ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. PLUNDERBUND MEDIA, LLC	)	CASE NO. 2013-596
Relator,	)	Original Action in Mandamus
v.	)	
THOMAS P. CHARLES, DIRECTOR OHIO DEPT. OF PUBLIC SAFETY	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION ON BEHALF OF RELATOR – STATE OF OHIO ex rel. PLUNDERBUND MEDIA, LLC

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Ohio Foundation is the Ohio affiliate of the national American Civil Liberties Union, one of the oldest and largest groups in the nation dedicated to the preservation and defense of the Bill of Rights. With some five hundred thousand members in all fifty states and with almost thirty thousand members and supporters in Ohio, this Amicus appears routinely in state and federal courts to defend the constitutional rights of individuals and to hold the government accountable to the public through Ohio's Sunshine Laws and Public Records Act. Issues relating to freedom of information and government transparency are among the core issues on which Amicus represents its members and constituencies.

Amicus Curiae has repeatedly litigated both as amicus and direct counsel on issues recognizing and respecting the need for open government and the public's right to know what activities the government is engaging in on its behalf. Such issues are included within its mandate and mission, which is to advance, preserve, and defend the Bill of Rights, and the freedoms set forth therein, without bias or political partisanship. The Ohio Constitution's guarantee of an open government is directly implicated by the instant case involving Plunderbund Media, LLC's ("Plunderbund") request for records from the Ohio Department of Public Safety ("ODPS"), and thus, touches directly upon Amicus' mission.

STATEMENT OF THE ISSUES PRESENTED

Whether records that contain information regarding investigations of threats made against a public official should be considered "security records" pursuant to R.C.

149.433, and therefore, be deemed not to be public records subject to mandatory disclosure under Ohio's Public Records Act.

Whether the right to privacy guaranteed under the Fourteenth Amendment to the U.S. Constitution prevents public disclosure of information regarding previous investigations of threats to government officials, such that, even with redaction of personal information, these records are exempt from Ohio's Public Records Act.

STATEMENT OF THE FACTS OF THE CASE

Amicus adopts the statement of facts as set forth in the Relator's Complaint for a Writ of Mandamus.

LAW AND ARGUMENT

I. The Public Records Act Should Be Construed Liberally In Favor of Broad Public Access and Any Doubt Should Be Resolved In Favor of Disclosure of Public Records

The policy of transparency in government and respecting the public's right to know is a long held tradition in our nation that dates back to our founding fathers. Thomas Jefferson, a proponent of public access to governmental records, once wrote: "The way to prevent [errors of] the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right * * *." *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 15 (quoting Letter from Thomas Jefferson to Col. Edward Carrington (January 16, 1787), *in* 11 *The Papers of Thomas Jefferson*, 49

(Boyd Ed.1955)). James Madison clearly agreed, as evidenced by his written opinion that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both * * *." *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 419, 667 N.E.2d 1223 (1996) (quoting Letter from James Madison to W.T. Barry (August 4, 1822), *in The Complete Madison: His Basic Writings*, 337 (Padover Ed.1988)).

These principles have since been recognized by federal law and the United States Supreme Court. *See U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 772, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), (noting that "the basic purpose of the Freedom of Information Act is 'to open agency action to the light of public scrutiny,'" quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)).

In Ohio, that tradition is equally strong. In fact, this Court recently endorsed the views of Jefferson and Madison, proclaiming that "[a] fundamental premise of American democratic theory is that government exists to serve the people. * * * [I]t is essential that the public be informed and therefore able to scrutinize the government's work and decisions." *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, at ¶ 15. Moreover, this Court has noted that allowing the public broad access to public records serves several important functions, such as "ensuring [government] accountability, * * * foster[ing] understanding of the rationale underlying state decisions, and promot[ing] cherished rights such as freedom of speech and press." *Id.* at ¶ 16.

"The rule in Ohio is that public records are the people's records and that officials in whose custody they happen to be are merely trustees for the people * * *." *Dayton*

Newspapers, Inc. v. Dayton, 45 Ohio St.2d 107, 109, 341 N.E.2d 576 (1976), quoting *State ex rel. Peterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960). The Ohio Constitution fully embraces a policy of open government, proclaiming that, "all political power is inherent in the people. Government is instituted for their equal protection and benefit * * * and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly." Ohio Constitution, Article I, Section 2.

In the Ohio Constitution, each of the first three Articles conveys a general purpose of public knowledge and openness for the three branches of government in regard to their activities. Article I conveys that the purpose of the government is to serve the public. Ohio Constitution, Article I. Article II allows for open meetings and open records of all laws passed, and Article III calls for executive information to be presented to the public. Ohio Constitution, Article II-III. Ohio's Public Records Act, codified at R.C. 149.43, embodies this purpose.

This Court has elaborated on R.C. 149.43's purpose, explaining that "the purpose of Ohio's Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997), quoting *WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355, 673 N.E.2d 1360 (1997). In particular,

> public scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable. If the public can understand the rationale behind its government's decision,

it can challenge or criticize those decisions as it finds necessary; the entire process thus allows for greater integrity and prevents important decisions from being made behind closed doors.

White, 76 Ohio St.3d at 420, 667 N.E.2d 1223. Thus, "[statutes that allow public access to government records], including those constituting R.C. Chapter 149, reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor." *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, at ¶ 17.

Unfortunately, the government entities of Ohio have not always met the standards set by the constitution and legislature when responding to requests for access to public information.[2] In a national study released by non-profit watchdog Better Government Association, that ranks government transparency in all fifty states, Ohio came in 40th overall.[3] One of the main problems with transparency in Ohio cited by the study was the lack of an appeals process for denials of public records requests.[4] Therefore, it becomes even more important that our courts act as the guardians of this important right.

II. ODPS Must Provide the Records Plunderbund Requested Because ODPS Cannot Meet Its Burden of Showing the Records Fall Within an Enumerated Exception

Over the years, the Ohio legislature and courts have refined the scope of public access to the records kept by the government; however, the underlying basic principles of transparency remain. Therefore, in assessing a public records claim, this Court has

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[2] Randy Ludlow, *'Integrity Index': Ohio ranks low in transparency*, Columbus Dispatch, July 17, 2013, http://www.dispatch.com/content/blogs/your-right-to-know/2013/07/bga.html. See also BGA-Alper Services Integrity Index, (2013). http://www.bettergov.org/action_policy/bgaalper_services_integrity_index_2013.aspx

[3] *Id.*

[4] *Id.*

numerous times held that "we construe the Public Records Act liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 11, quoting *Rocker v. Guernsey Cty. Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6. *See also State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 958, ¶ 29, *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996). Further,

> [e]xceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. *A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.*

(Emphasis added.) *Craig* at ¶.12, quoting *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 866 N.E.2d 206, ¶ 10. *See also, State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 41. There are several reasons why ODPS has failed to meet its burden in this case.

First, ODPS has not shown that the R.C. 149.433 "security records" exception is even applicable to the records requested by Plunderbund. The requested records are presumed by Ohio law to be subject to disclosure under the Public Records Act. Simply labeling them "security records" does not automatically transmute them so that they fall within the R.C. 149.433 exception to public records. Rather, ODPS has the burden of providing evidence to establish that these records contain information applicable to the

purpose of R.C. 149.433, as identified by the legislature and enumerated within the statute.

Additionally, ODPS has not attempted to refute Plunderbund's valid interpretation of the types of records R.C. 149.433(A) encompasses. Plunderbund argues that R.C. 149.433(A) "does not even refer to the government," but rather, to "records of security measures of private companies that may be available to the government as part of a strategic plan, but are not intended to become public."[5] They further point out that, "R.C. 149.433 refers only to strategic planning documents in public and private hands * * *." [6] Nowhere in its arguments does ODPS dispute this interpretation of the statute.[7] Instead, ODPS argues that based on the Black's Law Dictionary definitions of "attack," "interfere," and "sabotage," R.C. 149.433, (which was drafted to protect computer and electrical grids as part of the General Assembly's Homeland Security planning[8]), should also apply to the highway patrols investigation of threats made to the Governor's safety.[9] This interpretation seems to stretch the dictionary definitions to their limits and fails to take into account the underlying purpose of R.C. 149.433, which is to protect government buildings and "offices," not "officers."[10]

Moreover, ODPS has clearly adopted an overbroad view of the types of records R.C. 149.433 could possibly exempt from R.C. 149.43. ODPS argues that under R.C. 149.433, "*any record* that contains security information" is exempt from the requirement under the Public Records Act to be produced upon request for public review, even with

[5] Memorandum Contra Motion for Judgment on the Pleadings, Exhibit A, p.7.
[6] Exhibit A, p.7.
[7] Motion for Judgment on the Pleadings, Exhibit B.
[8] Exhibit A, p. 6. *See also*, Ohio Homeland Security Plan, p.7, www.homelandsecurity.ohio.gov.
[9] Exhibit B, pgs. 5-6.
[10] Exhibit A, p.7. *See also*, R.C. 149.433(B).

redactions to protect against concerns of releasing confidential information.[11] As Plunderbund points out in its response, this interpretation requires this Court to adopt the position that R.C. 149.433 now supersedes the Public Records Act, even though the Ohio General Assembly did not repeal R.C. 149.43(A)(2).[12]

Finally, even if R.C. 149.433 is generally applicable to the subject matter of this case, ODPS has not come close to meeting its burden of proving that the particular records at issue fall within the R.C. 149.433 "security records" exception. Mere speculation that knowledge of the "number of threats made against the Governor still potentially exposes security limitations and vulnerabilities"[13] is not enough to override the underlying national and state policy of government transparency that is at the heart of the Public Records Act.

Absent clear statutory language or guidance from the legislature, the presumption is in favor of broad disclosure of public records that interprets investigations of threats made against a public official to be records that fall within the purview of the Public Records Act. If ODPS wishes to argue that the records requested by Plunderbund are exempt under the Public Records Act, then they must provide evidence as to which provisions under R.C. 149.43(A)(2) these records fall. Absent an ability to do so, these documents are public records that should be produced upon request.

III. The Fourteenth Amendment to the United States Constitution Guarantees an Individual's Right to Privacy, But It Does Not Prevent Disclosure of Records Related to Investigations of Threats Made to Public Figures Simply Because It Relates to Safety Concerns

[11] (Emphasis added.) Exhibit B, p.7.
[12] Exhibit A, p.5.
[13] Exhibit B, p.9.

The United States Supreme Court has clearly recognized an individual's right to privacy guaranteed by the Fourteenth Amendment to the United States Constitution. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (recognizing a married couple's right to privacy with respect to the use of contraception). *See also Lawrence v. Texas*, 539 U.S. 558, 578-79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (finding unconstitutional a Texas statute prohibiting sodomy and suggesting that the law violated the Fourteenth Amendment because it implicated the most fundamental of privacy rights). This right has been interpreted to apply, not only to individual autonomy in personal decisions, such as marriage and procreation, but also to "the individual interest in avoiding disclosure of personal matters." *Nixon v. Adminstratior of Gen. Servs.*, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). *See also Whalen v. Roe*, 429 U.S. 589, 591, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (analyzing a New York law that required physicians to compile prescription records that contained detailed patient information in a centralized state-run database).

However, even though the U.S. Supreme Court recognized a Fourteenth Amendment right to privacy in both of these cases, it also held in both cases that the public interest in access to information outweighed the individual privacy interests at stake. *See, Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir.1998) (analyzing the application of the *Nixon* and *Whalen* decisions to the liability of the government for disclosing personal information from the personnel records of undercover police officers).

In *Kallstrom*, the U.S. Court of Appeals for the Sixth Circuit determined that this balancing test between an individual's privacy and the public's interest in access to

information will only apply where the privacy interest is of a "constitutional dimension." *Id.* Finding that the officers had a substantive due process right to "personal security and bodily integrity," the court weighed that right against the "compelling state interest" of allowing public access to agency records. *Id.* at 1062, 1064-065. In that particular case, predicated on the "state-created-danger theory," the court found that the affirmative acts of the agency created or increased the risk that the officers would be exposed to private acts of violence. *Id.* at 1067. Therefore, because the disclosure did not "narrowly [serve] the state's interest in ensuring accountable governance," it violated the officer's due process rights. *Id.* at 1065.

In reviewing this decision a few years later, the Sixth Circuit emphasized that the holding in *Kallstrom* was not intended to create a broad right to protection of all personal information. Rather, "*Kallstro*m created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous * * *." *Barber v. Overton*, 496 F.3d 449, 456 (6th Cir.2007) (holding that release of correctional officers social security numbers and birth dates did not violate the officer's due process rights).

In fact, in the state's own manual on the Ohio Sunshine Laws authored by Attorney General Mike DeWine, the manual notes that:

> Neither the Ohio Supreme Court nor the Sixth Circuit has applied the constitutional right to privacy broadly. Public offices and individuals should be aware of this potential protection, but know that it is limited to circumstances involving fundamental rights, and that most personal information is not protected.

Ohio Sunshine Laws, An Open Government Resource Manual 2013, Ch. 3, p.34.

This Court has also made it clear that:

> in enumerating very narrow, specific exceptions to the to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.

State ex rel. James v. Ohio State Univ., 70 Ohio St.3d 168, 172, 637 N.E.2d 911 (1994). Therefore, absent application to a specific statutory exception, public records are presumed to be subject to the Public Records Act, even if they may contain some personal information.

When analyzing cases where records custodians have claimed an exception to the Public Records Act, as noted earlier in this brief, this Court has emphasized that it "strictly construe[s] exceptions against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." *State ex rel. Beacon Journal Publishing Co.*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, at ¶ 25,

This principle has held true, even in situations where the records contained information that was arguably related to criminal investigations or was confidential in nature. For example, in *Rocker v. Guersney*, this Court held that records related to a criminal investigation of a sexual assault case were subject to disclosure under the Public Records Act because "they [were] not inextricably intertwined with the suspect's protected identity." *State ex rel. Rocker v. Guersney*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 14. This Court found that most of those records, once the

sheriff's office redacted personal identifiers, were, in fact, still subject to the Public Records Act. *Id.* at 330.

Similarly, even when this Court has found that there is a constitutional right to privacy related to a "fundamental constitutional interest in preventing the release of private information when disclosure would create a substantial risk of serious bodily harm * * *," the proper remedy has been determined to be providing the records with redactions of the private information. *Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, at ¶ 14, 23.

In the present case, ODPS argues that even if the Court does not find that the requested records fall within the exception for "security records" under R.C. 149.433, (which they arguably do not) they should still be prevented from having to produce them because the information contained in the records somehow implicates the privacy rights of the Governor. To support this claim ODPS points to the fact that, "[a] governor's decisions and actions, sometimes unpopular or controversial, affect millions in (and sometimes to [sic] those living outside) this State. * * * Although the Governor is by law afforded considerably more security than other government officials and police officers, he still faces real and substantial security dangers."[14]

These facts do not provide any basis for refusing to produce public records, even of potential threats made to the Governor. In fact, these arguments support the position that the Governor, as a politician and public figure, does not have the same expectation of privacy that a police officer or private citizen would have because his actions affect so many. *See State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997) (holding that "[o]ne of the salutary purposes of the Public Records Law is to

[14] Exhibit B, p. 9.

ensure accountability of government to those being governed.") In addition, as ODPS points out, the Governor's level of security is far greater than that afforded to other government officials and police officers, and therefore; the danger of exposing him to harm simply by producing documentation of investigations that may contain some personal information is far less than it would be for a private citizen. Further, should there be confidential or personal information within these documents, that information can be redacted.

CONCLUSION

There is a long-standing history and tradition of transparency in government in both the United States and the state of Ohio. This Court has endorsed that tradition by adopting Thomas Jefferson's belief that "[t]he way to prevent [errors of] the people, is to go give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people." (Citation omitted.) *Kish*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, at ¶ 15 (quoting Thomas Jefferson's Letter to Col. Edward Carrington, January 16, 1787). R.C. 149.43 reflects the General Assembly's desire to codify this expectation. The records requested by Plunderbund are presumed by law to be subject to the Public Records Act. The Ohio Department of Public Safety has failed to meet its burden to establish that these records fall under the R.C. 149.433 "security records" exception. Further, production of these documents does not violate the Governor's right to privacy under the Fourteenth Amendment because that protection does not apply to all documents containing personal information. Rather, it only applies to documents containing personal information of such a nature that disclosure of the information exposes a private citizen to an increased risk of

bodily harm. The information contained in these documents is related to investigations of threats made to a public figure, not to a private citizen. Information contained in these records is invaluable as a tool for public scrutiny of government activity and any confidential or personal information that is not relevant to that scrutiny can be redacted.

WHEREFORE, for the forgoing reasons, Amicus respectfully requests this Court to issue a peremptory writ of mandamus to compel the ODPS to comply with the Public Records Act and to produce the documents requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This foregoing Amicus Brief was delivered by means of e-mail to all parties on this 12th day of September, 2013.

/s/ Jennifer Martinez Atzberger
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American Civil Liberties Union of Ohio Foundation