

**In the
Supreme Court of Ohio**

STATE OF OHIO, <i>ex rel.</i>	:	Case No. 2015-0390
THE CINCINNATI ENQUIRER	:	
	:	
Relator,	:	Original Action in Mandamus
	:	
vs.	:	
	:	
OHIO DEPARTMENT OF PUBLIC SAFETY,	:	
et al.	:	
	:	
Respondents.	:	

REPLY BRIEF OF RELATOR THE CINCINNATI ENQUIRER

JOHN C. GREINER (0005551)*
**Counsel of Record*
DARREN W. FORD (0086449)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com
dford@graydon.com

Counsel for Relator The Cincinnati Enquirer

Michael DeWine (0009181)
Ohio Attorney General

Jeffery W. Clark (0017319)*
**Counsel of Record*
Hilary R. Damaser (0059190)
Morgan Linn (0084622)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
Phone: 614-466-2872
Fax: 614-728-7592
Email:
Jeffery.Clark@ohioattorneygeneral.gov
Hilary.Damaser@ohioattorneygeneral.gov
Morgan.Linn@ohioattorneygeneral.gov

*Counsel for Respondents Ohio Department of
Public Safety and John Born, Director*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

Reply to Respondents’ Proposition of Law No. I
A high-speed police pursuit of a motorist on an interstate highway is not an “investigation,” and thus, video records of a pursuit are not exempt confidential law enforcement investigatory records within the meaning of R.C. 149.43(A)(1)(h). 1

 A. The OSHP Videos do not pertain to a law enforcement investigation, and therefore, the CLEIR exception cannot apply..... 3

 B. Even if the troopers’ pursuit of Mr. Teofilo could be characterized as an investigation for purposes of the CLEIR exception, the images captured by the dash-cams do not constitute specific investigatory work product..... 7

 1. *The troopers did not assemble or compile the OSHP Videos, and thus, they cannot constitute specific investigatory work product under Steckman* 8

 2. *OSHP’s policy demonstrates that dash-cam videos are made in connection with multiple types of law enforcement interactions with the public*..... 11

 3. *If a dash-cam video contains exempt information, OSHP must redact that information and produce the remainder of the video*..... 12

Reply to Respondents’ Proposition of Law No. II
If the Court renders final judgment in The Enquirer’s favor, The Enquirer is eligible for an award of attorney’s fees. 13

Reply to Amicus Curiae The Ohio Prosecuting Attorneys Association
There is no evidence in the record that release of the OSHP Videos would have impaired Mr. Teofilo’s Sixth Amendment right to a fair trial, and thus, the application of R.C. 149.43(A)(1)(v) is not at issue 14

CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases

Cline v. BMV, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991)..... 3

Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) 7

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011)..... 7

Indep. Ins. Agents v. Fabe, 63 Ohio St.3d 310, 587 N.E.2d 814 (1992)..... 4

Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000) 7

State ex rel. Beacon Journal Publ’g Co. v. Maurer , 91 Ohio St.3d 54, N.E.2d 511 (2001).. 3, 5, 6

State ex rel. Carr v. City of Akron, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948 3

State ex rel. Cincinnati Enquirer v. Lyons, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d
989 7

State ex rel. Cincinnati Enquirer v. Sage, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d
616 9, 10, 11, 13, 14

State ex rel. DiFranco v. S. Euclid, 138 Ohio St.3d 367, 2014-Ohio-538, 7 N.E.3d 1136... 13, 14

State ex rel. Multimedia, Inc. v. Snowden, 72 Ohio St.3d 141, 647 N.E.2d 1374 (1995)..... 2

State ex rel. Nat’l Broad. Co. v. City of Cleveland, 38 Ohio St. 3d 79, 526 N.E.2d 786
(1988)..... 3

State ex rel. Polovishchak v. Mayfield, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990)..... 2

State ex rel. Rucker v. Guernsey County Sheriff’s Office, 126 Ohio St.3d 224, 2010-
Ohio-3288, 932 N.E.2d 327 12

State ex rel. Steckman v. Jackson, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994) 8, 9, 10

State ex rel. Vindicator Printing Co. v. Watkins, 66 Ohio St.3d 129, 609 N.E.2d 551 (1993) . 10

State ex rel. WLWT-TV5 v. Leis, 77 Ohio St.3d 357, 673 N.E.2d 1365 (1997) 9, 12

Statutes

R.C. 149.43 passim

Other Authorities

Merriam-Webster.com..... 4, 5

OSHP Policy No. OSP-103.22 11

OSHP Policy No. OSP-203.20 4

INTRODUCTION

In the face of a public records request for dashboard camera footage recording a motor vehicle pursuit on an Interstate highway and a subsequent conversation with the driver, the ODPS has elected not to comply with the unambiguous requirements of the Ohio Public Records Act, but rather to retreat to its bunker and guard the footage as though it is J. R. R. Tolkien's "precious."

In doing so, the ODPS relies on misstated facts, inaccurate legal principles and on an arcane analysis that is the very opposite of the duty to interpret the law in a manner that promotes transparency.

Whether the Department's reaction is the knee jerk reflex of bureaucrats to protect "turf" or an ill-informed belief in its meritless position makes no difference. Its position, if adopted, would permit police unfettered discretion to withhold from the public information related to the state's ultimate power—the power to apprehend, detain and arrest. Providing the state police with the ability to hide its activities will further add to the distrust and suspicion that poisons police/community relations throughout the state and the nation.

ARGUMENT

Reply to Respondents' Proposition of Law No. I

A high-speed police pursuit of a motorist on an interstate highway is not an "investigation," and thus, video records of a pursuit are not exempt confidential law enforcement investigatory records within the meaning of R.C. 149.43(A)(1)(h).

Respondents' argument that the Ohio State Highway Patrol ("OSHP") dashboard camera videos at issue in this case ("OSHP Videos") are exempt from disclosure under the

confidential law enforcement investigatory records exception, R.C. 149.43(A)(1)(h), relies chiefly on two unsupportable propositions.

First, Respondents assert that the motor vehicle pursuit at issue was an “investigative stop,” and that every high-speed police pursuit of a motorist on a federal interstate highway is a law enforcement investigation because it may involve a modicum of fact gathering. (Resp’t’s Br. at 10 (“Yes, ‘every high-speed pursuit of a motorist is an investigation’ of that motorist . . .” (emphasis in original).) Respondents must take this position because they concede that the phrase “law enforcement matter” as used in R.C. 149.43(A)(2) means a law enforcement “investigation.” (Resp’t’s Br. at 6 (“A ‘law enforcement matter’ means an investigation . . .”) (citing *State ex rel. Polovishchak v. Mayfield*, 50 Ohio St.3d 51, 53, 552 N.E.2d 635 (1990) & *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142-143, 647 N.E.2d 1374 (1995).)

Second, Respondents assert that video images taken by a camera mounted on the dashboard of a police cruiser (“dash-cam”) during a high-speed pursuit constitute specific investigatory work product within the meaning of R.C. 149.43(A)(2). In support of this proposition, Respondents argue that the troopers “assembled” the images captured by the dash-cams in anticipation of a probable prosecution, and that the cameras’ “inherent function” was to “document the nature and sequence of objective, observed events by Troopers Harvey and Perrin, in furtherance of prosecution of the suspected offenses.” (Resp’t’s Br. at 9.)

In making this second argument, Respondents treat a dash-cam video as equivalent to an investigator’s file assembled or compiled from multiple records for purposes of a criminal prosecution. The comparison they make is wholly absurd, however, because the

troopers had no control over what “work product” the video captured, and did not have a choice in whether to activate the video under OSHP policy. Moreover, the fact that the dash-cams in this case were as capable of capturing images of police misconduct as they were of capturing “evidence “ of civilian criminal conduct, by itself precludes a finding that these videos were specific work product of the troopers, or even “investigatory” in nature.

A. The OSHP Videos do not pertain to a law enforcement investigation, and therefore, the CLEIR exception cannot apply.

The plain language of the CLEIR exception dictates that for a public record to be exempt under that provision, the record must pertain to a law enforcement investigation. If the record does not pertain to a law enforcement investigation, then the Court need not reach the question whether disclosure would risk revealing the types of “confidential” information enumerated in R.C. 149.43(A)(2)(a) through (d). *State ex rel. Beacon Journal Publ’g Co. v. Maurer* (“*Maurer*”), 91 Ohio St.3d 54, 57, 741 N.E.2d 511 (2001).

Respondents concede that the phrase “law enforcement matter” means a law enforcement investigation. (Resp’t’s Br. at 6.) And indeed, this construction of the phrase “law enforcement matter” is the only construction that simultaneously gives meaning to the term “investigatory,” while avoiding a construction of the statute under which every law enforcement record could potentially satisfy the strictures of the CLEIR exception. *See Cline v. BMV*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991) (“In [the] determining [legislative] intent [of a statute], it is the duty of the court to give effect to the words used, not to delete words used or insert words not used.”) & *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 29, 859 N.E.2d 948, 952 (“R.C. 149.43 is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records” (internal quotations omitted)). *See generally State ex rel. Nat’l Broad. Co. v. City of Cleveland*,

38 Ohio St. 3d 79, 81, 526 N.E.2d 786 (1988) (observing that 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”).

Because the exception uses the word “investigatory,” that term cannot simply be ignored. The question is therefore what the term “investigatory” means in the context of the definition given for confidential law enforcement investigatory record.

Under the rules of statutory construction, “words and phrases shall be read in context and construed according to the rules of grammar and common usage.” *Indep. Ins. Agents v. Fabe*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814 (1992) (internal quotations omitted). The term “investigatory” derives from the verb “investigate.” The verb “investigate” means “to observe or study by close examination and systematic inquiry.” Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/investigate> (last visited Feb. 29, 2016). An investigation thus has as its objective obtaining answers to the “who, what, where, when, and why” of a crime, by close examination and systematic inquiry.

A motor vehicle pursuit, like the one involved here, cannot be labeled an “investigation” under this definition, nor under any common understanding of what the term means. Under OSHP policy OSP-203.20(H)(1), a motor vehicle pursuit is defined as “[a]n active attempt by an officer in an authorized emergency vehicle to *apprehend* fleeing suspects who are attempting to avoid apprehension through evasive tactics.” (Jt. Ex. B, at 43, Appx. A-57 (emphasis added).) The term “investigate” does not appear anywhere in the motor vehicle pursuit policy, and nothing in the policy remotely suggests that the purpose

of a pursuit is to investigate the commission of a crime by close examination and systematic inquiry. To the contrary, the object of a pursuit is to stop a crime in progress.

Moreover, characterizing a pre-incident report motor vehicle pursuit and suspect apprehension as an “investigation” would be completely at odds with this Court’s decision in *Maurer*. 91 Ohio St.3d 54, 741 N.E.2d 511. In that case, the police response was triggered by a 9-1-1 call from a caller (“Huffman”) who told the dispatcher that he was “waiting for the police to come and kill him.” *Id.* at 54. The incident ended when an officer shot and killed Huffman. *Id.*

Between the time of the shooting, and the submission of the incident report for the shooting, the police gathered a number of officer statements, transcribed those statements, and took statements from several other witnesses. *Id.* The Court found that these preliminary fact-gathering activities, and the incident report itself, were not part of an investigation for purposes of the CLEIR exception, even though the activities involved fact gathering relating to the subject incident. The Court, relying on precedent, stated that “incident reports initiate criminal investigations, but are not part of the investigation.” *Id.* at 56.

The word “initiate” means “to cause or facilitate the beginning of.” Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/initiate> (last visited Feb. 29, 2016). *Maurer* thus stands for the proposition that an investigation—for purposes of the CLEIR exception—does not begin until an incident report is prepared. That is not to say, however, that there must be an incident report for there to be an investigation for purposes of the CLEIR exception. Instead, it means that if there is an incident report, the Court will

look to that as the objective marker of when the investigation for that particular incident began.

In response to the clear *Maurer* rule, Respondents assert that it is “simply not true that a routine incident/offense report always temporally precedes genuine investigatory activity.” (Resp’t’s Br. at 19.) They then assert that the Court “has never ruled in *Maurer* or elsewhere that all investigative material that is in existence prior to the writing of an initial incident report is automatically public record.” (*Id.* at 21.)

But Respondents miss the point. Any fact-gathering activity can be characterized as “investigatory” in nature. Indeed, the information provided in an incident report is inevitably the product of some fact-gathering by the police officer who prepares the report. The question the *Maurer* Court answered was therefore not what types of activities can be characterized as “investigatory” in nature, but rather, when does an investigation for purposes of the CLEIR exception begin where an incident report is prepared? The Court rationally recognized the incident report as *a* document that initiates a formal investigation, since it contains the formal charges and the basic background information to support those charges. The Court did not hold that an incident report was the exclusive way in which an investigation, for purposes of the CLEIR exception, begins.

Where police do create an incident report, marking that document as the point at which the formal investigation for purposes of the CLEIR exception begins is rational, and provides clear guidance to law enforcement agencies as to when they may begin to invoke the CLEIR exception to protect their work product. The rule for which Respondents advocate would undo that clear guidance, and leave law enforcement with unfettered discretion to characterize any law enforcement activity that involves a modicum of fact

gathering (such as a highway pursuit) as an “investigation.” Such a rule would substantially decrease the public’s access to law enforcement records, thus reducing public scrutiny of Ohio’s law enforcement agencies, and subverting the legislative objectives of the law. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989 (observing that open records laws “should enjoy a broad judicial construction in favor of access to records, which promotes openness, transparency of process, and accountability”).

B. Even if the troopers’ pursuit of Mr. Teofilo could be characterized as an investigation for purposes of the CLEIR exception, the images captured by the dash-cams do not constitute specific investigatory work product.

Respondents argument as to how the images from Troopers Harvey’s and Perrin’s fixed dash-cams satisfy the “specific investigatory work product” prong of the CLEIR exception definition also lacks merit. They argue:

Cruiser dash cam videos, whether manually activated or automatically triggered by the officer deciding to activate her siren or lights with reasonable suspicion or probable cause that a crime is being committed, are “assembled by law enforcement officials,” and are “in connection with a probable or pending criminal proceeding.”

(Resp’t’s Br. at 9.)

As an initial matter, it is important to note that the images the OSHP Videos recorded were of an interaction between OSHP troopers and a civilian on a public Interstate highway. This interaction was not “confidential” as a matter of law, since any bystander or news organization could have lawfully recorded the interaction under the First Amendment to the United States Constitution. *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”). Thus, to the extent there is visual “work product” captured on the videos, that work product cannot fairly be deemed “confidential” for purposes of the CLEIR exception.

1. *The troopers did not assemble or compile the OSHP Videos, and thus, they cannot constitute specific investigatory work product under Steckman.*

The definition of “work product” relied upon by Respondents derives from the Court’s decision in *State ex rel. Steckman v. Jackson* (“*Steckman*”), 70 Ohio St.3d 420, 435, 639 N.E.2d 83 (1994). In fashioning the definition of “work product” for purposes of the CLEIR exception, the *Steckman* Court explained:

‘Under this rule any notes, working papers, memoranda or similar materials, prepared by attorneys [here, by law enforcement officials] in anticipation of litigation, are protected from discovery.’ Black’s Law Dictionary (6 Ed.Rev. 1990) 1606. This definition (working papers) is broad enough to bring under its umbrella any records compiled by law enforcement officials.

Id. at 434.

The key to understanding the *Steckman* decision is the Court’s use of the term “compiled,” and the context in which the Court rendered the decision. As the Court acknowledges, the problem it set out to address in that case was the purported “daily bombardment on [our] criminal justice system” with public records requests made by criminal defendants seeking access to the investigation file associated with their criminal prosecution. *Id.* at 428-29, 439.

The rule fashioned by the Court brought within the scope of the work product prong of the CLEIR exception the entirety of the investigator’s file, thus precluding criminal defendants from using R.C. 149.43 to obtain the contents of such files, unless a particular document in the file was otherwise subject to disclosure under Crim.R. 16. In other words,

the *Steckman* Court did nothing more than hold that an investigator's file, as a whole, constitutes work product, with the caveat that a defendant could nevertheless obtain discovery of evidence in that file pursuant to Crim.R. 16. The *Steckman* Court did not hold that every document placed within the file became exempt from disclosure, and in fact, this Court has explicitly held to the contrary. See *State ex rel. WLWT-TV5 v. Leis* ("*Leis*"), 77 Ohio St.3d 357, 361, 673 N.E.2d 1365 (1997) (holding that certain records in an investigator's file are nonexempt "and do not become exempt simply because they are placed in a prosecutor's file"). See also *Steckman*, 70 Ohio St.3d at 435, 639 N.E.2d 83 (holding that ongoing incident reports, even if contained within prosecutor's file, were not exempt from disclosure as work product).

A dash-cam video is not an investigation file of the sort considered in *Steckman*. A video is not "assembled" by a law enforcement officer like an investigation file, nor are video recordings compiled from other records. They are instead stand-alone records of objective facts and data that may, or may not, end up in an investigator's file at some later point-in-time. And as this Court has repeatedly held, the mere fact that a public record ends up in an investigator or prosecutor's file does not make the record exempt. *State ex rel. Cincinnati Enquirer v. Sage* ("*Sage*"), 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 16 (holding that 9-1-1 call did not become trial-preparation record "simply because it moved from [the dispatcher's] office to the prosecutor's file"). Thus, the videos do not meet the definition of "work product" given by the *Steckman* Court.

Respondents counter with the assertion that "[r]ecords compiled by a criminal investigator as 'evidence' in a case are perhaps the quintessential 'specific investigatory work product.'" (Resp't's Br. at 9.) But the fact that the OSHP Videos were evidence of a

crime, not merely work papers of an investigator, further illustrates why the work product label is inappropriate.

Here, there is little question that under Crim.R. 16, Mr. Teofilo would have been entitled to copies of the videos, or to have his attorney view them, as they evidenced his attempt to flee from officers. Thus, from a criminal discovery point of view, these videos would not have been exempt as attorney, or investigatory work-product, since the prosecuting attorney almost certainly would have introduced the videos as evidence against Mr. Teofilo at trial. *See* Crim.R. 16(B) (providing that criminal defendant entitled to discovery of photographs or tangible objects “intended for use by the prosecuting attorney as evidence at the trial”).

To be clear, Crim.R. 16 has no application to a non-defendant in the public records context. *See State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 135, 609 N.E.2d 551 (1993) (holding that Crim.R. 16 does not apply to non-parties to a criminal case), *overruled on other grounds by, Steckman*, 70 Ohio St.3d 420, 639 N.E.2d 83. But the fact that the OSHP Videos would have likely been used as evidence in a criminal trial, and thus, subject to Crim.R. 16 discovery, illustrates the fact that they are not entitled to “work product” protection under the *Steckman* decision. 70 Ohio St.3d at 435, 639 N.E.2d 83 (holding that “**except as required by Crim.R. 16**, information assembled by law enforcement officials in connection with a probably or pending criminal proceeding is, by the work product exception found in R.C. 149.43(A)(2), excepted from required release as said information is compiled in anticipation of litigation” (emphasis added)).

Moreover, although Respondents claim otherwise, this Court’s decision in *Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, makes clear that the mere fact that a public

record may be used by a prosecutor as evidence in a criminal prosecution does not turn the record into exempt “work product.” (Resp’t’s Br. at 11.) In that case, after withholding a 9-1-1 call for several months, the respondent prosecuting attorney introduced the 9-1-1 call into evidence at trial, and simultaneously released a copy to the public. *Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 8. As justification for withholding the 9-1-1 call, the prosecuting attorney cited several grounds, including the CLEIR exception. *Id.* at ¶¶ 16-18.

With respect to the CLEIR exception, the prosecuting attorney argued that the 9-1-1 call recording was “specific investigatory work product.” *Id.* at ¶ 17. The Court flatly rejected this argument, despite the fact that the prosecuting attorney had used the 9-1-1 call as evidence at trial. *Id.* (“appellants make no attempt to explain how the recording at issue actually constitutes law-enforcement investigatory work product . . . [a]nd we can find no justification ourselves”). As such, *Sage* establishes that the evidentiary nature of a public record has no bearing upon whether a record constitutes “specific investigatory work product” for purposes of the CLEIR exception.

2. *OSHP’s policy demonstrates that dash-cam videos are made in connection with multiple types of law enforcement interactions with the public.*

Respondents contend that “[a]ctivation of the cruiser video, whether automatically or manually, is expressly intended by OSHP policy and trooper practice to facilitate investigation and prosecution of traffic and other criminal offenses when reported or recognized as such.” (Resp’t’s Br. at 14.) OSHP’s policies governing dash-cam use are not so narrow, however, and require troopers to record “traffic stops, pursuits, and *other public contacts occurring within the operating range of the camera . . .*” OSP-103.22(B)(1) (Jt. Ex. B-2, Appx. A-16 (emphasis added)).

3. *If a dash-cam video contains exempt information, OSHP must redact that information and produce the remainder of the video.*

Even if the OSHP Videos contained information exempt from disclosure, most of the information they capture is non-exempt. Respondents nevertheless claim that they were under no obligation to redact the exempt information and provide the remainder of the record, despite the clear language of R.C. 149.43(B)(1).

Respondents cite *Leis* for the proposition that a public office is under no obligation to provide a redacted copy of a public record otherwise containing exempt information. *Leis* is wholly inapposite, however, for at least two reasons.

First, *Leis* dealt with a request for the entirety of an investigator's file, not a specific public record within that file. 77 Ohio St.3d 357, 361-62, 673 N.E.2d 1365. The *Leis* Court found that certain records within the prosecutor's file were "unquestionably nonexempt and d[id] not become exempt simply because they [were] placed in a prosecutor's file." *Id.* at 361, 673 N.E.2d 1365. Consequently, it ordered disclosure of eight of the records contained in the prosecutor's file. *Id.*

Second, nothing in the *Leis* opinion remotely addresses how a public office must handle a single record (as opposed to a compilation) that contains information otherwise exempt under the CLEIR exception. Respondents suggest that the cases holding that a public office must redact information in an investigatory record that would reveal the name of an uncharged suspect have no application here. (Respt's Br. at 16 (citing *State ex rel. Rocker v. Guernsey County Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327).) Respondents utterly fail, however, to explain why they could not remove portions of the videos claimed to contain "specific investigatory work product" and produce the rest of

the footage. Indeed, nothing in the statutory language itself suggests a special exemption for records that contain information purportedly exempt under the CLEIR exception.

Reply to Respondents' Proposition of Law No. II
If the Court renders final judgment in The Enquirer's favor, The Enquirer is eligible for an award of attorney's fees.

Respondents claim that this case is moot, and that because of this, the Court cannot award The Enquirer its attorney's fees under *State ex rel. DiFranco v. S. Euclid*, 138 Ohio St.3d 367, 2014-Ohio-538, 7 N.E.3d 1136. Respondents' argument fails for two reasons.

First, Respondents have not—until now—asserted that this case is moot.¹ Certainly, Respondents' unrepentant position that they rightfully withheld the OSHP Videos under the CLEIR exception, and can do so again in the future, shows that this controversy is not moot because it is capable of repetition yet evading review. *See Sage*, 142 Ohio St.3d 392, 394, 2015-Ohio-974, ¶ 9 n.1, 31 N.E.3d 616 (holding that doctrine “applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again”).

Second, a relator clearly may recover attorney's fees in a case in which it has received the requested records, but has pursued the litigation on the ground that the issue is capable of repetition but evading review. *Id.* at ¶ 43. In *Sage*, the respondent had provided the subject 9-1-1 call before the court of appeals rendered final judgment. The court of appeals nevertheless found that the case was capable of repetition yet evading

¹ The Enquirer notes that Respondents had many months to move to dismiss this action on mootness grounds, and failed to do so. To the extent that they now raise this issue for the first time in their response brief, this Court should find either that they waived the defense, or afford The Enquirer the opportunity to brief the issue of mootness in full.

review, and proceeded to final judgment. *Id.* at ¶ 9. On appeal, the Court reversed the court of appeals' denial of attorney's fees, and awarded relator its fees, almost a year after it had decided *DiFranco*. *Id.* at ¶ 49. Thus, if the Court renders final judgment in The Enquirer's favor, it is eligible to receive its reasonable attorney's fees.

Reply to Amicus Curiae The Ohio Prosecuting Attorneys Association
There is no evidence in the record that release of the OSHP Videos
would have impaired Mr. Teofilo's Sixth Amendment right to a fair trial,
and thus, the application of R.C. 149.43(A)(1)(v) is not at issue.

Amicus Curiae, the Ohio Prosecuting Attorneys Association, speculate that there may be a case in which release of a dash-cam video would impair a criminal defendant's federal Sixth Amendment right to a fair trial. (Amicus Curiae Ohio Prosecuting Attys. Ass'n Br. at 6.) That is not this case, however, as Respondents have never asserted that release would have jeopardized Mr. Teofilo's Sixth Amendment rights, nor is there any evidence in the record that this was a legitimate concern at the time of the initial denial of the records request. *See also Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, ¶¶ 18-19, 31 N.E.3d 616 (holding that prosecuting attorney that had raised Sixth Amendment concern as basis for denying records requests had failed to introduce sufficient evidence of potential violation).

Moreover, the Public Records Act accounts for disclosure issues involving Sixth Amendment rights with R.C. 149.43(A)(1)(v), which exempts from disclosure "[r]ecords the release of which is prohibited by state or federal law." *See Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, ¶¶ 18-19, 31 N.E.3d 616. Thus, the Court need not fashion any rule around the disclosure of dash-cam videos in this case with respect to the Sixth Amendment.

CONCLUSION

For the reasons set forth above, and for those set out in The Enquirer's Merit Brief, The Enquirer respectfully requests that the Court issue a writ of mandamus to Respondents, and award it its reasonable attorney's fees incurred in bringing this action.

Respectfully submitted,

Of Counsel:

GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836

/s/ John C. Greiner
John C. Greiner (0005551)*
**Counsel of Record*
Darren W. Ford (0086449)
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com
dford@graydon.com

COUNSEL FOR RELATOR

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ***Reply Brief of Relator The Cincinnati Enquirer to Respondents' 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 3rd day of March, 2016.

Jeffrey W. Clark, Esq.
Hilary R. Damaser, Esq.
Morgan Linn, Esq.
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215

Gregg Marx, Esq.
Fairfield County Prosecuting Attorney
Joshua S. Horacek, Esq.
239 West Main Street, Suite 101
Lancaster, OH 43130

/s/ John C. Greiner
John C. Greiner (0005551)*