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December 19, 2014

Via E-Mail: dwilliams4@city.cleveland.oh.us

Daniel Williams
Director of Media Relations
City of Cleveland
601 Lakeside Avenue
Cleveland, OH 44114

Re: Request for public record by Northeast Ohio Media Group,
Cory Shaffer

Dear Mr. Williams:

To follow up on our telephone call of a few minutes ago: this office is counsel to Northeast Ohio Media Group and Cleveland.com. As promised, I attach authority supporting what I told you on the phone.

That is: government records that were public record standing alone do not lose that public-record status merely because investigators assemble them in the course of investigating a law enforcement matter. The exemption for confidential law enforcement investigatory records and “specific investigatory work product” does not apply.

Attached are excerpts from my book that address that question. Footnotes 29, 30, 31, and 32 contain the Ohio Supreme Court decisions that pronounce what I’m saying in this letter and what the book says.

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Footnote 29: State ex rel. Morgan v. City of Lexington, 112 Ohio St. 3d 33, 42, 2006-Ohio-6365, 857 N.E.2d 1208, 1218, paragraphs 50-51.

Footnote 30: State ex rel. Dillery v. Icsman, 92 Ohio St. 3d 312, 316, 2001-Ohio-193, 750 N.E.2d 156, 160-161.

Footnote 31: Cincinnati Enquirer & Cincinnati Post v. Hamilton County, 75 Ohio St. 3d 374, 378, 1996-Ohio-214, 662 N.E.2d 334, 338

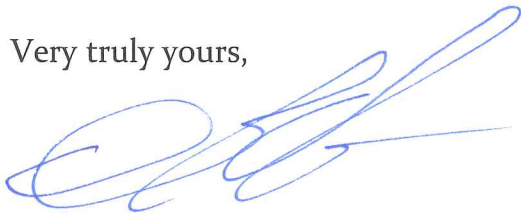
Footnote 32: State ex rel. Gannett Satellite Info. Network, Inc. v. Petro, 80 Ohio St. 3d 261, 267, 1997-Ohio-319, 685 N.E.2d 1228-1229.

I am unaware of any authority that contradicts what I say in the book or that modifies the points of law made in the above-cited Ohio Supreme Court decisions.

Please advise me promptly whether the City will grant Cory Shaffer's request for the video that was the subject of Cory's correspondence with Carol Harvenek.

Thank you.

Very truly yours,



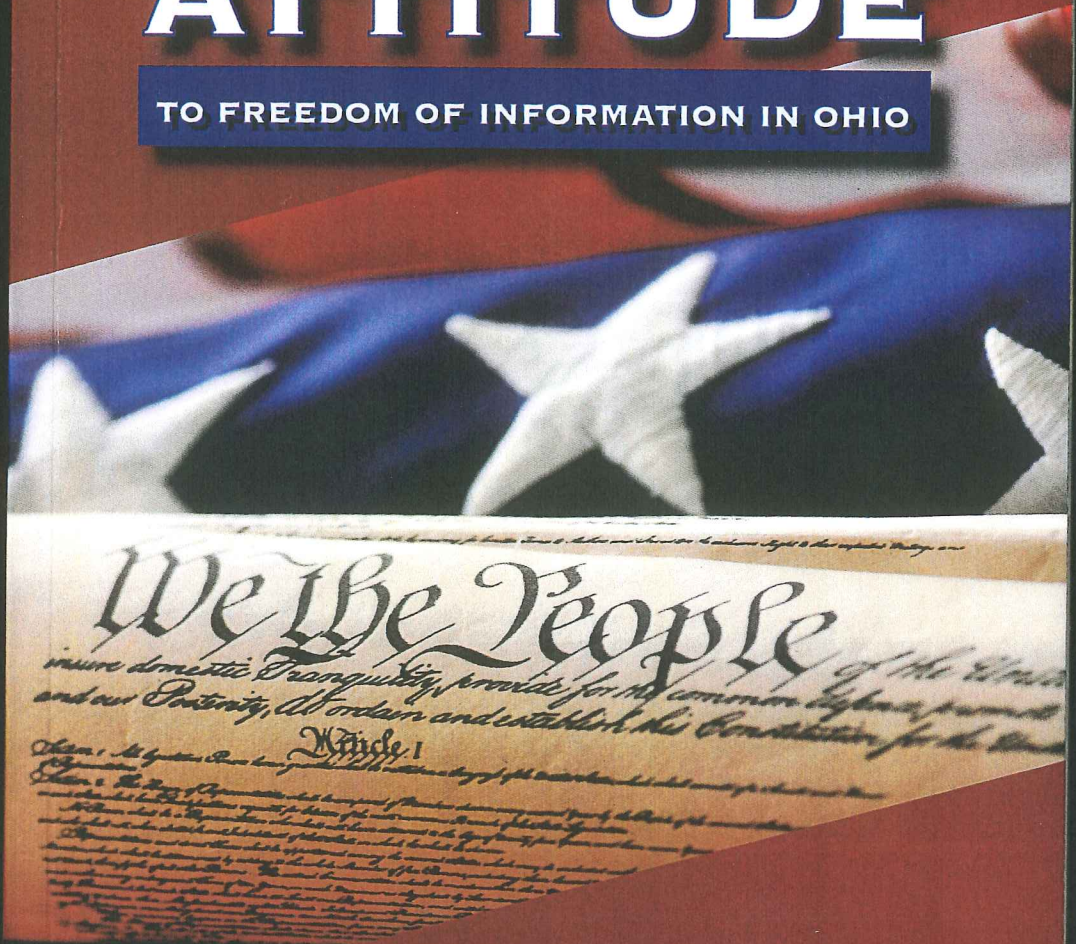
David L. Marburger

Attachment

AN ADVOCATE'S GUIDE

ACCESS WITH ATTITUDE

TO FREEDOM OF INFORMATION IN OHIO



David Marburger and Karl Idsvoog

WITH A FOREWORD BY DOUG CLIFTON

ACCESS WITH ATTITUDE

AN ADVOCATE'S GUIDE
TO FREEDOM OF
INFORMATION
IN OHIO

David Marburger
and Karl Idsvog

*With a foreword by
Doug Clifton*

OHIO UNIVERSITY PRESS • ATHENS

records received from the prosecutor, it was only to protect the prosecutor's investigation. The auditor had no legal standing to do that.

The ruling in the state auditor case won't automatically free up investigatory work product when police conduct a law enforcement investigation and then turn over their work product to another agency to assist in its separate law enforcement investigation.²⁷

6.7 **Sixth Limit: The Exemption Doesn't Apply to Records Collected by Investigators That Already Were Public Records**

The Exemption Covers Privately Owned Records That Investigators Obtain

When investigators obtain records from a private company or a private individual, the exemption for specific investigatory work product applies to those records.²⁸ Suppose that police seize financial records from a private company while executing a search warrant in a criminal investigation. The exemption applies.

The Exemption Doesn't Cover Public Records That Investigators Obtain

Suppose that police investigators execute a search warrant at a public school district's offices, and they gather the district's financial records as part of an ongoing criminal investigation. The specific investigatory work product exemption does *not* cover those records because they were public records before the investigators obtained them. The investigators can't transform public records into non-public records. You have a right to see them and to obtain copies—either from the school district or from the police. The police won't cooperate no matter what you argue, so go straight to the school district.

The Exemption Doesn't Cover Public Records That a Grand Jury Subpoenas

Suppose that a county grand jury subpoenas the school district's financial records. Separate laws ensure grand jury secrecy, so don't

bother trying to get anything from the grand jury. But the school district will have copies of what it turned over to the grand jury, and you have a right to see those copies.

Examples of Public Records That Kept That Status Despite Being Evidence in a Law Enforcement Investigation

- Time sheets of a mayor's court payroll clerk were public records even though collected by police and the state auditor when investigating whether a clerk falsified her overtime hours.²⁹
- A city's records of street repairs remained public records even though collected by the prosecutor to try a woman for carrying her child on city streets in a motorized wheelchair.³⁰
- Tapes of 911 calls were public records even though they contained evidence of murders and were copied by police as evidence in criminal investigations.³¹
- The state auditor had to disclose government contracts that a grand jury subpoenaed from a local government agency because the contracts were public records before the grand jury subpoenaed them.³²

6.8

Seventh Limit: Although the Exemption Applies after an *Investigation* Ends, It Stops When a *Prosecution* Ends

Criminal Investigations Rarely "Close"

When a crime has been committed, but the lawbreaker hasn't been caught or charged, law enforcement agencies don't usually close their investigations even if decades go by. The manpower and other resources devoted to an investigation may diminish to zero, but the investigation technically will remain "open." Even if the agency's case file contains a final disposition report designating the case "closed," that doesn't mean that the investigation will never resume.

Examples of How Police Classify Their Investigations

The city of Youngstown's manual of general police orders classifies its police investigations this way:

f its public employees, contained
nsure that the office's "operations,
eatest possible extent." *State ex rel.*
i N.E.2d 1251, 1253.

ide victim not to release the coro-
ubl'g Co. v. Schroeder, 76 Ohio St.

labor agreement that made confi-
investigations. *Toledo Police Patrol-*
E.2d 799, 802 (Lucas App. 1994).
er despite a provision in its labor
Vells, 18 Ohio St. 3d at 384, 481

City of Cleveland, 63 Ohio St. 3d

ng statistical information derived
eny access to his compilation by
re information by consulting the
pilation. *Schweikert*, 38 Ohio St.

duc., 99 Ohio St. 3d 6, 6, 2003-

Port Auth., 121 Ohio St. 3d 537,

58, 1997-Ohio-349, 684 N.E.2d

10. *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St. 3d 56, 60, 550 N.E.2d 945, 946 (1990).

11. *State ex rel. Lorain Journal Co. v. City of Lorain*, 87 Ohio App. 3d 112, 113-15, 621 N.E.2d 894, 896-97 (Lorain App. 1993) (results of polygraph tests are public records when administered by police as part of a background check of candidates for jobs as police officers); *accord State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St. 3d 141, 143, 1995-Ohio-248, 647 N.E.2d 1374, 1378.

12. *Snowden*, 72 Ohio St. 3d at 143, 1995-Ohio-248, 647 N.E.2d at 1378.

13. *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St. 3d 578, 581, 1998-Ohio-411, 697 N.E.2d 210, 214.

14. *State ex rel. Morgan v. City of Lexington*, 112 Ohio St. 3d 33, 42, 2006-Ohio-6365, 857 N.E.2d 1208, 1218, ¶s 50-51.

15. See *Wertheim*, 80 Ohio St. 3d at 157-58, 1997-Ohio-349, 684 N.E.2d 1239, 1242.

16. *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St. 3d 440, 445, 2000-Ohio-214, 732 N.E.2d 969, 975.

17. *State ex rel. Master v. City of Cleveland*, 75 Ohio St. 3d 23, 29-30, 1996-Ohio-228, 661 N.E.2d 180, 186.

18. *State ex rel. Leonard v. White*, 75 Ohio St. 3d 516, 518, 1996-Ohio-204, 664 N.E.2d 527, 529.

19. *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 435, 639 N.E.2d 83, 94 (1994).

20. *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St. 3d 54, 56-57, 2001-Ohio-282, 741 N.E.2d 511, 514.

21. *State ex rel. WBNS 10 TV, Inc. v. Franklin County Sheriff's Office*, 151 Ohio App. 3d 437, 444, 2003-Ohio-409, 784 N.E.2d 207, 211, ¶ 21.

22. *Maurer*, 91 Ohio St. 3d at 56, 2001-Ohio-282, 741 N.E.2d at 514.

23. *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St. 3d 39, 41, 2000-Ohio-8, 734 N.E.2d 797, 798, 799.

24. *Wertheim*, 80 Ohio St. 3d at 157-58, 1997-Ohio-349, 684 N.E.2d at 1242.

25. *State ex rel. Plain Dealer Publ'g Co. v. Lesak*, 9 Ohio St. 3d 1, 3-4, 457 N.E.2d 821, 823 (1984) (Celebrezze, C.J., concurring).

26. *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St. 3d 261, 265-67, 1997-Ohio-319, 685 N.E.2d 1223, 1228-29.

27. *State ex rel. Musial v. City of North Olmsted*, 106 Ohio St. 3d 459, 465, 2005-Ohio-5521, 835 N.E.2d 1243, 1250, ¶ 37 (city police investigating mayor shared the product of the police investigation with the state ethics commission).

28. *State ex rel. Cincinnati Enquirer and Cincinnati Post v. Hamilton County*, 75 Ohio St. 3d 374, 378, 1996-Ohio-214, 662 N.E.2d 334, 338; see also *Morgan*, 112 Ohio St. 3d at 42, 2006-Ohio-6365, 857 N.E.2d at 1218, ¶s 50-51.

29. *Morgan*, 112 Ohio St. 3d at 42, 2006-Ohio-6365, 857 N.E.2d at 1218, ¶s 50-51.

30. *State ex rel. Dillery v. Icsman*, 92 Ohio St. 3d 312, 316, 2001-Ohio-193, 750 N.E.2d 156, 160-61.

31. *Cincinnati Enquirer & Cincinnati Post*, 75 Ohio St. 3d at 378, 1996-Ohio-214, 662 N.E.2d at 338.

32. *Gannett Satellite Info. Network*, 80 Ohio St. 3d at 267, 1997-Ohio-319, 685 N.E.2d at 1228-29.

33. *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 57 Ohio St. 3d 77, 80, 566 N.E.2d 146, 149 (1991); *accord State ex rel. Polovischak v. Mayfield*, 50 Ohio St. 3d 51, 53-54, 552 N.E.2d 635, 638 (1990) (investigation began four years earlier and no enforcement action had been taken by the time of suit).

34. *State ex rel. WLWT-TV 5 v. Leis*, 77 Ohio St. 3d 357, 360, 1997-Ohio-273, 673 N.E.2d 1365, 1369; *Steckman*, 70 Ohio St. 3d 437, 639 N.E.2d at 96 (1994).