

**In the  
Supreme Court of Ohio**

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

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**REPLY BRIEF OF RELATORS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii, iii

INTRODUCTION..... 1

ARGUMENT ..... 3

**A. Reply to Respondent’s Proposition of Law No. 1 ..... 4**

**B. Reply to Respondent’s Proposition of Law No. 2 ..... 6**

**C. Reply to Respondent’s Proposition of Law No. 3 ..... 8**

        1. The CLEIR Exception..... 8

        2. The TPR Exception..... 9

        3. The Common Law .....10

**D. Reply to Proposition of Law No. 4 .....11**

**E. Reply to Proposition of Law No. 5 .....11**

**F. Reply to Respondent’s Proposition of Law No. 6 .....12**

**G. Reply to Respondent’s Proposition of Law No. 7 .....14**

**H. Reply to Brief of Amicus Curiae The Ohio Prosecuting Attorneys  
    Association .....14**

**I. Reply to Brief of Amicus Curiae Attorney General Michael  
    DeWine .....15**

CONCLUSION .....18

CERTIFICATE OF SERVICE .....20

## TABLE OF AUTHORITIES

### Cases

<i>State ex rel. Beacon Journal Publishing Co. v. Maurer</i> , 91 Ohio St.3d 54, 56, 741 N.E.2d 511 (2001).....	8
<i>State ex rel. Carpenter v. Jones</i> , 72 Ohio St.3d 579, 651 N.E.2d (1995) .....	3
<i>State ex rel. Carpenter v. Tubbs Jones</i> , 72 Ohio St.3d 579, 651 N.E.2d (1995) .....	9
<i>State ex rel. Cincinnati Enquirer v. Hamilton County</i> , 75 Ohio St.3d 374, 662 N.E.2d 334 (1996).....	9, 12
<i>State ex rel. Cincinnati Enquirer v. Sage</i> , 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616.....	2, 13, 14, 15, 16
<i>State ex rel. Community Journal v. Reed</i> , 12th Dist. No. CA2014-01-010 Clermont County, 2014-Ohio-5745, 26 N.E.3d 286 .....	16, 17
<i>State ex rel. DeGroot v. Tilsley</i> , 128 Ohio St.3d 311, 2011-Ohio-231, 943 N.E.2d 1018 .....	5
<i>State ex rel. Gannett Satellite Info. Network v. Petro</i> , 80 Ohio St.3d 261, 685 N.E.2d 1223 (1997).....	3
<i>State ex rel. Miller v. Ohio State Highway Patrol</i> , 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175 .....	2, 15
<i>State ex rel. O’Shea and Associates Co., L.P.A. v. Cuyahoga Metropolitan Housing Authority</i> , 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297 .....	5, 6, 7, 8
<i>State ex rel. Polovischak v. Mayfield</i> , 50 Ohio St.3d 51, 552 N.E.2d 635 (1990) .....	1
<i>State ex rel. Steckman v. Jackson</i> , 70 Ohio St.3d 420, 639 N.E.2d 83 (1994) .....	16
<i>State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.</i> , 121 Ohio St.3d 537, 2009–Ohio-1767, 905 N.E.2d 1221 .....	10
<i>State ex rel. Wadd v. City of Cleveland</i> , 81 Ohio St.3d 50, 689 N.E.2d 25 (1998) .....	7
<i>State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Office</i> , 82 Ohio St.3d 37, 693 N.E.2d 789 (1998).....	4, 5
<i>State ex rel. WLWT-TV5 v. Leis</i> , 77 Ohio St.3d 357, 673 N.E.2d 1365 (1996).....	3
<i>Woodruff v. Concord City Disc. Clothing Store</i> , 2d Dist. No. 10072 Montgomery County, 1987 Ohio App. LEXIS 5914 .....	10, 11

**Statutes**

R.C. 149.43 ..... passim

**Other Authorities**

Ohio Public Records and Open Meetings Acts.” Hon. Thomas J. Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. Ann. Surv. Am. L 247 (2003) .....13

## INTRODUCTION

Opposing counsel in this case eloquently wrote, over twenty-five years ago:

R.C. 149.43 was intended by the General Assembly to, among other things, ensure the openness of government by affording citizens access to governmental information through inspection of governmental records. With only limited and narrow exceptions (R.C. 149.43(A)(2)), public records, as defined in R.C. 149.43(A)(1), must be open to the inspection of the public. ***In fact, the records belong to the public, and the official holding such records does so on behalf of the public.***

*State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 54-55, 552 N.E.2d 635 (1990) (Douglas, J., dissenting) (emphasis added). After reading the three briefs filed in this case, one could be forgiven for concluding that this basic concept—that government records are the people’s records—is not shared among those responsible for keeping the records, and the government attorneys advising them.

The question presented in this case is straightforward: is the police body-cam recording that captured images of officer Ray Tensing shooting and killing Samuel DuBose during a routine traffic stop (“Tensing Video”) exempt from disclosure under the Public Records Act, R.C. 149.43 (the “Act”). The government’s answer is not only “yes,” in this instance, but “yes” in every instance. Indeed, the government’s position is that law enforcement should be able to video record their interactions with the public; keep those video recordings as long as they see fit; and have unfettered discretion to determine whether and when those video recordings are released to the public, once the recordings have found their way into a law enforcement investigator’s, or prosecutor’s file.

The Orwellian tone of the three briefs is troubling enough. But the fact that both Respondent, and Attorney General DeWine, have resorted to distortion and outright misrepresentations in advancing this legal position is much worse. Indeed, the Attorney

General's false characterization of this Court's decision in *State ex rel. Miller v. Ohio State Highway Patrol* ("*Miller I*"), 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175 is so egregious, the Court should disregard its brief completely.

Respondent, for its part, attempts to mislead this Court into addressing an issue that is not before this Court, that is, whether Respondent produced the Tensing Video promptly in response to Relators' requests. This case is before the Court because it is a matter capable of repetition, yet evading review. It is capable of repetition because Respondent takes the position that even though it turned over the Tensing Video, it had no legal obligation under R.C. 149.43 to do so. (Resp't's Br. at 8-14.) Indeed, Respondent is estopped from arguing to the contrary on the question of mootness. (Answer, at ¶ 31 ("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 if the Court decided to entertain the matter and decide the case **on the merits.**" (emphasis added).))

In sum, what these elected officials advocate for is less government transparency through more government discretion over how to characterize the records their offices and clients generate. They further argue, that public records requestors should have to engage in an onerous guessing game at the request stage to determine which, among several offices in possession of a record, is the right office to ask for that record. Were this Court to accept any of the governments' arguments, it would necessarily have to overrule twenty-plus years of precedent; precedent that makes clear that the mere fact that a public record ends up in the hands of a prosecutor or investigator does not affect its public records status, nor the prosecutor's or investigator's duty to turn such records over upon request. *See State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d

616 (holding that prosecuting attorney in possession of 9-1-1 call made by county sheriff's office was obliged to turn record over); *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 685 N.E.2d 1223 (1997) (holding that state auditor had to turn over nonexempt records in investigation file such as sanitation district contract and records, and campaign contributions); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 673 N.E.2d 1365 (1996) (holding that sheriff and prosecutor had to turn over public records contained in investigation and prosecution files); *State ex rel. Carpenter v. Jones*, 72 Ohio St.3d 579, 651 N.E.2d (1995) (holding that prosecutor had to produce nonexempt public records, such as routine offense reports, that were contained in prosecutor's file).

#### ARGUMENT

Respondent offers what it characterizes as seven propositions of law in support of its request that the Court deny the writ, all of which are either irrelevant to the issue presented, contrary to precedent, contrary to the plain language of the Act, or some combination of the three. In addition to the application of the CLEIR exception, Amicus Curiae, The Ohio Prosecuting Attorneys Association, raises (curiously) the issue of a defendant's fair trial rights under the Sixth Amendment to the Constitution. Respondent itself did not view the Sixth Amendment as a concern, though, evidenced by Mr. Deters' press conference at which he showed the media the Tensing Video, and offered his personal commentary on Mr. Tensing's guilt.

Last, the Attorney General, for his amicus brief, argues that the Tensing Video is exempt under the CLEIR exception, and that Respondent had no control over the Tensing Video despite the fact that Respondent instructed (not merely advised) two public offices to deny requests for the video.

**A. Reply to Respondent's Proposition of Law No. 1**

Respondent asks, again, that the Court dismiss this case on the grounds that this case is moot, that Respondent reasonably relied on a court of appeals case in denying the request, that the Tensing Video is not a “record” of the Respondent, and that Respondent provided the video to Relators in a “reasonable time.” Respondent made all of these arguments in its Motion for Judgment on the Pleadings, which the Court denied. (*See* Resp’t’s Mot. for J. Pleadings at 3-4.) Thus, Respondent unnecessarily re-raises these arguments again in what can only be considered an attempt to have this Court to reconsider its prior decision. The facts on which the Court considered the original motion have not changed. Accordingly, the Court should reject the arguments Respondent makes under Proposition of Law No. 1. Relators do ask, however, that the Court expressly reject Respondent’s specious argument that for a record to be a “public record” under R.C. 149.43, it must be made by the public office, or official in whose custody it resides.

The gist of Respondent’s argument is that the Tensing Video is not a public record vis-à-vis Respondent because it is not a “record” under R.C. 149.011(G). According to Respondent, the Tensing Video is not a “record” because it does not document the activities of the Hamilton County Prosecuting Attorney’s Office.

In support, Respondent cites the Court’s decisions in *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Office* (“*Wilson-Simmons*”), 82 Ohio St.3d 37, 42, 693 N.E.2d 789 (1998) and *State ex rel. DeGroot v. Tilsley* (“*DeGroot*”), 128 Ohio St.3d 311, 2011-Ohio-231, 943 N.E.2d 1018. ¶ 6. Neither case is relevant.

In *Wilson-Simmons*, the Court held that the emails the relator requested were not “records” because they did not serve to document the “organization, functions, policies,

decisions, procedures, operations, or other activities” of the respondent sheriff’s department, or any government office for that matter. *Wilson-Simmons*, 82 Ohio St.3d at 42, 693 N.E.2d 789 (“although the alleged racist e-mail was created by public employees via a public office’s e-mail system, it was never used to conduct the business of the public office and did not constitute records for purposes of R.C. 149.011(G) and 149.43”). The Court did not find that the e-mails documented the records of some other public office, and indeed, the request at issue in that case was for e-mails generated by the respondent’s employees.

*DeGroot* is equally inapposite for the legal proposition for which Respondent cites it. In that case, the Court held that home addresses of city addressees were not “records” within the meaning of R.C. 149.011(G) because they did not document the activities of a public office. The Court did not find that the addresses were public records of some other office, as would be necessary for that case to support Respondent’s argument.

Based on these cases, Respondent reaches the conclusion that “[i]t is clear that just because a public office has information, that fact does not necessarily mean that the information documents the organization, functions, policies, decisions, procedures, operations or other activities of the office.” (Resp’t’s Br. at 5.) Respondent then goes on to cite the “three-part test” in *State ex rel. O’Shea and Associates Co., L.P.A. v. Cuyahoga Metropolitan Housing Authority (“O’Shea”)*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 23. It fails to then apply the *O’Shea* test to the Tensing Video.

This is telling, because the Tensing Video clearly meets the *O’Shea* test. Under *O’Shea*, the information sought must be a: (1) document, device, or item, (2) “created or received by or coming under the jurisdiction of any public office of the state,” (3) “which serve[s] to document the organization, functions, policies, decision, procedures, operations,

or other activities of the office.” *Id.* at ¶ 23. The Tensing Video clearly satisfies this test (and thus the statutory definition), as it is as an item created by the University of Cincinnati Police Department (“UCPD”) that documents the functions, decision, procedures, operations, or other activities of UCPD.

Contrary to Respondent’s suggestion, the analysis does not stop there though. The ultimate question is whether the Tensing Video is a “public record” within the meaning of R.C. 149.43(A)(1). A public record is “*any* record that is *kept* by *any* public office.” *Id.* (emphasis added). The Tensing Video meets that definition in the hands of any public office that keeps it, regardless of whether that particular office created the record.

If this were not the correct analysis, a public office could simply move undesirable records to different public offices for safekeeping in order to avoid disclosure under R.C. 149.43. One need not be a cynic to imagine the problems that would result from such a narrow interpretation of the definition of “public record.”

**B. Reply to Respondent’s Proposition of Law No. 2**

For its second proposition of law, Respondent again argues that the Tensing Video, in its hands, was not a “public record” under R.C. 149.43. This time, however, Respondent asserts that it did not “keep” the record in the normal course of its “business.” (Resp’t’s Br. at 7.)

Respondent also seems to suggest that a public office has discretion as to whether it needs to respond to a public records request based upon “the context of the circumstances” surrounding the request. (*Id.*) For this argument, Respondent relies on language in the *O’Shea* decision taken entirely out of context.

With respect to Respondent's first argument, Respondent has simply invented language that appears nowhere in the definition of "public record" to make its point. This court has never held, and Respondent cites no authority for the proposition, that a public office only keeps a public record when it has done so in the past, and "in the normal course of business." This argument is yet another attempt to have this Court make law that would permit a public office in possession of a public record to deny requests for the record based on a vague, subjective backward-looking analysis of the office's pattern and practice with respect to a specific record. Nothing in the act supports Respondent's interpretation of "public record," and the offered interpretation is patently at odds with this Court's precedent requiring a broad construction of the Act in favor of access. *See 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.").

Respondent's second argument is even less consistent with a construction favoring broad access to public records. It contends that a public office may "consider the propriety of a public-records [sic] request 'in the context of the circumstances surrounding it.'" (Resp't's Br. at 7 (quoting *O'Shea*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 21).) In other words, Respondent contends that a public office may simply deny a request when it determines that the "surrounding circumstances" dictate the decision. *Id.*

Contrary to Respondent's suggestion, the "context of the circumstances" language the Court used in *O'Shea* refers to a public office's obligation to interpret a facially overbroad or ambiguous request in the context of the circumstances in which the relator made the request. *Id.* at ¶¶ 19-21. Thus, *O'Shea* stands for the proposition that a public

office cannot deny requests solely based on whether the request is facially proper. The case therefore cuts against Respondent's contention that public offices can decide whether to deny a request based on the "surrounding circumstances." To put it another way, nothing in the Court's *O'Shea* opinion supports Respondent's position that a government may deny a specific, facially proper request, based on the "surrounding circumstances."

**C. Reply to Respondent's Proposition of Law No. 3**

Respondent's contend that the Tensing Video is exempt under the CLEIR and Trial Preparation Records ("TPR") exceptions based on the false premise that the evidentiary nature of the record is relevant to this Court's analysis. Respondent also argues that the common law attorney-client privilege can make a public record exempt from disclosure. Each is addressed in turn.

**1. The CLEIR Exception.**

With respect to the CLEIR exception, Respondent ignores the basic rule that for the CLEIR exception to apply, the public office must make the record in the context of an "investigation." *State ex rel. Beacon Journal Publishing Co. v. Maurer* ("*Maurer*"), 91 Ohio St.3d 54, 56, 741 N.E.2d 511 (2001) (holding that incident report was not subject to CLEIR exception because such report initiate the investigation, but are not part of the investigations they initiate). The fact that a prosecutor or investigator declares a public record, made by another public office before any investigation began, to be evidence of a crime, cannot defrock the record of its vested, "public record" status. *Cf. State ex rel. Cincinnati Enquirer v. Hamilton County* ("*Cincinnati Enquirer*"), 75 Ohio St.3d 374, 378-79, 662 N.E.2d 334 (1996) (citing *State ex rel. Carpenter v. Tubbs Jones*, 72 Ohio St.3d 579, 580, 651 N.E.2d (1995)).

Likewise, the fact that release of an otherwise public record might assist a witness or criminal suspect when testifying before a grand jury is equally irrelevant. Respondent's argument is that it was justified in withholding the record because release "would have allowed Officer Tensing to adjust his story to match the video." (Resp't's Br. at 9.) Respondent fails to identify, however, how a witness testifying consistently with objective evidence is problematic. Indeed, Respondent's argument seems to be nothing more than its denial was justified because release would have made it harder for Respondent's office to present Officer Tensing as a liar to the grand jury. Respondent certainly does not suggest that Officer Tensing's credibility was the linchpin in its ability to get the grand jury to indict him for murder. In fact, Respondent does not actually provide any evidence that Officer Tensing testified before the grand jury, or if he did, whether he waived his Fifth Amendment right against self-incrimination. Regardless, a prosecutor's desire to engage in such tactics is not sufficient reason to ignore the plain language of the Act.

## **2. The TPR Exception**

The TPR exception has even less applicability to the facts of this case, and notably, Respondent did not even raise this exception as a basis for denying the request, or a basis for dismissal in its Motion for Judgment on the Pleadings.

Respondent argues that the "the body-cam video was downloaded solely for presentation to the Grand Jury," and is thus a trial preparation record within the meaning of R.C. 149.43(A)(1)(g). The Act defines "trial preparation record" as "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." R.C. 149.43 (4).

Even under the most generous reading of this definition, the Tensing Video does not qualify. Mr. Piepmeier’s grand jury file is not the “record” Relators sought, and the fact that the Tensing Video ended up in that file is irrelevant. Moreover, none of the information on the Tensing Video (as opposed to Mr. Piepmeier’s file) was compiled “in reasonable anticipation of . . . a civil or criminal action or proceeding.” Indeed, the alleged murder did not occur until several minutes into the video. As such, the trial preparation record has no application.

### **3. The Common Law.**

Respondent also suggests that the common law makes the record exempt under R.C. 149.43(A)(1)(v), “[r]ecord the release of which is prohibited by state or federal law.” Specifically, Respondent suggests that the Tensing Video was protected by the attorney-client privilege.

In the public records context, this Court has held that “[t]he attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law prohibiting release of [such] records.” *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 22 (emphasis added). It is axiomatic, however, that a client cannot make an otherwise non-privileged document privileged by sending it to its attorney. *Woodruff v. Concord City Disc. Clothing Store*, 2d Dist. No. 10072 Montgomery County, 1987 Ohio App. LEXIS 5914, at \*21 (“A document, which would be subject to discovery in the client’s possession, does not become privileged because the client sends it to his attorney”).

There is no attorney-client communication contained on the Tensing Video, and thus, the Tensing Video itself is not protected by the attorney-client privilege under state law. Accordingly, under basic attorney-client privilege law, as explained by the *Woodruff* court, the fact that UCPD sent the Tensing Video to Respondent cannot make it exempt from disclosure under state law.

**D. Reply to Proposition of Law No. 4**

Respondent argues that this is a matter “more appropriately addressed through the legislative process than the judicial process.” (Resp’t’s Br. at 17.) This argument has nothing to do with the question before this Court, however, which is whether—under R.C. 149.43 as written—the Tensing Video is a public record. This Court is vested with the power to decide cases under Article IV of the Ohio Constitution. It cannot simply abstain from exercising that power because one party does not like the law as currently written. Indeed, Respondent’s plea that the Court not rule in this case suggests that it agrees that the law—as currently written—does not contain an exemption that would allow them to withhold police body-cam footage of the kind involved here.

**E. Reply to Proposition of Law No. 5**

Respondent maintains that the body-cam footage is not analogous to 9-1-1 calls or incident reports because the body-cam footage is not “routine.” (Resp’t’s Br. at 18.) This argument ignores UCPD policy concerning the use of body-cams, which required Officer Tensing to activate his camera. (Rel. Ex. H-20.) Thus, the creation of such footage was routine, even if the information captured on the record was not. *Cf. Cincinnati Enquirer*, 75 Ohio St.3d 374, 378, 662 N.E.2d 334 (holding that content of 9-1-1 call irrelevant to whether it was subject to CLEIR exception).

Moreover, much like a 9-1-1 call or routine incident report, the only information captured on the Tensing Video was objective facts and data about the traffic stop. The video does not record Officer Tensing's thoughts and mental impressions about an investigation, nor does it capture any other information that could be considered investigatory "work product" of Officer Tensing within the meaning of R.C. 149.43(A)(2)(c).

**F. Reply to Respondent's Proposition of Law No. 6**

Proposition of Law No. 6 is Respondent's plea to this Court to ignore the plain language of the Act and make up rules that would allow a public office to: (1) withhold any body-cam video for 14 days; or (2) allow a public office to bring suit to obtain a declaration as to the status of a particular record. Respondent's argument in this section is less of a proposition of law, and more an overt request that the Court engage in law making to rebalance the Public Records Act in support of law enforcement and county prosecutors.

As to the 14-day rule, the timing of Respondent's release in this case is not at issue, as already discussed. Respondent has taken the position that he had no obligation to release the record when he did, and that it was an exempt record under several statutory exceptions.

Moreover, the language of the R.C. 149.43(B)(1) is unambiguous in requiring a public office to make a record available for inspection "promptly." Respondent is free to argue in a case where it is not contesting its obligation to disclose that 14 days is sufficiently "prompt" under the statute. That is not the legal position Respondent has taken in this case, however, and thus, the Court need not make up new rules to address issues that are not before this Court.

As to Respondent's request that the Court allow a public office to go on the offensive by seeking an order from a common pleas judge before a mandamus suit is filed, the Court has already spoken. It held, in *Sage*, that a prosecuting attorney who obtained a protective order in a criminal case stating that he had no obligation to release a 9-1-1 call had acted in bad faith. 142 Ohio St. 3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 41. The Court explained:

The protective order had no place in this public-records dispute. ***Mandamus actions resolve public-records matters***; criminal trial motions do not. Thus, the protective order only served to saddle the Enquirer with more litigation and more attorney fees. These tactics do not demonstrate good faith by the prosecutor's office, and the court of appeals was unreasonable in concluding otherwise. The office forced the Enquirer to incur additional legal fees. It should be responsible, in some measure, for the extra costs that it created.

*Id.* (emphasis added and citations omitted).

As the late Justice Thomas Moyer wrote, "Ohio courts have primarily approached the Ohio Sunshine Laws under a textual theory. The policy underlying this approach is, to some extent, attributable to the fact that the Ohio General Assembly has already balanced the relevant public and private interests within the Ohio Public Records and Open Meetings Acts." Hon. Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. Ann. Surv. Am. L 247, 256 (2003). Thus, the Court need not, and should not accept Respondent's invitation to attempt a rebalancing the law in Respondent's favor. Accordingly, the Court should reject Respondent's Proposition of Law No. 6 in its entirety.

**G. Reply to Respondent’s Proposition of Law No. 7**

Respondent’s failure to offer any legitimate defense of its position that it had no obligation to disclose the Tensing Video demonstrates why the Court should award Relators their attorney’s fees.

Respondent claims that it reasonably believed an exception to disclosure applied when it denied Relators’ requests, yet its arguments in this case show that no legitimate basis for denial existed then or now. The Tensing Video—particularly the footage up and until the shooting—were not made pursuant to any law enforcement investigation of Mr. DuBose, and certainly not with respect to the subsequent murder investigation of Officer Tensing. Respondent’s asserted reason for needing to withhold the video—to prevent Officer Tensing from changing his story—is not supported by any case law of this Court, or the statute itself.

**H. Reply to Brief of Amicus Curiae The Ohio Prosecuting Attorneys Association**

Amicus Curiae, the Ohio Prosecuting Attorneys Association, speculates that there may be a case in which release of a body-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 an issue in this case, however, as Respondent released the video to the public well in advance of Officer Tensing’s trial, thereby rejecting any Sixth Amendment fair trial concern. Furthermore, there is no evidence in the record that the Sixth Amendment was a legitimate concern at the time Respondent denied the records requests. *See 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 address any potential Sixth Amendment issues for purposes of this case.

### **I. Reply to Brief of Amicus Curiae Attorney General Michael DeWine**

The fact that the Ohio Attorney General (“AG”) has chosen to weigh in on this case, not on the side of transparency, but rather on the side of hiding information from the public, is troubling enough. But the fact that the AG has resorted to distortion in advancing his case is much worse. This Court should disregard the AG’s amicus brief because its utter disregard for an honest presentation of the facts and law renders it not worthy of consideration.

The AG relies in part on a reading of this Court’s ruling in *Miller I* that is not in any way aligned with the actual ruling in that case. The AG falsely claims that *Miller I* “rejected a bright-line approach to police ‘dash-cam’ or ‘cruiser-cam videos.’” (Amicus Curiae Ohio AG Br. (hereinafter “AG Br.”) at 1.) But given that no such bright line test was advanced before the Supreme Court, this statement is untrue. Moreover, the brief implies that the Supreme Court made the following statement in its opinion “the content and context, not the medium, determine whether a given video is public or exempt.” (*Id.*) Those words appear nowhere in the *Miller I* opinion, despite the AG’s suggestion that they do. *See Miller I*, 136

Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶¶ 23-27. This court should not award deception.

It is clear from the amicus brief that the AG's goal here is for this court to rewrite the Court's decision in *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994), and award the AG, and prosecutors throughout the state, indiscriminate and unlimited power to render clearly public records off limits to the public by pulling those records into an investigative file. For the AG to suggest that *Steckman* allows this practice is to engage in fabrication or fantasy, but in any event, this Court knows better and must denounce this effort in no uncertain terms. *See, e.g., Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 16 (holding that 9-1-1 recording "could not suddenly transform into a trial-preparation record simply because it moved from [9-1-1 dispatcher's] office to the prosecutor's file"). To allow any elected official to manipulate the production of records while hiding behind an inapplicable exemption is to invite abuse and to allow that elected official to advance his own political agenda at the expense of the public's right to know. This court rejected just such an effort in *Sage* (and awarded attorney fees in the process) and it should do the same here. *Id.* at ¶¶ 16, 39-43. It is no surprise that a politically ambitious elected official would crave power over information. What is surprising is that the elected official would think he could deceive this Court into assisting in that effort.

The AG's reliance on the deeply flawed decision in *State ex rel. Community Journal v. Reed* is unavailing. 12th Dist. No. CA2014-01-010 Clermont County, 2014-Ohio-5745, 26 N.E.3d 286. The basis for the Twelfth District's ruling in that case was the misguided belief that records received and maintained by the Bureau of Criminal Identification ("BCI") were

not “public records” because the records originally resided in a township police department. *Id.* at ¶ 38. The *Reed* court wrote:

In this case, the precise question before this court is whether the records held by BCI are “public records” subject to disclosure or if the records fall under the confidential law enforcement exception under the Public Records Act. Importantly, this court is not deciding whether the records fall into a public records exclusion while held at the Police Department. The documents BCI received from the Police Department were not BCI’s “public records” as the documents were not kept by BCI to “document the organization, functions, policies, decisions, procedures, operations, or other activities” of BCI. Instead, the documents served only to further BCI’s criminal investigation of illicit activity occurring at the Police Department. Therefore, because the documents were never BCI’s “records,” we find the documents do not fall under the ambit of the Public Records Act and do not need to be disclosed.

*Id.* (footnote omitted).

But this holding is blatantly at odds with the very definition of a public record under R.C. 149.011(G), which defines a record as any record “received by . . . any public office.” Given *Reed*’s disregard for the plain text of the definition of “record,” it is of no precedential value.

On the fee award, the brief again misstates the argument. It attempts to characterize Relators’ claim as some sort of witch-hunt against any government lawyer who gives inadequate advice, arguing that the county prosecutor’s only involvement here was its “advice” to UCPD. (AG Br. at 2, 13-16.) That is false on several levels.

First, the evidence demonstrates that the Prosecutor did not merely “advise” the University Police to withhold the video—it directed it to do so. (Rel. Ex. H-11, Interrogatory No. 15; Rel. Ex. A-4.) Given the Prosecutor’s power to bring obstruction of justice charges, this is not a matter of semantics.

If the AG is suggesting that there is an “advice of counsel” defense to a claim for attorney fees, it is absolutely wrong. Not only is there no such defense in the Act, such a defense would effectively render the attorney fee provision null and void. No doubt, every public official consults counsel in determining whether to apply an exception. And when that public official relies on bad advice, that public official is potentially liable for the requesting party’s attorney fees. The fact that the public official received bad advice is not a defense, nor should it be. The attorney fee provision protects the public, not civil servants.

### **CONCLUSION**

This Court has construed the Ohio Public Records Act in favor of government transparency and accountability for decades. Law enforcement agencies and county prosecutors do not warrant special treatment beyond that specifically provided for in the Act. Indeed, it is with the most powerful public offices, such as law enforcement agencies and prosecutors, that the preservation of broad access is most important. Accordingly, this Court should not accept Respondent and amici curiae’s invitation to pull the curtain over the activities of such offices by adopting a rule would provide them with the unfettered discretion they desire.

Accordingly, for the reasons set forth above, and for those set out in Relators’ Merit Brief, Relators respectfully request that the Court issue a writ of mandamus to Respondent, 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 *Reply Brief of Relators* 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 4th day of March, 2016.

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