Supreme Court of Ohio Clerk of Court - Filed June 30, 2015 - Case No. 2014-0244

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. Schiffbauer, et al.	:	**Case No. 2014-0244**
Relator,	:	**ORIGINAL ACTION IN MANDAMUS**
v.	:	
Larry Banaszak, et al.	:	
Respondent.	:	

RESPONDENTS' LARRY BANASZAK AND ROBERT GATTI (REFERRED TO COLLECTIVELY AS "THE UNIVERSITY") AMENDED MEMORANDUM CONTRA RELATOR'S MOTION TO STRIKE AFFIDAVIT OF DOUGLAS A. WILLIARD

Relator moved to strike three portions of the Memorandum Contra Schiffbauer's Motion for Statutory Damages and Attorney Fees. None of them should be stricken.

1. The Affidavit of Douglas A. Williard

Relator contends that the Affidavit of Douglas A. Williard should be stricken because it is hearsay. Evid.R. 801(C) defines hearsay as follows:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

In the present case, the October 21, 2014 Affidavit of Douglas A. Williard attached as **Exhibit A** is not hearsay as defined by Evid.R. 801(C) because it is not being offered to prove the fact of the matter asserted. The University is not submitting the affidavit to prove the truth of the legal advice provided by Assistant Attorney General Moorman but rather to provide evidence of the statements made upon which the University reasonably relied. The Affidavit of Deputy Chief Williard establishes the advice provided to the University by the Assistant Attorney General at a Sunshine Law Seminar conducted for the purpose of advising the public of legal rights and

obligations under the Public Records Act ("PRA") and interpretative case law as it existed at the time. [1] The University's conduct in this matter was reasonable given that the University relied upon the legal advice provided by the Assistant Attorney General.[2]

2. Footnote 9 of the Memorandum Contra

Relator also moves to strike footnote 9 on the basis of hearsay. The attached June 29, 2015 Affidavit of Robert Gatti eliminates this concern.[3] Even in the absence of Mr. Gatti's affidavit, this reference to the fact that the University's Dean of Students was concerned with the privacy rights of its students, including the privacy rights of alleged student victims of crime, is not hearsay because it is not being offered to prove the fact of the matter asserted. Rather, the incident provides an example of the public policy justification for protecting student privacy rights. The University's legitimate public policy concern with student privacy rights is demonstrated by the event in which a parent called the Dean of Students to complain that a student newspaper reporter had called the parent's daughter for an interview the day after the student's alleged sexual assault. This incident illustrates the reason Universities are concerned with student privacy rights to avoid "re-victimizing" the victim and to avoid the possible "chilling effect" on crime reporting if the identities of student perpetrators and/or victims are disclosed. The potential chilling effect on crime reporting if student identities, either the identity of the alleged perpetrator or alleged victim, are disclosed is an important public policy concern

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[1] The October 21, 2014 Affidavit of Douglas A. Williard was obtained on October 21, 2014. A Motion to Dismiss was filed which was limited by rule to addressing the adequacy of the Complaint. Although the Motion to Dismiss was fully briefed, as noted by the dissenting opinion, otherwise the merits of the University's defenses were not briefed.

[2] The concurring legal analysis of the law firms consulted by the University is reflected in the August 12, 2013 letter from Blaugrund, Herbert, Kessler, Miller, Myers & Postalakis attached as **Exhibit B** and Motion to Dismiss filed by Respondents on July 22, 2014.

[3] See: June 29, 2015 Affidavit of Robert Gatti attached as **Exhibit C** and 2014 Office for Civil Rights Questions and Answers on Title IX and Sexual Violence attached as **Exhibit D** (previously attached to Respondents' Memorandum Contra).

upon which guidance has been provided by the United States Department of Education Office of Civil Rights.

3. Statement that the Records Requested Were Available from the Westerville Mayor's Court

Relator moves to strike the statement the records requested in this lawsuit were always available to Relator and member of the public from the Westerville Mayor's Court, Westerville Municipal Court and/or Westerville Police Department on the ground that this statement is not found in the record.

The fact that arrest records in this case were available to Relator and other members of the public from the Westerville Mayor's Court is mentioned in the dissenting opinion in this case.[4] Additionally, the Affidavit of Relator Anna Schiffbauer herself (attached to Relator's February 13, 2014 Memorandum in Support of Complaint for Mandamus) confirms this. In that Affidavit, Relator acknowledged that she obtained the names of the alleged perpetrators and incident dates from the offices of the Westerville Mayor's Court.[5] Thus, Relator's own affidavit confirms that the arrest records sought in this case were accessed and always available to Relator and other members of the public from the public offices of the Westerville Mayor's Court. Further, the attached June 29, 2015 Affidavit of University Chief of Police Larry Banaszak confirms that the records sought in this case were always available from the Westerville Mayors' Court, attached as **Exhibit F**.

[4] *State ex rel. Schiffbauer v. Banaszak*, Slip Opinion No. 2015-Ohio-1854, P22.
[5] See: February 5, 2014 Affidavit of Anna Schiffbauer attached as **Exhibit E**.

For the foregoing reasons, the University respectfully requests that Relator's Motion to Strike be overruled.

Respectfully Submitted,

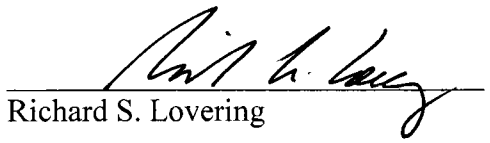
Richard S. Lovering (0022027)
Anne Marie Sferra (0030855)
Warren I. Grody (0062190)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
Email: rlovering@bricker.com
Counsel for Respondents,
Larry Banaszak and Robert M. Gatti

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent via email and first class U.S. mail on June 30, 2015, to:

John C. Greiner
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Counsel for Anna Schiffbauer

Michael DeWine, Ohio Attorney General
Jeffery W. Clark, Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
Counsel for Amicus
Attorney General Mike DeWine



Richard S. Lovering

IN THE SUPREME COURT OF OHIO

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	:	**ORIGINAL ACTION IN**
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AFFIDAVIT OF DOUGLAS A. WILLIARD

I, Douglas A. Williard, do hereby declare and state as follows based on personal knowledge:

1. I am the former Deputy Chief at Otterbein University Police Department and have served in that position from October 14, 2008 to August 13, 2013. My duties and responsibilities as Deputy Chief included overseeing the daily operations of the Otterbein Police Department.

2. On November 2, 2011, former Otterbein University Police Sergeant, Robert Reffitt and I attended a 3-hour class presented by the Ohio Attorney General's Office titled, "Sunshine Law."

3. We attended because we wanted to obtain the Ohio Attorney General's legal guidance and direction concerning our legal obligations, if any, under the Ohio Public Records Act. The Presenter was introduced as the Assistant Ohio Attorney General Robert Moorman who handles Ohio Public Records Act inquiries.

4. The Assistant Ohio Attorney General, Attorney, Robert Moorman, started the class by stating, "we'll cover the exemptions to Ohio's Sunshine Law first." He then proceeded to cover several exemptions.

5. One exemption Assistant Attorney General Moorman talked about was a case called, *Oriana House v. Montgomery*, which he stated established a "functional equivalency" test to determine whether private agencies/companies that receive public funds are subject to the Public Records Act.

6. As Assistant Attorney General Robert Moorman explained the case law and explained the functional equivalency standard, I thought at the end of the explanation he would say the Ohio Supreme Court found that *Oriana House* was a public institution and would have to submit to the Ohio Public Records Act, especially since he explained about the millions of public funds the agency received.

EXHIBIT A

7. When he advised that the Ohio Supreme Court ruled that although *Oriana House* met two of the four standards, they were not subject to Ohio's Public Records Act, Sergeant Reffitt and I looked at each other because we knew that Otterbein Police Department, at most, only met one of the four standards.

8. I cannot remember if it was at a break or at the end of the training, Sergeant Reffitt and I approached the Presenter/Assistant Ohio Attorney General Robert Moorman and I introduced us to him.

9. I then asked Presenter/Assistant Attorney General Robert Moorman for clarification of the *Oriana House* ruling because from what he told us, it sounded like Otterbein University Police Department would not be subject to Ohio's Public Records Act.

10. The Presenter/Assistant Ohio Attorney General stated he was familiar with Otterbein (I do not recall the reason), and then stated that he is not our university's attorney and as such, he cannot give us binding legal advice.

11. Despite his initial disclaimer, the Presenter/Assistant Ohio Attorney General Robert Moorman then went on to provide his legal opinion and state with specific detail that in his opinion it is "well established" through the *Oriana House* case standard that Otterbein University Police Department is ***not*** subject to Ohio's Public Records Act.

12. After Sergeant Reffitt and I returned from the class, we met with Chief Larry Banaszak. I gave Chief Larry Banaszak the Ohio Attorney General "Sunshine Law" seminar materials and advised Chief Banaszak that the Presenter/Assistant Ohio Attorney General advised Sergeant Reffitt and I that we, the Otterbein University Police Department, are clearly ***not*** subject to the Public Records law under the ruling of the Ohio Supreme Court in *Oriana House*.

13. Soon after our meeting with Chief Larry Banaszak, we met with Dean Robert M. Gatti and provided him with the same information and the Presenter/Assistant Ohio Attorney General Robert Moorman's statement to us that we were clearly ***not*** subject to Ohio Public Records laws.

14. We attended the Ohio Attorney General's Sunshine Law to obtain the Ohio Attorney General's legal guidance and direction concerning our legal obligations under the Ohio Public Records Act.

15. We relied on the Ohio Attorney General's statements, direction and legal guidance provided to us by Presenter/Assistant Ohio Attorney General Robert Moorman at the November 2, 2011 Ohio Attorney General Sunshine Law Seminar that under the Ohio Supreme Court's *Oriana House* case Otterbein's campus Police Department is ***not*** subject to Ohio's Public Records Act.

Further affiant sayeth not.

Douglas A. Williard

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Sworn to before me a Notary Public in and for the State of Ohio and subscribed in my presence by the said Douglas A. Williard on this 21 day of October, 2014.

Notary Public, State of Ohio
My Commission Expires: 6-16-2015

NOTARIAL SEAL
STATE OF OHIO

CHARLOTTE SEGLE
Notary Public, State of Ohio
My Commission Expires 6-16-2015
Recorded in Pickaway County

Blaugrund, Herbert, Kessler, Miller, Myers & Postalakis

INCORPORATED

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+OSBA Certified Specialist in Estate Planning, Trust and Probate Law

Via e-mail (jgreincr@graydon.com) and USPS

August 12, 2013

John C. Greiner, Attorney at Law
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut St.
Cincinnati, OH 45202

Re: Application of R.C. §149.43 to Otterbein University PD

Dear Mr. Greiner:

On behalf of Otterbein University and President Kathy Krendl, I am responding to your July 26, 2013 letter regarding application of Ohio's Public Records Act, R.C. §149.43, to records created and maintained by Otterbein's campus police department.

R.C. §149.43 mandates disclosure of "public records" which R.C. §149.43(A)(1) defines as "records kept by any public office." Unless Otterbein's police department is a "public office," the documents at issue are not "public records" subject to disclosure pursuant to R.C. §149.43(A)(1).

R.C. §149.011(C) defines "public office" as

> any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

After years of struggling with this statute's application to private bodies, the Ohio Supreme Court adopted the following test in 2006:

1. Private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.

2. In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public

EXHIBIT B

> Records Act, R.C. 149.43, a court shall apply the functional-equivalency test. Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

Syll., State ex rel. Oriana House, Inc. v. Montgomery, 110 Ohio St.3d 456, 2006-Ohio-4854 (2006). *See, also State ex rel. Bell v. Brooks*, 2011-Ohio-4897, ¶18, 130 Ohio St. 3d 87, 91 (2011) ("In *State ex rel. Oriana House, Inc. v. Montgomery* *** we set forth the applicable test for determining when a private entity is a public office subject to the Public Records Act") and *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commers.*, 2011-Ohio-625, ¶¶47-48, 128 Ohio St. 3d 256, 266 (2011) ("Prior to 2006, we used different tests to determine whether a private entity was a public office subject to the Public Records Act. *** In *State ex rel. Oriana House, Inc. v. Montgomery* *** we modified the test for determining a private entity's status as a public institution under R.C. 149.011(A)"). *Oriana House* compels the conclusion that Otterbein's police department is not a "public office" for purposes of R.C. §§149.011 and 149.43.

Oriana House, a private, nonprofit corporation, contracted with Summit County to operate the county jail. The Court noted both that operation of a jail was historically governmental and that 88% of Oriana House's revenue came from public sources. 2006-Ohio-4854, ¶¶28-32. On the other hand, Summit County did not direct Oriana House's day to day operations, it was not incorporated by a governmental body and it was not "created as the alter ego of a governmental agency to avoid the requirements of the Public Records Act." *Id.*, ¶¶33, 34. Applying the functional equivalence test, the court concluded there was no

> clear and convincing evidence that Oriana House is a public institution and thus a public office subject to the Public Records Act. Two factors of the functional-equivalency test favor the auditor's position, and two factors favor Oriana House's position. The two factors that favor the auditor's position are not fully in her favor, while the two factors that favor Oriana House are wholly in its favor. ***

Although Otterbein's police department arguably "performs a governmental function," satisfying the first prong of the functional equivalence test, it fails the remaining three. First, the department is not publicly funded. To the contrary, Otterbein supports its police department from its general fund. Moreover, R.C. §1713.50(B) prohibits both the use of public funds to reimburse members of the department for training and members' participation "in any state or municipal retirement system.".

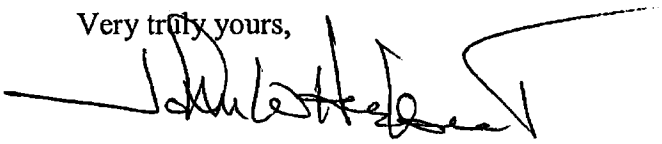
Second, government provides minimal oversight generally and has no role in the police department's day to day operations. The Attorney General and the Ohio Peace Officer Training Commission establish minimum training qualifications and, like statutes regulating any number of other professions, R.C. §1713.50(E)(1, 2) prohibits hiring or retention of convicted felons.

Similarly R.C. §1713.50(D) conditions Otterbein's right to operate a campus police department on maintenance of minimum levels of liability insurance. Neither R.C. §109.71, *et seq.* nor R.C. §1713.50 regulates or authorizes the government to regulate employment of campus police officers, however: pursuant to R.C. §1713.50(B), Otterbein's board of trustees – not the Attorney General or any other government actor – "assign[s] duties to the members" of Otterbein's police department, including "enforcement of *** [Otterbein's] *** regulations."

Finally, Otterbein's police department was neither "created by the government *** [nor] *** to avoid the requirements of the Public Records Act." R.C. §1713.50(A)(2)(b)'s definition of "private college or university" – the only body authorized to create a police department pursuant to R.C. §1713.50 – excludes institutions "owned or controlled by the state or any political subdivision of the state." Nor does Otterbein's police department store or maintain any other jurisdiction's records, precluding its use to "avoid the requirements of the Public Records Act."

My conclusions are, of course, only as good as the facts which support them. If I have missed something, if I am in error, please contact me at your convenience and I will be happy to discuss this further.

Very truly yours,



John W. Herbert

Cc: Robert Gatti, Vice president for Student Affairs
Rebecca Vazquez-Skillings, Vice President for Business Affairs

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Respondent.	:	

AFFIDAVIT OF ROBERT M. GATTI

I, Robert M. Gatti, being duly sworn does depose and state on firsthand knowledge:

1. I am a Respondent in the above styled litigation and have been Otterbein University's Vice President and Dean of Students from 1992 to the present

2 My educational background includes receiving a Master of Art in Student Personnel Services, Indiana University of Pennsylvania, 1978 and Bachelor of Arts in Journalism, University of South Carolina, 1977

3 On July 23, 2012, I responded to a parent who called me because she was distraught that her daughter had been telephoned by a reporter from the Otterbein student newspaper asking for an interview the day after the student reported that she had been sexually assaulted

4. This incident is an example of the public policy reason we are concerned with student privacy rights regarding alleged crimes reported to our campus police department because we do not want students to be "re-victimized" or discouraged from reporting crime if their identities are disclosed

5 The documents attached as **Exhibit 1** are an accurate copy of emails documenting the incident described above

EXHIBIT C

Further affiant sayeth not

Robert M Gatti

Robert M Gatti

STATE OF OHIO)
)
COUNTY OF)

ss:

Sworn to before me a Notary Public in and for the State of Ohio and subscribed in my presence by the said Robert M Gatti on this 29th day of June, 2015

Notary Public, State of Ohio
My Commission Expires: _____

NOTARIAL SEAL
STATE OF OHIO

SCOTT FITZGERALD, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C

CONFIDENTIAL

re: [redacted]

FOLLOW-UP: I spoke with [redacted] on July 23, 2012. They were upset because the same day the sexual assault occurred [redacted] received a call from the T&C stating they received a copy of the written report and her name from the Westerville Police Department (WPD). According to her [redacted], [redacted] is willing to please people and she let the T&C reporter talk into her providing her story. The reporter was [redacted] who was clear she would not publish [redacted] name. Obviously, her mother was upset about it and called the reporter and did not have a good exchange with her and was concerned we would allow that to happen. She also had observed the WPD and Otterbein Police Department were not cooperating and said there was some tension there.

I told her there was no tension -- we just questioned the delay in interviewing [redacted], but, it was definitely Westerville's jurisdiction.

Attached is an e-mail exchange with Mike Wagner on the subject

Robert M. Gatti

7/26/12

EXHIBIT
1

OTTERBEIN UNIVERSITY

RE: assault interview questions

2 messages

Mike Wagner <mwagner@dispatch.com> Thu, Jul 26, 2012 at 11:44 AM
To: "Gatti, Robert" <rgatti@otterbein.edu>

I understand your position of wanting to follow-up with the victim and their family the next day and not wanting to have to talk about media attention at the hospital. We are going to have an internal discussion with the students when we get back in a few weeks and I will certainly make that part of the discussion. I do think it's reasonable to consider how much time we should give the victims or their families before we attempt to contact them. Ultimately the students will decide on procedures and policy.

But I still have to disagree with a couple points. First, I don't believe it's fair to characterize [redacted] call as something that "traumatized" the victim. And second I think it's misleading to say we contacted her the same day. The assault happened around 4 a.m. and the call was made 17 hours later at 9 p.m. If the assault would have taken place at 10 p.m. and the student had called the victim the next day at 4 p.m. that would have actually been less total hours but would have been considered the next day.

I'm not trying to be argumentative and I know this is difficult for everyone involved. And again I will make sure we consider your point of view moving forward.

Mike

From: Gatti, Robert [mailto:rgatti@otterbein.edu]
Sent: Thursday, July 26, 2012 8:50 AM
To: Mike Wagner
Subject: Re: assault interview questions

Thanks Mike. I don't have a problem with the questions and my issue isn't with the mother. It just bothers me that we tramitized a victim on the day she was assaulted. I usually would call the victim the following day to see how they are doing and let them know it is a small campus, word will spread, and prepare them for a call so they are not caught off guard. I would hate to have this conversation at the hospital, but it looks like I will need to. Could we work together on this?

Bob

Robert M. Gatti

Vice President and Dean
for Student Affairs
Otterbein University
1 South Grove Street

Westerville, OH 43081
614 823 1250
rgatti@otterbein.edu

On Wed, Jul 25, 2012 at 8:05 PM, Mike Wagner <mwagner@dispatch.com> wrote:

Hi Bob,

I spoke with [redacted] and here are the only questions she asked in what was about a five minute phone call that again was made very close to 9 p.m..

* Was the door locked?

* Was there any indication it was a forced entry, meaning was there anything like a broken window?

* Did it appear the attacker was under the influence of drugs or alcohol?

* Is there any advice you would give other women in the area on how they might protect themselves?

* Was there any information not in the police report that you believe is important to share with the public so they can be better informed?

I don't believe those questions would in any way interfere with the investigation.

And as we discussed [redacted] again emphasized that she told the victim immediately that we would not publish her name nor would we ask her any detailed questions about the nature of the assault. If you have any more questions for me my cell is 614-634-8362.

I'm very sorry for all involved and that the victim's mother is upset. Her reaction is very understandable. But I believe our students represented themselves and the T&C appropriately.

Mike

Gatti, Robert <rgatti@otterbein.edu> Thu, Jul 26, 2012 at 1:01 PM
To: Mike Wagner <mwagner@dispatch.com>

Thanks Mike. That is all I'm asking is for the team to discuss this and if better judgement would be to wait for the following day.

Bob

Robert M. Gatti
Vice President and Dean
for Student Affairs
Otterbein University
1 South Grove Street
Westerville, OH 43081
614.823.1250
rgatti@otterbein.edu

[Quoted text hidden]

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence[1]

Title IX of the Education Amendments of 1972 ("Title IX")[2] is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.[3]

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").[4] The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.[5] Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

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[1] The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

[2] 20 U.S.C. § 1681 *et seq*.

[3] Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

[4] Available at http://www.ed.gov/ocr/letters/colleague-201104.html.

[5] Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

EXHIBIT D

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

E. Confidentiality and a School's Obligation to Respond to Sexual Violence

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

Answer: Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request

for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.[25]

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

[25] The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") torequest to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. *See* 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO, *ex rel.* ANNA SCHIFFBAUER c/o Tan & Cardinal/Otterbein360.com 1 South Grove Street Westerville, Ohio 43081 Relator, vs. **LARRY BANASZAK Director of Campus Police Otterbein University 194 West Main Street Westerville, Ohio 43081** and **ROBERT M. GATTI Vice President & Dean for Student Affairs Otterbein University 1 South Grove Street Westerville, Ohio 43081** Respondents.	:	Case No. 14-0244 **AFFIDAVIT OF ANNA SCHIFFBAUER**

JOHN C. GREINER (0005551)*
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COUNSEL FOR RELATOR ANNA SCHIFFBAUER

FILED
FEB 13 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
FEB 19 2014
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SUPREME COURT OF OHIO

EXHIBIT E

Affidavit for Anna Schiffbauer

1. My name is Anna Schiffbauer. I am over the age of 18 and make this affidavit on the basis of personal knowledge.
2. I am presently on staff as news editor for Otterbein360.com, a student-run media website on Otterbein University's campus in Westerville, Ohio. [Note: Otterbein360.com was the online version of the Tan & Cardinal student newspaper until the students decided to cease printing a weekly newspaper and focus on a digital-first, website format in the fall of 2013.]
3. On January 16, 2014, I mailed a letter through Certified Mail to the chief of the Otterbein Police Department, Larry Banaszak, on behalf of Otterbein360. The letter, dated January 16, 2014, requested the criminal reports for individuals (students and non-students) whose cases were referred to Westerville's Mayor's Court. An accurate copy of the January 16 request is attached here as Exhibit A.
4. On January 22, 2014, I received an email from the Dean for Student Affairs, Robert Gatti, in which he attached a digital version of the letter denying the records request. An accurate copy of his January 22 emailed response is attached as Exhibit B.
5. Robert Gatti also sent the letter denying the records request through the United States Postal Service. I received the mailed letter on February 4, 2014. An accurate copy of the letter, dated January 21, is attached as Exhibit C.
6. To date, Otterbein360 has not received any records in response to my January 16 request for criminal reports.

Anna Schiffbauer
Anna Schiffbauer

ODL TH 864746
Anna Schiffbauer Feb. 5, 2014
Date

Feb 5, 2014 Bharati N Shah
Notary Public

NOTARIAL SEAL
STATE OF OHIO

BHARATI N SHAH
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
February 21, 2015

My Commission Expires

PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this *AFFIDAVIT OF ANNA SCHIFFBAUER* along with the Summons and Complaint to the Respondents identified in the caption on page one via Certified Mail, return receipt requested.

John C. Greiner (0005551)

otterbein360.com
Otterbein University
33 Collegeview Road
Westerville, Ohio 43081
(614) 823-1159

January 16, 2014

Dear Chief Banaszak,

I would like to request the Criminal Reports for the following individuals. Offense dates are in parentheses.

2013
- Enrique Suber (7-1)
- Quintin Freeman (7-8)
- Michael Dannenhauer (7-8)
- Grey Owens (7-8)
- Steven Frost (7-10)
- Thomas Ansley (7-22)
- Robert Moreland (8-12)
- Peter Clack (8-19)
- Derek Gulley (8-19)
- Douglas Haubert (8-19)
- Tiffany Green (8-22)
- Esther Brueggemann (8-26)
- James Sanders (8-28)
- Afton Welch (8-29)
- Alyssa Johnson (9-3)
- Ashley Didinger (9-9)
- Quinton Ferenbaugh (9-9)
- Samuel Franklin (10-9)
- Bryan Mackenzie (9-13)
- Alexander Randall (9-13)
- Alex Armesto (9-19)
- Morgan Feeney (9-25)
- Marc McCuen (9-30)
- Ladislav Vosahlo (10-1)
- Nancy Skaggs (10-9)
- Samuel Franklin (10-9)
- James Eastep (10-11)
- Hannah Ritter (10-21)
- Michael Kuhn (10-21)
- James Robinson (10-21)
- Jaime Siddell (10-24)
- Ryan Sadivnychy (10-28)
- Chase Thompson (11-11)
- Joshua Padgett (11-16)

EXHIBIT A

- Mohamed Jalloh (11-19)
- James Scappucci (11-25)
- Charles Austin Piper (11-25)
- Amy Gadd (11-26)
- Chelsea Musselman (11-26)
- Sydney McSweeney (11-26)
- Brandon Bruner (12-5)
- David Buechner (12-9)
- Phillip Hight (12-19)
- Tommy Clark (12-23)

2014
- Xing Dong Wu (1-2)
- Alexander Jay Lindow (1-6)
- Tyler Royer (1-6)

My phone number is (614) 314-1326 if you would like to reach me by phone.

Thank you for your time,

Anna Schiffbauer
News Editor, Otterbein360.com

Fwd: Letter to T&C

Gatti, Robert <rgatti@otterbein.edu> Wed, Jan 22, 2014 at 6:07 PM
To: Anna Schiffbauer <anna.schiffbauer@otterbein.edu>

Hi Anna,

Attached is a response to your request to OPD. I've also sent you a hard copy through US mail. Please acknowledge receipt of this email.

Robert M. Gatti
Vice President and Dean
for Student Affairs
Otterbein University
1 South Grove Street
Westerville, OH 43081
614.823.1250
rgatti@otterbein.edu

Letter to A Schiffbauer re release of indiv crim records lhd.docx
710K

EXHIBIT B

OTTERBEIN
UNIVERSITY
OFFICE OF STUDENT AFFAIRS

1 South Grove Street
Westerville, OH 43081-2006
TEL (614) 823-1250
www.otterbein.edu

January 21, 2014

Anna Schiffbauer, News Editor
Otterbein360.com
33 Collegeview Road
Westerville, OH 43081

Dear Anna,

Your request for criminal reports for individuals on January 16, 2014 to Chief of Police Larry Banaszak has been referred to me. Per my e-mail to you on December 2, 2013, as a private university, Otterbein believes we are not subject to Public Records and therefore do not make our records public.

Sincerely,

Robert M. Gatti
Vice President and Dean
for Student Affairs

RMG:dl

EXHIBIT C

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. Schiffbauer, et al.	:	**Case No. 2014-0244**
Relator,	:	**ORIGINAL ACTION IN MANDAMUS**
v.	:	
Larry Banaszak, et al.	:	
Respondent.	:	

AFFIDAVIT OF LARRY BANASZAK

I, Larry Banaszak, being duly sworn, depose and state as follows based on personal knowledge:

1. I am the Chief of the Otterbein Police Department and have served in that position from July 1, 2011 to the present.
2. The arrest records sought by the above-referenced lawsuit were always available to Relator and other members of the public at the Westerville Mayor's Court.

Further affiant sayeth not.

Larry Banaszak

JOHN J. PETROZZI
Notary Public, State of Ohio
My Commission Expires 4-17-19

EXHIBIT F

STATE OF OHIO)
)
COUNTY OF)

ss:

Sworn to before me a Notary Public in and for the State of Ohio and subscribed in my presence by the said Larry Banaszak on this 29th day of June, 2015.

Notary Public, State of Ohio
My Commission Expires: 4-17-19

JOHN J. PETROZZI
Notary Public, State of Ohio
My Commission Expires 4-17-19