

OPINIONS OF THE SUPREME COURT OF OHIO

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The State ex rel. Beacon Journal Publishing Company, Appellant, v. Kent State University et al., Appellees.

[Cite as State ex rel. Beacon Journal Publishing Co. v. Kent State Univ. (1993), Ohio St.3d .]

Public records -- R.C. 149.43 -- Newspaper seeks state university police investigative report -- University seeks to exempt almost the entire file -- List of files court of appeals directed to release.

(No. 93-1056 -- Submitted September 28, 1993 -- Decided December 15, 1993.)

Appeal from the Court of Appeals for Portage County, No. 92-P-0042.

In April 1992, relators, Beacon Journal Publishing Company and reporter Thrity Umrigar, filed a complaint for mandamus against respondents, Kent State University ("KSU") and KSU's police chief and Director of Marketing and Communications. The Beacon Journal sought documents relating to reports that KSU employees working in the admissions office had received threatening letters. The Beacon Journal also sought documents related to reported misconduct by Bruce Riddle, former KSU Director of the Department of Admissions.

The incident prompting the Beacon Journal requests arose on November 21, 1991, when a KSU admissions official, termed "John Doe" for purposes of this opinion, received a hand-printed anonymous letter threatening to kill him. When Doe complained to the KSU police, he asked that his identity be kept confidential, and the police agreed. In December 1991, Doe received two additional threatening letters. Between those two December letters, an unknown person shot and killed a KSU custodian. On January 16, 1992, Doe found a threatening note on his car parked on campus. On January 29, a student was shot on campus. On February 2, 1992, KSU police asked Doe not to go to campus because police feared for his safety.1

After a thorough investigation of the letters, police identified a possible culprit, but Doe declined to prosecute. After consulting with the prosecutor, police ended their investigation of the case without charging anyone.

When faced with the Beacon Journal's mandamus petition,

the respondents released a few records and submitted the remaining forty-four file folders of documents to the court of appeals for an in camera inspection. The court of appeals found almost every one of the documents to qualify as an exempt "confidential law enforcement investigatory record" under R.C. 149.43. The Beacon Journal and reporter Umrigar disagreed with the results of the in camera review, and have appealed as a matter of right to this court.

Roetzel & Andress Co., L.P.A., Ronald S. Kopp, Amie L. Bruggeman and Howard Groedel, for appellants.

Lee I. Fisher, Attorney General; Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A., Dennis R. Wilcox, Jack D. Maistros and Joseph M. Hegedus, for appellees.

Per Curiam. We find that the court of appeals erred in exempting from release virtually all of the KSU investigative file and accordingly remand the case to the court of appeals for release of further documents.

The Ohio Public Records Act, R.C. 149.43, requires public officials to provide access to all public records upon request from a member of the public. State ex rel. Natl. Broadcasting Co. v. Cleveland (1988), 38 Ohio St.3d 79, 526 N.E.2d 786. "R.C. 149.43 was intended by the General Assembly to be liberally construed to ensure that governmental records be open and made available to the public \* \* \* subject only to a few very limited and narrow exceptions." State ex rel. Williams v. Cleveland (1992), 64 Ohio St.3d 544, 549, 597 N.E.2d 147, 151.

Admittedly, reversing the court of appeals' decision as to the disclosure of records on the basis of a factual determination, following its in camera review of the records, requires finding an abuse of discretion. State ex rel. Hamblin v. Brooklyn (1993), 67 Ohio St.3d 152, 153, 616 N.E.2d 883, 884; State ex rel. Vindicator Printing Co. v. Watkins (1993), 66 Ohio St.3d 129, 136-137, 609 N.E.2d 551, 558. However, relators labor under an imposing handicap, not having access to the records to prove an abuse of discretion. In fact, KSU, as a "governmental body refusing to release records[,] has the burden of proving that the records are excepted from disclosure by R.C. 149.43." State ex rel. Natl. Broadcasting Co. v. Cleveland, supra, at paragraph two of the syllabus.

As public records, "[l]aw enforcement investigatory records must be disclosed unless they are excepted from disclosure by R.C. 149.43." Natl. Broadcasting Co., supra, at paragraph one of the syllabus. However, respondents argue the documents are exempt "confidential law enforcement investigatory records" under R.C. 149.43(A)(2).

Exempting the records from release on that basis requires a two-step analysis. "First, is the record a confidential law enforcement record? Second, would release of the record 'create a high probability of disclosure' of any one of four kinds of information specified in R.C. 149.43(A)(2)?" State ex rel. Polovischak v. Mayfield (1990), 50 Ohio St.3d 51, 52, 552 N.E.2d 635, 637.

In fact, "the General Assembly sought to guard against these exceptions swallowing up the rule which makes public records available." State ex rel. Beacon Journal Publishing

Co. v. Univ. of Akron (1980), 64 Ohio St.2d 392, 398, 18 O.O.3d 534, 538, 415 N.E.2d 310, 314. Like Beacon Journal, this case involves that newspaper seeking a state university police investigative report, and the university seeks to exempt almost the entire file.

Relators argue that KSU wrongfully attempted to "privatize" a crime by granting confidential informer status to the victim who received the threatening notes. Yet Doe, as a witness fearful for his personal safety, qualifies as a "witness to whom confidentiality has been reasonably promised" under R.C. 149.43(A)(2)(b). See State ex rel. Johnson v. Cleveland (1992), 65 Ohio St.3d 331, 333, 603 N.E.2d 1011, 1013; State ex rel. Polovischak v. Mayfield, supra.

However, we find no basis under the facts to extend confidentiality to the text of the threatening letters. The letter writer clearly knew that Doe had reported the letters to the police, and no confidentiality interest protects their text. If the victim's name and any identifying features are deleted, the text of the letters would not, directly or by inference, identify the informant. Thus, releasing the redacted letters creates no "high probability of disclosure" of the confidential informant's identity.

The court of appeals also abused its discretion in applying the uncharged-suspect exception, R.C. 149.43(A)(2)(a), to exempt some internal documents of the admissions office. Police did not create these routine administrative documents, which were used for other than investigative purposes; in fact, most of these predated the investigation. More important, release of these documents would not create a "high probability" of disclosing either the informant's identity or the names of uncharged suspects. Nor would release of these documents compromise "confidential investigatory techniques" protected by R.C. 149.43(A)(2)(c). See Natl. Broadcasting Co., supra, 38 Ohio St.3d at 83, 526 N.E.2d at 790.

Thus the court of appeals needs to release certain student appointment forms, requests for leave, a seventeen-page schedule of visits and the computer printout of admissions office employees. (Files 34, 35, 39 and 41.) Of course, the court of appeals may make any appropriate redactions, e.g., Social Security numbers.

Respondents also overused the exemption for investigatory work product, R.C. 149.43(A)(2)(c). That exemption "protects an investigator's deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans. The exception does not encompass the objective facts and observations he has recorded." NBC, supra at paragraph three of the syllabus. See, also, State ex rel. Natl. Broadcasting Co. v. Cleveland (1991), 57 Ohio St.3d 77, 566 N.E.2d 146.

Accordingly, the court of appeals is directed to further inspect factual reports and release documents in selected files after any needed redaction to protect the identity of the confidential informant and various uncharged suspects. (See files 7, 22 [report on Cunningham], 31 [summary report] and 38 [summary report].)

The court of appeals did not abuse its discretion in finding the remainder of the investigative file exempt.

Release of remaining documents would create a high probability of disclosing the protected identity of uncharged suspects and the confidential informant. Protected identities of uncharged suspects and confidential informants are inextricably intertwined with the remaining materials. See State ex rel. Moreland v. Dayton (1993), 67 Ohio St.3d 129, 616 N.E.2d 234; State ex rel. McGee v. Ohio State Bd. of Psychology (1990), 49 Ohio St.3d 59, 60, 550 N.E.2d 945, 947; State ex rel. Thompson Newspapers, Inc. v. Martin (1989), 47 Ohio St.3d 28, 546 N.E.2d 939. (Files 12, 14, 26, 33, 36 and 40, and the court of appeals' May 5, 1993 summary.)

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to that court for additional release of documents as follows:

a. Release the text of the threatening letters after deleting the recipient's name and any other language that would identify the victim. (Files 1, 2, 4, 11 and 42.)

b. Release nineteen student appointment forms (file 39), twenty-three requests for leave (file 34), the seventeen-page schedule of visits (file 34), eighty-two applications for leave (file 35), and a computer printout of all admissions office employees (file 41) after any appropriate redaction (for instance, to delete Social Security numbers).

c. Release, after appropriate redaction such as to conceal the identity of the informant and uncharged suspects, the factual reports in files 7, 22 (report on Cunningham), 31 (summary report) and 38 (summary report).

Judgment accordingly.

Moyer, C.J., A.W. Sweeney, Douglas, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.

Wright, J., not participating.

#### FOOTNOTE

1 On February 10, 1992, Kent police shot and killed Mark Cunningham after Cunningham had fired at KSU police. The ensuing police investigation suggested that Cunningham may have shot the KSU custodian and student, but those shootings appear unrelated to the threatening letters sent to Doe.