Supreme Court of Ohio Clerk of Court - Filed May 27, 2021 - Case No. 2021-0211

IN THE SUPREME COURT OF OHIO

The State of Ohio ex rel. Derek J. Myers, Relator, v. Ron Meyers, et al., Respondents.	Case Nos. 2020-1469 2021-211 Original Actions for Writs of Mandamus

MERITS BRIEF OF RELATOR DEREK J. MYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

STATEMENT OF FACTS

Relator Derek J. Myers is editor and proprietor of the Scioto Valley Guardian (the "Guardian"), a local news organization. (Amend. Compl. ¶ 2; Compl. ¶ 2.[1]) The Guardian provides original reporting, analysis, and editorial commentary on Ohio politics and newsworthy events, publishing such information on its news website. (Complaints ¶ 4.) As part of his work as editor of and reporter for the Guardian, Mr. Myers regularly submits public records requests to the Chillicothe Police Department (the "Department") seeking disclosure of routine offense and incident reports. (*Id.* ¶ 2.) The Department is, unsurprisingly, an organ of the City of Chillicothe. (*Id.* ¶ 6.) Ron Meyers ("Chief Meyers" or "Meyers") is the Department's Chief of Police, and Mica Kinzer ("Kinzer") is the Department records clerk.[2] (*Id.* ¶¶ 6-7.)

Report P2015185

On November 19, 2020, a Department officer authored a routine offense and incident report ("Report") identified as Report P2015185. The next morning, per usual practice, Kinzer emailed a "Daily Media Report" to Mr. Myers and other members of the media listing routine offense and incident reports taken the day before, including Report P2015185. (*See* Amend. Compl. Ex. B at 5.) Less than half an hour later, Mr. Myers sent Kinzer a public records request via email seeking disclosure of the Report. (*Id.* at 4.)

Respondents already had a history of wrongfully withholding routine offense and incident reports from Mr. Myers and the Guardian, and thus, that same morning, Mr. Myers also emailed Chief Meyers: "Chief, we must address the persisting issue of your records department denying

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[1] "Amended Complaint" or "Amend. Compl." refers to the amended complaint filed in case number 2020-1469. "Complaint" or "Compl.," standing alone, refers to the complaint filed in case number 2021-211. "Complaints" refers to both the Amendment Complaint and Complaint.

[2] The City of Chillicothe ("Chillicothe"), Meyers, and Kinzer are referred to collectively as "Respondents."

public records requests for police reports." (*Id.* at 3.) In that email, Mr. Myers went on to inform Chief Meyers that Respondents' refusal to immediately disclose routine offense and incident reports was contrary to law. (*Id.*) He politely cautioned: "I'm afraid if this continues, we will have to file suit against the city, which we don't want to do." (*Id.*) Chief Meyers replied minutes later, stating, "When investigations are completed and able to be released, they are. We hold [sic] nothing from anyone." (*Id.*)

Because Chief Meyers's email was ambiguous (*i.e.*, it did not directly grant or deny Mr. Myers's request), Mr. Myers emailed Kinzer a follow-up to his original request for Report P2015185 at 11:01 AM, stating, "Please let me know if you will be sending this report today. If you deny the request, please cite your reasoning and law." (*Id.* at 4.) Kinzer did not respond. (*See id.*) Mr. Myers followed up with two more emails on November 23, 2020. (*Id.* at 1, 4.) Kinzer responded later on November 23: "I was told that [Report P2015185] is not to be released at this time because it is still being investigated by Det. Fyffe. I believe the Chief of Police told you the same thing last week when you requested it." (*Id.* at 1.) Just like Chief Meyers's previous response, Kinzer failed to cite legal authority setting forth why the request for release of P2015185 was denied. (*See id.*; Compl. ¶¶ 10, 19.)

Given Respondents' refusal to disclose the Report in defiance of their obligations under the Public Records Act, R.C. 149.43, Mr. Myers filed case number 2020-1469 on December 4, 2020, requesting that this Court issue a writ of mandamus directing Respondents to disclose the Report. One week later, on December 11, Kinzer emailed Mr. Myers and, for the first time, provided a purported basis for Respondents' denial of his request, stating "we cannot release the record based on the Confidential Law Enforcement Investigatory records exemption, in that it is

an investigative work product covered under ORC 149.43 (A)(2)(c)." (Amend. Compl. Ex. B at 4.)

Five weeks after Mr. Myers filed his initial complaint, Respondents' counsel provided Mr. Myers with a truncated version of the Report. (Myers Suppl. Aff. ¶ 3.) That excerpt included *no* facts about the incident supposedly recorded in the Report, other than that it involved "a possible sexual assault." (Myers Suppl. Evid. Ex. A.) The excerpt does not provide *any* information concerning, *e.g.*, *who* made the incident report to the police in the first place, *how* the incident report was made, or *what* information the incident report contained. (*See id.*) In fact, though the excerpt states that Officer Christopher Fyffe "opened an investigation," it does not even indicate who in the Department took the initial report. (*See id.*)

Instead of disclosing this information as required, Respondents, in a misguided effort to skirt the requirements of the Public Records Act, have adopted a policy of referring to the substantive portions of the Department's routine offense and incident reports as "Supplement Narrative" and refusing to disclose that information until the Respondents deem the subsequent investigation closed.[3] (Amend. Compl. ¶ 18; Compl. ¶ 36.) Instead of disclosing the Supplement Narrative as required, Respondents at most disclose an "Initial Narrative," which is devoid of substance. The Initial Narrative often simply states "report taken," or states only, "investigation,"

[3] By way of example, Exhibit B attached to Mr. Myers's Submission of Additional Evidence contains complete versions of Reports P2015606 and P2100318. As to both, Respondents had previously denied Mr. Myers's requests for disclosure of the Reports' Supplement Narratives and only provided full copies of the Reports on February 18, 2021, after this mandamus action commenced. *See infra* at 4-8. Report P2015606 shows that the first Supplement Narrative was written *the very same minute* as the Initial Narrative. Moreover, the first paragraph of the Supplement Narrative simply conveys the content of the complaint received by the Department. Likewise, regarding Report P2100318, the first Supplement Narrative was written nine minutes after the Initial Narrative. That entire Supplement Narrative recounts the complaint received by the Department and is not the product of Department investigation.

on the assumption that use of this magic word will shield the routine offense and incident report from public examination under the Public Records Act. (*E.g.*, Myers Suppl. Evid. Ex. C at 12 (Initial Narrative states only "Report taken."); *id.* at 8 (Initial Narrative states only "investigation"); Myers Suppl. Evid. Ex. B at 3 (same); *id.* at 13 (Initial Narrative states "I received a phone call . . . . Investigation pending."). The "Initial Narrative" and "Supplement Narrative" sections of the Department's routine offense and incident reports are often composed at the very same time. *See* fn. 3, *supra*.

In the case of Report P2015185, the truncated report Respondents disclosed contains a two-sentence Initial Narrative: "Detective opened an investigation into a possible sexual assault. Investigation continues." (Myers Suppl. Evid. Ex. A at 1.) But it omits the Supplement Narrative. (*See id.*) To this day—more than six months after Mr. Myers's initial request—Respondents have refused to disclose the Supplement Narrative. That is, they continue to withhold the primary substantive portion of this routine offense and incident report on the specious theory that the allegedly "ongoing" nature of the investigation exempts the Supplement Narrative from disclosure. (*E.g.*, Amend. Compl. ¶ 23; Myers Suppl. Evid. Ex. Q at 2 (counsel for Respondents noting continued refusal to release the Supplement Narrative).)

Report 18-019929

Unfortunately for Mr. Myers, the Guardian, the Guardian's readers, and the public at large, Respondents have persisted in their refusal to release requested routine offense and incident reports, in defiance of the Public Records Act. On December 6, 2020, Mr. Myers emailed Kinzer a request for disclosure of Report 18-019929. (Compl. ¶ 11; Compl. Ex. A at 1-2.) Kinzer denied Mr. Myers's request on December 7, stating that the Report "cannot be released, it is still a pending investigation." (Compl. Ex. A at 1.) Mr. Myers responded to Kinzer's denial via email later that

day, asking that she "cite the reason for this denial, including legal authority." (*Id.*) Kinzer replied to the email but declined to cite legal authority setting forth why the request was denied. (*See id.*)

Respondents failed to disclose *any* portion of Report 18-019929 until February 18, 2021. On that date, Respondents' counsel provided Mr. Myers with a truncated copy of the Report. (Myers Suppl. Evid. ¶ 5 & Ex. C. at 1.) As with Report R2015185, the excerpt Respondents provided included the Initial Narrative but omitted the Supplement Narrative, with the result that the excerpt was devoid of substance beyond simply stating the name of the alleged offense at issue. (Myers Suppl. Evid. Ex. C at 1.) The excerpt contained *no* information about the alleged incident, including who reported it to police, how it was reported, what was reported, etc. The Initial Narrative stated only: "Detective opened an investigation into *a reported sexual assault*. Investigation ongoing…". (*Id.* (emphasis added).) The excerpt thus says that a report was taken, yet Respondents refuse to release the actual content of that routine offense and incident report (presumably hidden away in the Supplement Narrative) as required by law. To this day, respondents refuse to disclose the actual substance of Report 18-019929. (Myers Suppl. Aff. ¶ 5.)

Reports P2015431 and P2015437

On December 8, 2020, Mr. Myers emailed Kinzer requesting Reports P2015431 and P2015437. (Compl. Ex. B.) Once again Respondents rejected Mr. Myers's requests. (*Id.*) Kinzer failed to cite legal authority to support either of these denials. (*Id.*; Compl. ¶ 21.)

On February 18, 2021, Respondents' counsel provided Mr. Myers with a truncated version of Report P2015431 for the first time. (Myers Suppl. Aff. ¶ 5.) But the truncated report included no information concerning, *e.g.*, how the incident was reported to police or *what* was reported to police, other than "[d]ispatched on a possible deceased female." (*Id.* at 4.) To this day,

Respondents refuse to disclose the Supplement Narrative for P2015431 because the matter purportedly "remains under investigation." (Myers Suppl. Aff. ¶ 5; Respondent's Evid. at 116.)

Also on February 18, 2021, Respondents' counsel released what appears to be the complete version of Report P2015437. (*Id.* ¶ 4.)

Report P2015499

On December 10, 2020, Mr. Myers emailed Kinzer a request for Report P2015499. (Compl. Ex. at D.) Kinzer responded denying the request and refusing to cite legal authority in support of that decision. (*Id.*)

On February 18, 2021, Respondents' counsel provided a truncated version of the Report which, like the truncated version of Report P2015431, contained identifying information for certain victims, witnesses, and suspects. (Myers Suppl. Aff. ¶ 5 & Ex. C at 5-8.) The truncated Report also identified the individual who first reported the incident to police and contained the address to which the responding officer was dispatched. (Myers Suppl. Evid. Ex. C at 5-8.) But the truncated report included no information concerning, *e.g.*, how the incident was reported to police or *what* was reported to police. (*See id.*) The Initial Narrative states only "Investigation," and the Supplement Narrative is completely omitted. (*Id.* at 8.) To this day, Respondents have refused to release any portion of the Substantive Narrative because the investigation purportedly "remains ongoing." (Myers Suppl. Aff. ¶ 5; Respondent's Evid. at 116.)

Report P2015606

On December 15, 2020, Mr. Myers emailed Kinzer a request for Report P2015606. (Compl. Ex. E.) The next day, Kinzer emailed Mr. Myers stating, "[t]his is all I am able to release on the case from Det. Fyffe at this time." (*Id.*) The email proceeded with the following two sentences: "*Detective was notified via ICAC of possible pornography involving a juvenile. Suspect in case*

has not been identified at this time, still awaiting information on case." (*Id.*) No copy of the requested Report was provided. (*See id.*) Thus, Kinzer denied Mr. Myers's request. In doing so, she failed to cite legal authority to justify that decision. (*See id.*; Compl. ¶ 31.)

On February 18, 2021, Respondents' counsel provided what appears to be a complete version of Report P2015606. (Myers Suppl. Aff. ¶ 4 & Ex. B at 6-7.) Review of the Report shows that, among other things, Respondents improperly withheld the substantive narrative, which was plainly subject to disclosure at the time of Mr. Myers's request and includes the following:

> **Supplement Narrative By Christopher Fyffe, 12/14/20 09:05[—]**
>
> On this date Detective was notified via ICAC (Internet Crimes Against Children) of possible pornography involving a juvenile. Detective received the following information from ICAC. The media in question is described as a video showing a young female involved in sex with an older male. Detective reviewed the video and found that although the video does show what appears to be a juvenile female engaged in sex, the female[']s face is never seen. The male subject in the video is also unable to be identified, however, is believed to be speaking Spanish.

(Myers Suppl. Evid. Ex. B. at 6.)

Report P2100231

On January 18, 2021, Mr. Myers emailed Kinzer requesting Report P2100231. (Compl. Ex. F.) Kinzer responded on January 19 by providing Mr. Myers with a truncated version of the Report that omitted the Supplement Narrative. (*Id.*) The Initial Narrative, included in the excerpt, stated only, "Investigation." (Myers Suppl. Evid. Ex. B at 8.) Kinzer failed to cite legal authority setting forth why Respondents denied Mr. Myers's request for release of P2100231. (Compl. ¶ 37 & Ex. F.)

On February 18, 2021, Respondents' counsel provided what appears to be a complete version of Report P2100231. (Myers Suppl. Aff. ¶ 4 & Ex. B at 8-11.) Review of the Report

shows that, among other things, Respondents had improperly withheld statements made by witnesses during the incident-reporting phase of the matter. (*See id.* Ex. B at 8-11.)

Report P2100318

On January 22, 2021, Mr. Myers emailed Kinzer requesting Report P2100218. (Compl. Ex. G.) Kinzer responded on January 19 by providing Mr. Myers with a truncated version of the Report that omitted the Supplement Narrative. (Compl. ¶ 41 & Ex. G.) In so denying Mr. Myers's request, Kinzer failed to cite legal authority setting forth why. (Compl. ¶ 43 & Ex. G.) The Initial Narrative stated only: "I received a phone call from Vinton County Sheriff's Office in reference to a possible sexual crime. Investigation pending." (Myers Suppl. Evid. Ex. B at 13.) The contents of that call, *i.e.*, the substantive portion of this routine offense and incident report, were shunted into the Supplement Narrative section withheld by Respondents, as discussed immediately below. (*Id.* at 13-14.)

On February 18, 2021, Respondents' counsel provided what appears to be a complete version of Report P2100231. (Myers Suppl. Aff. ¶ 4 & Ex. B at 12-15.) Review of the Report shows that the Supplement Narrative—completed nine minutes after the Initial Narrative—is a recounting of the offense/incident facts initially reported to the Department by the Vinton County Sheriff's Office. (Myers Suppl. Evid. Ex. B at 13-14.)

Report P2100352

On January 26, 2021, Mr. Myers emailed Kinzer requesting Report P2100352. (Compl. Ex. H.) Kinzer responded later on January 26 with a truncated version of the Report that omitted the substantive portion because the case was "still under investigation." (*Id.*) Respondents' counsel likewise provided the truncated version to Mr. Myers again on February 18, 2021. (Myers Suppl. Aff. ¶ 5.) The truncated report—which, true to form, included the Initial Narrative but

omitted the Supplement Narrative—named the citizen who had made the complaint but provided no information about the substance of the complaint. (Myers Suppl. Evid. Ex. C at 9-12.) Rather, the Initial Narrative section stated only: "Report taken." (*Id.* at 12.) The content of that citizen report was presumably shunted into the undisclosed Supplement Narrative portion of the report. In that vein, the truncated Report incorporated the still-undisclosed Supplement Narrative by reference on several occasions. (*Id.*) Specifically, it includes a list of four names and indicates that all are referred to in the "Supplement." (*Id.*) Providing only this truncated excerpt amounted to a denial of Mr. Myers's request, but Kinzer once again failed to cite legal authority in support of Respondents' decision. (Compl. ¶ 49 & Ex. H.)

Respondents still refuse to release the Supplement Narrative portion of this citizen complaint because the Department's investigation purportedly "remains ongoing." (Myers Suppl. Aff. ¶ 5; Respondents' Evid. at 116.)

Procedural History

Mr. Myers filed his original complaint in case number 2020-1469—seeking a writ of mandamus regarding Report P2015185—on December 4, 2020. This Court referred the case to mediation on December 15, 2020. Unfortunately, mediation proved unsuccessful, and the case was returned to the regular docket on March 5, 2021. But while case number 2020-1469 was stayed for mediation, Mr. Myers continued his practice of regularly requesting from Respondents Reports that appeared, from the basic descriptions provided by Kinzer's "Daily Media Report" emails, to be potentially newsworthy. Respondents' denials of Mr. Myers's public-records requests also continued. As explained more thoroughly in his Notice of Related cases filed on February 26, 2021, given the time-sensitive nature of the at-issue records requests and the ongoing

mediation stay in case number 2020-1469,[4] Mr. Myers reluctantly filed his complaint in case number 2021-211—seeking a writ of mandamus regarding the other eight Reports at issue here—on February 16, 2021. After the mediation stay was lifted in case number 2020-1469, Mr. Myers filed his Amended Complaint—expanding and clarifying his prior allegations regarding Report P2015185—in that case on March 18, 2021.[5]

This Court consolidated the two cases for the submission of evidence and briefing on April 28, 2021.

ARGUMENT

Proposition of Law No. 1

Respondents violated R.C. 149.43(B)(3) by failing to cite legal authority to support their decisions denying each of Mr. Myers's requests for access to the nine at-issue Reports.

* * *

The Public Records Act requires:

> If a request [for access to a public record] is ultimately denied, in part or in whole, the public office or the person responsible for the requested public records 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.

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[4] Supreme Court Rule of Practice 19.01(A)(3) bars a party from filing an amended complaint while a case is stayed for mediation.

[5] On multiple occasions, both Mr. Myers and counsel have conveyed to Respondents their desire to resolve these matters as expeditiously and amicably as possible. (*E.g.*, Amend. Compl. Ex. B at 3 (Mr. Myers to Chief Meyers: "I'm afraid if this continues, we will have to file suit against the city, which we don't want to do."); Respondents' Evid. at 120.) In this vein, undersigned wrote to Respondents' counsel on March 26, 2021: "Are you aware of any case that comes down in [Respondents'] favor? I would happily review it if so. I'm not looking to pursue needless litigation . . . so we would be open to dropping these claims and cases if there is authoritative case law I'm missing that holds against us." (Respondents' Evid. at 120.) Respondents did not reply. They declined this, and every other, invitation to provide support for their legal position and potentially resolve these cases without continued litigation and needless accrual of attorneys' fees.

R.C. 149.43(B)(3). As shown in the Statement of Facts above, and as set for in Mr. Myers's Amended Complaint and Complaint, Respondents denied Mr. Myers's written requests for disclosure of each of the nine at-issue reports "in whole or in part" and, in each instance, failed to "cite legal authority[] setting for why the request was denied." *Id.* And this was in spite of Mr. Myers's repeated requests that Respondents comply with their obligation to cite such authority. (*E.g.*, Compl. ¶¶ 13, 24; Compl. Ex. A.)

Mr. Myers is entitled to statutory damages for each of these nine violations of R.C. 149.43(B)(3). *See* R.C. 149.43(C)(2) ("[T]he requester shall be entitled to recover . . . statutory damages if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accord with division (B) of [R.C. 149.43].").[6]

Proposition of Law No. 2

Respondents violated R.C. 149.43(B)(1) by failing to disclose the requested Reports.

* * *

A. Respondents Failed to Disclose *Any* Version of Six of the Requested Reports Until After Mr. Myers Filed These Mandamus Actions.

Revised Code 149.43(B)(1) provides:

[6] The statute sets statutory damages at $100 per violation per business day. Single-violation statutory damages are capped at $1,000. R.C. 149.43(C)(2). Mr. Myers requested nine distinct, unrelated routine offense and incident reports. As to each of the nine Reports, Respondents failed to cite legal authority, thus committing in each instance a separate violation of R.C. 149.43(B)(3). This failure persisted for more than ten business days after Mr. Myers filed his respective petitions for mandamus (except in the case of Report P2015185, where the failure persisted for only seven days). But that failure is arguably mooted with respect to Reports P2015437, P2015606, P2100231, and P2100352, given that Respondents released what appear to be complete versions of those Reports two business days after Mr. Myers filed his applicable petition for mandamus. Accordingly, Mr. Myers is entitled to statutory damages of $200 each for these four Reports and to statutory damages of $700 for Report P2015185, and statutory damages of $1000 per Report with respect to the remaining four Reports, for a total of $5,500 as compensation for Respondents' R.C. 149.43(B)(3) violations.

> Upon request . . . , all public records responsive to the request shall be promptly prepared and made available for inspection to any person . . . . [U]pon 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. 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.

But with respect to six of the nine at-issue Reports requested by Mr. Myers, Respondents failed to make *any* version of the requested Reports—however truncated or redacted—available to Mr. Myers until long after his requests. The initial disclosures of these reports likewise were not made until after Mr. Myers filed the instant mandamus actions.

Mr. Myers submitted his public record request for Report P2015185 on November 20, 2020. *Supra* at 1-4. Respondents denied Mr. Myers's request outright, refusing to disclose *any* portion of the Report. *Id.* Respondents did not disclose even the truncated version of the Report until January 8, 2020—35 days after Mr. Myers filed his mandamus action with respect to P2015185. *Id.*

With regard to the other five Reports—18-019929, P2015431, P2015437, P2015499, and P2015606—Mr. Myers submitted his public records requests on December 6, December 8, December 8, December 10, and December 15, 2020, respectively. *Supra* at 4-7. Respondents denied these requests outright as well and failed to disclose *any* portion of these Reports. *Id.* None of these Reports were disclosed, even in part, until February 18, 2021—two days after Mr. Myers filed his mandamus action with respect to these Reports. *Id.*

It is blackletter law that "'police incident reports are subject to disclosure.'" *State ex rel. Cincinnati Enquirer v. Ohio Dep't of Pub. Safety*, 148 Ohio St. 3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 14 (citing *State ex rel. Beacon Journal Publishing Co. v. Maurer*, 91 Ohio St.3d 54, 55, 741 N.E.2d 511 (2001)). But with respect to these six reports, Respondents failed to disclose *any* portion of them until after litigation and, moreover, failed to cite any law legal authority in defense of that decision. Accordingly, pursuant to R.C. 149.43(C)(2), Mr. Myers is entitled to statutory damages for these violations of R.C. 149.43(B)(1).[7]

B. Respondents Violated R.C. 149.43(B)(1) by Failing to Disclose, at Minimum, the First "Supplemental Report" Section of the Reports.

With respect to all nine Reports, Respondents failed to timely disclose the Supplement Narrative sections of the Reports. Indeed, Respondents *still* have not disclosed the Supplement Narrative sections of five of the Reports—P2015185, 18-019929, P2015431, P2015499, and P2100352—purportedly because the investigations into those matters remain ongoing.

But the presence—or absence—of an ongoing investigation has no bearing on whether an ongoing routine offense and incident report must be released. This Court has been crystal clear in holding that "ongoing routine offense and incident reports" are *not* exempt from disclosure under R.C. 149.43(A)(2)(c) (the "investigatory techniques and procedures" and "investigatory work product" exemptions)—the only exemptions that Respondents have asserted apply here. *See, e.g.*, *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 421, 639 N.E.2d 83 (1994); *Maurer*, 91 Ohio St.3d at 57.

[7] Specifically, Mr. Myers is entitled, under this theory, to $2,000 in damages—$1,000 for Respondents' failure to disclose any portion of Report P2015185 for more than ten business days after his petition for mandamus was filed in case number 2020-1469, and $200 per violation for Respondents' failure to disclose the other any portion of the other five reports for two business days after Mr. Myers's mandamus petition was filed in case number 2021-211.

The Supplement Narratives are part of the offense and incident reports here for several reasons. First, they are *included in the very same document*. In *Maurer*, this Court held that "typed narrative statements" were incorporated into a Report because they were "referenced" therein. *Id.* And the Court quickly reaffirmed that conclusion in *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 120, 2002-Ohio-67, 760 N.E.2d 421. If documents merely "referenced" in a Report are, by virtue of that reference, incorporated into that Report, then *a fortiori* narratives that are themselves part of the very same document are part of the Report as well.[8]

Second, at least the first Supplement Narrative entries in each Report are, by and large, created at the very same time as the Initial Narratives that all parties agree are part of the Reports. *See, e.g.*, *supra* at 3, fn. 3. The change in section heading from "Initial Narrative" to "Supplement Narrative" in these circumstances is nothing more than a too-clever-by-half attempt to shield from release content that is clearly subject to disclosure under the Public Records Act.

Third, Supplement Narratives that have been released after Respondents initially withheld them show that they often simply contain narrative derived directly from the party reporting the facts of the at-issue offense or incident to the Department. For example, the "Initial Narrative" in Report P2100318 states only, "I received a phone call from Vinton County Sheriff's Office in reference to a possible sexual crime. Investigation pending." (Myers Suppl. Evid. Ex. B at 13.) The first Supplement Narrative, drafted nine minutes later, proceeds to recount the incident facts conveyed to the Department by the reporting party—here, the Vinton County Sheriff's Office. (*Id.* at 13-14.) Similarly, the first Supplement Narrative paragraph of Report P2015606 only recounts

[8] Relatedly, some of the truncated reports disclosed by Respondents also directly reference their corresponding Supplement Narratives. (*E.g.*, Myers Suppl. Evid. Ex. B at 3 (referring reader to "supplement" for Report P2015437); *id.* at 13 (same re Report P2100318); Myers Suppl. Evid. Ex. C at 4 (same re Report P2015431); *id.* at 12 (same re Report P2100352).) This is yet another basis for concluding that the Supplement Narratives are part of the Reports and must be released.

the facts of the alleged offense as conveyed to the Department by the Internet Crimes Against Children association. (*Id.* at 6.) Of course, Mr. Myers has been deprived of the opportunity to review the Supplement Narratives portions of the majority of the at-issue Reports. But it is a virtual certainty that this Court's *in camera* review will reveal that those Supplement Narratives, too, contain factual information conveyed to the Department by the party reporting the incident or offense.

Fourth, even where Supplement Narratives created concurrently with Initial Narratives contain information that could potentially be classified as work product from the earliest stages of the Department's investigation into the at-issue incident or offense, still those Narratives should be released pursuant to the rule from *Steckman*, *Maurer*, and their progeny. This Court held in *Steckman* that "[t]he work product exception does not include ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence *and records containing the results of intoxilyzer tests*." *Id.* at 88 (emphasis added). Intoxilyzer test results are, of course, investigatory in nature, though they generally occur when an incident or offense is first reported or observed. Just as intoxilyzer results are subject to disclosure notwithstanding the investigatory-work-product exemption, so officer observations, interviews, assessments, and the like that occur concurrently with or immediately after the report of an incident or offense must also be recognized as part of the at-issue routine offense or incident report and thus must be disclosed.

Fifth, to the extent this Court is not fully persuaded by the arguments above, it should still find the at-issue Supplement Narratives to be part of the Reports because "R.C. 149.43 is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d 374, 376, 662 N.E.2d

334 (1996) (citing *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St. 3d 245, 246, 643 N.E.2d 126 (1994)). "Exceptions to disclosure must be strictly construed against the custodian of public records, and the burden to establish an exception is on the custodian." *State ex rel. James v. Ohio State Univ.*, 70 Ohio St. 3d 168, 169, 637 N.E.2d 911 (1994).[9]

C. This Court Should Adopt the Definition of "Investigatory Work Product" Advanced by Chief Justice O'Connor in *State ex rel. Caster v. City of Columbus*.

The Court should also narrow the definition of investigatory work product—and thus the scope of R.C. 149.43(A)(2)(c)'s investigatory-work-product exemption—and, in so doing, bar Respondents from relying on that exemption to shield from disclosure factual information found in later-occurring Supplement Narrative sections assembled after an investigation has already begun.[10] In *Steckman*, this Court defined investigatory work product broadly, to include "information assembled by law enforcement officials in connection with a probable or pending criminal proceeding."[11] *Id.* at 434. In *State ex rel. Caster v. City of Columbus*, 151 Ohio St. 3d

[9] For the violations of R.C. 149.43(B)(1) set forth in part B, Mr. Myers is entitled to statutory damages totalling $5,800. Respondents still have not disclosed any Supplement Narratives with respect to five of the nine at-issue Reports. Mr. Myers's statutory damages for each of these five are capped to $1,000 each, or $5,000 total. Regarding the remaining four Reports—P2015437, P2015606, P2100231, and P2100318—Respondents produced what appear to be complete versions of these Reports on February 18, 2021, two business days after Mr. Myers's mandamus action seeking their release was filed. He is thus entitled to damages of $200 for each of these, for a total of $800. Of course, the damages discussed here are *not* cumulative to those discussed in footnote 7, above.

[10] Mr. Myers assumes that at least some of the still-withheld Reports contain multiple Supplement Narratives, some of which significantly post-date the given Report's Initial Narrative. While some—if not all—Supplement Narratives incorporated into a Report are subject to immediate disclosure for the reasons stated in part B above, Respondents will likely argue that later-in-time Supplement Narratives are exemption from disclosure simply because that were assembled after the investigation was already underway and are for that reasons "investigatory work product." Adoption of the definition of "investigatory work product" advanced by Chief Justice O'Connor would neutralize this argument right out of the gate.

[11] Of course, this broad definition of investigatory work product "does not include ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of

425, 2016-Ohio-8394, 89 N.E.3d 598, Chief Justice O'Connor advocated for a narrowed definition of investigatory work product—one that would include the "theories, mental impressions, and thought processes of the investigator" while excluding "fact work product," even where such factual information in gleaned after the investigation is well underway. *Id.* at ¶¶ 63-64. (O'Connor, C.J., concurring in part and dissenting in part). As Chief Justice O'Connor pointed out, this narrowed definition is appropriate in light of post-*Steckman* amendments to Criminal Rule 16—amendments that have "move[d Ohio] toward open-file discovery" and that "obligate[] prosecuting attorneys to turn over much of the investigatory files to defendants."[12] *Id.* at ¶ 61. Such a narrowed definition is also in keeping with the Court's stated desire in *Steckman* to model the definition of investigatory work product on the more widely recognized and understood, and better established, definition of attorney work product. *Id.* at ¶ 64.

The Court should adopt this narrowed definition and thus reject any attempts by Respondents to shield factual information in later-in-time Supplement Narratives from disclosure via the investigatory-work-product exemption.

Proposition of Law No. 3

The Court should award reasonable attorney's fees to Mr. Myers.

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Mr. Myers also respectfully requests that this Court award him reasonable attorney's fees in this matter. R.C. 149.43(C)(3)(b) provides, in part, that "[i]f the court renders a judgment that

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driving while under the influence and records containing the results of intoxilyzer tests." *Steckman* at 88.

[12] *Steckman* adopted a broad definition of investigatory work product in part to keep criminal defendants from using the Public Records Act to do an end run around the then-much-more-restrictive Criminal Rule 16. *Id.* at 431.

orders the public office or the person responsible for the public record to comply with division (B) of this section[13] . . . , the court may award reasonable attorney's fees to the relator." Such an award of attorney's fees is "remedial and not punitive." R.C. 149.43(C)(4)(a). "Awarding 'attorney fees in public records cases is discretionary and is to be determined by the presence of a public benefit conferred by relator seeking the disclosure. Moreover, since the award is punitive,[14] reasonableness and good faith of the respondent in refusing to make disclosure may also be considered.'" *Maurer*, 91 Ohio St.3d at 58 (quoting *State ex rel. Multimedia, Inc. v. Whalen*, 51 Ohio St.3d 99, 100, 554 N.E.2d 1321 (1990)).

All three of these considerations weigh heavily in favor of an award of attorney's fees. The public benefit of Mr. Myers's mandamus actions in clear. Mr. Myers is a reporter and is editor of the Guardian, and "securing th[ese] record[s] enables [him] to provide 'complete and accurate news reports . . . to the public.'" *Id.* Further, even if Mr. Myers were not a journalist, "the public benefit [conferred by a public-records mandamus action] is still sufficient: by forcing a recalcitrant public official to comply with the unambiguous mandate of precedent, it will make compliance with this precedent more likely in the future." *Rasul-Bey*, 94 Ohio St. 3d at 122.

Regarding reasonableness and good faith, this Court "ha[s] unequivocally held that incident reports are public records and must be disclosed immediately upon request. Thus, we have consistently and summarily rejected [arguments to the contrary]." *Maurer* at 58. Such arguments are therefore neither reasonable nor made in good faith. Respondents' persistent

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[13] Division (B), of course, includes R.C. 149.43(B)(1), discussed in the section of this brief concerning Proposition of Law No. 2, above.

[14] Per R.C. 149.43(C)(4)(a), an award of attorney's fees is no longer punitive. But this Court has nevertheless concluded that "reasonableness, good faith, and public benefit" are still proper "considerations . . . in a court's attorney-fee determination." *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 35.

refusal—despite their statutory obligation and Mr. Myers's repeated requests—to cite legal authority in support of their decision to withhold each of the Reports until well after litigation commenced is further evidence of the unreasonable and bad-faith nature of their position. The same can be said of their refusal, despite repeated requests from the undersigned, to provide *any* case law in support of their position. *E.g.*, *supra* at 10, fn. 5. Finally, the very nature of Respondents' shenanigans—stripping Initial Narratives of substance and placing the factual content of the Department's routine offense and incident reports under the heading of "Supplement Narrative" in order to hide that information from the public—is plain evidence of unreasonableness and bad faith.[15]

CONCLUSION

For the reasons stated above, Relator Derek Myers respectfully asks that this Court issue a writ of mandamus ordering Respondents to disclose, at minimum, the first "Supplemental Narrative" section of each of the outstanding Reports, along with subsequent "Supplemental Narrative" sections as set forth above. In addition, pursuant to statute, Mr. Myers requests an award of $11,300 in statutory damages, plus reasonable attorney's fees and costs.

Dated: May 27, 2021

Respectfully Submitted,

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[15] Mr. Myers is also entitled to recover costs of suit. R.C. 149.43(C)(3)(a).

CERTIFICATE OF SERVICE

I hereby certify that, on May 27, 2021, a copy of this Merits Brief of Relator Derek J. Myers was served upon opposing counsel as follows: Anna Maria Villarreal, at anna@avlawohio.com; D. Patrick Kasson, at pkasson@reminger.com; and M. Kent Hushion, at khushion@reminger.com.

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