

**In the
Supreme Court of Ohio**

STATE OF OHIO, <i>ex rel.</i>	:	Case No. 2017- 1618
THE CINCINNATI ENQUIRER	:	
	:	
Relator,	:	
	:	
vs.	:	<u>Original Action in Mandamus</u>
	:	
THE CITY OF CINCINNATI	:	
Police Department	:	
	:	
Respondent.	:	
	:	
	:	

RELATOR'S MERIT BRIEF

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INTRODUCTION

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* 92 (1914). The role that public records laws play in publicizing government activities—both good and bad—is manifest. See *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 14. And where the government does not wish to publicize its activities, the need for strong laws protecting the public’s right of access is greatest.

The City of Cincinnati itself recognizes that its decision to employ the use of police body worn camera systems derives from the principle articulated by Justice Brandeis over a century ago. Its written body camera policy provides: “[Body Worn Camera (BWC)] systems promote accountability and transparency for law enforcement by providing a video record of police activity. Police operations become more transparent to the public and help resolve questions following encounters between officers and citizens.” (Relator’s Ex. 2, at 1.)

Of course, to achieve the objectives of “accountability and transparency for law enforcement,” body camera recordings must be subject to prompt disclosure under the Public Records Act (the “Act”). The decision whether to release cannot lie solely with the agency with control over the record, and thus, exceptions to disclosure of these

recordings must be applied narrowly by agencies (and reviewing courts), to avoid affording discretion to public officials on whether to release records.

The question presented in this case is whether Respondent violated the Act when it denied, in its entirety, The Enquirer's request for recordings made by Cincinnati Police Department officers of events relating to the tasing and arrest of two individuals in August 2017. At the time of the request, this Court's precedent governing the disclosure of police dash-cam recordings required the release of most (if not all) of the information captured on these recordings. Thus, Respondent's outright and total denial lacked any legal justification.

The Enquirer respectfully requests that the Court grant its request for a writ of mandamus, and award it its reasonable attorney's fees and court costs incurred in the prosecution of this action.

STATEMENT OF FACTS

Relator Gannett GP Media, Inc. publishes The Cincinnati Enquirer ("The Enquirer"), a newspaper of general circulation in the greater Cincinnati metropolitan area. (Jt. Ex. A, Agreed Stmt. of Facts ("Agreed Stmt."), ¶ 1.) James Pilcher is a reporter for the Enquirer. (*Id.* at ¶ 2.) Respondent The City of Cincinnati, which includes its police department ("CPD"), is a "public office" within the meaning of R.C. 149.43. (*Id.* at ¶ 3.)

On August 8, 2017, while on duty, and during a response to a service call, CPD officers Lawrence Johnson, Jeffrey Howell, and Richard Sullivan (the “CPD Officers”) encountered Richard Coleman (“Coleman”) and James Crawley (“Crawley”). (*Id.* at ¶ 4.) In the process of arresting both Coleman and Crawley, Coleman and Crawley resisted arrest, and the CPD Officers used a taser on both men to subdue and arrest them. (*Id.* at ¶ 5.) The CPD Officers, pursuant to CPD Procedure § 12.540, were wearing body cameras during the encounter with Coleman and Crawley. (*Id.* at ¶ 6.) Both Coleman and Crawley were charged with resisting arrest under R.C. 2921.33, among other crimes, the same day as their arrest. (*Id.* at ¶ 8.) A standard CPD incident report was prepared in connection with the arrests. (Agreed Stmt. at ¶ 13; Relator’s Ex. 1.)

On October 31, 2017, Pilcher made a request to CPD for “any body cam footage” from the arrests of Crawley and Coleman (“Records Request”). (*Id.* at ¶ 9; Jt. Ex. C.) On November 2, 2017, CPD denied the Records Request (“CPD Denial”) in an email to Pilcher, writing:

James and Sarah,

The video that you requested involving the arrest of James Crawley and Richard Coleman that resulted in a tasing.

This video is not releasable under the Exception CLEIRs - ORC 149.43(A)(1)(h) and (A)(2).

Steve

Lt. Steve Saunders
Cincinnati Police Department
Community Relations Unit / Public Information Officer
Work: 513-352-3519
Cell: 513-368-1353

(Agreed Stmt. at ¶ 10; Jt. Ex. D.)

The Enquirer filed the instant mandamus action in this Court on November 14, 2017. (*See* Compl. in Mandamus.) On December 1, 2017, following Coleman’s and Crawley’s guilty pleas, CPD provided redacted copies of the body-cam footage taken by officers who responded to the Coleman and Crawley incident. (Agreed Stmt. at ¶ 12; Jt. Ex. B.) CPD provided nineteen individual video files containing body-cam footage from the scene, named as follows:

- FINALCPD170808001094-ALEXANDER-20839-8_8_2017_3_55_51_PM.mp4 (“Alexander Footage”)
- FINALCPD170808001094-EVE-25348-8_8_2017_3_58_37_PM.mp4 (“Eve Footage”)
- FINALCPD170808001094-GEERS-33228-8_8_2017_3_56_16_PM.mp4 (“Geers Footage”)
- FINALCPD170808001094-HORNER-24413-8_8_2017_3_54_57_PM.mp4 (“Horner Footage”)
- FINALCPD170808001094-JOHNSON-25375-8_8_2017_3_32_09_PM.mp4 (“Johnson Footage”)
- FINALCPD170808001094-SCHILDMEYER-13644-2017-08-08_1556.mp4 (“Schildmeyer Footage”)
- FINALCPD170808001094-VENTRE-25405-2017-08-08_1556.mp4 (“Ventre Footage”)
- FINALCPD170808001094-WYLIE-32287-8_8_2017_3_54_35_PM.mp4 (“Wylie Footage”)
- FINALREDACT_CPD170808001094-10474-2017-08-08_1557.mp4 (“Unidentified Footage”)

- FINALREDACT_CPD170808001094-COMAN-13003-8_8_2017_3_55_51_PM.mp4 (“Coman Footage”)
- FINALREDACT_CPD170808001094-ESPITIA-32281-2017-08-08_1554.mp4 (“Espitia Footage”)
- FINALREDACT_CPD170808001094-GRAVES-13011-2017-08-08_1555.mp4 (“Graves Footage”)
- FINALREDACT_CPD170808001094-HOWELL-26281-2017-08-08_1556.mp4 (“Howell Footage”)
- FINALREDACT_CPD170808001094-MATHEWS-19227-8_8_2017_3_55_04_PM.mp4 (“Mathews Footage”)
- FINALREDACT_CPD170808001094-MITTERMEIER-31176-8_8_2017_3_58_39_PM.mp4 (“Mittermeier Footage”)
- FINALREDACT_CPD170808001094-ROCK-20557-8_8_2017_3_54_54_PM.mp4 (“Rock Footage”)
- FINALREDACT_CPD170808001094-SULLIVAN-31423-8_8_2017_3_32_09_PM.mp4 (“Sullivan Footage”)
- FINALREDACTCPD170808001094-CARDER-13268-2017-08-08_1555.mp4 (“Carder Footage”)
- FINALREDACTCPD170808001094-NORMAN-31199-8_8_2017_3_17_45_PM.mp4 (“Norman Footage”)

(Jt. Ex. B.)

Broadly categorized, the nineteen videos (“Body Cam Footage”) contain the following information from CPD’s encounter with Coleman and Crawley:

- CPD officers’ initial arrival and interaction with the individual who called CPD for service;

- CPD officers entering the individual's apartment;
- CPD officers' verbal exchanges with Coleman and Crawley inside the apartment;
- CPD officers' tasing and arrest of Coleman and Crawley;
- CPD officers searching the apartment for spent taser cartridges and related conversations between officers regarding the search;
- CPD officers arriving at the scene after the tasing and arrest of Coleman and Crawley;
- CPD officers removing Coleman and Crawley from the apartment and building in handcuffs;
- A CPD officer's conversation with the resident following the arrests of Coleman and Crawley;
- Conversations between CPD officers on the street and sidewalk outside of the apartment building following the incident;
- CPD officers placing Coleman and Crawley in the back of CPD cruisers, and comments made by Coleman and Crawley while in the back of the CPD cruisers.

Some of the Body Cam Footage is redacted to conceal the faces of CPD officers in plain clothes. It is unclear from the videos produced whether CPD redacted any recorded audio.

CPD policy 12.540 ("BODY WORN CAMERA SYSTEM"), as revised on April 27, 2017, provides in pertinent part:

Officers are required to activate their [Body Worn Camera (BWC)] system during all law enforcement-related encounters and activities as defined in this procedure. Officer will deactivate the BWC only at the conclusion of the event or with supervisor approval . . .

Officers have the right to the BWC system (e.g., inside a private home/facility, public/private school) **as long as** they have a legal right to be there (e.g., call for service, valid search warrant, consent of owner) . . .

Officers who fail to use the equipment as required or fail to report damage to the equipment in violation of the Manual of Rules and Regulations and are subject to the disciplinary process for the CPD . . .

Video files are the property of the CPD and are not to be duplicated and/or used without authorization from the Police Chief or their designee. Officers are not required to inform citizens they are being recorded with the BWC.

(Relator’s Ex. 2, at 2-3.) The policy also states that “[a] video containing possible criminal evidentiary footage **may not** be copied to an authorized format until after it has been redacted by Police Records according to current Ohio Public Records law.”

(*Id.*)

ARGUMENT

Proposition of Law No. I

Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, and a relator need not establish the lack of an adequate remedy at law to establish entitlement to the writ.

“Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act [(the “Act”).” *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm’rs* (“*ACLU*”), 128 Ohio St.3d 256, 261, 2011-Ohio-625, 943 N.E.2d 553 (internal quotations omitted). To establish entitlement to a writ of mandamus, a relator

must establish, by clear and convincing evidence: “[1] a clear legal right to the requested relief, [2] a corresponding clear legal duty on the part of respondents, and [3] the lack of an adequate remedy in the ordinary course of the law.” *Id.* at 260. A relator need not establish the third element in an action to enforce R.C. 149.43. *ACLU* at 261.

R.C. 149.43 provides “[u]pon request . . . all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular hours.” (Emphasis added.) It further states that “[i]f a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.” *Id.*

Proposition of Law No. II

A recording made by a CPD body camera system is a public record under R.C. 149.43.

The Act defines “public record” as “any record that is kept by any public office.” R.C. 149.43(A)(1). The term “record” means “any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” R.C. 149.011(G). Consistent with the General Assembly’s intent to “effectuate broad access to records,” this Court has held that the term “record”

encompasses “almost all documents memorializing the activities of a public office,” unless exempt. *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20.

In *State ex rel. Cincinnati Enquirer v. Ohio Department of Public Safety (“ODPS”)*, 148 Ohio St. 3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶¶ 33-34, the Court held that video footage from dashboard-mounted camera on an Ohio State Highway Patrol (OSHP) cruiser constituted a “record” within the meaning of R.C. 149.011(G).¹ The Court found that the dash-cam recordings met this definition because they “memorialize the activities of employees of the OSHP,” and because under OSHP policy “troopers [were] expected to record traffic stops, pursuits, and other public contacts occurring within the operating range of the camera.” *Id.* at ¶ 34 (internal quotations omitted).

CPD Policy § 12.540 provides that “BWC systems promote accountability and transparency for law enforcement by providing a video record of police activity.” (Relator’s Ex. 2, at 1 (emphasis added).) Under CPD’s policy, “[o]fficers are required to activate their BWC system during all law enforcement-related encounters and activities . . .” (*Id.* at 2.) CPD officers who fail to use their BWC system when required “are subject to the disciplinary process for the CPD.” (*Id.*)

¹ The Court declined to decide the issue whether a police body camera recording met the definition of “public record” in *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St. 3d 595, 2016-Ohio-8195, 71 N.E.3d 1076, ¶ 21, but assumed *arguendo* that it did.

The Enquirer's Records Request sought body cam footage of CPD's encounter with Coleman and Crawley, which occurred as a result of a service call to CPD. The Body Cam Footage of the Coleman and Crawley incident thus memorialized the activities of CPD officers while engaging in policing activities, which is a function of the City of Cincinnati Police Department. And because the Coleman and Crawley arrests constituted a law enforcement-related encounter or activity, the CPD officers were required to turn their BWC systems on to document the event. The Body Cam Footage thus constitutes a "record" within the meaning of R.C. 149.011(G). And because the Body Cam Footage was kept by a public office, i.e., CPD, it constitutes a "[p]ublic record" under R.C. 149.43, unless an exception applies.

Proposition of Law No. III

The Body Cam Footage contains information that was not exempt from disclosure under the confidential law enforcement investigatory records exception, R.C. 149.43(A)(1)(h).

As grounds for denying The Enquirer's Records Request, CPD invoked only R.C. 149.43(a)(1)(h), the "confidential law enforcement investigatory records" (CLEIR) exception.

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

“falls squarely” within that exception. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118

Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

The CLEIR exception excludes from the definition of “public record”:

any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
- (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source’s or witness’s identity;
- (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
- (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

149.43(A)(2).

For CPD to meet its burden to show that the CLEIR exception applied to the entirety of the Body Cam Footage when it denied The Enquirer’s request, it must establish that all of the information contained on the Body Cam Footage “[1] pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature and [2] that its release would create a high probability of disclosure” of one of the four categories of information enumerated in R.C. 149.43(A)(2)(a) through (d). *ODPS*, 148 Ohio St. 3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 38 (internal quotations omitted).

Under *ODPS* all of the information captured on the Body Cam Footage would satisfy the first element of this two-part test, in that the information pertains to a law enforcement matter of a criminal nature. The second prong of the test, however, requires a case-by-case analysis to determine whether disclosure of any of the information captured on the Body Cam Footage would have created a high probability of disclosing the types of information enumerated in subsections (A)(2)(a) through (d). *ODPS*, at ¶ 45. And to the extent that only some of the information was exempt, CPD had a clear duty to redact that information, and produce the non-exempt information.

A. Release of the Body Cam Footage in response to Relator's Records Request would not have created a high probability of disclosure of (A)(2)(a) or (A)(2)(b) information.

Release of the Body Cam Footage in response to Relator's Records Request would not have created a high probability of disclosure of "[t]he identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised[.]"

First, Coleman and Crawley were charged with resisting arrest, among other crimes, on August 8, 2017. The Enquirer did not make its Records Request until October 31, 2017. Accordingly, disclosure of Coleman's and Crawley's identities would not have revealed the identity of an uncharged suspect.

Second, there is no evidence that anyone whose face was captured on one of the body camera recordings was a confidential information source or witness. The name of the owner of the apartment where the incident occurred appears in the “Incident Detail Report” provided to Relator. (Relator’s Ex. 1, at 5). And CPD has not provided any other evidence in this case that the recordings show the identity of a confidential information source or witness to whom confidentiality was promised. Likewise, there is nothing depicted on the Body Cam Footage that would seemingly reveal “[i]nformation 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[.]” R.C. 149.43(A)(2)(b). Accordingly, neither (A)(2)(a) nor (A)(2)(b) provided a ground for CPD’s denial of The Enquirer’s Records Request.

B. Release of the Body Cam Footage in response to Relator’s Records Request would not have created a high probability of disclosure of (A)(2)(c) information.

Subsection (A)(2)(c) creates a category for information constituting “[s]pecific confidential investigatory techniques or procedures or specific investigatory work product[.]” This category further breaks down into sub-categories for “specific confidential investigatory techniques or procedures” and “specific investigatory work product.”

Relator cannot, of course, address information that it has not received. And as Relator has not inspected the unredacted footage submitted to this Court for *in camera*

inspection on March 15, 2018, it cannot address whether any of the information on the unredacted footage might constitute (A)(2)(c) information. Accordingly, Relator only addresses the information provided in the Body Cam Footage marked as Joint Exhibit B.

1. *The Body Cam Footage does not appear to contain any information that constitutes “specific confidential investigatory techniques or procedures.”*

Relator must presume that none of the unredacted Body Cam Footage received on December 1, 2017 reveals “specific confidential investigatory techniques or procedures.” This presumption is based on the fact that this type of information, in contrast to “specific investigatory work product,” is not case-specific. That is to say, such information is of a general nature, and not limited to a specific investigation.

For example, the Eighth District Court of Appeals has held that a “police contingency plan which is intended to prevent crime as well as maintain public order and safety” falls within (A)(2)(c) as a specific confidential investigatory technique or procedure. *State ex rel. Cleveland Police Patrolmen’s Ass’n v. City of Cleveland* (“CPPA”), 122 Ohio App. 3d 696, 700-701 (8th Dist. 1997). In contrast, citing *CPPA*, the Fourth District Court of Appeals held that the historical work schedule of two corrections officers did not constitute (A)(2)(c) information, but that “future work schedules, or similar information which could be used to discern specific law enforcement tactics or techniques on a given day and location,” might reveal such information. *Conley v. Corr. Reception Ctr.*, 141 Ohio App. 3d 412, 416-17, 2001-Ohio-2365, 751 N.E.2d 528, 531 (4th Dist.).

Here, the Body Cam Footage reveals what specific CPD officers were doing on August 8, 2017, and the tactics they employed to arrest Coleman and Crawley on that particular day. CPD's release of the Body Cam Footage on December 1 demonstrates that CPD did not think there was a risk that disclosure of the information provided to The Enquirer would reveal "confidential" procedures or techniques generally employed by CPD when handling similar events. Accordingly, subsection (A)(2)(c) could not have been a basis for CPD's outright denial of Relator's Records Request on November 1.

As for the images redacted from the Body Cam Footage, they all appear to be the faces of plain-clothes CPD officers who responded to the scene to assist. The identity of a plain-clothes CPD officer, whether undercover or not, does not constitute a "confidential investigatory technique[] or procedure[]." Thus, to the extent CPD's redactions of the faces of the officers were appropriate, they could only be so under subsection (A)(2)(d) upon a showing by CPD that revealing their identities would have endangered the life or safety of the officers. *See Conley* at 416 ("The name and identity of law enforcement officers is not exempt from disclosure as a confidential law enforcement record, unless there is some affirmative showing that disclosure would endanger the officer.").

2. *Most, if not all of the information contained on the Body Cam Footage does not constitute "specific investigatory work product," and should have been released.*

In *ODPS*, the Court reaffirmed the Court’s long-standing definition of “specific investigatory work product,” holding that the phrase encompasses “any notes, working papers, memoranda or similar materials, prepared by . . . law enforcement officials in anticipation of litigation.” 148 Ohio St. 3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 41 (internal quotations and original formatting omitted). In applying this standard to the OSHP dash-cam recordings at issue in *ODPS*, the Court specifically rejected the State of Ohio’s invitation to “adopt an interpretation of the investigative-work-product exception that would shield from disclosure all dash-cam recordings in their entirety merely because they contain potential evidence of criminal activity that may aid in a subsequent prosecution.” *Id.* at ¶ 45.

The facts of *ODPS* are instructive here. In that case, The Enquirer made a request for dash-cam footage from a high-speed pursuit by OSHP officers on Interstate 71. *Id.* at ¶ 22. The recording contained images of the suspect fleeing from OSHP, the suspect’s crash into the highway median, the suspect’s arrest, and audio of statements made by the suspect in response to post-*Miranda* warning questioning by the arresting OSHP trooper, among other information. *Id.* at ¶¶ 7-21. The recordings also depicted images of the empty backseat of one of the pursuing OSHP’s trooper’s cruiser, *id.* at ¶ 21, and “various individual who took pictures of the crash site,” *id.* at ¶ 18. Combined, the three recordings contained approximately 151 minutes of footage. *Id.* at ¶¶ 7, 16, 21.

Out of the 151 minutes of footage, the Court found that only 90 seconds of audio capturing the post-*Miranda* questioning of the suspect, Teofilo, constituted specific investigatory work-product that OSHP could have withheld in response to The Enquirer's request. *Id.* at ¶ 46 (“Based on our review of the recordings, we conclude that about 90 seconds of Harvey’s recording—when Harvey takes Teofilo to her patrol car, reads him his *Miranda* rights, and questions him—could have been withheld as investigative work product compiled in anticipation of litigation.”). The Court based its decision on its finding that the OSHP trooper “conducted her questioning of [the suspect] inside the patrol car, away from public view,” and by giving a *Miranda* warning “intended to secure admissible statements for the prosecution’s later use at trial.” *ODPS* at ¶ 46.

With respect to the remaining footage, the Court held that it did not constitute specific investigatory work product on three grounds. First, the Court held that “the investigative information in the recordings duplicate[d] in large part the same information in the incident reports.” *Id.* at ¶ 47. The Court noted that “[w]hile there may be circumstances where the disclosure of investigative work product might impede a criminal prosecution, that concern is not implicated here, where the work product (and more) had already been disclosed by other means.” *Id.*

Second, the Court found that the recordings were not prepared in anticipation of litigation “because under OSHP policy, troopers [were] expected to record all pursuits

and traffic stops, regardless of whether a criminal prosecution may follow.” *Id.* at ¶ 48.

The Court explained:

The dash-cams here began to record automatically as soon as the troopers activated their emergency lights and siren, so the troopers did not exercise any investigatory discretion in activating their dash-cams. In contrast, OSHP does not require troopers to record crashes and leaves it to the discretion of troopers to determine when evidence at a crash scene is necessary for prosecution. In those circumstances, respondents would have a better argument that a dash-cam recording was prepared in anticipation of litigation.

Id. Thus, the absence of any investigative decision on the part of the OSHP troopers to activate their dash-cams precluded a finding that they were created in anticipation of litigation. *Id.*

Last, the Court found that “a large portion of the recordings did not involve any investigative functions at all.” *Id.* at ¶ 49. The Court gave as examples footage of “various individuals who took pictures of video of the crash site,” audio of “discussions between troopers about matters of public safety,” and footage of the empty back seat of a trooper’s cruiser during the pursuit. *Id.*

i. **The Incident Report and Arrest Supplement described the CPD Officers' altercation with Coleman and Crawley.**

The Enquirer's Records Request asked for body cam footage relating to the arrests of Coleman and Crawley for assault. (Jt. Ex. C.) The "CINCINNATI POLICE DEPARTMENT INCIDENT REPORT" provides:

UPON ARRIVING AT LISTED LOCATION, LISTED ARRESTED INDIVIDUALS BECAME PHYSICALLY COMBATIVE WITH OFFICERS. WHEN OFFICERS ATTEMPTED TO PLACE LISTED ARRESTED INDIVIDUALS IN CUSTODY OFFICERS WERE INJURED.

(Relator's Ex. 1, at 2.) The "ARREST SUPPLEMENT," which comprises part of the incident report, identifies Coleman and Crawley as the "ARRESTEES," and states that Coleman suffered a "MINOR CUT(s)/LACERATION(s) TASER DART TO GROIN."²

Although brief, these descriptions describe the events depicted on the Body Cam Footage through Coleman's and Crawley's arrests. Thus, as in *ODPS*, events on the Body Cam Footage, from the officers' arrival at the apartment, through their arrests of Coleman and Crawley, were described in an incident report subject to public disclosure upon request. Thus, the information at issue had been "disclosed by other means." For this reason, CPD had no basis for withholding these portions of the Body Cam Footage as specific investigative work product.

² The Enquirer observes that the "ARREST SUPPLEMENT" does not state that Crawley was tased, although the Body Cam Footage clearly shows that he was. There is no evidence in the record that explains why the Crawley tasing was omitted from the report.

ii. **The CPD Officers did not exercise discretion when they recorded the Body Cam Footage.**

Like the OSHP troopers, CPD policy required the CPD officers to activate their BWC systems before responding to the call that led to the incident with Coleman and Crawley. (Relator's Ex. 2, at 2.) It provides: "Officers are *required* to activate their BWC system during *all* law enforcement-related encounters and activities as defined in this procedure. Officers will deactivate the BWC system only at the conclusion of the event or with supervisor approval." (*Id.* (emphasis added).)

Section A.2 of the BWC policy describes the activities at issue here. It provides, in part:

2. Officers will use BWC equipment to record **all** calls for service and self-initiated activities. The BWC must be activated when the officer arrives on scene. This includes:

a. While responding for calls for service in emergency mode.

...

d. When assisting other officers on any call for service or self-initiated activity.

...

g. Recordings of all persons physically arrested and being transported in any Department vehicle to any location.

(*Id.* at 4.) There is nothing in any of the individual videos to suggest that the responding officers exercised any discretion in activating their body cameras. Moreover, the Johnson Footage makes clear that the officers obtained consent from the apartment's

resident before entering the apartment. (Jt. Ex. B, Johnson Footage at T19:53:01.) Consequently, the officers would have had no cause to shut off their BWC systems under CPD policy so as to imply that their continued use inside the apartment was the product of investigatory discretion. (See Relator's Ex. 2, at 5 (stating that officers will not use BWC system "[i]n any place where there is a reasonable expectation of privacy (e.g., restroom, locker room)").)

Given this policy, all of the Body Cam Footage depicting the events leading up to the incident, the incident itself, the arrests, and Coleman's and Crawley's detention in the back of the CPD cruisers are events that CPD policy required the responding officers to record. Accordingly, under *ODPS*, the CPD officers did not make the recordings "in anticipation of litigation," and the footage does not constitute specific investigatory work product under *ODPS*.

The only information on the Body Cam Footage analogous to the 90 seconds of post-*Miranda* interrogation the Court found exempt in *ODPS* is a CPD officer's questioning of the service caller following the arrests of Coleman and Crawley. (Graves Footage, at T20:00:48Z.) It also does not appear that Coleman or Crawley ever received *Miranda* warnings following their arrests, and there does not appear to be any footage of their interrogation on the redacted Body Cam Footage.

With respect to the interaction between the officer and the service caller on the Graves Footage, it is clearly not an "interrogation" like that in *ODPS*. Nor is it clear that

the officer is asking the questions for the purpose of securing evidence for a future prosecution. Moreover, Respondent has not put any evidence into the record, such as an affidavit from the officer, to establish that this portion of the Body Cam Footage (about 2 minutes and 30 seconds) constitutes specific investigatory work product.

As in *ODPS*, the CPD officers had no discretion whether to activate their body camera systems when they made the Body Cam Footage. The resulting recordings were thus not made in anticipation of litigation, and did not constitute specific investigatory work product when CPD denied Relator's Request.

iii. Portions of the Body Cam Footage depict events that had no investigative function.

As in *ODPS*, the Body Cam Footage contains images of police activity that had no investigative function. For instance, the *Ventre* and *Schildmeyer* Footage consists solely of images and audio from inside a CPD cruiser, presumably while the officers wearing the body cams are driving to the scene of the incident. These images, like the empty back seat of the trooper's cruiser, are not the product of any investigative function. Accordingly, CPD had no basis for withholding this footage, and by doing so, violated the Act.

C. There is no evidence that release of the unredacted portions of the Body Cam Footage would have created a high probability of disclosing “[i]nformation that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.”

Respondent bears the burden of establishing that release of the Body Cam Footage in response to The Enquirer’s October 31 Records Request would have disclosed “[i]nformation that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.” Nothing in the Body Cam Footage is of such a nature as to suggest that release would have caused a disclosure of (A)(2)(d) information, at least not without additional context. And Respondent has not submitted any evidence to support a finding that release would have disclosed this information. *See State ex rel. Plunderbund Media, L.L.C. v. Born*, 141 Ohio St. 3d 433, 2014-Ohio-3679, 25 N.E.3d 988, ¶ 23 (relying on multiple sworn affidavits of law-enforcement and telecommunications experts to conclude that records were exempt as security records within the meaning of R.C. 149.43(A)(3)).

Because the record is devoid of evidence that would support a finding that a law enforcement officer’s life would have been endangered by release of the Body Cam Footage, The Enquirer is unable to assess the propriety of the redactions to the faces of individuals who appear to have been ununiformed CPD officers. But The Enquirer does not bear the burden of eliminating all possible bases for the redactions.

Rather, Respondent bore the burden of establishing that these redactions were proper. For instance, were the officers in plain clothes undercover CPD officers (which would support redaction)? Or were they merely off duty (in which case, (A)(2)(d) would not apply)? In the absence of competent evidence in the record, this Court cannot assess the propriety of Respondent's redactions, and as such, must hold that Respondent has failed to demonstrate applicability of the CLEIR exemption to this information. *See State ex rel. Nat'l Broad. Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 85, 526 N.E.2d 786, 791 (1988) (holding that respondent's failure to provide evidence that records were prepared specifically for litigation prevented court from determining whether trial preparation records exception applied). *See also State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St. 3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 25 (holding that respondent failed to submit sufficient evidence to establish that 9-1-1 call was exempt from disclosure under the Sixth Amendment to the United States Constitution).

Proposition of Law No. IV

The Court should award Relator its reasonable attorney's fees and court costs under R.C. 149.43(C)(2).

If the Court enters judgment in The Enquirer's favor, an award of court costs is mandatory. *See* R.C. 149.43(C)(3)(a)(i). That provision provides:

If the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court *shall* determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(Emphasis added). *See also State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St. 3d 7, 15, 2014-Ohio-2354, 14 N.E.3d 989 (“We have repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary.”).

An award of attorney’s fees to a relator is proper when “the court renders a judgment that orders the public office or the person responsible for the public record to comply” with R.C. 149.43(B). In determining whether to award discretionary fees, the Court has held that a court should consider the reasonableness of the public office’s position, whether the public office acted in good faith, and any public benefit conferred by the relator’s pursuit of the action. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St. 3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 36.

Here, CPD denied the entirety of Relator’s Records Request on the ground that all of the information contained on the Body Cam Footage was exempt under the CLEIR exception. (Jt. Ex. C.) It was not until Coleman and Crawley pleaded guilty that CPD released a redacted version of the Body Cam Footage. (Agreed Stmt., ¶ 12.) At that point in time, even if CPD had had a good faith basis for withholding the entirety of the body cam footage requested under the CLEIR exception, the Court’s decision in *State ex rel. Caster v. City of Columbus*, 151 Ohio St. 3d 425, 2016-Ohio-8394, 89 N.E.3d 598, compelled release.

CPD did not, however, have a good faith basis for withholding **all** of the body cam footage The Enquirer requested on October 31 (even if some of the footage could have been withheld). This Court decided *ODPS* nearly a year before The Enquirer made its Records Request. The Court made unequivocally clear in its decision that a public office cannot withhold the entirety of a recording made by a law enforcement camera merely because the recording contains some information exempt from disclosure under the CLEIR exception. Rather, the Court instructed that “[a] case-by-case review is necessary” to determine how much of a record claimed to be exempt under CLEIR should be disclosed, and that non-exempt information contained in the recording must be produced.

Despite the clear guidance offered in *ODPS*, and the absence of any conflicting case law to the contrary, CPD withheld the entirety of the footage until *Caster* compelled disclosure following Coleman’s and Crawley’s guilty pleas. This Court need only review the Ventre and Schildmeyer Footage to conclude that CPD consciously ignored this Court’s directive in *ODPS*, forcing The Enquirer to bring the instant lawsuit.

CPD may argue that the law regarding law enforcement body camera recordings was not clear, despite *ODPS*, since that case involved law enforcement dash cam recordings. But the difference in the type of equipment used to make the recordings was not a factor this Court’s holding that dash-cam recordings were “records” within

the meaning of R.C. 149.011(G). Moreover, the definition of “records” does not suggest that the nature of the equipment used is relevant to the inquiry. And there is no question that body cam recordings memorialize the policing activities of CPD, and are kept by CPD, a public office, so as to fall within the definition of “public record” for purposes of the Act.

The other factor that weighs in favor of an award of fees is the public benefit conferred by The Enquirer in bringing this lawsuit. As one New York trial court cogently observed in addressing the issue of body camera recordings under New York’s public records laws:

Video recordings of police interactions with members of the public have been at the forefront of public debate on police officers’ use of lethal force, most notably against black men and other persons of color. Alton Sterling, Philando Castile, Tamir Rice, Walter Scott, Michael Brown, Eric Garner, Kajieme Powell and others: crucial moments preceding each of their deaths at the hands of police officers were recorded on video, released to the public and subject to widespread scrutiny . . .

Regardless of the precise conclusions that may be drawn from any particular video, it is beyond dispute that recordings of police interactions with members of the public have allowed a fuller discourse on the role of local police in the United States.

Matter of Time Warner Cable News NY1 v. New York City Police Dep’t, 53 Misc. 3d 657, 36 N.Y.S.3d 579 (N.Y. Sup. Ct. 2016). The General Assembly has instructed that an award of fees is “remedial and not punitive.” R.C. 149.43(C)(4)(a). The Enquirer’s repeated efforts to protect the public’s right to access law enforcement camera recordings, to further an important public discourse regarding the role of law enforcement in the State

of Ohio, establish that a full award of The Enquirer's attorney's fees in this case is appropriate.

Additionally, neither of the factors requiring denial of attorney's fees under R.C. 149.43(C)(3)(c) are present here. First, no well-informed public office would have believed that its complete denial of The Enquirer's Records Request was proper. R.C. 149.43(B)(1) specifically requires a public office to redact exempt information from public records, and the *ODPS* Court affirmed that this requirement applies to law enforcement camera recordings. Accordingly, CPD was required to provide the non-exempt portions of the footage, and redact those portions that fell squarely within the CLEIR exemption.

Second, CPD could not have believed that its denial of The Enquirer's Records Request served the public policy of the CLEIR exception. At most, the body cam footage provided evidence to support the prosecution of Coleman and Crawley for resisting arrest. But the *ODPS* expressly rejected the argument that the law enforcement agencies could withhold records solely on the ground that they contained "potential evidence of criminal activity." 148 Ohio St. 3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 45. Consequently, this Court has rejected the notion that the public policy purpose underlying the CLEIR exception is to allow law enforcement to prevent public scrutiny of evidence of criminal activity contained in records that would otherwise be subject to disclosure under R.C. 149.43(B)(1). CPD's denial of the Records Request therefore did

not further any recognized public policy behind the CLEIR exception so as to bar an award of attorney's fees under R.C. 149.43(C)(3)(c)(ii).

The Enquirer has satisfied all of the necessary requirements to be entitled to an award of attorney's fees under R.C. 149.43(C)(2). The Enquirer: (1) made a proper request for public records pursuant to R.C. 149.43; (2) the requested records were not turned over in response to that request; and (3) the public office's refusal to produce the records compelled The Enquirer to file a mandamus action to obtain the records. *State ex rel. Pennington v. Gundler*, 75 St.3d 171, 661 N.E.2d 1049 (1996). Moreover, Relator's request for the Body Cam Footage was for the purpose of providing complete and accurate news reports to the public.

CONCLUSION

For the reasons set forth, The Enquirer has established, by clear and convincing evidence, that it had a clear right to inspect the Body Cam Footage, and that Respondent had a correspondingly clear duty to make the Body Cam Footage available for public access promptly upon request. Respondent cannot meet its reciprocal burden to show that an exception to disclosure applied to all of the Body Cam Footage, so as to justify its complete and outright denial. Accordingly, The Enquirer respectfully requests that the Court issue a writ of mandamus, and award it its reasonable attorney's fees incurred in bringing this action.

Respectfully submitted,

/s/ John C. Greiner

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Relator's Merit Brief* was served upon all counsel of record via Regular U.S. Mail, postage prepaid, pursuant to Ohio R. Civ. P. 5(B)(2)(c), on this 19th day of April, 2018.

/s/ John C. Greiner

John C. Greiner (0005551)

APPENDIX

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

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under sections 3705.12 to 3705.124 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) In the case of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code or a review conducted pursuant to guidelines established by the director of health under section 3701.70 of the Revised Code, records provided to the board or director, statements made by board members during meetings of the board or by persons participating in the director's review, and all work products of the board or director, and in the case of a child fatality review board, child fatality review data submitted by the board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
- (x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;
- (y) Records listed in section 5101.29 of the Revised Code;
- (z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;
- (aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;
- (bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division;
- (cc) Information and records that are made confidential, privileged, and not subject to disclosure under divisions (B) and (C) of section 2949.221 of the Revised Code;
- (dd) Personal information, as defined in section 149.45 of the Revised Code;
- (ee) The confidential name, address, and other personally identifiable information of a program participant in the address confidentiality program established under sections 111.41 to 111.47 of the Revised Code, including the contents of any application for absent voter's ballots, absent voter's ballot identification envelope statement of voter, or

provisional ballot affirmation completed by a program participant who has a confidential voter registration record, and records or portions of records pertaining to that program that identify the number of program participants that reside within a precinct, ward, township, municipal corporation, county, or any other geographic area smaller than the state. As used in this division, "confidential address" and "program participant" have the meaning defined in section 111.41 of the Revised Code.

(ff) Orders for active military service of an individual serving or with previous service in the armed forces of the United States, including a reserve component, or the Ohio organized militia, except that, such order becomes a public record on the day that is fifteen years after the published date or effective date of the call to order.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, an investigator of the bureau of criminal identification and investigation, or federal law enforcement officer, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee,

firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer by the peace officer's, parole officer's, probation officer's, bailiffs, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, investigator of the bureau of criminal identification and investigation's, or federal law enforcement officer's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiffs, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, investigator of the bureau of criminal identification and investigation's, or federal law enforcement officer's employer from the peace officer's, parole officer's, probation officer's, bailiffs, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, investigator of the bureau of criminal identification and investigation's, or federal law enforcement officer's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(9) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(9) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "federal law enforcement officer" has the meaning defined in section 9.88 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)

(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may

require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7)

(a) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

(b) Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to division (B)(7) of this section. A public office that adopts a policy and procedures under division (B)(7) of this section shall comply with them in performing its duties under that division.

(c) In any policy and procedures adopted under division (B)(7) of this section:

(i) A public office may limit the number of records requested by a person that the office will physically deliver by United States mail or by another delivery service to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes;

(ii) A public office that chooses to provide some or all of its public records on a web site that is fully accessible to and searchable by members of the public at all times, other than during acts of God outside the public office's control or maintenance, and that charges no fee to search, access, download, or otherwise receive records provided on the web site, may limit to ten per month the number of records requested by a person that the office will deliver in a digital format, unless the requested records are not provided on the web site and unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes.

(iii) For purposes of division (B)(7) of this section, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)

(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, or federal law enforcement officer and, if the peace officer's, parole officer's, probation officer's, bailiffs, prosecuting

attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, investigator of the bureau of criminal identification and investigation's, or federal law enforcement officer's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiffs, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, investigator of the bureau of criminal identification and investigation's, or federal law enforcement officer's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)

(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may do only one of the following, and not both:

(a) File a complaint with the clerk of the court of claims or the clerk of the court of common pleas under section 2743.75 of the Revised Code;

(b) Commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages

under division (C)(2) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

(2) If a requester transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public

policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(3) In a mandamus action filed under division (C)(1) of this section, the following apply:

(a)

(i) If the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(ii) If the court makes a determination described in division (C)(3)(b)(iii) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section or if the court determines any of the following, the court may award reasonable attorney's fees to the relator, subject to the provisions of division (C)(4) of this section:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(iii) The public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with division (B) of this section. No discovery may be conducted on the issue of the alleged bad faith of the public office or person responsible for the public records. This division shall not be construed as creating a presumption that the public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order described in this division.

(c) The court shall not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(4) All of the following apply to any award of reasonable attorney's fees awarded under division (C)(3)(b) of this section:

(a) The fees shall be construed as remedial and not punitive.

(b) The fees awarded shall not exceed the total of the reasonable attorney's fees incurred before the public record was made available to the relator and the fees described in division (C)(4)(c) of this section.

(c) Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.

(d) The court may reduce the amount of fees awarded if the court determines that, given the factual circumstances involved with the specific public records request, an alternative means should have been pursued to more effectively and efficiently resolve the dispute that was subject to the mandamus action filed under division (C)(1) of this section.

(5) If the court does not issue a writ of mandamus under division (C) of this section and the court determines at that time that the bringing of the mandamus action was frivolous conduct as defined in division (A) of section 2323.51 of the Revised Code, the

court may award to the public office all court costs, expenses, and reasonable attorney's fees, as determined by the court.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)

(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)

(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk

commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(G) A request by a defendant, counsel of a defendant, or any agent of a defendant in a criminal action that public records related to that action be made available under this section shall be considered a demand for discovery pursuant to the Criminal Rules, except to the extent that the Criminal Rules plainly indicate a contrary intent. The defendant, counsel of the defendant, or agent of the defendant making a request under

this division shall serve a copy of the request on the prosecuting attorney, director of law, or other chief legal officer responsible for prosecuting the action.

Amended by 131st General Assembly File No. TBD, HB 471, §1, eff. 12/19/2016.

Amended by 131st General Assembly File No. TBD, HB 317, §1, eff. 9/28/2016.

Amended by 131st General Assembly File No. TBD, SB 321, §1, eff. 9/28/2016.

Amended by 131st General Assembly File No. TBD, HB 359, §1, eff. 9/8/2016.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 130th General Assembly File No. TBD, HB 663, §3, eff. 3/20/2015.

Amended by 130th General Assembly File No. TBD, HB 663, §1, eff. 3/23/2015.

Amended by 130th General Assembly File No. 56, SB 23, §1, eff. 3/20/2015.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No. 129, SB 314, §1, eff. 9/28/2012.

Amended by 129th General Assembly File No. 127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 43, HB 64, §1, eff. 10/17/2011.

Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, §101.01, eff. 10/16/2009.

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Related Legislative Provision: *See 129th General Assembly File No. 131, SB 337, §4 .*

R.C. 149.011 Documents, reports, and records definitions.

As used in this chapter, except as otherwise provided:

...

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

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

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