Supreme Court of Ohio Clerk of Court - Filed February 08, 2016 - Case No. 2015-1222

In the Supreme Court of Ohio

STATE OF OHIO, *ex rel.*	:	Case No. 2015-1222
THE CINCINNATI ENQUIRER, et al.	:	
	:	Original Action in Mandamus
Relators,	:	
	:	
vs.	:	
	:	
JOSEPH T. DETERS, HAMILTON	:	
COUNTY PROSECUTING ATTORNEY,	:	
	:	
Respondent.	:	
	:	

RELATORS' MERIT BRIEF

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INTRODUCTION

University of Cincinnati police officer Ray Tensing shot and killed Samuel DuBose during a routine traffic stop—a traffic stop Officer Tensing made because the car Mr. DuBose was driving allegedly was missing a front license plate. A body camera worn by Officer Tensing during the traffic stop recorded the events leading to Mr. DuBose's death ("Tensing Video").

Despite the requests of the six relators, Respondent refused to release the Tensing Video promptly upon request. Respondent relied on invalid excuses for not complying with the Ohio Public Records Act, R.C. 149.43 ("Act").

The issue presented in this case is whether Respondent had a legal duty, under, the Act, to release the video promptly upon request. Respondent contends that it did not.

In support of its position, Respondent argues: (1) that the Tensing Video is not a "public record" because Respondent did not create or prepare the video; (2) that Respondent was not, at the time Relators filed their suit, the public office responsible for the Tensing Video; and (3) that the Tensing Video constituted an exempt confidential law enforcement investigatory record under R.C. 149.43(A)(1)(h). Respondent also argues that even if it had a legal duty to release the video under the Act, it was justified in waiting until after it presented the Tensing Video to the grand jury.

Respondent's arguments find no support in the Act, nor in this Court's precedent. Justice Louis Brandeis wrote, over a century ago, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914). The role that public records laws play in facilitating the publicity of government activities—good or bad—is manifest. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 14. And where the government does not wish to publicize its activities, the need for strong laws protecting the public's right of access is greatest.

Accordingly, Relators respectfully request that the Court hold that they had a clear legal right to promptly inspect and copy the Tensing Video under the Act, and that Respondent had a corresponding clear legal duty to make the video available for Relators' inspection. Relators further request that the Court award them their reasonable attorney's fees.

STATEMENT OF FACTS

Relators The Cincinnati Enquirer, a division of Gannett GP Media, Inc. ("The Enquirer"), Scripps Media, Inc. d/b/a WCPO-TV ("WCPO"), The Associated Press ("AP"), Raycom Media d/b/a WXIX-TV ("WXIX"), Hearst Corporation d/b/a WLWT-TV ("WLWT"), and Sinclair Media III, Inc. d/b/a WKRC-TV ("WKRC") are all media organizations that report on news events in the greater Cincinnati, Ohio metropolitan

area. (Compl. ¶¶ 2-6; Answer, ¶¶ 2-6.) Joseph T. Deters is the Hamilton County Prosecuting Attorney. The Hamilton County Prosecuting Attorney's Office ("HCPAO") is the public office for the Hamilton County prosecuting attorney as authorized by Chapter 309 of the Ohio Revised Code. (Compl. ¶ 7; Answer ¶ 7.)

On January 19, 2015, Ray Tensing, a police officer with the University of Cincinnati Police Department ("UCPD"), shot and killed Samuel DuBose during a traffic stop in the Cincinnati neighborhood of Mount Auburn. (Rel. Ex. A-3-4.) Images and audio of the events leading up to the shooting, the shooting itself, and events immediately following the shooting, were recorded by a body camera worn by Officer Tensing on his chest ("Tensing Video"). (*Id.*; Rel. Ex. I, Ex. 1.)

Later that evening, Chief Assistant Prosecuting Attorney Mark Piepmeier of the HCPAO instructed both UCPD and the Cincinnati Police Department ("CPD"), which was in charge of the investigation, to withhold the Tensing Video until after the HCPAO presented it to the grand jury. (Rel. Ex. H-11, Interrogatory No. 15; Rel. Ex. A-4.) A University of Cincinnati police officer submitted an incident report for the shooting shortly after midnight. (Rel. Ex. A-3.)

On July 20, 2015, Enquirer reporter Rebecca Butts requested, via email, a copy of "the incident report, all related security/surveillance camera footage, and the personnel file for the UC officer that shot and killed a man during a traffic stop on July 19, 2015 at approximately 6:30 pm at the intersection of Rice and Valencia streets in the Cincinnati

neighborhood of Mount Auburn." (Rel. Ex. B.) She made her request to both UCPD and CPD ("Enquirer Request"). (*Id.*)

That same day, WLWT reporter John London contacted Julie Wilson, Chief Assistant Prosecutor and Public Information Officer for the HCPAO, and requested a copy of the body camera video "in regards to the incident involving a University of Cincinnati police officer's fatal shooting of a suspect in a traffic stop on July 19, 2015" ("WLWT Request"). (Rel. Ex. D.)

The next day (July 21), WCPO assignment editor Jillian Parrish sent an email request for the Tensing Video to CPD ("WCPO Request"). (Rel. Ex. C.) The same day, both UCPD and CPD denied Ms. Butts' request for the incident report and all related security-surveillance camera footage. (Rel. Ex. B-2, ¶ 2.) Mr. Piepmeier also received a physical copy of the Tensing Video at some point during the day. (Resp't's Evid., at 2, Aff. Mark Piepmeier, ¶ 8.)

On July 22, 2015, WXIX assignment manager Teresa Weaver contacted the University of Cincinnati Office of General Counsel and requested a copy of the Tensing Video ("WXIX Request"). (Rel. Ex. F.)

Later, Respondent released the following emailed statement to the media through Ms. Wilson:

> The body cam video in the July 19th UC officer involved shooting will not be released pursuant to:

1. Sixth Amendment to the United States Constitution and ORC Section 149.43(A)(1)(v) as release could jeopardize a possible future fair trial; and
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 procedures or specific investigatory work product, and State of Ohio ex rel. Mark W. Miller vs. Ohio State Highway Patrol, 2014-Ohio-2244.

(Rel. Ex. B-2 & 9.)

The following day, July 23, AP Cincinnati correspondent Dan Sewell wrote to Ms. Wilson and requested the Tensing video, noting that Respondent "now has custody." ("AP Request"). (Rel. Ex. E-4.) Ms. Wilson's reply to Mr. Sewell informed him that the HCPAO stood by its previous statement. (*Id.*)

A short time after denying the AP Request, Ms. Wilson then sent another email to the media with a statement from Prosecuting Attorney Deters, which read:

> The law supports our position to not release the video. If you do not want to look at the law and just use your common sense, it should be clear why we are not releasing the video only a few days after the incident occurred. We need time to look at everything and do a complete investigation so that the community is satisfied that we did a thorough job. The Grand Jury has not seen the video yet and we do not want to taint the Grand Jury process. The video will be released at some point - - just not right now.

(Rel. Ex. C-5.)

WKRC news assignment manager Timothy Meredith sent a request to Ms. Wilson the next day, requesting a copy of the Body-Cam Footage ("WKRC Request"). (Rel. Ex. G.) Ms. Wilson denied Mr. Meredith's request via email later that same day,

writing: "we stand by our previous statements for not releasing the video at this time." (*Id.* at 4.)

Relators commenced this action on July 27, 2015. Two days later, the grand jury returned an indictment charging Officer Tensing with murder and voluntary manslaughter. (Resp't's Evid. at 4, Piepmeier Aff. ¶ 14.) Prosecuting Attorney Deters held a press conference shortly after the grand jury returned the indictment, during which he released a copy of the Tensing Video to Relators. (*Id.* at ¶ 16.) Despite the Sixth Amendment concerns that allegedly "necessitated" non-disclosure of the Tensing Video, during the press conference, Mr. Deters stated that Officer Tensing murdered Mr. DuBose, and that the murder arose out of "a pretty chicken-crap stop." Mr. Deters also said that Officer Tensing "should never have been a police officer," and that such shootings "might happen in Afghanistan or somewhere," but that they do not happen in the United States. (Relators' Resp. to Resp't's Mot. for J. on the Pleadings, Ex. A.)

Respondent moved for judgment on the pleadings on September 4, 2015, arguing, among other things, that Respondent's release of the Tensing Video made Relators' action moot. The Court denied Respondent's motion on December 30, 2015.

ARGUMENT

Proposition of Law No. I
Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, and a relator need not establish the lack of an adequate remedy at law to establish entitlement to the writ.

"Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm'rs*, 128 Ohio St.3d 256, 261, 2011-Ohio-625, 943 N.E.2d 553 (internal quotations omitted). To establish entitlement to a writ of mandamus, a relator must establish, by clear and convincing evidence: "[1] a clear legal right to the requested relief, [2] a corresponding clear legal duty on the part of respondents, and [3] the lack of an adequate remedy in the ordinary course of the law." *Id.* at 260. A relator need not establish the third element in an action to enforce R.C. 149.43. *Id.* at 261.

R.C. 149.43 provides "[u]pon request . . . 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 hours." (Emphasis added.) It further states that "[i]f 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." *Id.*

Respondent argues the Tensing Video was not a "public record," and that he therefore had no duty to make it available to Relators. Respondent also argues that two

of the Relators failed to make a request to Respondent for the Tensing Video, and thus had no right to commence an action under the Act.[1] All of Respondent's arguments lack merit.

<u>Proposition of Law No. II</u>
A police body-cam video is a public record under R.C. 149.43.

The Act defines "public record" as "any record that is kept by any public office." R.C. 149.43 (A)(1). The term "record" means "any document, device, or item, regardless of physical form or characteristic, 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). Consistent with the General Assembly's intent to "effectuate broad access to records," this Court has held that the term "record" encompasses "almost all documents memorializing the activities of a public office," unless exempt. *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20.

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[1] Respondent also argued in its motion for judgment on the pleadings that it made the video available promptly after receiving Relators' requests, and that its compliance made this action moot. Respondent concedes, however, that its release of the video did not make this matter moot, thus making Respondent's assertion that it promptly provided the record irrelevant. Specifically, Respondent wrote: "The pending case is moot but Respondent concedes that ***it is a matter capable of repetition but evading review*** and, accordingly, Respondent would make no objection is the Court decided to entertain the matter and decide the case on the merits." (Answer, ¶ 31 (emphasis added).) Whether Respondent promptly released a record it claims it had not legal duty to release is thus not an issue.

UCPD created the Tensing Video to document its officers' policing activities. The University of Cincinnati, as a state-supported educational institution, is a "public office" within the meaning of R.C. 149.43. *See State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 637 N.E.2d 911 (1994), syllabus (holding that promotion and tenure records "maintained by a state-supported institution of higher education" are public records). Thus, the Tensing Video is a "public record" unless otherwise exempt.

The Tensing Video is a "record" because UCPD created the video to document its policing activities. And the video was a "public record" because it was "kept" by a public office, in this case both UCPD and HCPAO.

<u>Proposition of Law No. III</u>
Respondent became the public office responsible for the Tensing Video when it instructed UCPD and CPD to deny requests for public access.

R.C. 149.43(B)(1) provides that "[u]pon request . . . all public records responsible to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular hours." The next sentence provides, "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." *Id.* (emphasis added).

It is undisputed that the Respondent asserted control over the Tensing Video the day of the shooting when Mr. Piepmeier instructed UCPD and CPD to deny any

requests for the video. Furthermore, Mr. Piepmeier attests that he believed he had all copies of the Tensing Video. (Resp't's Evid. at 2, Piepmeier Aff. ¶ 10.)

Thus, from July 19 forward, HCPAO was unquestionably "*a* public office . . . responsible" for the Tensing Video. *Cf. State ex rel. Rea v. Ohio Dep't of Educ.*, 81 Ohio St.3d 527, 530-31, 692 N.E.2d 596 (1998) (emphasis added) (observing in the context of a records request for records in the possession of a private entity that the Act "includes records under the control of a public office *even if those records are not within its custody*" (emphasis added)). As the office with control of the Tensing Video, Respondent had a duty to allow access to the Tensing Video in response to all requests made to it on or after July 19, unless an exception to disclosure applied. *See State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616.

WLWT, AP, and WKRC all made their requests for the Tensing Video to Respondent after July 19. The Enquirer, WCPO, and WXIX, however, made their requests to UC, CPD, or both, on or after July 20. They did not send a duplicate request to Respondent.

When UC and CPD denied the requests, however, they did so upon Respondent's instructions. Respondent knew that the media was making requests for the video, and Ms. Wilson sent out an email addressed to the "media" confirming Respondent's position with respect to the basis for the denials. Thus, this is not a case

where the responsible public office can claim ignorance of a request for a public record under its control.

Respondent clearly had notice of The Enquirer's, WCPO's, and WXIX's requests for the video; it instructed the public offices that received the requests to deny them; and it was a public office responsible for the Tensing Video at the time of all three requests. Relators therefore had the right to bring a cause of action against Respondent to obtain access to the record. A rule that would require a relator to jump through the pointless procedural hoop of sending a futile duplicate request under these circumstances would be contrary to this Court's liberal rule of construction favoring broad access to public records. *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 51-52, 689 N.E.2d 25 (1998) ("R.C. 149.43 must be liberally construed in favor of broad access, with any doubt resolved in favor of disclosure of public records.").[2]

<u>Proposition of Law No. IV</u>
The Tensing Video is not a confidential law enforcement investigatory record under R.C. 149.43(A)(1)(h).

This Court construes the exceptions to the definition of "public record" strictly, and against the public-records custodian. *Miller*, 136 Ohio St. 3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, at ¶ 23. Thus, to establish the applicability of an exception, the records custodian must prove that the subject record "falls squarely" within that exception.

[2] Respondent also raised this issue as a ground for dismissal in its Motion for Judgment on the Pleadings, which the Court denied.

State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

The CLEIR exception excludes from the definition of "public record":

> 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.

R.C. 149.43 (A)(2).

The CLEIR exception is a product of the Court's 1978 decision in *Wooster Republican Printing Co. v. Wooster* ("*Wooster*"), 56 Ohio St.2d 126, 383 N.E.2d 124 (1978). In that case, the Court held that "[p]olice and other law enforcement investigatory records are not subject to the compulsory disclosure provisions of R.C. 149.43," in an attempt to reconcile the provisions of the newly enacted Privacy Act, R.C. Chapter 1347

and R.C. 149.43. *Wooster*, 56 Ohio St.2d 126, 383 N.E.2d 124 (paragraph 4 of the syllabus).

Shortly after the *Wooster* decision, the General Assembly amended R.C. 149.43 "to expressly state that law enforcement investigatory records were, subject only to narrow exceptions, within the compulsory disclosure provisions of R.C. 149.43 (138 Ohio Laws, Part I, 245-246)." *See State ex rel. Nat'l Broad. Co. v. City of Cleveland* ("*Nat'l Broad.*"), 38 Ohio St. 3d 79, 81, 526 N.E.2d 786 (1988). With this amendment, the General Assembly intended to reverse the result in *Wooster*, and "to subject law enforcement investigatory records to disclosure under the public records law." *Nat'l Broad.*, 38 Ohio St.3d 79 at 82, 526 N.E.2d 786. Although the General Assembly has amended the Act many times since the Court's 1988 *National Broadcasting* decision, it has not altered the CLEIR exception definition construed by that Court. *Compare* R.C. 149.43(A)(2) and *Nat'l Broad.*, 38 Ohio St.3d at 82, 526 N.E.2d 786. *See also* H.R. 152, 120th Gen. Assem., 1993-94 Reg. Sess. (Ohio 1993) (text of 1993 amendment to 149.43).

Based on the CLEIR definition provided in R.C. 149.43, this Court developed a two-part test for evaluating whether the CLEIR exception applies. The test asks:

> First, is the record a confidential law enforcement record? Second, would release of the record create a high probability of disclosure of any one of the four kinds of information specified in R.C. 149.43(A)(2)?

Miller, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, at ¶ 25 (internal quotations omitted).

But if the confidential law enforcement record at issue is not "investigatory" in nature, CLEIR—and its two-part test—has **no** application, regardless of whether release would disclose the types of information specified in R.C. 149.43. The Court made this clear in *State ex rel. Beacon Journal Publishing Co. v. Maurer* ("*Maurer*"), 91 Ohio St.3d 54, 56-57, 741 N.E.2d 511 (2001).

In *Maurer*, the Court considered whether a police report for an officer-involved shooting was exempt from disclosure under the CLEIR exception. The report at issue was extensive, containing "four typed transcripts of taped statements of law enforcement officers" and "[w]ritten statements by other witnesses." While the actual form report was two pages in length, the report with the officer and witness statements totaled thirty-five pages. *Id.* at 54, 741 N.E.2d 511.

The Court held that the entire thirty-five page incident report was a public record, and not exempt under the CLEIR exception. Although the Court took note of its two-part CLEIR test, it did not apply the test to the report. Instead, the Court held that the incident report at issue was a public record because it was not part of an investigation into the officer-involved shooting. *Id.* at 56, 741 N.E.2d 511 ("incident reports initiate the criminal investigations but are not part of the investigation"). Resolving any doubt about the meaning of its decision, the Court explained that it was ruling this way "despite the risk that the report may disclose the identity of an uncharged suspect." *Id.* at 57.

Maurer establishes that a law enforcement record created before the start of an investigation is **never** exempt under CLEIR. It also clarifies that—as a matter of law—the incident report in all cases is created before the investigation commences because it is that record which initiates the investigation. By definition, therefore, the incident report is not part of the investigation. Moreover, "[r]ecords even further removed from the initiation of the criminal investigation than the form reports themselves, such as 9-1-1 recordings, are also public records." *Miller*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 26 (internal quotations omitted).

In light of the Court's precedent dealing with pre-investigation law enforcement records, such as incident reports, Respondent cannot meet its burden to show that the Tensing Video falls squarely within the CLEIR exception.

A. The Tensing Video is a pre-investigation law enforcement record, and was therefore subject to immediate disclosure upon request.

At 12:45 a.m. on July 20, UCPD filed an incident report describing the DuBose shooting based on witness statements, including most notably, Officer Tensing's. The Tensing Video was created about six hours **before** the UCPD incident report. (*See* Rel. Ex. A-3.) Thus, from a temporal standpoint, the Tensing Video is more similar to a 9-1-1 recording than an incident report.

Furthermore, the video was not created during an investigation of Officer Tensing for murder, which is the investigation for which Respondent invokes CLEIR. The video was instead created during a routine traffic stop. And UCPD's own body-

cam policy draws a distinction between such traffic stops, and investigatory stops. (*See* Rel. Ex. H-20.)

More important, Officer Tensing was the subject of the investigation Respondent relied upon in citing the CLEIR exception. Specifically, Prosecuting Attorney Deters—through Ms. Wilson—stated that he was withholding the Tensing Video because his office needed "time to look at everything and do *a complete investigation* . . ." (Rel. Ex. D-4 (emphasis added).) The investigation to which he referred was, of course, the investigation of Officer Tensing for Mr. DuBose's alleged murder.

Thus, under *Maurer*, the Tensing investigation started—at the earliest—with the July 20 incident report. For purposes of evaluating the applicability of the CLEIR exception, the inquiry should end there.

Even if the Court did not apply *Maurer*, however, the Tensing Video was clearly not created with an investigatory purpose in mind. All of the images captured prior to Officer Tensing's alleged murder of Mr. DuBose were of events leading up to the commission of the alleged crime. Consequently, there was no nexus between the intent in creating the video, and a law enforcement investigation. (For the plainly obvious reason that there can be no investigation until the subject crime actually occurs.) With respect to the post-shooting images captured, no allegation of criminal conduct had yet been made by UCPD or CPD so as to trigger the investigation of Officer Tensing.

It is also important that the statements Officer Tensing made to the other police officers that arrived at the scene following the shooting conveyed the same information UCPD included in its incident report. The fact that Officer Tensing's statements were recorded on his body-cam has no impact on the CLEIR exception analysis. Indeed, the *Maurer* incident report included "four typed transcripts of *taped* statements of law enforcement officers" regarding the officer-involved shooting in that case. *Maurer*, 91 Ohio St.3d at 54, 741 N.E.2d 511 (2001) (emphasis added).

The Tensing Video by itself establishes that it is a pre-investigation law enforcement record. Thus, under *Maurer*, Respondent cannot establish that the Tensing Video was exempt from disclosure under CLEIR, regardless of whether release would have revealed one of the four types of information specified in R.C. 149.43(A)(2)(a)-(d).

B. Even if the Tensing Video constituted a law enforcement investigatory record, there was no risk that disclosure would reveal "confidential investigatory techniques or procedures or specific investigatory work product."

Even if the Court were to conclude that the Tensing Video was an investigatory record, none of the information it contains constitutes "specific confidential investigatory techniques or procedures or specific investigatory work product" as Respondent asserted as justification for denying the records requests.[3] (*See* Ex. B-9.)

[3] Although Respondent also cited the Sixth Amendment to the United States Constitution as a ground for withholding the record (Ex. B-9), it does not make that argument in this action.

With respect to "confidential investigatory techniques," all of the events Officer Tensing's body-cam recorded (until he entered the CPD police vehicle for transport to the hospital) occurred in a public forum, i.e., on city streets. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 779, 108 S. Ct. 2138 (1988) (holding that "city streets and sidewalks have immemorially been held in trust for use of the public" (internal quotations omitted)). The majority of federal circuit courts of appeals that have addressed the question have held that the First Amendment to the United States Constitution protects the public's right to record police activity in public. *See Glik v. Cunniffe*, 655 F.3d 78, 82 & 84 (1st Cir. 2011) (holding that First Amendment protects right to film police activity); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (same); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (question of fact existed as to whether police officer assaulted and battered plaintiff "to prevent or dissuade him from exercising his First Amendment right to film matters of public interest"). *See also Mocek v. City of Albuquerque*, No. CIV 11-1009, 2013 U.S. Dist. LEXIS 10676, at *113-18 (D.N.M. Jan. 14, 2013) (summarizing federal circuit decisions). Thus, to the extent Officer Tensing's body-camera recorded an investigatory technique, the Court cannot consider the technique "confidential" since a nearby citizen could have readily recorded him applying that technique. To put it another way, investigatory techniques or procedures that law enforcement utilizes in full view of the public

cannot—as a matter of law—be confidential within the meaning of the R.C. 149.43(A)(2)(c).

Likewise, the Tensing Video reveals no specific investigatory work product. The term "specific investigatory work product" means "notes, working papers, memoranda, or similar materials prepared by law-enforcement officials in anticipation of litigation." *Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 18 (citing *State ex rel. Steckman v. Jackson* ("*Steckman*"), 70 Ohio St.3d 420, 434, 639 N.E.2d 83 (1994)). The exception for law enforcement work-product exists to protect the thoughts and mental impressions of a law enforcement officer engaged in an investigation. As the *Steckman* Court explained:

> If the product of such work is to be available merely upon demand, then there is a very real probability that certain information will remain unrecorded, witnesses' names will not be catalogued and other memoranda will be absent from the 'official' files.

70 Ohio St.3d at 434, 639 N.E.2d 83.

When Officer Tensing activated his body-camera, he did so because he was making a routine traffic stop, and UCPD policy required him to activate the camera. (*See* Rel. Ex. H-20.) UCPD's policy provides:

> Examples of when the department issued [Body Worn Digital Recording] system *must* be activated include, but are not limited:
>
> 1. Traffic stops, from the initiation to the completion of the enforcement action.

(*Id.* (emphasis added).)

But more important, any ideas Officer Tensing may have had about the "investigatory" nature of his traffic stop are irrelevant, since he—not Mr. DuBose—became the subject of the criminal investigation. Moreover, CPD—not UCPD—was charged with conducting that investigation. Thus, even if the work-product exception could apply to the law enforcement agency as a whole, rather than a specific law enforcement officer, UCPD never conducted an investigation of Officer Tensing. This is made clear in the UCPD incident report, which provides: "It was mutually agreed that Cincinnati Police would handle the investigation. Shortly thereafter, Cincinnati Police investigative resources began to arrive." (Rel. Ex. A-4.)

In relying upon the CLEIR exception, Respondent relies upon the reasoning of the Court of Appeals for the Twelfth Appellate District's decision in *Miller* after remand, where the court held that OSHP traffic stop records, including a dash-cam video, were exempt under CLEIR because disclosure would reveal specific investigatory work product. *State ex rel. Miller v. Ohio State Highway Patrol* ("*Miller II*"), 12th Dist. No. CA2012-05-034, Clermont County, 2014-Ohio-2244, 14 N.E.3d 396, ¶ 29. The *Miller II* court based its decision on the fact that the dash-cam captured the trooper's "specific assessment of whether he had probable cause to arrest [the driver] for OVI." *Id.* at ¶ 24. It further held that "there was no doubt that the video depiction was intended to be used by Trooper Westhoven to justify his probable cause determination, and by the state to support the impending criminal case against [the

driver]." The Twelfth District's reasoning is not persuasive, and this Court should not adopt it, for at least two reasons.

First, the video was clearly a record "relating to a charge of drunk driving." Indeed, the video captured a field sobriety test, which is conceptually identical to the "intoxilyzer test" included in the types of records the *Steckman* Court identified as non-exempt records. *Miller II*, 2014-Ohio-2244, at ¶ 23. Thus, under *Steckman*, the video of the traffic stop was subject to immediate release. 70 Ohio St.3d at 435, 639 N.E.2d 83, 94. The fact that the video may have supported a probable cause determination, or was evidence in a criminal case, is irrelevant. The Act does not contain an exception for public records that the government may decide to use as evidence in a subsequent criminal prosecution.[4]

Moreover, in distinguishing *Steckman*, *t*he Twelfth District offered nothing more than a cursory reference to changes in the way law enforcement officers investigate crimes. But the *Miller II* Court ignored that fact that the *Steckman* Court was merely approving the holding of this Court in *State ex rel. MADD v. Gosser*, in which the Court held that a number of records relating to impaired driving arrests, including breath test results, were public records under the Act. 20 Ohio St.3d 30, 34, 485 N.E.2d 706 (1985). *See also State ex rel. Outlet Commc'ns v. Lancaster Police Dep't*, 38 Ohio St.3d 324, 528 N.E.2d 175 (1988) (noting "in *State, ex rel. Mothers Against Drunk Drivers,* v. *Gosser* (1985),

[4] It is also not difficult to imagine the problems that would arise if the General Assembly had created such an exception to disclosure.

20 Ohio St. 3d 30, 20 OBR 279, 485 N.E. 2d 706 . . . we held records of intoxilyzer test results are public records which, absent any specific statutory exclusion, must be made available for public inspection").

Second, the Twelfth District also found that the "impaired driver report" prepared by the trooper was exempt under the CLEIR exception. *Miller II*, 2014-Ohio-2244, ¶ 27-30. That report is the equivalent of an incident report, which is never exempt from disclosure under the CLEIR exception. *See Maurer*, 91 Ohio St.3d at 56-57, 741 N.E.2d 511. The Twelfth District did not, however, attempt to distinguish the Court's 2006 *Maurer* decision, which involved a much more detailed report of an officer-involved shooting.

Miller II, for obvious reasons, has no application here. The Tensing Video captures Officer Tensing's alleged murder of Mr. DuBose. Whatever investigatory techniques Officer Tensing employed during the traffic stop are neither confidential, nor relevant to the subsequent criminal investigation of Officer Tensing.

<u>Proposition of Law No. V</u>
The Court should award Relators their reasonable attorney's fees under R.C. 149.43(C)(2).

The criteria for an award of attorney's fees is set forth in R.C. 149.43. Under that subsection, "the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c)." A court may make a reduction to fees based on the reasonableness of the government's actions.

Under the reasonableness test,

> 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 or 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.

R.C. 149.43(C)(2)(c). The Court has repeatedly held that a request that would enable a newspaper to provide "complete and accurate news reports to the public" confers a public benefit, which supports an award of fees. *See Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 42 (citing *Maurer*, 91 Ohio St. 3d at 58, 741 N.E.2d 511).

Relators have satisfied all of the necessary requirements to be entitled to an award of attorney's fees under R.C. 149.43(C)(2), as explained by this Court in *State ex rel. Pennington v. Gundler*, 75 St.3d 171, 661 N.E.2d 1049 (1996). Specifically, Relators: (1) made a proper request for public records pursuant to R.C. 149.43; (2) the records were

not turned over in response to that request; and (3) Relators were therefore forced to file a mandamus action to obtain the records. *Id.* Moreover, Relators' requests for the Tensing Video were for the purpose of providing complete and accurate news reports to the public.

Furthermore, no reduction of Relators' fees under R.C. 149.43(C)(2)(c)(i) and (ii) would be appropriate in this case. Nothing on the Tensing Video remotely approaches information that a well-informed public servant could reasonably deem exempt under the CLEIR exception, and no well-informed public servant would have reasonably believed otherwise. Likewise, no well-informed public servant would reasonably believe that withholding the Tensing Video served the Act's objectives of open government and transparency.

In an officer-involved shooting, a public office's failure to comply with a request for a public record can generate significant public backlash, and create the perception that the government is attempting to avoid negative publicity or worse. This is precisely what happened recently in Chicago, where a dashboard mounted camera on a police vehicle captured a Chicago police officer shooting and killing seventeen year-old Laquan McDonald on October 20, 2014. There, the city did not release the video for over a year, and not until a court ordered it to do so. The City of Chicago has been widely condemned for its refusal to release the video. Editorials published by major news organizations went so far as to accuse city officials of trying to cover up Laquan

McDonald's murder. (*See* Aff. of Darren W. Ford, Exs. 1 through 5.) Granting law enforcement discretion whether to release the functional equivalent of an incident report invites this type of abuse.

Enforcement of open records laws is essential to avoiding the loss of confidence that attends a perceived government that skirts open records laws. By seeking access to the DuBose video here, and taking legal action to enforce the public's right to that record, Relators thus conferred a significant benefit on the public. Accordingly, an award of attorney's fees is appropriate.

CONCLUSION

For the reasons set forth, Relators have established their right to inspect the Tensing Video by clear and convincing evidence, and Respondent's corresponding clear duty to permit public access. Respondent cannot meet its reciprocal burden to show that an exception to disclosure applies. Accordingly, Relators respectfully request that the Court issue a writ of mandamus, and award them their reasonable attorney's fees incurred in bringing this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ***Relators' Merit Brief*** was served upon all counsel of record via Regular U.S. Mail, postage prepaid, pursuant to Ohio R. Civ. P. 5(B)(2)(c), on this 8th day of February, 2016.

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APPENDIX

R.C. 149.43 Availability of public records for inspection and copying.

(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;

(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) In the case of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code or a review conducted pursuant to guidelines established by the director of health under section 3701.70 of the Revised Code, records provided to the board or director, statements made by board members during meetings of the board or by persons participating in the director's review, and all work products of the board or director, and in the case of a child fatality review board, child fatality review data submitted by the 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;

(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.

(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;

(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;

(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 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.

(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.

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.

(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.

(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.

149.011 Documents, reports, and records definitions.

As used in this chapter, except as otherwise provided:

…

(G) "Records" includes 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.

Amended by 129th General AssemblyFile No.1, HB 1, §1, eff. 2/18/2011.

Effective Date: 09-26-2003; 2006 HB9 09-29-2007

Title	SOP Number
Body Worn Digital Recording Systems	PU50
Approval Signature Chief Jason Goodrich	
Reviewed/Revised by	Pages 1 of 5
Last Revision Date 10/12/14 JRC 1/29/15	Effective Date 10/13/14

1. PURPOSE AND SCOPE

The use of the Body Worn Digital Recording (BWDR) system provides an unbiased audio/video recording of events that officers encounter. These recordings can be useful for the documentation of evidence, the preparation of offense reports, and future court testimony. These recordings can also protect officers from false allegations of misconduct and be of use when debriefing incidents or evaluating performance. This policy covers the use of the Department issued BWDR systems.

A. GENERAL INFORMATION

DEPARTMENT ISSUED BODY WORN DIGITAL RECORDING SYSTEM

(a) All police officers will be issued a BWDR system and will be trained in the operation of the equipment prior to its use. BWDR equipment will be used in accordance with Ohio law and this procedure. All uniformed patrol officers will wear their issued BWDR while on duty. Special assignment and plainclothes officers will wear their BWDR when engaged in activities where the use is reasonably foreseeable. **Officers will notify and try to obtain consent prior to recording interviews with crime victims and witnesses. Officers will note in their ARMs report their reasoning if they fail to record an activity that is required by department policy**. Officers will not use any personally owned recording equipment or devices while on duty without approval from the Chief or Assistant Chief. **Data images, video, and metadata captured, recorded, or otherwise produced by the BWDR is the sole property of the University of Cincinnati Police Department.**

(b) Officers who discover an operational defect with the BWDR system will attempt to correct the problem according to the training provided (I.E.: Reseating cables, Cycling the power, etc.). If the BWDR is found to have a physical defect or malfunction, the employee will notify the supervisor, and write up the device for service describing the events leading up to failure. The supervisor will issue the officer a spare BWDR.

(c) Officers shall not:

a. Bypass or attempt to override the equipment.

b. Erase, alter, or delete any recording produced by the BWDR.

B. WHEN DEPARTMENT ISSUED BWDR SYSTEM USE IS REQUIRED

This section is not intended to describe every possible situation where the system may be used. In general, the BWDR should be used to record activities where law enforcement

action is being taken, or where other circumstances could result in an officers actions being questioned. In some circumstances it may not be possible to capture images of an incident due to conditions or location of the camera, however the audio portion can be valuable evidence and is subject to the same activation requirements.

(a) Officers responding to a scene shall activate their department issued BWDR:

1. Prior to arriving on-scene when dispatched on a call where they are likely to detain or arrest a person; or
2. Have detained or arrested a person; or
3. Are attempting to detain or arrest a person; or
4. Are confronting disorderly or hostile subjects; or
5. Are searching for or collecting evidence, especially where drugs or money are involved; or
6. Any other situation where the officer believes that documentation of their activities is desirable.

(b) Examples of when the department issued BWDR system must be activated include, but are not limited to:

1. Traffic stops, from the initiation to the completion of the enforcement action.
2. DWI investigations including field sobriety tests
3. Warrant service
4. Investigatory stops
5. Any contact that becomes adversarial in an incident that would not otherwise require recording. In those situations, it may be impractical or unreasonable for officers to activate their BWDR system before taking police action. In that case, officers will activate their BWDR as soon as possible to record the remainder of the incident.

(c) In addition to the required situations, officers may activate the system anytime they believe its use would be appropriate and/or valuable to document an incident.

(d) There may be instances in which an officer is required to take immediate action to an event that occurs directly in front of them which may not allow time to activate their BWRD. In these circumstances, the officer shall activate their BWDR as soon as practical.

C. WHEN DEPARTMENT ISSUED BWDR SYSTEM DEACTIVATION

IS AUTHORIZED

Once the BWDR system is activated it shall remain on until the incident has concluded.

(a) For purposes of this section, conclusion of an incident has occurred when:

1. After an arrested suspect has been transported to the station.

2. All witnesses and victims have been interviewed.

(b) Recording may cease if no further law enforcement action is likely to occur (e.g., after a field stop has concluded and the subject is sent on their way)

D. WHEN DEPARTMENT ISSUED BWDR SYSTEM USE IS NOT REQUIRED

Activation of the BWDR systems is not required during routine patrol, or while the officer is engaged in non-enforcement activity, such as meal breaks or routine conversation with the general public.

E. BODY WORN DIGITAL RECORDINGS AS EVIDENCE

(a) Officers will securely upload all recordings captured on any BWDR system they are carrying by the end of their tour of duty to the **www.evidence.com**.

(b) Recordings not needed as evidence or other official UCPD business may be erased after 15 days from the date of the recording.

(c) Recordings will be preserved for the duration of any court proceedings or internal investigations.

F. REVIEW OF ALL BWDR SYSTEM RECORDINGS

This section outlines the review of department issued BWDR system recordings.

(a) Recordings may be reviewed:

1. By an officer to make sure the BWDR system is working

2. By an officer to assist with the writing of a report, supplement, or memorandum.

3. By authorized persons for the purpose of reviewing evidence

4. By a supervisor investigating a specific act of employee conduct

5. By authorized Department personnel participating in an official capacity such as a personnel complaint, administrative inquiry, criminal investigation, or use of force review.

(b) Recordings may be reviewed for the purpose of training. If an involved employee objects to showing a recording, their objection will be submitted to their supervisor to determine if the training value outweighs the employee's objection.

(c) Recordings will not be used or shown with the intent to ridicule or embarrass any employee.

(d) Employees shall not obtain, attempt to obtain, or convert for their personal use or for the unauthorized use of another person, any information obtained by a BWDR system. Employees shall not make personal copies or attempt to upload recordings to social networking sites (e.g., You-Tube, Facebook).

(e) Recordings may be released to the Prosecutor through the normal evidentiary process. Any other release of a recording must be approved through the normal records release process.

G. STORAGE and CHARGING

(a) All officers will only **upload, charge** and **store** their BWDR in the docking stations located in the squad room.