Sunshine Synopsis: Police issues

October 20, 2017

Public Records cases - Supreme Court

State ex rel. Cincinnati Enquirer v. Ohio Dept. of Public Safety, 148 Ohio St. 3d 433, 2016 Ohio 7987 (Decided December 6, 2016)

This case involves a public records request for dash-cam videos created by the Ohio State Highway Patrol. The recordings were created during a pursuit that lasted approximately 20 minutes before the suspect crashed his car into a guardrail.

The Cincinnati Enquirer's request for the recordings was originally denied by the Ohio Department of Public Safety (ODPS), which claimed the videos were exempt from disclosure as specific investigatory work product under the confidential law enforcement investigatory records (CLEIR) exception to the Public Records Act.

The Ohio Supreme Court pointed out that:

> [T]he three recordings contain images that have concrete investigative value specific to the prosecution of Teofilo that may be withheld, but also contain images that have little or no investigative value that must be disclosed. A case-by-case review is necessary to determine how much of the recordings should have been disclosed.

After reviewing the recordings, the Court determined that the ODPS was entitled to withhold 90 seconds of one tape, but had to release the rest.

> In the end, we hold that decisions about whether an exception to public-records disclosure applies to dash-cam recordings require a case-by-case review to determine whether the requested recordings contain investigative work

product.

State ex rel. Cincinnati Enquirer v. Deters, 148 Ohio St. 3d 595, 2016 Ohio 8195 (December 20, 2016)

The Cincinnati Enquirer and several other news organizations sought the release of a body-cam video that recorded a police officer shooting and killing a motorist after a traffic stop. The county prosecutor initially denied the request, claiming it was both a confidential law enforcement record and a trial preparation record. The prosecutor released the requested video a few days later, immediately after the grand jury returned an indictment in the case. The Supreme Court found that the prosecutor had acted appropriately under the Public Records Act.

First, the Court dismissed three of the news organizations because they had never made a request to the prosecutor's office for the recording.

> It is axiomatic that in order to be a person aggrieved by the failure of a public office to promptly respond to a public-records request, one must first request records from the public office.

The Court also found that the remaining news outlets were not entitled to the requested writ, because the prosecutor provided the video in a reasonable time.

> Because the prosecutor was entitled to review the video to determine whether any redaction was necessary and produced the body-camera video six business days after it was initially received by his office, we conclude that he responded in a reasonable period of time.

State ex rel. Shaughnessy v. City of Cleveland, 149 Ohio St. 3d 612, 2016 Ohio 8447 (Decided December 29, 2016)

The Ohio Supreme Court rejected Mr. Shaughnessy's requested relief because he asked the city to conduct research for him instead of submitting proper public records requests.

Mr. Shaughnessy's law practice focuses on recovering economic losses for crime victims through the Ohio Crime Victims Fund. Mr. Shaughnessy made a series of requests from the city that the Court described as follows:

> Shaughnessy typically requested police incident reports involving felonious assaults or other assaults causing serious harm but excluding those involving domestic violence, elder abuse, or assault upon a minor. Cleveland's evidentiary submission explained the steps involved in fulfilling his requests. Cleveland first had to search its database for reports that involved incidents of assaults or aggravated assaults and then exclude records involving the types of victims and offenses that Shaughnessy did not want. Then, to retrieve the actual reports, the records custodian typed each police-report number into Cleveland's database to extract and print each individual report. Cleveland submitted each report to its law department for review and redaction of information that the law department deemed exempt from disclosure under the Public Records Act. The information typically redacted from reports included Social Security numbers, criminal information obtained from the National Crime Information Center and the Ohio Bureau of Criminal Investigation, the names of juveniles, medical information, and information describing the details of sexual offenses.

The Court found Mr. Shaughnessy's requests do not meet the requirements of the Public Records Act.

> This was an improper public-records request, because it required Cleveland to do research for Shaughnessy and to identify a specific subset of records containing selected information.
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> The Public Records Act does not compel a public office "to do research or to identify records containing selected information."

As a result, the Court determined that the city could have rejected the requests and asked Mr. Shaughnessy to revise them. Even if the city failed to conform to its public records policy, Mr. Shaughnessy could not prevail because "Cleveland's failure to comply

with its own policy does not in itself compel relief in mandamus."

State ex rel. Caster v. City of Columbus, 2016 Ohio 8394 (Decided December 28, 2016)

The Ohio Innocence Project (OIP) is an organization that identifies, investigates and litigates cases in which persons may have been wrongfully convicted of serious crimes. The OIP will not enter into an attorney/client relationship with the person unless there is evidence that he or she was wrongfully convicted. In order to pursue this mission, OIP submitted public records requests to the city's police chief.

On September 5, 2013, OIP student fellows, at Mr. Caster's direction, made the first public records request to the police department. The department rejected the request, claiming the records were confidential law enforcement investigatory records. In October, the students resubmitted the request, again at Mr. Caster's direction. The city responded in the same fashion as before. Finally, Mr. Caster submitted a records request to the department by certified mail, explaining that there were no ongoing proceedings in Mr. Saleh's case. The department did not respond to the third request at all.

The Court explicitly used this case to revise the scope of the specific investigatory work product aspect of the CLEIR exception to the Public Records Act. The Court's previous jurisprudence provided a fairly broad exclusion for such records.

> In Steckman, this court held that records excepted from disclosure pursuant to R.C. 149.43(A)(2)(c) remain unavailable to a defendant in a criminal case who has exhausted the direct appeals of his or her conviction and seeks to employ R.C. 149.43 to pursue postconviction relief. Id. at 437. In State ex rel. WLWT-TV5 v. Leis, 77 Ohio St.3d 357, 360, 673 N.E.2d 1365 (1997), a case in which a television station sought investigatory work product following the convictions of two individuals, this court held that there can be no disclosure of such material "until all proceedings are fully completed."

This standard led one court of appeals to conclude: "[A]bsent proof that no further proceedings are possible, e.g., the defendant's death perhaps, a custodian of confidential law enforcement investigatory records is under no duty to disclose them."

The Court determined that changes to criminal discovery allowed for Steckman and its progeny to be modified, holding that the specific work product exception under CLEIR "does not extend beyond the completion of the trial for which the information was gathered."

Public Records Cases - Court of Claims

Gannett GP Media, Inc. dba Cincinnati Enquirer v. Ohio Dept. of Pub. Safety, 2017 Ohio 4248 (Decided May 20, 2017)

Ohio is a party to the interstate Emergency Management Assistance Compact (EMAC). Pursuant to this agreement, the Ohio State Highway Patrol provided assistance to North Dakota during protests over the Dakota Access Pipeline. The Cincinnati Enquirer made public records requests to the Ohio Department of Public Safety (ODPS) for information about the deployment and the officers who participated in the project.

ODPS refused to release a list of the names and ranks of the 37 officers involved in the deployment under the right to privacy and claiming the exception for security records was applicable. Because the passage of time reduced the risk to the officers, the court rejected these arguments:

> Here, with respect to ODPS's contention that certain state troopers' names should not be released because disclosure would violate the troopers' constitutional right to privacy under the Fourteenth Amendment, the special master states: "Upon careful review, the evidence in this case supports the privacy exception only to the extent of withholding the Troopers' names during deployment. The evidence does not justify the continuing use of the exception following the Troopers' return to Ohio."?
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> In this instance, because ODPS has admitted that it is in the "position of having no examples of the 37 Ohio Troopers, or

> their family members, being the subject of a violent threat or doxing since returning from deployment" (Objections, 11), it is far from evident that, at present, the state troopers who have returned to Ohio following deployment in North Dakota require protection and security against attack, interference, or sabotage or that the names of these state troopers constitute a security record—a "record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage."

The court found that the Enquirer's other requests were so overly broad and ambiguous they were improper. The special master stated:

> An ambiguous request for research rather than specific records undermines the legitimate interests of both the public office and the requester. A request to find all communications "regarding" a topic, to or from any employee, anywhere in the office, requires a needle-in-the-haystack search through the office's paper and electronic communications. It also requires judgment calls as to whether any given communication—whether personal, tenuous, or duplicative—is "regarding" the topic. If a public office attempts such a universal search, the time involved results in delay for the requester. Nor can a public office assume that agreeing to "do the best it can" with an ambiguous or overly broad request, instead of denying it, will shield it from liability. The dilemma for the public office may not be whether the public office can identify any records responsive to the request, but whether the terms of the request permit it to reasonably identify all responsive records. Request No. 2 poses a potentially impossible task to respond fully to its ambiguous and overly broad terms.

Hilliard City School District v. Columbus Division of Police, 2017 Ohio 8052 (Ct. of Claims Filed September 12, 2017)

The district made a request to the police department for "the complete investigative file" of an incident where one of its bus drivers alleged she was sexually assaulted while on her school bus. The department provided certain documents in response to the request but withheld others, claiming they were medical records, confidential law enforcement investigatory records and/or protected by the right to privacy.

The department claimed that records created by a sexual assault nurse examiner (SANE) were medical records under provision (A)(3) of the Public Records Act and the department was entitled to withhold them. The special master rejected this argument: "A document that pertains to diagnosis and treatment, but is held and used by an agency that does not maintain the document in the process of medical treatment, does not meet the definition."

> The SANE records commence with an authorization and release form affirming the victim's understanding that the examination is a medical forensic examination to obtain evidence for the prosecution of alleged assault offenses, and authorizing the healthcare providers and hospital to provide physical evidence, photographs, hospital records, and any other information obtained from examination and treatment to the Columbus Police Department and/or Franklin County Prosecutor's Office for use in criminal investigation and prosecution. On the same page, the SANE nurse affirms that she performed the medical forensic examination to obtain physical evidence, photographs, hospital records, and any other information from the alleged offense. The ensuing examination forms contain a limited medical history, the victim's description of the assault, a description of clothing, a list of evidence collected and given to law enforcement, a one-sentence summary of the forensic examination, vital signs, a list of 80 photographs, anatomical outlines identifying photograph locations, and photographs of the victim and clothing. None of the SANE records recommend or discuss medical treatment. The SANE records appear to consist solely of sexual assault evidence collection.

The court determined that the records were gathered in order to gather evidence to prosecute a crime, not in the process of medical treatment. Given that, the records did not fall within the medical records exception to the Public Records Act.

The special master concluded, however, that the department was justified in withholding the records as CLEIR. First, the department was able to show that the records pertained to a law enforcement matter of a criminal nature because they arose "from a specific suspicion of violation of criminal law," which the department has the authority to investigate or enforce. The

department also met the second prong of the CLEIR doctrine by showing the records were specific investigatory work product.

> "Specific investigatory work product" includes "any notes, working papers, memoranda or similar materials" and all other "information assembled by law enforcement officials, in connection with a probable or pending criminal proceeding."

This exception, however, does not include "ongoing routine offense and incident reports," as these documents initiate criminal investigations but are not part of the investigations themselves. After examining the withheld documents, the special master determined the records fell within the exception.

The district argued that if the exception had applied, it was expired because the investigation was inactive and there were no suspects. The special master disagreed:

> Sergeant Pelphrey, the supervising detective sergeant, affirms to the contrary that "[t]his case is not closed." Pelphrey states that the case is proceeding as the investigation of a crime, and explains that while the case is currently inactive due to exhaustion of available leads, it could become active at any time that additional information becomes known. The lack of an identified suspect in this case does not remove the investigatory records from the status of being compiled in anticipation of probable criminal proceeding.

Having determined that the withheld records were subject to the CLEIR exception, the special master did not address the constitutional right to privacy argument.

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