus decided that society's interest in providing criminal defendants with the fruits of a police investigation

outweighs the risk that someone might get away with a criminal offense by using the disclosed investigatory work product.

The following hypothetical illustrates this principle. Suppose that mafia boss Tony Soprano's attorney issues a public records request for the government's wiretap records for each of Soprano's family members, even though none of them has been arrested yet. Disclosure of that information would clearly compromise the integrity of the government's investigation into the crime family. But once the government charges someone in the Soprano family with a crime arising from its investigation, Rule 16 forces the prosecutor to disclose that information to the charged suspect, who then is free to disclose it to others who may have been complicity, but not apprehended or charged. To that extent, the investigation has been compromised.

At that point, the true purpose underlying the investigatory records exemption also is compromised and, so, evaporates.

C. Disclosure required by Criminal Rule 16 destroys the confidentiality necessary to support the Public Records Act's investigatory records exemption.

The plain language of the Ohio public records act supports this conclusion. Breaking the investigatory exemption down into digestible parts makes clear that it only applies to confidential information that is not already subject to disclosure. It applies "***only to the extent***" that disclosure of the record "***creates***" a "***probability of disclosure***" of the information enumerated in Section 149.43(A)(2).

Each word of the statute matters. Former Chief Justice Celebrezze stressed this when the Court ruled that an already-disclosed suspect's name was not subject

to the exemption. Chief Justice Celebrezze explained that the reason for this result lies in the statute's plain language:

> The court of appeals found [the school district's] argument unpersuasive for the reason that the name of the athletic director had already been published in newspaper articles which reported this case.
>
> I agree with the determination made by the court of appeals. . . .
>
> In the case at bar the release of the . . . records will not "create" a probability that the athletic director's identity will be disclosed.

State ex rel. Plain Dealer Publ'g Co. v. Lesak, 9 Ohio St.3d 1, 4, 457 N.E.2d 821 (1984) (Celebrezze, C.J., concurring).

Once a criminal defendant has the right to modern Criminal Rule 16 discovery, the integrity of a law enforcement investigation is thus no longer protected because Rule 16's open discovery requirements go beyond "creating a probability of disclosure" to actually disclosing the information enumerated in Section 149.43(A)(2).

D. If society's only interest is gone, then there is no reason for the public records act to stand in the way of anyone seeking access to the files.

When the reason for a rule disappears, the rule itself should follow its logic into the same black hole. See, *e.g.*, *Lutwak v. United States*, 344 U.S. 604, 615, 73 S.Ct. 481, 97 L.Ed. 593 (1953) (where sham marriage was entered solely for the purpose to defraud, "the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule."); *Estate of Graves v. City of Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201, ¶ 19-20 (where rationale

behind this Court's decision in a previous case ceases to exist due to enactment of a new law, then the rule in the previous decision does not apply).

In *Steckman*, the Court announced a broad, blanket definition of "investigatory record," based on maintaining society's interest in the integrity of the investigation, which it believed had been compromised by defendants' use of the public records act to circumvent the rules of criminal procedure. But now, post 2010 criminal rule amendments, the open discovery policy in the new Criminal Rule 16 subsumes society's interest in protecting the integrity of the investigation, causing that interest to disappear at the point that such discovery is available to the criminal defendant. *Steckman*'s broad definition of "investigatory record" should thus follow society's interest into the same black hole.

Steckman implicitly recognizes this principle. *Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). The concerns articulated in *Steckman* all stem from the potential of disclosing investigatory records that would not otherwise be subject to disclosure. In fact, the entire basis of *Steckman* appears to be the information gap between what the 1994 Criminal Rule 16 allows defendants to get, and the concept of "open discovery." *See, e.g.*, *Steckman* 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 . . . 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.").

Significantly, none of the defendants in the cases disposed of by *Steckman* had a right to the information sought via public records under the then-existing criminal rules. In all three cases, the Court held that requested records were "work product," which the Court defined as information "***not subject*** to discovery pursuant to Crim.R. 16(B)." *Steckman* at 432 (emphasis added). Given the disappearance of society's interest once open discovery becomes available to a defendant, the corollary to the rule in *Steckman* should also be true – information subject to discovery pursuant to Crim. R. 16(B) should fall outside of the investigatory record exemption and inside the definition of a "public record."

The Court's decision in *WHIO-TV* offers no reason to avoid the rule requested here. Simply put, it was wrongly decided. In *WHIO-TV*, the Court, without analyzing the plain language of the statute, held that information disclosed to a defendant during discovery is not a public record due to privacy expectations embedded in the discovery process. *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 1997-Ohio-271, 673 N.E.2d 1350. Relying on cases involving private parties and protective orders, the Court explained that "[d]iscovery is neither a public process nor typically a matter of public record." *WHIO-TV* at 354.

The import of this observation, however, is only that documents that were not already public records do not become public records by virtue of being exchanged in discovery. In the context of civil litigation between private parties, this observation makes perfect sense. The documents they exchange with each other do not become public records simply because they availed themselves of the public court system to

resolve their dispute. In the context of a criminal proceeding where one of the parties to discovery is the government, the observation is beside the point. Whether or not discovery is typically public, nothing prevents either the prosecutor or the criminal defendant from publicizing information exchanged during discovery.

This Court must return to the language of the open records act to determine what the exemptions mean. Once the subject of an investigation has a right to information – i.e. via the open discovery currently permitted by Criminal Rule 16 – then there is no risk of "creating" the "probability of disclosure" because the potential for actual disclosure already exists. Moreover, society's interest in maintaining the integrity of the investigation completely disappears once open records discovery becomes available to a criminal defendant. Once society's interest in protecting the records is gone, then there is no reason for the public records act to stand in the way of anyone seeking access to the files.

IV. CONCLUSION

For the reasons set forth above, the Court should find that *Steckman* offers no bar to Relator's public records request because the present rules of Criminal Procedure permit the disclosure of the requested records via open discovery. Amicus therefore respectfully urges the Court to grant the Relator's request for a writ of mandamus.

Dated: June 18, 2015

Respectfully submitted,

David L. Marburger
dmarburger@bakerlaw.com
Melissa A. DeGaetano
mdegaetano@bakerlaw.com
BAKER & HOSTETLER LLP
PNC Center
1900 East 9th Street, Suite 3200
Cleveland, OH 44114-3482
Telephone: 216.621.0200
Facsimile: 216.696.0740

Attorneys for Amicus Curiae
The Ohio Coalition for Open
Government

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2015, a copy of the foregoing Amicus Curiae Brief of The Ohio Coalition for Open Government was served by regular U.S. Mail upon the following:

Frederick M. Gittes (0031444)
fgittes@gitteslaw.com
Jeffrey P. Vardaro (0081819)
jvardaro@gitteslaw.com
THE GITTES LAW GROUP
723 Oak Street
Columbus, OH 43205
Telephone: (614) 222-4835
Facsimile: (614) 221-9655
Attorneys for Relator Donald Caster

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

Melissa A. DeGaetano (0080567)