

**IN THE
SUPREME COURT OF OHIO**

CHARLES A. SUMMERS,	:	Case No. 18-0959
	:	
Relator,	:	
	:	
v.	:	Original Action in Mandamus
	:	
MATTHEW FOX, PROSECUTING	:	
ATTORNEY, MERCER COUNTY,	:	
OHIO, et al.,	:	
	:	
Respondents.	:	

**RELATOR CHARLES A. SUMMERS' RESPONSE TO RESPONDENTS' PRIVILEGE
ASSERTION**

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Comes now Relator, Charles A. Summers (“Mr. Summers”), and respectfully submits this Response to Respondents’ Privilege Assertion in Response to Documents Requested by Relator. After providing zero documents in their initial response to Mr. Summers’ requests under the Public Records Act, Respondents have now provided the Court with, among other public records, twenty-three audio and video recordings (including audio recordings of Christopher Summers), dozens of pages of correspondence, a police report, and a lab report – all while proclaiming their transparency. *See* Respondents’ Document Identification List, pp. 2-4. And, despite their claims about the burden of the requests, Respondents were able to do so within the forty-five-day period provided by the Court. Respondents’ illusory attempts to retroactively legitimize their unlawful refusal to turn over numerous public records are incorrect under Ohio law and unveil their true intent – to prohibit the release of public records based on their guess at the requestor’s intended use. Respondents have the burden to prove the public records are not disclosable, yet have been extraordinarily vague in their assertions of privilege while ignoring controlling law and the primary purpose of the Public Records Act: to keep government transparent. *See State ex rel. Miller v. Ohio State Highway Patrol*, 136 Ohio St. 3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23.

I. Mr. Summers is not a designee when he is not in privity with an inmate

Respondents yet again claim without basis that Mr. Summers is a designee of his son. Mr. Summers is not a designee simply because he is a family member of an incarcerated citizen, Mr. Summers is not in privity with Christopher Summers, and Respondents have no right to guess at Mr. Summers’ use of the public records. *See* Mr. Summers’ Merit Brief, pp. 12-15; Mr. Summers’ Reply Brief, pp. 12-14. This alleged exception fails.

Ohio courts have narrowly restricted when the judicially-constructed exception to the Public Records Act for a “designee” can permit a public official to block the release of public

records, and have repeatedly found that a “designee” relationship only exists if a records requestor is standing in legal privity with the inmate (e.g., *res judicata* or husband-wife privity). *See State ex rel. Barb v. Cuyahoga County Jury Comm’r*, 128 Ohio St. 3d 528, 2011-Ohio-1914, 947 N.E.2d 670, ¶ 1 (“Barb II”) (“dismissing petitioner’s case requesting identical documents to inmate’s request based on *res judicata* because, “as Danny’s designee—he was in privity with him.”); *see also State ex rel. Roberson v. Mason*, 8th Dist. Cuyahoga No. 91783, 2009-Ohio-1884, ¶¶ 8-9 (dismissing designee’s mandamus action following dismissal of inmate designator’s mandamus action under *res judicata* grounds, finding privity between the parties); *Ellis v. Cuyahoga Cty. Prosecutor’s Office*, Ct. of Cl. No. 2018-00782PQ, 2018-Ohio-3479 (finding a family member was only considered a designee after making a request already made by an inmate); *State ex rel. Hopgood v. Cuyahoga Cty. Prosecutor’s Office*, 2018-Ohio-4121, 2018 Ohio App. LEXIS 4426 (8th Dist.) (finding wife barred from seeking documents for husband). Privity is not present here where no identical request has previously been made by the inmate, and where the relationship between the inmate and the requestor is parental, vis-à-vis marital.

Respondents cite in a footnote to *State ex rel. Ellis v. Cleveland Police Forensic Lab.*, 157 Ohio St. 3d 483, 485, 2019-Ohio-4201, 137 N.E. 3d 1171, which involved an inmate requesting records, and who “misapprehend[ed] both *Caster* and Crim.R. 16(H).” Respondents’ Privilege Assertion in Response to Documents Requested by Relator (“Respondents’ Privilege Brief”), p. 2, fn. 1; *Ellis*, 157 Ohio St. 3d 483 at ¶ 11. While *Ellis* is irrelevant to Respondents’ “designee” argument, it is relevant in that this Court re-affirmed that *Caster* still applied to whether “the specific-investigatory-work-product exception (R.C. 149.43(A)(2)(c)) applies after an underlying criminal case has concluded.” *Ellis*, 157 Ohio St. 3d 483 at ¶ 11. Contrary to Respondents’ assertions, it does not. *See Caster* at ¶ 1; *c.f.* Respondents’ Privilege Brief, pp. 5-6, 8-9, 10, 18.

Respondents' attempt to paint Mr. Summers as a "designee" is a thin-veiled attempt to circumvent the Public Record Act's prohibition on officials guessing at the use of public records. See O.R.C. § 149.43(B)(4); *State ex rel. Quolke v. Strongsville City Sch. Dist. Bd. of Educ.*, 142 Ohio St. 3d 509, 2015-Ohio-1083, 33 N.E.3d 30, ¶¶ 23-24. Respondents' privilege brief completely disregards this Court's holding that the Public Records Act "to be construed liberally in favor of broad access, and any doubt is to be resolved in favor of disclosure of public records." *Caster* at ¶ 40. Indeed, Respondents' only references to *Caster* are in a footnote and in a citation noting that the case Respondents quoted had been overruled. See Respondents' Privilege Brief, pp. 2, fn. 1; 6.

II. The public records requests are not overbroad and Respondents did not provide Mr. Summers an opportunity to revise his allegedly overbroad requests

Respondents assert that the following requests are "overbroad":

- Any correspondence between the prosecutor and/or members of his staff to the defense lawyers, Howell and Lammers in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
- Any correspondence between members of the Mercer County Sheriff's Department to the Mercer County Prosecutor or member of his staff in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.

Respondents' Privilege Brief, pp. 11-13, 18. Respondents' introductory statement that "many of Relator's requests are overbroad" is both incorrect and unfairly vague to put Mr. Summers on notice of *which* responses are overly broad besides the two specifically identified. See pp. 2-3. Moreover, Respondents compiled the responses to Mr. Summers' Public Records Act requests within the forty-five-day time period requested by this Court.

However, *even if* Respondents genuinely believed Mr. Summers' public records requests were overbroad, the Public Records Act requires that they "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." R.C. 149.43(B)(2). Ironically, Respondents rely on *Gannett GP Media, Inc. v. Ohio Dept. of Pub. Safety*, a Court of Claims case, for their assertion of privilege. But they did not mention *Gannett's* holding that they were required to provide an opportunity for Mr. Summers to revise his request:

After an office has denied a request that is ambiguous, overly broad, or otherwise does not reasonably identify the records requested, it is then required to "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."

Ct. of Cl. No. 2017-00051-PQ, 2017-Ohio-4247, ¶ 13, citing R.C. 149.43(B)(2). It is undisputed this did not occur. *See* Letters from Mercer County Prosecutor's Office to Mr. Summers and H. Louis Sirkin (Feb. 28, 2017; April 18, 2017; and May 31, 2017), attached as Exhibits B, D, and F to Affidavit of Mr. Summers, attached as Exhibit A to Mr. Summers' Merit Brief. Moreover, "A public office's voluntary effort to provide some responsive records, notwithstanding denial of the request, is considered favorably in evaluating its response to an ambiguous or overly broad request," so the inverse should be true – their refusal to voluntarily provide *any* records or ask the requestor to amend an allegedly overbroad request should imply the public officials' bad faith. *See id.* at ¶ 13.

Moreover, Respondent Fox has admitted that his office does not organize and maintain records in a manner that can be made available for inspection or copying, despite the Public Records Act's requirement that "Public officials have a duty to "organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with" the Public Records Act." Affidavit of Matthew Fox, ¶ 27, attached as Exhibit B to Mr. Summers' Merit Brief; *c.f.*, O.R.C. § 149.43(B)(2).

None of the cases cited by Respondents apply here. These are not requests for “any and all documents” related to an individual, so *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 314, 2001 Ohio 193, 750 N.E.2d 156 (2001) does not apply. These are not requests for all e-mails between the Respondents and Christopher Summers’ counsel or all e-mails between the Respondents, nor do Respondents argue the e-mails were not possible to retrieve, so *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861 (2012) does not apply. This is not a request for all e-mails over a seven-year period, so *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711, 939 N.E.2d 831 (2010) does not apply.

Nor is using the word “regarding” a topic an automatic reason to reject a public records request. The requests are clear, party-specific, subject-limited, and time-limited: “Any correspondence between the prosecutor and members of his staff to the defense lawyers, Howell and Lammers in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030” and “Any correspondence between members of the Mercer County Sheriff’s Department to the Mercer County Prosecutor or member of his staff in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-0.”

Mr. Summers’ requests were specific. Respondents have not offered a chance for Mr. Summers to revise his allegedly overbroad requests. Nor have they offered any suggestions how he might do so. In any event, it seems they figured it out, and have done so within forty-five days, as they have provided “numerous emails and letters” and “numerous emails” in response to the respective requests. *See* Respondents’ Document Identification List, pp. 4, 6. However, without identifying how many e-mails, or providing a chance for Mr. Summers to revise his request, Mr. Summers has no idea how “overbroad” his requests actually are. This “privilege” assertion is not

valid and is yet another way Respondents have attempted to justify their stubborn and indefensible refusal to hand over public records.

III. The requests are not moot because Respondents never provided the public records to Mr. Summers

The Respondents have claimed the following documents should not be disclosed because the issue is “moot”:

- Any and all video recordings of interviews with the accuser and any other witnesses that were interviewed in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030:
 - Interview with J.K. on November 5, 2012
 - Interview with J.K. on November 6, 2012
 - Interview with J.K. on November 7, 2012
 - Interview with J.K. on November 9, 2012
 - Interview with witness L.P. on November 16, 2012
 - Interview with witness D.W. on November 26, 2012
 - Interview with witness D.B. on January 31, 2013
 - Interview with witness K.N. on July 11, 2013
 - Interview with witness K.F. on July 11, 2013
- Any and all audio recording of interviews or phone calls made with an accuser or potential witness in the case of State of OH vs Christopher A. Summers 12-CRM- 129 and 13-CRM-030:
 - Audio recording of Christopher Summers’ threatening telephone call to J.K.
 - Audio recording of H.F. interview
 - Audio recording of J.K. interview
 - Audio recording of L.N. interview
 - Audio recording of L.S. interview
 - Audio recording of V.M. interview
 - Audio recording of W.B. interview
 - Audio recording of Laurie Summers voicemail left with J.K.
 - Audio recording of search warrant/Miranda warning with Christopher Summers
- Any statements (written or recorded) made by the accuser J.K. to any member of the Sheriff’s Dept or the Prosecutor’s Office:
 - Two written witness statements by J.K.

See Respondents’ Privilege Brief, pp. 3, 8, 13-15; Respondents’ Document Identification List, pp. 2-3.

The Public Records Act is clear: O.R.C. § 149.43(B)(1) states that “Subject to division (B)(8) of this section, upon request, by any person a public office or person responsible for public records *shall* make copies of the requested public record available to the requester at cost and within a reasonable period of time.” (Emphasis added.). A public official has no right to guess at which documents an individual has received from *a different public records requestor* who obtained the documents pursuant to a request to a *different public official*.

Respondents do not cite to any case where a court blocked access to public records because the requestor *may* have received them from a *different requestor* pursuant to a request on a *different public official*, nor is Mr. Summers aware of any. Even if Mr. Summers *had* made the request on Darke County, one valid purpose of a requestor could be simply to determine what records that specific official (e.g., each of the Respondents) has in their possession.

Respondents only argue that Mr. Summers *might* have access to some video interviews *with JK* because *Darke County Prosecutor* provided *another requestor* with unidentified discovery in Christopher Summers’ criminal case. *See* Respondents’ Privilege Brief, pp. 3 and 8 (“Relator posted snippets of the video recordings of J.K.’s interviews on the “Justice for Chris” Facebook page [... and] The video recordings of J.K.’s interviews, as well as the remainder of the video recordings, were provided by the Darke County Prosecutor in response to a public records request made by an individual known to Relator and his incarcerated son.” “Relator is presumably in possession of the requested audio recordings because Darke County produced them in response to the third party’s request.”) *c.f.* Darke County Prosecutor Response to Joyce White, Exhibit A. They do not argue that *Respondents* provided him with *any* interviews. They do not argue that Darke County provided *Mr. Summers* with the audio and video interviews.

Moreover, it appears some video and audio recordings provided for in camera inspection by Respondents were not turned over by Darke County. The Darke County Prosecuting Attorney provided Joyce White with a list of documents it was turning over. *See* Exhibit A. While it does state, “Summary: Discovery provided to defense counsel, including 6 discs (98pp); Date: 3-13-13,” it does not list any other audio or video recordings. Nor is it clear what video, audio, or written interviews were provided in discovery to Christopher Summers’ defense counsel. Indeed, it is unclear if the Darke County Prosecutor’s Office had access to *all* the video, audio, and written interviews. At least two of the video interviews listed by Respondents were taken after March 13, 2013. And, again, this was provided to Joyce White – not Mr. Summers.

Respondents only state that a Facebook page has “snippets” of two of J.K.’s video interviews, and have never presented evidence that Mr. Summers is in possession of the videos of other interviews. *See* Respondents’ Merit Brief, pp. 24-26; Respondents’ Privilege Brief p. 3.

With regard to the audio recordings, Respondents have never presented evidence Mr. Summers is in possession of the audio interviews, instead arguing that “Since Relator is in possession of the video recordings, *he is presumably in possession* of the audio recordings as well.” Respondents’ Privilege Brief p. 8 (emphasis added).

In response to the written witness statements, Respondents only argue that Mr. Summers has access to two written statements that were posed on a Facebook page. Respondents’ Privilege Brief pp. 13-14. They present no evidence that he has access or is possession of the third JK written witness statement. Nor do they present evidence that he is in possession of the other witnesses’ statements.

IV. Work-Product and Trial Preparation Privileges do not apply after a criminal trial has concluded

Respondents’ alleged work product and trial-preparation material includes:

- Any and all video recordings of interviews with the accuser and any other witnesses that were interviewed in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Interview with J.K. on November 5, 2012
 - Interview with J.K. on November 6, 2012
 - Interview with J.K. on November 7, 2012
 - Interview with J.K. on November 9, 2012
 - Interview with witness L.P. on November 16, 2012
 - Interview with witness D.W. on November 26, 2012
 - Interview with witness D.B. on January 31, 2013
 - Interview with witness K.N. on July 11, 2013 Interview with witness K.F. on July 11, 2013
- Any and all audio recording of interviews or phone calls made with an accuser or potential witness in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Five (5) telephone calls between J.K.'s mother and the Mercer County Sheriff's Office on November 5, 2012
 - Audio recording of Christopher Summers' threatening telephone call to J.K.
 - Audio recording of H.F. interview
 - Audio recording of J.K. interview
 - Audio recording of L.N. interview
 - Audio recording of L.S. interview
 - Audio recording of V.M. interview
 - Audio recording of W.B. interview
 - Audio recording of Laurie Summers voicemail left with J.K.
 - Audio recording of search warrant/Miranda warning with Christopher Summers
- Any and all notes made by the prosecutor or member of his staff or the sheriff's detectives during interviews with the accuser or any potential witnesses in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - "Handwritten notes made by Prosecutor Fox and his staff."
- Copies of letters sent to potential defense witnesses by the prosecutor or any member of his staff in the case of State of OH vs Christopher A. Summers 12- CRM-129 and 13-CRM-030.
 - Letter from Prosecutor to J.K. dated June 4, 2013
 - Letter from Prosecutor to J.K.'s mother dated June 4, 2013 Letter from Prosecutor to M.B. dated June 4, 2013
 - Letter from Prosecutor to W.B. dated June 4, 2013
 - Letter from Prosecutor to M.V. dated June 4, 2013
 - Letter from Prosecutor to B.S. dated June 4, 2013
 - Letter from Prosecutor to D.B. dated June 4, 2013
 - Letter from Prosecutor to L.P. dated June 4, 2013
 - Letter from Prosecutor to C.P. dated June 4, 2013
 - Letter from Prosecutor to D.W. dated June 4, 2013
 - Letter from Prosecutor to M.W. dated June 4, 2013
- Any statements (written or recorded) made by the accuser J.K. to any member of the Sheriff's Dept or the Prosecutor's Office.

- J.K. written statement provided to Sheriff's Office (5 pages)
- J.K. email statement to Sheriff's Office dated January 4, 2013 (2 pages)
- J.K. written statement provided to Sheriff's Office dated April 26, 2013 (1 page)
- Any correspondence between members of the Mercer County Sheriff's Department to the Mercer County Prosecutor or member of his staff in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - "Numerous emails."

Respondents' Privilege Brief, pp. 5; 8; 9; 10; 15; 18; Respondents' Document Identification List pp. 2-4, 6.

Respondents' characterization of work product is unworkably broad and contrary to this Court's clear precedent that "the specific-investigatory-work-product exception of R.C. 149.43(A)(2)(c) does not extend beyond the completion of the trial for which the information was gathered." *State ex rel. Caster v. City of Columbus*, 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 47. As mentioned, Respondents fail to address *Caster* in their brief *at all*.

Here, almost all of the material at issue is already "open to opposing counsel on mere demand" through Criminal Rule 16. Crim. R. 16(B) requires that "the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items: [...] Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal [...] and] All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents." Witness statements and police reports are not exempt from discovery under Crim. R. 16 simply because the prosecutor's office "utilized" those statements in preparation for trial. Nor does Crim. R. 16 exclude law enforcement records simply because sheriff's deputies might have created them at the prompting of prosecutors. To the contrary, Crim. R. 16 attempts to enforce an "open file" discovery system. Since Crim. R. 16 was amended in 2010, prosecuting attorneys and law enforcement have

continued to record witness interviews with the expectation and understanding that these interviews must be disclosed to opposing counsel.

Material that is subject to disclosure under Crim. R. 16 cannot later be withheld as “trial preparation material” or “work product.” *State ex rel. Carpenter v. Tubbs Jones*, 1995-Ohio- 313, 72 Ohio St. 3d 579, 580, 651 N.E.2d 993, 994. As far back as 1995, this Court specifically held that material subject to discovery under Crim.R.16 cannot later be withheld as “trial preparation materials” in response to a later public records request. Respondents have already claimed Mr. Summers received materials disclosed to Christopher Summers during discovery. See Respondents’ Privilege Brief, pp. 3, 8 (“[The video interviews] were provided by Darke County Prosecutor in response to a public records request made by an individual known to Relator...;” “Relator is presumably in possession of the requested audio recordings because Darke County produced them in response to the third party’s request.”); Exhibit A (noting that the Darke County Prosecutor had provided Joyce White a copy of “discovery provided to defense counsel” on 6 discs).

Documents discoverable under Crim. R. 16(B) or other records, such as routine office and indictment reports, fall outside the definition of “trial preparation record” and are always subject to disclosure upon request by the criminal defendant. See *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 435, 639 N.E.2d 83, 94. These non-exempt records do not become “trial preparation records” simply because they are contained within a prosecutor's file. Within that file, there can be both “trial preparation records,” which are exempt, and other records, which must be disclosed.

If a criminal defendant can obtain a record under Crim. R. 16(B), that record is subject to immediate release to that defendant regardless of whether it is contained within a prosecutor's file and combined with "trial preparation records."

Furthermore, this Court has repeatedly refused to adopt a broad definition of "trial preparation materials" that might undermine public records law. *State ex rel. Coleman v. City of Cincinnati*, 57 Ohio St. 3d 83, 84, 566 N.E.2d 151, 153 (1991). Instead, the Court has "emphasized the strictly limited nature of the trial preparation exemption." *State ex rel. Zuern v. Leis*, 56 Ohio St. 3d 20, 21, 564 N.E.2d 81, 83 (1990). The public records act was intended in large part to foster release of law enforcement records, and these records should be released "with only a few narrow exceptions" provided by law. *Coleman*, supra. This Court has, on multiple occasions, rejected Respondents' contention that all the documents in the prosecutor's file are subject to exemption, holding that "not every record contained within a prosecutor's file is an exempt 'trial preparation record.'" *See State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St. 3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 15. Respondents do not cite any specific case law suggesting that law enforcement records become "trial preparation materials" simply because they end up in the prosecutors file, or because the prosecutor finds them useful in preparing his or her case.

Because police investigate cases not only to prosecute offenders but to promote public safety and generally investigate crimes, the documents they generate in the course of investigations cannot be classified as being "specifically compiled" for trial. *Zuern* at 21-23. As the files held by Respondent Grey and his officers were generated, in part, to protect the public safety, they are not subject to the trial preparation records exception. Similarly, recordings made for public safety purposes are not subject to exemption. *Cincinnati Enquirer* at ¶ 16.

Respondents cite *Steckman* for the proposition that “[i]t is difficult to conceive of anything in a prosecutor’s file, in a pending criminal matter, that would not be either material compiled in anticipation of a specific criminal proceeding or the personal trial preparation of the prosecutor.” But in *Steckman*, the Court was generally concerned with the tension between Crim. R. 16 and the Public Records Act. The Court held that criminal defendants should not be able to use the broad provisions of public records act to sidestep the provisions of Crim. R. 16, and therefore the Court recognized a broad “work product” exemption for materials that were “not subject to discovery pursuant to Crim.R. 16(B).”

But since Ohio adopted “open file” criminal discovery rules, a broad “work product” exemption is no longer justified. *State ex rel. Caster v. Columbus*, 2016-Ohio-8394, 151 Ohio St. 3d 425, 436, 89 N.E.3d 598, ¶ 47. In *Caster*, the Court overruled *Steckman* on the grounds that changes to criminal discovery had made the Court’s prior concerns obsolete. *Id.* at ¶41 (“[t]his court's prior jurisprudence in this area was based on expedience—the idea that a defendant should not be able to have more information on retrial than he or she could have gained through Crim.R. 16 discovery for the original trial. [...] The reworking of Crim.R. 16 has allayed those concerns.”). As such, this Court specifically held that police could not withhold “investigatory work product” beyond the conclusion of the criminal case at issue.

It would be nonsensical to allow broad postconviction access to law enforcement records under the investigatory work product exemption, while preventing access to the exact same documents and recordings as “trial preparation materials.” As the Court held in *Coleman*: The “trial preparation record” exception must be interpreted in *pari materia* with the other statutory exceptions, notably the exception for confidential law enforcement investigatory records, R.C. 149.43(A)(2). The General Assembly clearly evidenced an intention to require police investigatory

records to be released with only a few narrow exceptions. “This court has acknowledged that R.C. 149.43 was amended to subject law enforcement investigatory records to disclosure under the public records law. [...] Clearly, the wording of the statute indicates that the General Assembly sought to guard against these exceptions [trial preparation and work product] swallowing up the rule which makes public records available.” *State, ex rel. Beacon Journal Publishing Co., v. Univ. of Akron*, 64 Ohio St.2d 392, 398, 18 O.O.3d at 538, 415 N.E.2d (internal citations and quotations omitted).

Written correspondence is subject to the Public Records Act. *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 20. In order to qualify as attorney-client communications, the sheriff must be seeking the prosecutor's legal advice. *See State ex rel. Leslie v. Ohio Haus. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 24. Without showing that the Sheriff's Office communicated with the Prosecutor on a legal question as its attorney, the privilege does not apply after the trial is over. *See Caster*, ¶ 47. Moreover, Respondents have simply stated they turned over “numerous emails,” without any dates or subjects, making it impossible for Mr. Summers to argue how the privilege would specifically apply to each email.

Respondents' reliance on *Ogle v. Hocking County Sheriff*, 2012-Ohio-1768 (4th Dist. 2012) is misplaced, as it was decided before *Caster*, and involved an inmate requesting records before the conclusion of his criminal case. ¶¶ 2-3, 16. The court also noted that the requestor “received (1) the Investigator's Notes, (2) Thompson's Statement, and (3) the Incident Report through the normal discovery process,” implying that these notes would indeed be subject to disclosure under the Public Records Act today. *Id.* at ¶ 17.

Contrary to Respondents' assertions, notes and mental impressions *may* be public records. While Respondents are correct that, generally, personal notes taken for the convenience of a public employee are not a public record, this does not apply if the notes are maintained by the public official for future reference, or if they contain exonerating information not in a public report. *See State ex rel. Pietrangelo v. City of Avon Lake*, 149 Ohio St. 3d 273, 2016-Ohio-5725, 74 N.E.3d 419, ¶¶ 19-20. Therefore, Respondents have a duty to produce notes that have been retained by their office for future review, or that may contain exonerating information not in the public report, and the Court should order Respondents to produce any such notes.

Respondents have not asserted why the notes produced should not be disclosed due to one of these exceptions, despite their burden to prove they should not be disclosed. Respondents' attempt to ignore controlling caselaw, and Mr. Summers' lack of access to the in-camera documents, leaves Mr. Summers without recourse to argue the notes and mental impressions should be disclosed under one of the two exceptions under *Pietrangelo*. Because Respondents have not met their legal burden, the Court should order them to disclose all notes and mental impressions.

Allowing prosecutors to re-classify law enforcement records as "trial preparation materials," and thereby undermine the Court's ruling in *Caster*, would be a drastic and unnecessary departure from this Court's precedent. The Court should not allow Respondents to abuse this very limited exception.

V. The "Confidential Law Enforcement Technique" exception does not apply to "building trust and rapport in" interviews with JK, who publicly testified

Respondents assert the "Confidential Law Enforcement Technique" exception to:

- Any and all video recordings of interviews with the accuser and any other witnesses that were interviewed in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Interview with J.K. on November 5, 2012
 - Interview with J.K. on November 6, 2012
 - Interview with J.K. on November 7, 2012
 - Interview with J.K. on November 9, 2012
- Any and all audio recording of interviews or phone calls made with an accuser or potential witness in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Audio recording of J.K. interview

Respondents' Privilege Brief, pp. 4, 8; Respondents' Document Identification List pp. 2-3.

Respondents argue that the above contain “confidential law enforcement investigatory records” (“CLEIRs”), and specifically, confidential investigatory techniques. Yet in the same brief, Respondents argue that Mr. Summers was provided these documents when the Darke County Prosecutor’s Office turned over the Government’s discovery responses in Christopher Summers’ criminal case. *See* Respondents’ Privilege Brief, p. 3 (“Relator posted snippets of the video recordings of J.K.’s interviews on the “Justice for Chris” Facebook page [... and] The video recordings of J.K.’s interviews, as well as the remainder of the video recordings, were provided by the Darke County Prosecutor in response to a public records request made by an individual known to Relator and his incarcerated son.” P. 3); Darke County Prosecutor Response to Joyce White, Exhibit A. However, Crim. R. 16(D)(3) provides that prosecuting attorneys can withhold confidential investigatory techniques from criminal discovery disclosure if the prosecutor provides

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

Clearly, the Darke County Prosecutor's Office did not believe that these interviews contained confidential investigatory techniques when it turned them over in criminal discovery and then allegedly released the audio and video interviews to Joyce White, as Respondents contradictorily claim.

Respondents appear to conflate two distinct issues – whether “building of trust and rapport” is a confidential investigatory technique, and whether the police can refuse to produce public records because they portray witnesses and complainants, which could lead to a chilling effect. Respondents' Privilege Brief, p. 4. Simply put, building “trust and rapport” with victims is not a confidential technique if it is easily found through an online Google search. *See Relator's Merit Brief*, p. 16. Respondents do not show how building trust and rapport can be reconciled with Crim. R. 16(D)'s factors in determining if any confidential investigatory techniques prohibit discovery disclosures.

With regard to the confidentiality of witnesses, JK already testified publicly. Moreover, the Ohio legislature has already enacted statutes to protect undisclosed witnesses and complainants, but these laws are not applicable in this case. *See O.R.C. 149.43(A)*; *see generally* Respondents' Merit Brief, p. 39, fn. 13. Nor have Respondents offered to redact the documents, as they are required to do. *See State ex rel. Nat'l Broad. Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 85, 526 N.E.2d 786 (1988) (“If the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.”). In summary, Respondents cannot assert that interviews of J.K. which were provided in discovery and a previous public records disclosure contain CLEIRs; “Building trust and rapport” is not a confidential law enforcement technique; JK's identity was disclosed after she testified; and Respondents have made no good faith effort to redact the interviews.

VI. Attorney-Client Privilege does not apply to communications not seeking legal advice

Respondents assert attorney-client privilege for the following documents:

- Any correspondence between members of the Mercer County Sheriff's Department to the Mercer County Prosecutor or member of his staff in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - "Numerous emails and letters have been provided."

Respondents' Privilege Brief, p. 17; Respondents' Document Identification List p. 4

As mentioned above, Written correspondence is subject to the Public Records Act. *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 20. In order to qualify as attorney-client communications, the sheriff must be seeking the prosecutor's legal advice. *See State ex rel. Leslie v. Ohio Haus. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 24; *Hinners v. City of Huron*, Ct. of Cl. No. 2018-00549PQ, 2018-Ohio-3652, ¶ 7 ("A communication is not subject to the privilege merely because it was sent to or from an agency's legal counsel [...] The test is [...] whether the investigation communication was "incident to or related to any legal advice" that the attorney would give in the matter."). Without showing that the Sheriff's Office communicated with the Prosecutor on a legal question as its attorney, the privilege does not apply after the trial is over. *See Caster*, ¶ 47.

Despite their burden to prove the applicability of the privilege, Respondents have not asserted whether any of the correspondence seek legal advice, nor have they provided correspondence subject matter or dates. Without any assertion how this privilege applies, they have not met their burden as to why these "numerous emails and letters" should not be disclosed.

VII. JK's right to privacy does not prevent disclosure of public records

Respondents assert JK's purported "right to privacy" for the following documents:

- Any and all video recordings of interviews with the accuser and any other witnesses that were interviewed in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Interview with J.K. on November 5, 2012
 - Interview with J.K. on November 6, 2012
 - Interview with J.K. on November 7, 2012
 - Interview with J.K. on November 9, 2012
- Any and all audio recording of interviews or phone calls made with an accuser or potential witness in the case of State of OH vs Christopher A. Summers 12-CRM-129 and 13-CRM-030.
 - Audio recording of J.K. interview
- Any statements (written or recorded) made by the accuser J.K. to any member of the Sheriff's Dept or the Prosecutor's Office.
 - J.K. written statement provided to Sheriff's Office (5 pages)
 - J.K. email statement to Sheriff's Office dated January 4, 2013 (2 pages)
 - J.K. written statement provided to Sheriff's Office dated April 26, 2013 (1 page)

Respondents' Privilege Brief, pp. 3-4, 8, 15; Respondents' Document Identification List pp. 2-3.

Respondents again ask the Court to create an artificial, judicially created rule that would allow *government officials* to refuse to release public records based on a *complainant's* undefined "right to privacy." The Ohio legislature has already provided statutory protections within the Public Records Act to protect J.K.'s right to privacy, which do not apply here. Moreover, Respondents had a legal requirement to redact the public records, but instead chose to simply use a "right to privacy" as an excuse for a blanket refusal. *See* O.R.C. § 149.43(B)(1); *State ex rel. Nat'l Broad. Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 85, 526 N.E.2d 786 (1988).

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) involved a 42 U.S.C. § 1983 retaliation claim where a sheriff released intimate and undisclosed details of an unprosecuted rape in retaliation for the complainant speaking with media about the failure to prosecute, and there "was no nexus between the details of the rape released by [the sheriff] and the Blochs' criticism of the investigation." *Id.* at 673. *Bloch's* only mention of the Public Records Act is a note that the sheriff

refused to produce the victim statement to the victim pursuant to the Public Records Act, so it is hard to imagine how it could be interpreted as specifically authorizing public officials to withhold public records. 156 F.3d at 676. The Sixth Circuit noted that "the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private" and that "the details of the rape primarily implicate a private interest *until such time as the public interest in prosecution predominates.*" *Id.* at 684, 686 (emphasis added). The only privacy right endorsed by the *Bloch* court is a right to prevent "government officials from gratuitously and unnecessarily releasing the intimate details of the rape *where no penological [sic] purpose is being served.*" *Id.* at 686.

J.K. publicly testified in the prosecution against Christopher Summers, waiving any alleged privacy right she claims under *Bloch*. This Court has espoused the penological purposes of public records requests in allowing public oversight over criminal prosecutions, including exonerating wrongfully convicted prisoners. *See Caster*, 151 Ohio St. 3d at 428, 436-37. *Bloch* does not create any privacy right that would bar disclosure of public records that would not otherwise be prohibited from disclosure under the Public Records Act. Public scrutiny of the credibility of witnesses, the nature of prosecutorial interviews, and potential misconduct by law enforcement and prosecutors related to the prosecution of crimes are legitimate "penological purpose[s]" to be served by the release of public records.

Nor should "Marsy's Law" affect this Court's analysis. Nothing in Marsy's Law relates to public records, or O.R.C. § 149.43. The Ohio legislature has already protected her privacy rights under the exceptions listed in O.R.C. § 149.43,¹ and has updated the Public Records Act since the passage of Marsy's Law, yet has not added any exceptions that would allow J.K. to block the

¹ See O.R.C. § 149.43(A)(1)(dd), (ee), (ii)(i and ii), (mm); O.R.C. § 149.43(A)(2).

release of the requested public records. *See* Brief of Amicus Curiae Ohio Prosecuting Attorneys Association, pp. 5, 7; *see also* Respondents’ Privilege Brief pp. 6-7.

Respondents undoubtedly want to silence Mr. Summers’ First Amendment right to speak out about possible injustices in their county under the auspices that he might commit a crime against J.K. on a Facebook page. But, as this Court noted yesterday in a First Amendment context,

Even if the trial court here determined [... the speaker] violated R.C. 2903.211(A), there has been no valid judicial determination that any *future* expression [the speaker] might make *to others* through posted messages would necessarily be integral to the criminal conduct of menacing by stalking in violation of R.C. 2903.211(A). Even if *past* speech that an offender made *to* a person that the offender knew would cause that person to believe that the offender would cause physical harm to that person or would cause mental distress to that person could be considered speech that was integral to the criminal conduct of menacing by stalking, we do not believe that this principle may be applied categorically to *future* speech – that is, by its nature uncertain and unknowable – directed *to others*.

Bey et al. v. Rasaweher, Slip Opinion No. 2020-Ohio-3301 (Decided June 16, 2020), ¶ 46 (emphasis in originals). Respondents cannot simply guess that Mr. Summers will commit a crime with the public records, and J.K. has other legal remedies to address alleged torts and crimes committed with the public records following their release. *See id.* at ¶ 56 (“appellees are not without civil tort remedies to redress any cognizable injuries they claim to have suffered as a result of [the speaker’s] statements about them [...]”).

A broad and vague assertion of a “right to privacy” to block release of public records that exceeds the defined statutory protections would, if accepted, result in a giant loophole for the government to withhold documents vital to the public’s oversight of the criminal justice system, while providing an unworkable judicial rule that would take decades for courts to tailor. This is precisely what this Court sought to avoid in *Caster*. During these times of increasing public scrutiny over an increasingly controversial criminal justice system, it is vital that the public’s right

to public records remain unfringed, especially by a judicially created rule that usurps the legislature's power to define what is a "public record."

VIII. Conclusion

For the foregoing reasons, Respondents have not asserted any valid exception or privilege for producing the public records Mr. Summers requested, and he is entitled to all the documents produced in camera, as well as an award of attorney fees.

Respectfully submitted,

/s/ H. Louis Sirkin

H. Louis Sirkin (0024573)

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Counsel for Relator, Charles A. Summers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. mail and electronic mail this 17th day of June, 2020 upon the following:

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H. Louis Sirkin (0024573)
Counsel for Relator, Charles A. Summers

RE: Public Records Request



Page 1 of 1

RE: Public Records Request

X DELETE ← REPLY ← REPLY ALL → FORWARD ...



Kelly Ormsby
Fri 10/19/2018 12:10 PM

mark as unread

To: Joyce White <jwhite89@woh.rr.com>;

Dear Ms. White:

I acknowledge receipt of your public records request concerning Christopher Summers this morning. I have one case file on him, being Case No. 13-CR-10 in the Darke County Common Pleas Court. In that case, he pled guilty to one count of sexual battery and was sentenced to serve one year in prison, consecutive to a much longer sentence from Mercer County for (I believe) eight counts of sexual battery. Most of my file consists of reports sent to the Greenville Police Department by the Mercer County Sheriff's Office. If you are also seeking information from Mercer County, there will be a lot of duplication. I mention this because we do charge for copies of records, so I don't know if you want to pay twice for the same documents or recordings. We are allowed to charge a "reasonable" fee for copies and postage, if you want everything mailed to you. If you prefer to pick up the copies at my office, there would obviously be no postage costs.

Please let me know if you do desire copies of everything, including records received from the Mercer County authorities. I will then calculate and provide you the cost. When we receive payment from you, we will copy and provide the records to you.

Sincerely,
R. Kelly Ormsby, III
Darke County Prosecuting Attorney

From: Joyce White <jwhite89@woh.rr.com>
Sent: Friday, October 19, 2018 10:53 AM
To: Kelly Ormsby
Subject: Public Records Request

Please let this serve as my official Public Records Request for the following:

1. Any/all documents, reports, records, all audio and video, specifically everything you have on Christopher Summers, DOB 01/27/80, SS# 277-90-1696.

*** Please confirm receipt of this request.

If you have any questions please feel free to contact me at 937.216.8950.

<https://192.9.200.5/owa/>

1/15/2019

Summary of Documents Provided	Date
Indictment (1p)	1-25-13
Request for Summons (1p)	1-25-13
Entry of Appearance by Defense Counsel (2pp)	2-4-13
Defendant's Demand for Discovery (2pp)	2-4-13
Entry (Arrestment) (2pp)	2-11-13
Bond Form (1p)	2-11-13
Discovery provided to defense counsel, including 6 discs (98pp)	3-13-13
Assignment Notice (1p)	3-20-13
Entry (Granting Continuance of Pretrial Conference) (1p)	4-9-13
Assignment Notice (1p)	6-13-13
Assignment Notice (1p)	7-16-13
Notice of Hearing (1p)	8-12-13
Entry (Defendant's Guilty Plea) (2pp)	8-26-13
Transcript of Plea Hearing (22pp)	8-26-13
Guilty Plea Form (3pp)	8-26-13
Defendant's Motion to Continue Sentencing Hearing (2pp)	9-16-13
Entry (Continuing Sentencing Hearing) (2pp)	7-7-13
Request for Warrant of Removal for Sentencing (1p)	10-7-13
Entry (Defendant's Sentencing Hearing) (3pp)	10-11-13
Transcript of Sentencing Hearing (31pp)	10-11-13
Entry (Defendant's Duties to Register as a Sex Offender) (2pp)	10-11-13
Defendant's Notice of Appeal (1p)	11-4-13
Decision and Entry (3pp)	12-30-13
Notification that Record for Appeal is Complete (2pp)	1-7-14
Defendant's Appellate Brief (13pp)	1-27-14
Magistrate's Order (1p)	1-31-14
Order to File Brief by 3-24-14 (2pp)	3-10-14
State's Appellate Brief (26pp)	3-24-14
Defendant's Reply Brief (6pp)	4-2-14
Defendant's Amended Motion to Expand Record (2pp)	4-2-14
Magistrate's Order (2pp)	4-30-14
State's Waiver of Appearance for Oral Argument (2pp)	5-21-14
Opinion of Court of Appeals (9pp)	6-6-14
Final Entry Court of Appeals (2pp)	6-10-14
Supreme Court Declines to Accept Jurisdiction of Appeal (1p)	11-19-14
Materials on Defendant's Petition for a Writ of Habeas Corpus (16pp)	2-24-16

Sirkin, H. Louis

From: SCO Case Activity Notification <do-not-reply@sc.ohio.gov>
Sent: Wednesday, June 17, 2020 2:10 PM
To: Sirkin, H. Louis
Subject: Activity in Case 2018-0959: Charles A. Summers v. Matthew Fox, Prosecuting Att

Activity: Docket Item filed
Detail: Response to respondents privilege assertion
Case Number: 2018-0959
Caption: Charles A. Summers v. Matthew Fox, Prosecuting Attorney, Mercer County, Ohio, and Jeff Grey, Sheriff, Mercer County, Ohio
Public Docket: <http://sc.ohio.gov/Clerk/ecms/#/caseinfo/2018/0959>
Date Filed: 06/17/2020

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