

IN THE SUPREME COURT OF OHIO

<b>STATE OF OHIO, ex rel.</b>	:	
<b>THE CINCINNATI ENQUIRER</b>	:	Case No. 2015-1222
	:	
<b>STATE OF OHIO, ex rel.</b>	:	
<b>SCRIPPS MEDIA INC. D/B/A WCPO-TV</b>	:	
	:	
<b>STATE OF OHIO, ex rel.</b>	:	
<b>THE ASSOCIATED PRESS</b>	:	
	:	<b>Original Action in Mandamus</b>
<b>STATE OF OHIO, ex rel.</b>	:	
<b>RAYCOM MEDIA D/B/A WXIX-TV</b>	:	
	:	
<b>STATE OF OHIO, ex rel.</b>	:	
<b>HEARST CORPORATION D/B/A WLWT-TV</b>	:	
	:	
<b>STATE OF OHIO, ex rel.</b>	:	
<b>SINCLAIR MEDIA III, INC. D/B/A WKRC-TV</b>	:	
	:	
<i>Relators,</i>	:	
	:	
v.	:	
	:	
<b>JOSEPH T. DETERS, HAMILTON COUNTY</b>	:	
<b>PROSECUTING ATTORNEY</b>	:	
	:	
<i>Respondent.</i>	:	

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**MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN  
SUPPORT OF RESPONDENT JOSEPH T. DETERS, HAMILTON COUNTY  
PROSECUTING ATTORNEY**

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<i>Respondent.</i>	:	

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MOTION

Respondent, Joseph T. Deters, Hamilton County Prosecuting Attorney, through counsel, moves this Court to grant him judgment on the pleadings as provided in *S. Ct. Prac. R. 12.04 (B)(1)* and deny the Writ of Mandamus for the following reasons:

1. The Complaint is now moot. The information sought by Relators has been released.
2. Respondent followed existing case law in not immediately releasing the

information sought by Relators.

3. The information sought by Relators was not and is not a “record” of the Hamilton County Prosecutor’s Office. (*R.C. 149.011[G].*)
4. The information sought by Relators is not a “public record” as set forth in *R.C. 149.43*.
5. The information sought by Relators was released by Respondent within a “reasonable time” as provided for in *R.C. 149.43(B)(7)*.
6. Relators Cincinnati Enquirer, Scripps Media Inc. D/B/A WCPO-TV and Raycom Media D/B/A WXIX-TV lack standing to see a Writ in this matter and should be stricken as Relators.

A Memorandum in Support is attached.

Respectfully submitted,

JOSEPH T. DETERS  
PROSECUTING ATTORNEY  
HAMILTON COUNTY, OHIO

*/s/ Christian J. Schaefer*

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## MEMORANDUM

### Statement of the Case

This Mandamus Action involves the issue of whether evidence of criminal activity received by a prosecuting attorney is a record of the prosecuting attorney as defined in *R.C. 149.011(G)*; if it is a record as defined by *R.C. 143.011*, whether it is a “public record” as provided in *R.C.149.43*; and whether the voluntary release of the record within eight business days is reasonable under the circumstances.

The criminal activity that gave rise to this case was an officer-involved shooting that occurred during a traffic stop on July 19, 2015 at 6:30 p.m. A University of Cincinnati (“UC”) police officer stopped Samuel Dubose and shot and killed him with his firearm during the stop. At the time of the traffic stop, the UC police officer was wearing a body camera device that recorded the incident. The City of Cincinnati (“Cincinnati”) police department investigated the Dubose death. The body camera video recording (“video”) taken during the traffic stop by the UC police officer was sought by Relators and is the subject of this Mandamus Action.

The video was obtained by Cincinnati police as part of their investigation. The morning following the Dubose death, Monday, July 20<sup>th</sup>, Assistant Prosecutors from the Hamilton County Prosecuting Attorney’s Office went to the Cincinnati police district headquarters, viewed the video and at some point thereafter obtained a copy of it. Cincinnati police were unable to interview witnesses to the Dubose death until Tuesday, July 21<sup>st</sup>.

Monday July 20<sup>th</sup>, reporter John London of WLWT requested the Video from Assistant Prosecuting Attorney Julie Wilson. (London Affidavit, ¶ 1) Assistant Prosecuting Attorney Wilson responded to the London request for the video by an email to all media outlets sent on

Wednesday, July 22<sup>nd</sup>. The Wilson email stated that the video would not be released and cited among other things, *State ex rel. Miller v. Ohio State Highway Patrol*, 2014-Ohio-2244, 14 N.E. 3d 396 (12 Dist). (Butts Affidavit Exhibit #4, Martin Affidavit Exhibit #1/2, Weaver Affidavit Exhibit #2)

On Thursday, July 23<sup>rd</sup>, Dan Sewell of the Associated Press requested that Assistant Prosecuting Attorney Wilson provide him with a copy of the video. (Martin Affidavit Exhibit #1/2) This prompted Wilson to respond by stating that she stood by her prior email to the media, but added Sewell to her list of those seeking the Video. (Martin Affidavit Exhibit #1/2) Wilson then sent a second email to all of the media asking them to use their common sense and stating that the video would be released, just not right now. (Parrish Affidavit Exhibit #2, London Affidavit Exhibit #2)

On Friday, July 24<sup>th</sup> at 1:24 p.m., WKRC-TV decided to ask Assistant Prosecuting Attorney Wilson for the video. (Meredith Affidavit Exhibit #1)

The Complaint and Affidavits were filed with this Court early on Monday, July 27<sup>th</sup>, just five working days after John London requested the video. Although the London affidavit does not specify the time of the request, it is believed the evidence will establish that the London request was made before the Respondent Deters' office had the video. The Complaint was joined by Sinclair Media III, Inc. D/B/A WKRC-TV even though less than a half of a business day expired between their request for the video and filing of the Complaint. The Associated Press joined the Complaint even though only two business days separated their request for the video and the filing of the Complaint.

None of the Affidavits and Exhibits attached to the Complaint demonstrates that Relators, the Cincinnati Enquirer, Scripps Media D/B/A WCPO-TV, or Raycom Media D/B/A WXIX-TV ever requested the video from Respondent Deters' office.

On July 29<sup>th</sup>, the Grand Jury returned an indictment in *State v. Tensing* B-1503961 concerning the Dubose death. Respondent Deters, on the same day, July 29<sup>th</sup>, announced the indictment and immediately released the video to all relators. The Summons in this case was served on Respondent Deters on Thursday, July 30<sup>th</sup>; the day after the video was released.

Relator, Cincinnati Enquirer, in an editorial following the release of the video, acknowledged that Respondent Deters' delay in releasing the video served the twin purposes of preventing witnesses from adjusting their testimony to match the video and “. . . to avoid a potentially explosive situation before today's indictment was announced.”

#### Argument

**1. The requested body camera video has been released to the Relators and therefore the issue is moot.**

The Relators' Complaint for Writ of Mandamus is now moot because the Hamilton County Prosecutor's Office, although believing the video not to be, under the current laws of Ohio, a “public record,” has released the requested body camera video. Pursuant to Ohio law, a mandamus action may be commenced to compel the production of an alleged “public record” if the public office has failed to comply with the statutory protocols for the release of such records. *R.C. 149.43 (C)(1)*. To avoid the invocation of *R.C. 149.43(C)(1)*, a public office or person responsible for records that are non-exempt public records shall make copies of the requested public record available at cost and “*within a reasonable period of time.*” *R.C. 149.43(B)(1)* (emphasis added). In the case at bar, the Relators, improperly Respondent believes, seek a Writ

to cause release of the information they seek. Since the requested “record” has been released, there is no further relief to be granted.

The Respondent has provided all of the Relators with the body camera video that they requested in their public records requests. This information was provided within eight business days, “a reasonable period of time,” after the first request was made and before the Respondent was officially served. See *State ex rel. Striker v. Cline*, Richland No. 09CA107, 2010-Ohio-3592. Since the records have been provided and the Relators’ Complaint for Writ of Mandamus is moot, the Court should grant Respondent Deters judgment on the pleadings and deny the writ of mandamus.

**2. The requested body camera video is not a public record of the Office of the Hamilton County Prosecuting Attorney as defined in R.C. 149.011(G).**

Under the Ohio Public Records Law, “records” are defined as:

any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. *R.C. 149.011(G)*.

The Court has interpreted *R.C. 149.011(G)* to mean that even if the requested information is a “document” and the office that it is requested from is a “public office” the document still must create a “record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts” of the public office. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 164, 2005-Ohio-4384, , 833 N.E.2d 274, 280, ¶ 22. The record that is at the heart of this action is the video that was taken during the police-involved shooting that occurred on July 19, 2015. The video was taken by a body camera that was worn by the UC police officer that was involved in the shooting. The video in this particular case documents the UC police officer’s actions and investigation of a suspect during a

traffic stop. The video does not serve to “document the organization, functions, policies, decisions, procedures, operations, or other activities” of the Hamilton County Prosecutor’s Office such that the video would qualify as a “record” under *R.C. 149.011(G)*. If the video is not a “record” of the Hamilton County Prosecutor’s Office, the Prosecutor is not required, under the Ohio Public Records Law, to release the video. *Id.* at ¶ 40.

Additionally, the fact that the Hamilton County Prosecutor at some point had physical possession of the video does not make the video a public record and does not mean that it is a public record of the Hamilton County Prosecutor’s Office. *Id.* at ¶ 29 (“simply because an item is received and kept by a public office does not transform it into a record under *R.C. 149.011[G]*”). See also *State ex rel. Cmty. Journal v. Reed*, 2014-Ohio-5745, 26 N.E.3d 286, 297-98, ¶ 42, (12 Dist.) which found that a governmental agency having physical possession of public records did not automatically mean that the documents were public records of that office under *R.C. 149.011[G]*) and also *State ex rel. Wilson-Simmons v. Lake County Sheriff*, 82 Ohio St.3d 37, 693 N.E.2d 789 (1998).

**3. The Relators failed to properly file their Complaint for Writ of Mandamus under the guidelines of Ohio law**

The Ohio Revised Code details, with specificity, the procedures that an aggrieved party must follow in order to get relief from the courts when a records request is denied. The code reads in part:

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... *R.C. 149.43(C)(1)*.

The main problem that the Relators have is that they requested documents from the wrong party. The Relators should have made their record request to the UC Police Department, as the requested video is a “record” of that department, not the Hamilton County Prosecutor’s Office. UC and Cincinnati deferred to the decision of the Hamilton County Prosecutor. However, the Hamilton County Prosecutor is not the records custodian of either entity, and is not the legal advisor to a state university or a municipal corporation. *R.C. 309.09*. The requested video is the “public record” of the University of Cincinnati Police Department. Pursuant to *R.C. 149.43(C)(1)*, the Relators are required to bring their mandamus complaint against the “public office or the person responsible for the public record.” Since the Relators have brought suit against the wrong party, this Court should grant Respondent Deters judgment on the pleadings and deny the writ of mandamus. .

Even if this Court were to find that the Hamilton County Prosecutor is the correct party, there are several Relators who cannot demonstrate they are entitled to a writ of mandamus. Pursuant to *R.C. 149.43(C)(1)*, each Relator must establish that they have actually made a prior request upon the Respondent. “*R.C. 149.43(C)* requires a prior request as a prerequisite to a mandamus action.” *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 145, 2012-Ohio-4246, 976 N.E.2d 877, 884, ¶ 20 (quoting *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 390, 715 N.E.2d 179 [1999]); *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶ 14. Several Relators in this action have failed to establish this prerequisite. Relators The Cincinnati Enquirer, Scripps Media Inc. D/B/A WCPO-TV and Raycom Media D/B/A WXIX-TV have all failed to present any evidence that they ever actually made a public records request of the Hamilton County Prosecutor’s Office. (Butts Affidavit, Parrish Affidavit, Weaver Affidavit). These Relators state that they received

emails from Julie Wilson of the Hamilton County Prosecutors Office on July 22 and July 23 stating that the Prosecutor would not be releasing any video; however these were simply emails that Ms. Wilson sent out to all local media contacts. These emails were not in response to a specific request from the Relators. Unless these Relators made a specific request upon the Hamilton County Prosecutor, and that request was denied, the Relators are not entitled to file their Complaint for Writ of Mandamus under Ohio law. On this basis, this Court should grant Respondent Deters Judgment on the pleadings with regard to Relators The Cincinnati Enquirer, Scripps Media Inc. D/B/A WCPO-TV and Raycom Media D/B/A WXIX-TV for lack of standing.

**4. The Hamilton County Prosecuting Attorney relied on existing Ohio law in denying the records requests of the Relators.**

In denying the requests of Relators (those with proper standing) which sought the release of the body camera video, the Respondent relied on the only reported case involving police video cameras. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 2014-Ohio-2244, 14 N.E.3d 396 (12 Dist.).

In *Miller*, the Ohio State Highway Patrol was sued because they refused to provide an individual with the video from the dash camera of a patrol officer from a traffic stop for suspicion of driving under the influence of alcohol. *Id.* at ¶ 3. The State Highway Patrol refused to provide this particular video because it was part of an ongoing criminal investigation of the driver, and the Patrol deemed the video to be confidential law enforcement investigatory work product. *Id.* at ¶ 6. The Twelfth District was charged with determining whether this dash camera video was exempt from disclosure under the Ohio Public Records Law as confidential law enforcement investigatory work product. *Id.* at ¶ 8. In their examination, the appeals court first explained that confidential investigatory “work product consists of ‘any notes, working papers,

memoranda or similar materials, prepared by attorneys or law enforcement officials in anticipation of litigation.’” *Id.* at ¶ 16 (quoting *State ex rel. Leonard v. White*, 75 Ohio St.3d 516, 518, 664 N.E.2d 527 (1996)). The appeals court then went on to explain that the dash camera video is different than incident reports and 911 calls because the video was initiated by the patrol officer as part of his investigation of the driver. *Id.* at ¶ 21. The video included particular techniques that the officer used to determine whether the driver was under the influence and demonstrated how the officer was able to draw his conclusions that the driver was in fact under the influence. *Id.* at ¶ 23. The video further demonstrated that the officer had probable cause to stop the driver, and would be used in the criminal case against the driver. *Id.* at ¶ 24. Ultimately, the appeals court determined that the video was exempt from disclosure under the Ohio Public Records Law as a confidential law enforcement investigatory work product. *Id.* at ¶ 33; *R.C. 149.43(A)(1)(h)*.

The Hamilton County Prosecutor was entitled to consider, talk with his counsel and rely on this analysis in deciding not to release the body camera video. As demonstrated in the Relators’ supporting affidavits, Julie Wilson sent out an email to all local media indicating that the body camera video would not be released pursuant to:

2. ORC Section 149.43(A)(1)(h) Confidential law enforcement investigatory records. See specifically ORC Section 149.43(A)(2)(c), Specific confidential investigatory techniques or specific investigatory work product, and *State of Ohio ex rel. Mark W. Miller vs. Ohio State Highway Patrol*, 2014-Ohio-2244.

The Prosecutor used his best judgment and followed, as well as applying his good sense, the only reported case law that was on point in making his decision. The *Miller* case is still persuasive Ohio law. Additionally, it is important to note that the entirety of this action, from the first request on July 20<sup>th</sup> to the initiation of this lawsuit on July 27<sup>th</sup>, took eight business days. Some requests were sent as late as July 24<sup>th</sup>, meaning that the time elapsed between request and

initiation of the lawsuit was three total days (one business day). Pursuant to Ohio law, a public office or person responsible for public records shall make copies of the requested public record available, if not otherwise exempt, at cost and “*within a reasonable period of time.*” *R.C. 149.43(B)(1)* (emphasis added). Given the unique nature of the requested video, eight business days (or less) is certainly a reasonable amount of time to respond to a request for public records

### CONCLUSION

This Court should grant Respondent Deters judgment on the pleadings and deny the writ of mandamus.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. mail on the 28<sup>th</sup> day of August, 2015, upon:

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