

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. Cor-re-don Rogers	:	
RELATOR	:	
	:	Case No. 2017-0331
	:	
v.	:	
	:	Original Action in Mandamus
	:	
Ohio Dept. of Rehabilitation & Correction:	:	
RESPONDENT	:	

**RELATOR’S RESPONSE IN OPPOSITION TO
RESPONDENT’S MOTION FOR A PROTECTIVE ORDER**

Now comes Relator, Cor-re-don Rogers (“Mr. Rogers”), and, for reasons stated within the attached memorandum in support, herein responds in opposition to Respondent’s, the Ohio Department of Rehabilitation and Correction (“ODRC”), motion for a protective order.

Respectfully submitted,

THE JAMES J. LEO LAW OFFICE

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ James J. Leo

ANDREA BOYD (0090468)*, A.A.G.

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COUNSEL FOR RELATOR

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MEMORANDUM IN SUPPORT

I. FACTS

On March 7, 2017, Mr. Rogers brought this public records lawsuit against ODRC based upon its refusal to supply video footage of a use of force event that occurred at the Marion Correctional Institution (“MCI”), a prison within ODRC.

On May 30, 2017, Mr. Rogers propounded interrogatories upon ODRC.

From June 5, 2017 to June 20, 2017, Mr. Rogers and ODRC exchanged correspondence to amicably resolve issues about the interrogatories. (See Exhibits A, B, C, D, and E, attached hereto). In exchange for a stipulation by OCRC, Mr. Rogers withdrew some of his interrogatories, limited the scope of an interrogatory, and even agreed to limit the scope of his public records request. (Id. at Exhibits D and E). However, the parties were not able to agree on all matters concerning the interrogatories.

On June 27, 2017, ODRC filed a motion for a protective order (“ODRC’s Motion” or “the Motion”) to excuse it from answering the following two interrogatories:

9. Please give a general description of the location of the video cameras that captured video footage of the use of force events that occurred at M.C.I. on November 10, 2015, involving Officer Shiffer and Inmate Wilt, and involving Lieutenant Byrd and Inmate Wilt (for example, Main Hall, near the Sally Port Gate; or South Hall near the Chapel, etc.).

10. Please state whether the video cameras at MCI capture footage constantly or whether they are motion activated and stop capturing footage after a period of time in which there is no motion in front of the camera.

Mr. Rogers now presents this response (“Rogers’s Response” or “this Response”) to ODRC’s Motion.

II. LAW AND ARGUMENT

A. **ODRC's Argument that, By Answering the Interrogatories About the Public Records, It Will Somehow Create a Waiver Which Will, in Turn, Require it to Produce the Records; Is Not Supported by Any Case Law and, If Adopted, Would Mean that there Could Never Be Any Discovery in Public Records Lawsuits.**

Within its Motion, ODRC erroneously conflates the issue of whether it may properly refuse to disclose a record with the issue of whether it may properly refuse to answer interrogatories about the records. ODRC asserts that, if it answers the Interrogatories 9 and 10, it will somehow waive its reliance on the exemptions to the Public Records Act and will ultimately have to produce the records. (See ODRC Motion at Pages 7-8). ODRC fails to cite any case law to support that contention. Furthermore, ODRC does not even make a cogent, logical argument how such a waiver could occur merely from answering the interrogatories.

If this Court were to adopt ODRC's argument that answering interrogatories waives the government's right to claim exemptions from disclosure; then there could never be any discovery in public records cases because the government office could always refuse to answer any questions about the records, asserting that, by providing answers, it would create a waiver. This would gut the discovery process and would eliminate a requestor's ability to learn whether the agency has a valid reason for not disclosing records. The ultimate effect would be that public records would not be produced and the requesting party would be hamstrung to do anything about it because of a lack of discovery.

B. Interrogatory 9.

- i) The Identification of the General Location of the Camera that Captured the Footage of a Use of Force Event (Interrogatory Number 9), is Not a Disclosure of a Record and therefore R.C. 149.433 (Which Only Protects Records) Is Not Applicable.**

In interrogatory 9, Mr. Rogers asks ODRC to give a general description of the location (for example, Main Hall, South Hall, etc.) of the camera that captured the video footage of the use of force event – the subject of Mr. Rogers’s public records request. This information may be useful as matters develop through the course of this litigation. ODRC argues that the location of the camera(s) that caught the footage of the use of force event is protected by the infrastructure or security exemptions of R.C. 149.433. (See ODRC Motion at Page 8).

R.C. 149.433(A) provides,

* * * "Infrastructure record" means any record that discloses the configuration of critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building.

"Infrastructure record" includes a risk assessment of infrastructure performed by a state or local law enforcement agency at the request of a property owner or manager.

"Infrastructure record" does not mean a simple floor plan that discloses only the spatial relationship of components of the building.

"Security record" means any of the following:

(1) Any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage;

(2) Any record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, including any of the following:

(a) Those portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and communication codes or deployment plans of law enforcement or emergency response personnel;

(b) Specific intelligence information and specific investigative records shared by federal and international law enforcement agencies with state and local law enforcement and public safety agencies;

(c) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism.

(3) An emergency management plan adopted pursuant to section 3313.536 of the Revised Code. * * * *

R.C. 149.433(B) exempts infrastructure and security records from disclosure. However, ODRC's reliance on that statutory section to justify not answering the interrogatories is misplaced. While R.C. 149.433(B) exempts records from disclosure, it does not exempt government offices from answering interrogatories about why it is not disclosing. If government offices could use the Public Records Act to justify not answering interrogatories about why records are withheld, requesters would be trapped by the government's circular argument: "We cannot provide information about why we will not disclose the records because the records are exempt from disclosure."

ii The Camera that Captured the Use of Force Footage is In Plain View and, Even if the Provisions of the Public Records Act Could Be Used Justify Not Answering Interrogatories, the Infrastructure and Security Exemptions Cannot Apply to a Camera Whose Location Is Known By Thousands.

Even if the Public Records Act could be used to justify not answering interrogatories about why records are withheld, the infrastructure and security exemptions of R.C. 149.433 do not apply to Interrogatory 9 (asking for the general location of the camera that captured the requested use of force footage) because that

camera is in plain view and its location is known to thousands of people, most of whom are or have been inmates of MCI.

Within ODRC prisons, video cameras capture footage so that, if an issue arises, the video record can be studied to learn if proper protocols were followed by staff. For example, if the staff member uses force on an inmate, the video could help show whether the force used was appropriate or excessive under the circumstances.

ODRC has stipulated, as follows: “One or more camera(s) that captured video footage that is the subject of Mr. Roger’s February 15, 2017 public records request is/are not hidden (i.e., it is readily viewable to anyone in the vicinity).” (See Exhibit E). Mr. Rogers has made it clear that, if there are any hidden cameras at MCI that captured footage of the use of force event, he is not seeking any footage from such hidden cameras. He is only seeking footage from the camera(s) in plain view (“the Plain View Camera(s)”. (See Exhibit D). Furthermore, Mr. Rogers limited Interrogatory 9 to only asks ODRC to identify the general location of the Plain View Camera(s) that captured the use of force footage. He is not seeking an answer about the location of all plain view cameras at MCI.

Because it is readily viewable (not hidden), the location of the Plain View Camera(s) that captured the use of force footage is known by the staff at MCI. It is known by any third party vendor who comes to MCI and walks near it. It is known by the thousands of inmates who transfer into and out of MCI every year. It stretches the limits of credibility that the general location of the Plain View Camera is a critical infrastructure record or security record, as ODRC argues, when that location is known to thousands of people.

R.C. 149.433(A) provides some guidance about infrastructure records and such guidance does not support ODRC's argument that the general location of the Plain View Camera(s) is an infrastructure record.

"Infrastructure record" does not mean a simple floor plan that discloses only the spatial relationship of components of the building.

(Id.).

Simple floor plans of a prison are not infrastructure records. The general location of the Plain View Camera(s) that captured the use of force footage reveals far less information than a simple floor plan of the prison – further supporting Mr. Roger's position that Interrogatory 9 does not seek information about infrastructure records.

ODRC also asserts that disclosing the general location of the Plain View Camera(s) would be the equivalent of disseminating records containing "information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage." (See ODRC Motion at Page 8, quoting R.C. 149.433(A)(3)(a). It is hard to fathom how the stating the general location of the Plain View Camera(s) could create a security breach when that location is already known by thousands, most of whom are not affiliated with ODRC except for being or having been former inmates. In fact, an inmate, upon his release from MCI, could draw a diagram of the entire prison and mark the location of all the plain view cameras and could disseminate that diagram to anyone he wishes. This would involve the release of far more information than Mr. Rogers is seeking in his answer to Interrogatory 9.

C. Interrogatory 10.

The Answer to the Question of Whether the Video Cameras Record Continuously or Whether they are Motion Activated (Interrogatory Number 10) is Not a Disclosure of an Infrastructure or Security Record.

In interrogatory 10, Mr. Rogers asks ODRC to state whether the video cameras at MCI capture footage continuously or whether they are motion activated (they start with motion and stop with lack of motion). This is important because, if Mr. Rogers receives footage with gaps in it, he must be able know whether those gaps are because footage was edited out of the video or because the cameras stopped recording due to inactivity.

ODRC argues that an answer to this question is an infrastructure record and a security record. (See ODRC Motion at Page 8). As discussed above, answering a question is not the same as producing a record and ODRC is incorrectly conflating the issue of responding to interrogatories with producing records. Furthermore, ODRC fails to give any explanation about how answering this question fits within the types of things mention in R.C. 149.433 (A) as an infrastructure record or security record.

D. Administrative Rules Which Might Speak to Issues About the Public Records Sought Are Not Applicable Because Such Rules are Subservient to the Public Records Statute and Rules May Not Properly Create Exemptions Where None Exist within the Statute.

In a further attempt to support it position about infrastructure and security matters, ODRC also cites Ohio Admin. Code 5120-9-49(B)(6) and (B)(7); but it fails to quote any language from those administrative rules. Even if such language did

exist in the Rules to exempt an answer to Interrogatories 9 and 10, they cannot apply as they would go beyond the scope of the statute. See *McFee v. Nursing Care Management* (2010) 126 Ohio St.3d 183, 189; citing *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250 (“An agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute.”). Certainly this Court does not wish to create precedent which would “green light” agencies to create administrative rules to redefine the statutory parameters of public records.

E. On Four Occasions in the Recent Past, ODRC Has Produced Video Records from MCI, Just Like the Records Mr. Rogers is Currently Requesting and Which are the Subject of This Lawsuit, and Thus OCRC Has Waived Any Objections to Producing Such Video Records Now.

On four occasions in 2015, public records requests were made to ODRC for video footage of use of force events that occurred within MCI (the very same type of request Mr. Rogers has made, ODRC denied, and which is the basis of this lawsuit). On all four occasions, OCRC complied with such requests. (See Affidavit of Attorney James J. Leo, attached as Exhibit F). In fact, it even sent CD Roms with the videos on them to the requesting party. (Id.)

The infrastructure and security exemptions of R.C. 149.433 have existed for over a decade. It is peculiar that ODRC recently produced videos just like the one Mr. Rogers is requesting; but it is now suddenly asserting that such records are exempt from disclosure - - as if it has just now discovered the infrastructure and security exemptions. At the risk of sounding cynical, Mr. Rogers asserts that ODRC

has not changed its position because it has recently discovered the infrastructure and security exemptions. Rather, it has changed its position because, by producing videos of use of force events within prisons, it exposes itself to potential lawsuits by prisoners upon whom excessive force was used and ODRC has become weary of facing such liability. By not disclosing the videos, ODRC makes it much harder to learn whether a prisoner was subjected to excessive force. This is the true reason for ODRC's recent refusal to produce the videos - - but avoiding lawsuits is not a valid reason for withholding public records.

ODRC correctly asserts that prisons are dangerous places. But granting ODRC's wish to keep videos of use of force events from public disclosure would only make prisons more dangerous. If ODRC gets its way, the ability for the public to learn whether inmates are being subject to excessive force will be thwarted and this would make prisoners more vulnerable to being injured or killed by staff. This ultimately also puts the staff in danger, because, as aggression against prisoners goes unchecked, tensions will rise among inmates and the likelihood of riots will increase.

By supplying such video records in the past, ODCR has waived any argument that such records are exempt as infrastructure and/or security records. As this Court has held, "Voluntary disclosure can preclude later claims that records are exempt from release as public records." See *State ex re; Zuern v. Leis* (1990) 56 Ohio St. 3d 20, 22; citing, *Cooper v. United States Dept. of the Navy* (C.A. 5, 1979), 594 F.2d 484; and *Mead Data Central, Inc. v. United States Dept. of the Air Force* (C.A. D.C. 1977), 566 F.2d 242, 257-258. Admittedly, as discussed, this argument that ODRC

has waived its right to claim videos are exempt from disclosure focuses on the public records issue itself and not on the interrogatory issue (the actual issue of ODRC Motion). Mr. Rogers raises it now, in response to the interrogatory issue, purely in the event that this Court conflates the interrogatory issue with the public records issue, as ODRC does in its Motion.

III. CONCLUSION

For all of the reasons stated above, Mr. Rogers respectfully request that ODRC's Motion for a Protective Order be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing RELATOR'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR A PROTECTIVE ORDER was sent, by electronic mail and regular mail, on this 1st day of July, 2017 to:

Andrea Boyd, A.A.G.
Criminal Justice Section
150 E. Gay Street, 16th Floor
Columbus, Ohio 43215

Andrea.Boyd@ohioattorneygeneral.gov

Respectfully Submitted,

THE JAMES J. LEO LAW OFFICE

/s/ James J. Leo

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MIKE DEWINE

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June 5, 2017

Mr. Leo:

The State is in possession of your interrogatories, and has had the opportunity review them with our client, the Ohio Department of Rehabilitation and Correction. Some of these interrogatories seek sensitive information of which the unrestricted, public release poses security concerns. These concerns would be alleviated through a protective order limiting the use and disclosure of this sensitive information. Please let us know if you would be willing to work with us toward a mutually satisfactory protective order. We would appreciate a response by this Friday, June 9, 2017. If that time frame poses an issue for you, please let us know.

Sincerely,

Andrea K. Boyd
Assistant Attorney General

RESPONSE EXHIBIT A

James J. Leo, Attorney at Law

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website: attorneyleo.com

June 6, 2017

Ms. Andrea Boyd, A.A.G.

By email: Andrea.Boyd@OhioAttorneyGeneral.gov

Re: Rogers v. Department of Rehabilitations & Corrections

Dear Ms. Boyd:

In response to your letter (of June 6, 2017), at this point, I cannot agree to a protective order. Perhaps if I knew which particular interrogatories DRC has concerns with, I might be able to work with you concerning a protective order or I might possibly alter the question(s).

If you would like to identify the particular interrogatories for which DRC has a concern and the reason for that concern, please advise.

Sincerely,

James J. Leo

James J. Leo



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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June 18, 2017

Mr. Leo:

Thank you for your reply to Respondent's request for a protective order. In response to your June 6 letter, DRC requests a protective order for any and all interrogatories that require Respondent to provide details regarding the security videos that you seek disclosure of in this public records action. Because of this security concern, DRC seeks a protective order as to Interrogatories 6, 7(b), 8, 9 and 10.

With this clarification in mind, please let us know by Tuesday, July 20 if you are willing to agree to a mutually satisfactory protective order as to these specific interrogatories. If not, then my client has asked me to consider filing a motion for a protective order with the Court. If this time frame poses an issue for you, please let us know.

Sincerely,

Andrea K. Boyd
Assistant Attorney General

RESPONSE EXHIBIT C

James J. Leo, Attorney at Law

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email: jim@attorneyleo.com
website: attorneyleo.com

June 19, 2017

Ms. Andrea Boyd, A.A.G.

By email: Andrea.Boyd@OhioAttorneyGeneral.gov

Re: Rogers v. Department of Rehabilitations & Corrections

Dear Ms. Boyd:

You have asked that I agree to a protective order concerning interrogatories 6, 7(b), 8, 9, and 10. In the spirit of cooperation, I can agree to withdraw questions 6, 7, and 8, if DRC will stipulate to the following facts:

- 1) there are multiple video cameras at Marion Correctional Facility that are not hidden (i.e., they are readily viewable to anyone in the vicinity of the cameras);
- 2) one or more camera(s) that captured video footage that is the subject of Mr. Roger's February 15, 2017 public records request, is/are not hidden (i.e., it is readily viewable to anyone in the vicinity of the camera).

As discussed in my June 7, 2017 correspondence to you, I can limit the public records request to only video from the camera(s) that is in plain view and that captured footage that is the subject of the February 15, 2017 request. I do not know if there are hidden cameras that captured such video; but, if there are, I am not seeking footage from such hidden cameras - - just the one(s) in plain view.

I will not withdraw question 9 (asking for a general description of the location of the video camera(s) that captured the requested footage) but I will limit that question to only the camera(s) in plain view. If any hidden cameras caught video that is the subject of the February 15, 2017 request, then DRC need not make a general description of the location of such hidden cameras.

I will not withdraw question 10 (asking if video cameras at MCI capture footage constantly or whether they are motion activated and stop during periods of inactivity) because, if gaps in video coverage exist, I will need to know if footage was edited out of the video or if the gaps were caused because the camera stopped filming during inactivity.

Please let me know, by July 20, 2017, if you will agree to these terms.

Sincerely,

James J. Leo

James J. Leo

RESPONSE EXHIBIT D



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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June 20, 2017

Mr. Leo:

Thank you for your response. I appreciate your willingness to agree to withdraw questions 6, 7 and 8. In the spirit of cooperation, DRC will stipulate to your proposed facts as follows:

1. There are multiple video cameras at Marion Correctional Facility that are not hidden (i.e., they are readily viewable to anyone in the vicinity of the cameras);
2. One or more camera(s) that captured video footage that is the subject of Mr. Roger's February 15, 2017 public records request is/are not hidden (i.e. it is readily viewable to anyone in the vicinity of the camera).

I understand that you are unwilling to withdraw question 9 and 10. However, Respondent continues to object to these questions based on the security concerns outlined previously, and will consider filing a protective order as to those questions.

Sincerely,

Andrea K. Boyd
Assistant Attorney General

RESPONSE EXHIBIT E

AFFIDAVIT OF JAMES J. LEO

State of Ohio

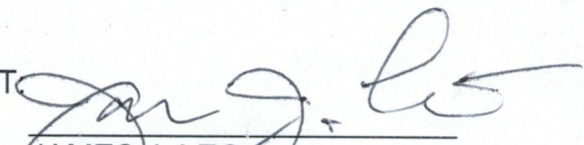
ss

Medina County

I, James J. Leo, being duly cautioned and sworn, depose and state that I am competent to testify to the facts contained herein, that I have knowledge of the facts contained herein, and that the facts contained herein are true and accurate to the best of my belief.

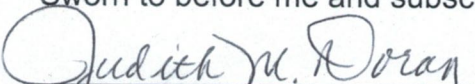
1. I am an attorney licensed to practice law in Ohio.
2. On February 10, 2015, I made a public records request to the public records officer of Marion Correctional Institution ("MCI"), a prison facility within the Ohio Department to Rehabilitation and Corrections ("ODRC"). I requested, among other things, video footage of a use of force event that occurred inside MCI on September 17, 2014 and involved MCI Staff Member Cor-re-don Rogers. ODRC complied with this request and sent me a CD Rom with the video footage I requested.
3. On April 24, 2015, I made a public records request to the public records officer of MCI. I requested, among other things, video footage of a use of force event that occurred inside MCI on April 15, 2015 and involved MCI Staff Member Kelly Donahue. ODRC complied with this request and sent me a CD Rom with the video footage I requested.
4. On May 19, 2015, I made a public records request to the public records officer of MCI. I requested, among other things, video footage of a use of force event that occurred inside MCI on January 23, 2014 and involved MCI Staff Member A. Lucki. ODRC complied with this request and sent me a CD Rom with the video footage I requested.
5. On May 19, 2015, I made a public records request to the public records officer of MCI. I requested, among other things, video footage of a use of force event that occurred inside MCI on May 4 or 5, 2015 and involved MCI Staff Member Simmers. ODRC complied with this request and sent me a CD Rom with the video I footage requested.

AFFIANT FURTHER SAYETH NAUGHT



 JAMES J. LEO

Sworn to before me and subscribed in my presence this 29TH day of JUNE, 2017.



 Notary Public

