Supreme Court of Ohio Clerk of Court - Filed July 08, 2015 - Case No. 2014-1621

IN THE SUPREME COURT OF OHIO

State ex rel. DONALD CASTER.	:	
Relator,	:	Case No. 2014-1621
v.	:	ORIGINAL ACTION IN MANDAMUS (Public Records)
CITY OF COLUMBUS, Ohio, et al.	:	
Respondents	:	

RESPONDENTS' BRIEF

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I. SUMMARY OF ARGUMENT

To be entitled to a writ of mandamus, Relator "must establish a clear legal right to the requested relief and a clear legal duty on the part of Respondents to provide the relief. *State ex rel. The Cincinnati Enquirer v. Sage*, 2015- Ohio- 974, 2015 Ohio LEXIS 620, ¶10, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d, ¶ 6; *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 488, 974 N.E.2d 89 (2012). Based on existing statutory and case law, Relator fails to state a clear legal right to relief.

Respondents are the City of Columbus and Chief of Police Kimberley Jacobs in her official capacity. Relator Donald Caster, an attorney with the Ohio Innocence Project ("OIP"), brings this public records mandamus action pursuant to R.C. 149.43(C)(1). He claims his public records request gives him a legal right to "medical records, police reports, investigation notes, and evidence reports, and any other material compiled by the Columbus Division of Police" in connection with the Julie Popovich homicide investigation. (See Agreed Stmt. of Facts: Exhibs. 2, 3, 5).

On May 3, 2007, Adam Saleh was convicted of murder, attempted rape, and kidnapping of Julie Popovich as well as tampering with the evidence. *State v. Saleh*, Franklin County Common Pleas, Ohio Case No. 05-CR 8796. Saleh appealed the judgment, and on March 31, 2009, the conviction was affirmed. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542. On July 1, 2009, this Court refused review of his appeal. *State v. Saleh*, 122 Ohio St.3d. 1457, 2009-Ohio-3131 (2009). Saleh is serving a sentence of 38 years to life. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542 at *P63. Relator claims a review of the police homicide investigation file would assist in his decision whether to represent Saleh in postconviction proceedings.

Relator is not maintaining existing law "clearly" supports his right to the police homicide investigation file. To the contrary, by the instant action, Relator asks this Court to "overrule" its decision in *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). (See Rel's Brief, p. 15). *Steckman* held, inter alia, that the exemption from public records for "confidential law enforcement investigatory records" ("CLEIR"), included in the Public Records Act at R.C. 149.43(A)(1)(h) and for the CLEIR sub category of "specific investigatory work product," set forth at 149.43(A)(2)(c), is "broad enough to bring under its umbrella any records compiled by law enforcement officials and information assembled by law enforcement officials in connection with a probable or pending criminal proceeding." *Id*. at 435." *Steckman* recognized that "specific investigatory work product" consists of "notes, working papers, memoranda or similar materials." *Id*. at 420. In *Steckman*, this Court also held, "Once a record becomes exempt from disclosure, it remains exempt unless and until "all trials, actions or proceedings have been completed." *Id*. at 432.

Based on the ordinary application of existing law, Respondents denied Relator's public records request for the Popovich homicide investigative file. (Agreed Stmt. of Facts: Exhibs. 2,4). Respondents reasonably concluded that the requested homicide investigation records are CLEIR, exempt from public records as stated in R.C. 149.43(A)(1)(h) and (A)(2)(a)-(d) and as the statute has been interpreted in *Steckman* and progeny.

Relator does not argue that Respondent's reliance on *Steckman* and progeny is misplaced. Relator acknowledges the *Steckman* Court interpreted the exceptions to public records for CLEIR in R.C. 149.43(A)(1)(h) and "specific investigatory work product" in (A)(2)(c) to cover "literally every document in the files of . . . law enforcement officers related to a criminal proceeding . . . and it extended these limitations beyond trial, to cover proceedings on direct

appeals and even requests for postconviction relief." (Rel's Brief, p. 7). Relator acknowledges lower courts have reinforced *Steckman*. *Id*.

Relator's argument that this Court should "overrule" *Steckman* rests entirely on the 2010 revision of Ohio Crim. R. 16 to require "open file discovery." Relator maintains *Steckman's* holdings as to CLEIR and "specific investigatory work product", in general, and, in particular, its extension of these public records exceptions to cover postconviction proceedings, are "obsolete" in light of revised Rule 16.

Relator fails to address *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355, 673 N.E.2d 1360 (1997), wherein this Court reasoned, ". . . [I]nformation that a criminal prosecutor has disclosed to the defendant for discovery purposes pursuant to Crim. R. 16 is not thereby subject to release as a "public record" pursuant to R.C. 149.43." "Discovery is neither a public process nor typically a matter of public record. . . . " *Id.*

Moreover, Relator does not address the fact that the legislature has not amended R.C. 149.43(A)(1)(h) or (2)(c) either in response to *Steckman* and progeny or in response to the revision of Ohio Crim. R. 16 in 2010. The Public Records statute, as it exists, evidences the legislative intent to maintain the CLEIR exception for specific investigatory work product, and, in particular, for police homicide investigation files.

Judicial construction of R.C. 149.43(A)(2)(c) must be balanced against the compelling need to let police investigators do their jobs effectively, which not only encompasses the need for investigators to document their thought processes and communications, but also the various privacy, safety, and property interests of suspects, victims, witnesses and other persons. *Steckman* struck that balance by clarifying that a law enforcement investigative file is a "specific

investigatory work product" falling under the CLEIR exception to public records and that the specific investigatory work product exemption continues until all trials, actions, and/or proceedings have been completed. Relator's argument that the 2010 revision of the criminal discovery rules per force rendered *Steckman* obsolete fails to recognize the different and distinct purposes of, and procedures for, criminal discovery and public records law.

Relator's argument goes beyond the instant public records request for the Popovich homicide investigation file and the particular interests of the OIP; he seeks a revision of current case law interpreting R.C.149.43(A)(1)(h) and (A)(2)(c) that would affect all public records requests for law enforcement investigative files.

Additionally, to clarify the issues before the Court, Respondents do not maintain that routine incident reports or "911" calls are not public records. The law enforcement investigation at issue involved a homicide—not a routine traffic stop. The investigation did not entail routine incident reports or "911" calls. The investigation arose out of a "missing person" report. Respondents voluntarily provided the missing person investigatory forms that initiated the investigation, the Franklin County Coroner's report (with Social Security numbers redacted), newspaper articles, a press release, and subpoenas. (Agreed Stmt. of Facts, Exhib. 6, pp. 1-29).

Further, Respondents clarify that the bulk of the homicide investigation file at issue consists of records that fall under the specific investigatory work product exemption, R.C. 149.43(A)(2)(c), that is, the personal notes, working papers, memoranda, evidentiary findings, and similar materials compiled by the law enforcement investigators in anticipation of a homicide prosecution. (Affid. of J. Schirg). Respondents raised additional exceptions for some

of the documents. [1] These additional exceptions to public records disclosure are not at issue. Similarly, the exception for medical records is not at issue.

II. Statement of Facts

In connection with the submission of evidence, Respondents stipulated to the Agreed Statement of Facts. Additionally, Respondents also filed the Affidavit of Jonathan Schirg.

III. Argument

To be entitled to a writ of mandamus, Relator "must establish a clear legal right to the requested relief and a clear legal duty on the part of Respondents to provide the relief. *State ex rel. The Cincinnati Enquirer v. Sage*, supra at ¶10. It is apparent from Relator's Brief he does not maintain existing law "clearly" supports his right to the requested records. To the contrary, as Relator acknowledges, by the instant action, he asks this Court to overrule *Steckman*. Relator maintains *Steckman's* holdings as to CLEIR in R.C. 149.43(A)(1)(h) and "specific investigatory work product" in R.C. 149.43(A)(2)(c), and, in particular, its extension of these public records exceptions to cover postconviction proceedings, are "obsolete" in light of the 2010 amendment of Crim. R. 16.

Relator first contends that, in light of the "open file discovery" provided in revised Rule 16, there is no longer a valid basis for law enforcement agencies to withhold records that are part of a criminal investigation file-- *at any time*. This argument would render R.C. 149.43(A)(2)(c) a nullity. Moreover, the argument that the "specific investigatory work product" exemption from

[1] A public office is not limited to the explanation(s) previously given for denial, but may rely on additional reasons or legal authority in defending the mandamus action. R.C. 149.43(B)(3). Respondents submit that the investigative file also contains records that qualify for exception from public records under R.C. 149.43. See Affid. of J. Schirg at ¶¶ 2-3.

public records has no application denies the legislature's and Ohio courts' express recognition of the public interest in promoting the effectiveness of law enforcement investigations and prosecutions. This argument also ignores the critical roles of the trial court judge and officers of the court, that is, the prosecutor and defense counsel, in the course of criminal prosecution—roles that are distinct from those of law enforcement agency officials responding to a public records request.

In apparent recognition that the public records exception for specific investigatory work product in R.C. 149.43(A)(2)(c) serves valid interests throughout the duration of a criminal trial and appeal, Relator makes a more qualified argument that the revision of Rule 16 renders R.C. 149.43(A)(2)(c) obsolete "particularly when the defendant's direct appeal has ended and there are no proceedings pending." (Rel's Brief, p. 11). Relator seems to argue that for purposes of R.C. 149.43(A)(1)(h) and (A)(2)(c), *Steckman* should be reversed or revised to clarify that "all trials, actions, and/or proceedings" are completed at the conclusion of a direct appeal.

A. R.C. 149.43(A)(1)(h) and (A)(2)(c) Evidence the Legislative Intent to Except Specific Investigatory Work Product from Public Records.

R.C. Chapter 149.43: "Availability of Public Records" sets forth the exception for "confidential law enforcement investigatory records" ("CLEIR") at 149.43 (A)(1)(h), stating in relevant part:

> (A) As used in this section:
>
> (1). . . . "Public Record" does not mean any of the following:
>
> . . .
>
> (g) Trial preparation records
>
> (h) Confidential law enforcement investigatory records
>
> . . .

R.C. 149.43(A)(2) further defines the exceptions to public records contained in (A)(1):

> (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 of any of the following:
>
> (a) the identity of a suspect who has not been charged with the offense to which the records 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, or witness, or a confidential information source

B. *Steckman* and Progeny Hold the Exception for Specific Investigatory Work Product in R.C. 149.43(A)(2)(c) Includes Information Assembled by Law Enforcement Officials in Connection with a Probable or Pending Criminal Proceeding and that It Extends Until All Actions, Including Postconviction Proceedings, Are Completed.

In *Steckman* this Court considered three separate cases involving two criminal defendants and one convicted person, all of whom sought police or prosecutor records pursuant to R.C. 149.43. This Court ultimately dismissed all three actions, holding, inter alia:

> Information, not subject to discovery pursuant to Crim. R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4).

Id. at Syll., No. 3

> Once a record becomes exempt from release as a "trial preparation record," that record does not lose its exempt status unless and until

> all "trials," "actions" and/or "proceedings" have been fully completed.

Id. at Syll., No. 4

> Except as required by Crim. R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation. The work product exception does not include ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence and records containing the results of intoxilyzer tests. . . .

Id. at Syll., No. 5.

Steckman recognized that the concept of "work product" in 149.43(A)(2)(c) was transferred by the General Assembly from its attorney-client genesis to the area of confidential law enforcement investigatory records and ruled that "any notes, working papers, memoranda or similar materials" compiled by law enforcement officer in anticipation of a criminal proceeding would come under the investigatory work product exception. *Steckman* at 434.

In *Steckman*, this Court expressly recognized that none of the definitions of "proceedings," including the definition of "trial," "makes any distinction between an initial court proceeding, direct appeals and/or postconviction relief." *Id*. at 432.

> Accordingly, we also hold once a record becomes exempt from release as a trial preparation record, that record does not lose its exempt status unless and until all trials, actions and/or proceedings have been fully completed.

Id.

This Court expressly rejected the argument that the exhaustion of direct appeals "concluded" a criminal case. The second case (Case No. 93-1336) considered in *Steckman* was brought by an incarcerated man who had been convicted of aggravated murder and robbery and

who had exhausted his direct appeals. His mandamus action sought police records dealing with the crimes for which he was convicted. This Court affirmed the appellate court's dismissal of the mandamus action, holding that the records sought by appellant were exempt from disclosure based upon the work product exception of R.C. 149.43(A)(2)(c). "A defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for postconviction relief." *Id*. at 437.

Moreover, this Court has held that the availability of records in criminal discovery does not defeat the "work product" exception. Two years after the *Steckman* decision, this Court considered a public records mandamus action brought by a television station, which sought police records related to the investigation and arrest of persons who had pled guilty to murder, gross abuse of a corpse, and tampering with evidence. *The State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 673 N.E. 2d 1360 (1997). The Relator sought incident reports, witness statements, criminal records, police reports, documents and photographs, and results of mental examination, including polygraphs. Relator contended that because the subject information had been disclosed to the defendants for discovery purposes pursuant to Crim. R. 16, it was not subject to the "work product" exception in R.C. 149.43(A)(2)(c). This Court denied the writ of mandamus, holding that "information that a criminal prosecutor has disclosed to the defendant for discovery purposes pursuant to Crim. R. 16 is not thereby subject to release as a 'public record' pursuant to R.C. 149.43. '[C]riminal discovery is a matter solely between the prosecutor and the defendant.' " *Id*. at 354. "Discovery is neither a public process nor typically a matter of public record. . . . Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will

remain private." *Id*. See also *State ex rel. WLTV-TV5 v. LEIS*, 77 Ohio St.3d 357, 359, 673 N.E.2d 1365 (1997) ("information assembled by the work product exception found in R.C. 149.43(A)(2)c) excepted from required release to the public, as said information is compiled in anticipation of litigation whether or not some of such information may be disclosed to the defendant pursuant to Crim. R. 16").

Accordingly, the Eighth Appellate District, relying on *Steckman*, dismissed a mandamus action on the basis that the requested records were substantive work product, exempt from disclosure. *Perry v. Onunwor*, 8th Dist. No. 78398, Ohio App. LEXIS 5893 (2000). *Perry* was a public records mandamus action, like the instant action, seeking police records--investigative reports, witness statements, evidentiary reports, and scientific reports. The appellate court held: "Mr. Perry seeks investigative reports, witness statements, evidentiary reports and scientific reports. These are substantive work product and do not include the routine offense or incident report. Therefore, the entirety of his request consists of records which are exempt from disclosure." *Id.* at *5. *Perry* relied on *Steckman's* holding that "information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is by the work product exception found in 149.43(A)(2) (c), excepted from required release as said information is compiled in anticipation of litigation." *Id.* at *4-5. *Perry* also cited *Lowe*, *supra*, for its holding that disclosure by a prosecutor in discovery does not take away the exemption for police investigative reports. *Id*. at *5. Additionally, relying on *Steckman*, *Perry* recognized that once a record becomes exempt from disclosure as a public record, it remains exempt unless and until all trials, actions, or proceedings have been completed. *Perry* clarified that "even if a criminal defendant has been convicted and that conviction has been affirmed on appeal, the possibility of further proceedings and trials remain, and the confidential law enforcement

investigatory records remain exempt from disclosure." *Id*. at *8. "The possibilities for further proceedings and trial are numerous, e.g., a postconviction relief petition, a motion to withdraw a guilty plea, a motion for new trial based on newly discovered evidence, a new trial from a reversal on a successful application to reopen pursuant to App. R. 26(B), and federal *habeus corpus* proceedings." *Id*.

In *The State ex rel. Rasul-Bey v. Onunwor, Mayor*, 94 Ohio St.3d 119, 760 N.E.2d 421 (2002), a mandamus public records action seeking a "routine" police incident report, this Court distinguished and implicitly approved the Eighth District's decision in *Perry*, reasoning as follows: **"**Here the mayor does not assert that the police report is a CLEIR or some other exemption. . . . In *Perry*, the records that were requested did not include any routine offense or incident report ('Mr. Perry seeks investigative reports, witness statements, evidentiary reports and scientific reports. These are substantive work product and do not include the routine offense or incident report. Therefore, the entirety of his request consists of records which are exempt from disclosure.')" *Rasul-Bey* at 121. This Court did *not* take exception to the Eighth District's conclusion that the fact that Perry's direct appeals were exhausted did not "conclude" his case. See also, *State of Ohio, ex rel. Roberson v. Mason, Prosecutor*, 8th Dist. 91783, 2009 Ohio App. LEXIS 1598 at *P10. (The Court dismissed the public records mandamus action for police reports relating to investigation of convicted murderer. "Police reports of evidentiary and scientific findings, such as ballistics reports, are exempt from disclosure as trial preparation and confidential law enforcement records. Roberson argues that those exemptions no longer apply because all appeals and postconviction remedies were exhausted. The Court finds such assertions unpersuasive.")

More recently, this Court relied on *Steckman* in a decision addressing the CLEIR work product exception to public records. *The State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office, et al.* 133 Ohio St.3d 139, 976 N.E.2d 877 (2012). In connection with a request for portions of the prosecutors' records, this Court commented, "[E]ven assuming that the claim was properly before us, it appears that the records were exempt from disclosure under R.C. 149.43 as trial preparation records of the underlying criminal cases." *Id*. at 150. " . . . [A] review of the sealed records here establishes that the records have everything to do with the criminal cases and nothing to do with assertions of prosecutorial misconduct. And, the mere fact that the cases have now been dismissed without prejudice by the state does not prevent the records from remaining exempt because '[o]nce a record becomes exempt from release as a "trial preparation record," that record does not lose its exempt status unless and until all "trials," "actions," and/or proceedings have been fully completed.' " *Id*. at 151, citing *Steckman* at syll. par. 4.

According to Relator, he requested the Popovich homicide investigation file in order to assess whether the OIP will represent Saleh in postconviction relief proceedings. Per *Steckman*, therefore, "proceedings," have not been fully completed, and R.C. 149.43(A)(2)(c) operates to except the homicide investigation file from public records.

C. The Revision of Ohio Crim. R. 16 Did Not Render *Steckman* and Progeny Obsolete.

Relator argues *Steckman's* holding that the investigatory work product exception in R.C. 149.43(A)(2)(c) continues until all proceedings have been fully completed as well as its holding that the exhaustion of a direct appeal does not conclude a "criminal case" are no longer valid because the criminal discovery rules were revised in 2010 to require "open discovery." Relator's argument does not recognize the different purposes of, and different interests served by, public

records law and criminal discovery rules. Moreover, Relator's argument does not take into account the critical roles of the trial court judge and the prosecuting and defense counsel in the course of criminal discovery and criminal litigation—roles very distinct from the law enforcement agency responsible for responding to requests for criminal investigative files.

The purpose of Ohio Crim. R. 16 is "to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large." Crim. R. 16(A). Rule 16 provides for the production of witness statements, police and investigatory reports, and tangible evidence without requiring that they be exculpatory or material to the preparation of the defense. In connection with the criminal discovery process and criminal court proceedings, and subsequent to the revision of the criminal discovery rules, "the trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large." See Rel's Brief. App. Crim R. 16 Staff Notes Division (L).

In particular, Rule 16, while requiring "open file" discovery, nevertheless recognizes: "The prosecuting attorney may designate any material subject to disclosure under this rule as 'counsel only' by stamping a prominent notice on each page or thing so designated. 'Counsel only' material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, 'counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense

counsel may orally communicate the content of the 'counsel only' material to the defendant." Crim. R. 16 (C).

Revised Rule 16 recognizes that the prosecuting attorney may withhold from disclosure material or portions of materials under this rule upon certification that the prosecutor has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party . . . subject to substantial risk of serious economic harm, compromise an ongoing criminal investigation or confidential law enforcement technique or investigation *regardless of whether that investigation involves the pending case or the defendant*. (emphasis added).

Ohio's criminal discovery rules recognize the need to protect defendants, victims, and society at large in connection with the criminal discovery process in a particular criminal trial. The court provides oversight to ensure such protection, and prosecution and defense counsel, who are officers of the court, are obligated to limit dissemination of sensitive materials. The criminal discovery rules also recognize society's interests in protecting the confidentiality of law enforcement investigations that may be related to, but not involve, the crime for which a particular defendant is being tried.

Unlike the criminal discovery process, the procedure for responding to public records requests pursuant to R.C. 149.43 does not provide for oversight by a trial court judge. While "the court is the final arbiter regarding disclosure of public records under R.C. 149.43 . . . [d]etermination of an application for disclosure under R.C. 149.43 must first be made on an *ad hoc* basis by the governmental body holding the requested information." *State of Ohio ex rel. The Cincinnati Enquirer v. Sage*, 2013- Ohio-2270; 992 NE2d 1178; 2013 Ohio App. LEXIS

2253. Moreover, a law enforcement agency may receive a public records request for a particular investigative file at any time, perhaps during the pendency of a criminal trial/s of one or more defendants or several years later. A law enforcement agency official is not in a position to know the status of proceedings in a particular criminal case the way that a prosecutor, defense counsel, or trial court judge would. In particular, the law enforcement agency official would not be in a position to know the status of discovery in a particular criminal case. Records provided in discovery in a criminal case are provided to the parties; they are not necessarily provided to the public. The law enforcement agency would not be in a position to know whether records provided in criminal discovery were sealed, reviewed "in camera," or for counsel's eyes only. The records custodian is not in a position to know whether the particular investigative records at issue, including witness information contained therein, were admitted into evidence, and if so, under what conditions. The law enforcement agency is not in a position to evaluate the circumstances of a criminal proceeding to know whether witnesses, who were promised confidentiality, testified at trial, and, if so, under what conditions, or to know whether records included in one investigative file could compromise an ongoing criminal investigation or trial in another case or expose persons to harm-- gang-related crime being but one example.

The law enforcement agency may be unaware of safety concerns recognized by the trial court. Sup. R. 45(E) provides the procedure for restricting public access to records where the court determines by clear and convincing evidence that it is in the interest of "public policy, state, federal, or common law, or the risk of injury to persons, privacy rights and interests, proprietary business . . . public safety, fairness of the adjudicatory process." The availability of records to the parties in connection with a criminal prosecution, or, more exactly, whether or not those records produced in discovery were subsequently made available to the public, is not a

workable standard by which a law enforcement agency can determine whether records in a homicide investigation file should be produced pursuant to a public records request.

Further, Respondents submit that from a practical standpoint, with the revision of Ohio Crim. R. 16, those, such as Relator, seeking records in order to assess whether to represent an incarcerated felon in further postconviction proceedings have available sources of records and information. Records and evidentiary information could be sought from the prosecutor, criminal defense counsel, or possibly the criminal defendant involved in a particular proceeding, with or without a public records request. Law enforcement investigative records may be available based on their admission in open trial. Under Sup. R. 45(A), "[c]ourt records are presumed open to public access." The prosecutor, the criminal defense counsel, and the trial court involved in a particular criminal proceeding would have knowledge not only as to the status of the criminal proceedings, but also as to the admission of evidence.

D. R.C. 149.43(A)(1)(h) and (A)(2)(c) Evidence the Legislature's Intent and Were Not Revised in Response to *Steckman* or Revised Ohio Crim. R. 16.

R.C. 149.43(A)(2)(c) evidences the legislative intent to create an exemption from public records for "specific investigatory work product." The legislature did not include *any* duration or expiration time for the specific investigatory work product exemption in 149.43(A)(1)(h) or (A)(2)(c). *Steckman* and progeny held that the specific investigatory work product exception continues until all trials, actions, and/or proceedings are fully completed, and that the conclusion of a direct appeal does not constitute the completion or exhaustion of all actions or proceedings.

First, the legislature did not revise 149.43(A)(2)(c) in response to *Steckman and progeny*. Subsequent to these holdings, there has been no amendment of 149.43(A)(1)(h) or (A)(2)(c) that would indicate the legislature intended for the specific investigatory work product exception for

public records to expire at the conclusion of a particular defendant's criminal trial or direct appeal.

Second, the legislature did not revise 149.43(A)(2)(c) in response to the revision of Rule 16 in 2010. There is no indication that the legislature concluded the revision of the criminal discovery rules eliminated the need for the "specific investigatory work product" exemption, or, more narrowly, that the revision of Rule 16 eliminated the need for the specific investigatory work product exception at the conclusion of a direct appeal of a criminal conviction.

The purpose for which public records are sought, like the identity of the requesting party, is ordinarily not relevant to the procedure for making a public records request. R.C. 149.43(B)(5). Anyone can make a public records request for a law enforcement investigative file, for any purpose—legitimate or not. Respondents agree with Relator that the public has a vital interest in exonerating those who are wrongfully convicted. A reversal of revision of this Court's longstanding interpretation of Public Records law, however, must take into account the various scenarios under which public records requests for law enforcement investigation files may be made. The instant challenge to R.C. 149.43(A)(1)(h) and (A)(2)(c), in particular the challenge to the duration of the specific investigatory work product exemption for law enforcement investigation records, raises public policy concerns beyond the interest Relator has asserted. The weighing of all interests involved in a clarification of R.C. 149.43(A)(2)(c), among them the public's interest in effective law enforcement investigation and the privacy and safety interests of victims, witnesses, and uncharged suspects, are better left to the legislature to consider.

E. R.C. 149.43(B)(8) Provides a Procedure for an Incarcerated Person Seeking Public Records Concerning a Criminal Investigation.

While the identity of the requesting party is ordinarily not relevant to the consideration of a public records request, the legislature expressly limited the right of a person incarcerated pursuant to a criminal conviction to inspect or copy public records. R.C. 149.43 (B)(8) states in relevant part:

> A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction . . . to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution . . . 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. (emphasis added)

There is no evidence that the judge who imposed Saleh's sentence has considered the information sought and found that it is necessary to support an apparent justiciable claim. Respondents understand that Relator is not counsel for Saleh or his family member/s. Relator alleges a review of the police records will assist him in assessing whether to represent Saleh in postconviction proceedings. Relator premises his interest in assessing the homicide investigation file, however, on Saleh's allegedly claiming he is "innocent," he was "wrongfully convicted," and that "he could be exonerated upon a full examination of the case by the OIP." (Brief, pp.4 and 12 at n. 3). Relator does not offer any affidavit testimony to evidence Saleh's statements or his position as of today. It appears that Relator is *speaking for* Saleh.

Perhaps Saleh's alleged assertions that he is "innocent" and that a "full examination of the case could exonerate him" are not relevant to Relator's instant action and should be

disregarded. If Saleh's current position as to his conviction is relevant to Relator's Public Records request, however, it has not been offered by Saleh, but rather by Relator speaking for him. Respondents submit the legislature's express intention to limit the rights of a person incarcerated pursuant to a criminal conviction to make a public records request for a criminal investigation would apply to Relator's request. See e.g., *State ex rel. Barb v. Cuyahoga Cty. Jury Comm'r*., 2010-Ohio-6190, aff'd., *State ex rel Barb v. Cuyahoga Cty Jury Comm'r*, 124 OS3d 238; 2010-Ohio-120; 921 NE2d 236.

F. Relator Is Not Entitled to the Requested Relief.

Based on the ordinary application of statutory law and Ohio case law at the time of Relator's public records request, a well-informed public office or person responsible for the requested public records reasonably would believe that refusing to provide the homicide investigation file based on R.C. 149.43(A)(1)(h) and (A)(2)(c) did not constitute a failure to comply with R.C.149.43. Further, a well-informed public office or person would believe that the assertion of the specific investigatory work product exception for homicide investigation files where proceedings are not concluded serves the public's interest in allowing police investigators to do their jobs effectively. The record supports that Respondents' reliance on *Steckman* and progeny was reasonable. Respondent's reliance on statutory law and *Steckman* and progeny does not warrant an imposition of attorney's fees. See *State ex rel DiFranco v. City of South Euclid*, 138 OS3d 367; 2014-Ohio-538; 7 NE3d 1136.

IV. CONCLUSION

For all the above-stated reasons, Relator's pleadings failed to demonstrate he is entitled to the requested extraordinary relief in mandamus, and the requested writ of mandamus and requested attorney's fees and statutory damages should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Respondents' Brief was served by electronic and regular U.S. Mail on Frederick M. Gittes and Jeffrey P. Vardaro, THE GITTES LAW GROUP, 723 Oak Street, Columbus, Ohio 43205; Soumyajit Dutta, 810 Sycamore Street, Second Floor, Cincinnati, Ohio 45202; Ashley E. Bass and David J. Shaw, Covington & Burling LLP, One City Center, 850 Tenth Street N.W., Washington, DC 20001-4956; and David L. Marburger and Melissa A. DeGaetano, BAKER & HOSTETLER LLP, PNC Center, 1900 East 9th Street, Suite 3200, Cleveland, Ohio 44114-3482 this 8th day of July 2015.

s/ Paula J. Lloyd
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