

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio, ex rel. The Toledo Blade Co. Court of Appeals No. L-12-1183

Relator

v.

City of Toledo, Ohio

DECISION AND JUDGMENT

Respondent

Decided: July 12, 2013

* * * * *

Fritz Byers, for relator.

Adam W. Loukz, Director of Law, for respondent.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This case is before this court as an original action in mandamus regarding a public record request. Relator, the Toledo Blade, a newspaper of general circulation, seeks an order directing respondent, the city of Toledo, to comply with its previous public record request and make available a document known as a “gang map,” that was created

by and is maintained by respondent through its Police Department. The parties have filed cross-motions for summary judgment and the case is now decisional.

{¶ 2} The undisputed facts of this case are as follows. In December 2011 or January 2012, Officer William C. Noon, an officer assigned to the gang task force of the Toledo Police Department and also assigned as a task force officer with the Bureau of Alcohol, Tobacco and Firearms (“ATF”), created the document at issue in this case. The gang map was created to document the geographic areas of the city of Toledo within which the various criminal gangs in the city operate.

{¶ 3} On or about June 25, 2012, an employee of relator orally requested that respondent permit her to inspect the gang map during regular business hours. Respondent refused, and continues to refuse, to make the map available for inspection or copying.

{¶ 4} On July 11, 2012, relator filed the present action in mandamus. “Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 21, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C)(1). The Public Records Act implements the state’s policy that “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft.*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. “Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access

and resolve any doubt in favor of disclosure of public records.” *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶ 13, quoting *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

{¶ 5} Generally, to be entitled to the issuance of a writ of mandamus, the realtor must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent’s part to perform the requested act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). Where the allegation relates solely to a public records request, the Supreme Court has held that the requirement of the lack of an adequate remedy, as an element of a petition for a writ of mandamus, does not apply. *State ex rel. Glasgow, supra*, at ¶ 12.

{¶ 6} Ohio’s Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. As used in R.C. 149.43, public records are “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units * * *.” R.C. 149.43(A)(1). Moreover, “records” include “any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office * * * which serves to document the organization, functions, policies, decisions,

procedures, operations, or other activities of the office.” R.C. 149.011(G). A “public office” includes “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 149.011(A). “Exceptions to disclosure under the Public Records Act * * * 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.” *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus. When the release of a public record is challenged, it is the function of the courts to analyze the information to determine whether it is exempt from disclosure. *See State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 85, 526 N.E.2d 786 (1988).

{¶ 7} Both relator and respondent have filed summary judgment motions in this matter. Respondent asserts that the gang map is exempt from disclosure because it is a confidential law enforcement investigatory record, the release of which would create a high probability of disclosure of specific confidential investigatory techniques or procedures or specific investigatory work product. Relator counters that, given the undisputed facts of this case, respondent cannot meet its burden of proving its claim that the map is exempt from disclosure. Both parties rely on the deposition testimony of Officer William C. Noon, the officer who created the map. In addition, pursuant to our

earlier order, respondent has filed a copy of the gang map, in unredacted form and under seal, for an in-camera inspection.

{¶ 8} Pursuant to R.C. 149.43(A)(1)(h) and (A)(2), “confidential law enforcement investigatory records” are excepted from disclosure under the Public Record Act. “The applicability of the R.C. 149.43(A)(2) confidential-law-enforcement-investigatory-record exemption requires, first, that the records pertain to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, and second, that the release of the records would create a high probability of disclosure of any of the four types of information specified in R.C. 149.43.” *State ex rel. Ohio Patrolmen’s Benevolent Assn. v. Mentor*, 89 Ohio St.3d 440, 444, 732 N.E.2d 969 (2000).

{¶ 9} It is undisputed that the map pertains to a law enforcement matter of a criminal nature. Participating in a criminal gang is a second degree felony in Ohio. R.C. 2923.42. The issue before us is whether release of the map would create a high probability of disclosure of specific confidential investigatory techniques or procedures or specific investigatory work product, the exemptions set forth in R.C. 149.43(A)(2)(c).

{¶ 10} The map itself is simply a map of the city of Toledo on which various geographic areas are outlined in different colors. Each geographic area is then assigned a number that corresponds to a specific gang, the names of which are then listed on the map. There are also three stars on the map that correspond to the clubhouses of three motorcycle gangs, although it is impossible to tell from the map the actual addresses of those clubhouses. Finally, the outlines of the geographic areas are colored in red, blue,

black, green or yellow. Those colors correspond to the major gang (i.e. Bloods, Crips, etc.) with which the area gangs affiliate. In his testimony, Officer Noon described the map and testified that he created it based on information gathered from confidential informants, surveillances, crime reports, field interviews, and felony crime logs. He further stated, however, that there is nothing on the map that would reveal a particular investigative technique that led to that information, or that would reveal any source of information. Other than revealing that the police department knows where the gangs operate, Officer Noon stated that nothing on the map identifies any location that the Toledo Police Department is surveilling. Accordingly, it is undisputed from the record that release of the map would not reveal any specific confidential investigatory technique or procedure.

{¶ 11} Specific investigatory work product has been defined as information assembled by law enforcement officials in connection with a pending or highly probable criminal proceeding. *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St.3d 261, 266-267, 685 N.E.2d 1223 (1997). In *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994), paragraph five of the syllabus, the Supreme Court of Ohio held:

Except as required by Crim.R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C.

149.43(A)(2)(c), excepted from required release as said information is

compiled in anticipation of litigation. The 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. Routine offense and incident reports are subject to immediate release upon request. If release is refused, an action in mandamus, pursuant to R.C. 149.43(C), will lie to secure release of the records.

{¶ 12} In *State ex rel. Leonard v. White*, 75 Ohio St.3d 516, 518, 664 N.E.2d 527 (1996), the court further clarified that “any notes, working papers, memoranda or similar materials, prepared by attorneys or law enforcement officials in anticipation of litigation constitute work product.” To be considered work product, however, a record must have been assembled in connection with an actual pending or highly probable criminal prosecution. *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 188, 648 N.E.2d 808 (1995). A criminal proceeding is considered probable or highly probable “even where the police have not yet identified a suspect, as long as it is clear that a crime has in fact been committed.” *Leonard* at 518.

{¶ 13} The map in question was not created in connection with any particular case. Officer Noon testified that he created the map based on information gathered from confidential informants, surveillances, crime reports, field interviews, and felony crime logs during his ongoing investigation of criminal gangs within Toledo. Although Noon testified that he was investigating federal drug and firearms crimes within gang

communities, he did not associate the map with any particular case. Rather, the map was created to be used as a tool or reference. It does not record actual crimes or note the addresses of locations believed to be associated with criminal activity. It has never been used as an exhibit or evidence in any case, although it was shown to a U.S. Attorney in connection with a case. In short, respondent has not established that the map was created “in connection with an actual pending or highly probable criminal prosecution” as that phrase is defined by the Supreme Court of Ohio. As such, the map is not exempt from disclosure.

{¶ 14} Respondent has not met its burden of proving that the gang map falls squarely within the work product exception. We therefore conclude that relator has a clear legal right to the requested public record and respondent has a clear legal duty to provide the record in compliance with R.C. 149.43. Accordingly, relator is entitled to judgment as a matter of law. Relator’s motion for summary judgment is granted.

Respondent’s motion for summary judgment is denied.

{¶ 15} Within its petition, relator has further requested attorney’s fees and statutory damages of \$100 per day, from the date of the filing of the action until such time as respondent makes the record available for inspection and copying.

{¶ 16} R.C. 149.43(C)(2)(b) provides that if the court orders a public office to comply with a public records request, the court may award reasonable attorney fees. “R.C. 149.43(C) allows a court to use its discretion in awarding such fees.” *State ex rel. Olander v. French*, 79 Ohio St.3d 176, 179, 680 N.E.2d 962 (1997). R.C.

149.43(C)(2)(c) then provides that an award of fees under the statute is considered remedial, not punitive, and the court may reduce an award of attorney's fees or not award them at all if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office *** that allegedly constitutes a failure to comply with a * * * [public records request] and that was the basis of the mandamus action, a well-informed public office * * * reasonably would believe that the conduct or threatened conduct of the public office * * * did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office * * * would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

{¶ 17} The Toledo Police Department's argument that the map was exempt from disclosure was not unreasonable given the holdings in *Steckman* and *Leonard*. That is, the only police records that are clearly subject to immediate release as public records are ongoing routine offense and incident reports. Accordingly, the Blade's request for attorney fees should be denied.

{¶ 18} Regarding the Blade’s request for statutory damages, R.C. 149.43(C)(1) only permits statutory damages when a requestor has transmitted a written request to inspect or copy a public record and the person responsible for the public record failed to comply. There is no evidence in the record that an employee of the Blade made a written request. Moreover, the parties have stipulated that an employee of the Blade orally requested that respondent permit her to inspect the map. Accordingly, the Blade is not entitled to statutory damages.

{¶ 19} Respondent is ordered to produce the gang map and to provide it to relator within ten days of the date of this decision. Relator shall notify the court, in writing, when it has received the requested record. All other pending motions are denied.

Writ granted.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

Stephen A. Yarbrough, J.,
DISSENTS.

YARBROUGH, J., dissenting.

{¶ 20} I respectfully dissent. For the following reasons, I believe the record at issue here, a criminal gang map, is fully exempt from disclosure as a type of

“[c]onfidential law enforcement investigatory record” under R.C. 149.43(A)(1)(h). I would therefore grant the city’s motion for summary judgment and deny the Blade’s cross-motion for summary judgment. For that reason, the Blade’s request for attorney’s fees must also be denied.

I. Background

{¶ 21} The parties apparently agree that when Blade reporter Taylor Dungjen verbally asked Toledo Police Sergeant Joe Heffernan for a copy of the gang map, he denied her request on the basis that “[the map] is an intelligence piece we’re using to do our enforcement. It’s actively being used.” The uncontradicted deposition testimony of Detective William Noon of the Toledo Police Department (TPD), which is the primary evidence before us, is consistent with Heffernan’s explanation. Detective Noon’s testimony as to the origin of the criminal gang map, its purpose, and the manner in which it is used, establishes that the map is a paradigm example of “specific investigatory work product” under R.C. 149.43 (A)(2)(c), a derivative category of information within the larger “confidential law enforcement investigatory record” exemption.

A. Nature of the Record Sought

{¶ 22} Detective Noon is one of 12 members of TPD’s gang task-force unit. The TPD presently devotes significant resources to interdicting and suppressing gang activity within the city of Toledo. It is a continuing mission of the TPD to investigate and prosecute crimes committed by gang members. As the majority notes, active participation in a criminal gang, combined with promoting or assisting any crime or

pattern of criminal activity, is itself a second-degree felony. Noon is also assigned as a joint Task Force Officer (TFO) with the Bureau of Alcohol Tobacco Firearms and Explosives (BATFE). For approximately ten years, Noon has worked in targeted gang investigations in dual capacities: first, as a TPD detective for the purpose of investigating and prosecuting gang-related felonies in state court, and then as a TFO with BATFE for the purpose of assisting in the investigation and prosecution of gang-related federal felonies, principally those involving drugs and firearms.

{¶ 23} Detective Noon created the gang map which The Blade is seeking through this mandamus action. In December 2011 he began assembling the map to show sections of the city where gangs or gang members were suspected to be active, to demarcate each gang's "territory" and its boundaries, and to track their activity. Initially, the map was based on information developed from investigations that Noon and other TPD gang task-force members conducted. It later came to include information provided to Noon through his work as a TFO with BATFE. Noon testified that it was his idea to create the map as a *cumulative* product of TPD and BATFE investigations into gang activity within the city. The map was compiled as an aid to *active* investigations of crimes known or suspected to be the work of gang members or at least gang-related.

B. The Map

{¶ 24} The map is entitled "Toledo Gang Territorial Divisions" and is a modified street map of the city of Toledo. It has three "boxes" on its face and each box contains the names of certain groups or gangs, although only one of these is marked "LEGEND."

The legend box is color-coded – that is, it is marked in five colors to reflect four gangs and one “unaffiliated” group. The four identified gangs are “genus” gangs (“Crips,” “Bloods,” etc.). A second box then lists the names of some 18 affiliated sub-gangs or “sets,” smaller units that operate separately but have a known association with a larger group. Scattered over the map, within lined areas, are special markings which use colors and numbers. These markings “identify a certain gang [or set] in a certain area,” as Noon described it. The legend also contains a separate symbol for motorcycle gang “clubhouses.” A third box then lists the names of these clubhouses after a letter. The location of a clubhouse is designated on the map by a corresponding lettered symbol.

C. Current Use

{¶ 25} As it evolved, the map became an integrated reflection of gang presence, identity, and location within the city. Sources of information from which the map was assembled included field interviews, crime reports from the public, surveillance by TPD officers (some working undercover), BATFE agents, and confidential informants. From Noon’s initial version, the map was refined over time as more specific information was gathered, or mistakes were corrected, based on later-acquired data. In March 2012, the gang map was put into its final, computer-generated form by “the [intelligence] division of [BATFE].” Copies of the TPD/BATFE gang map were then distributed to TPD gang officers, certain TPD command officers, and to BATFE agents.¹

¹ When Detective Noon was asked why he thought creating the map would advance TPD’s investigation of gang crime, he replied: “Basically it was done to set up the areas of town that we needed to work our surveillance with other jurisdictions outside the

{¶ 26} Noon testified that the gang map has been used in the investigation of federal narcotics and firearms crimes, and that federal indictments resulted from those investigations. An assistant United States Attorney received a copy of the map in connection with a specific criminal case although Noon did not know what transpired with it, nor how or if the map was used. The map aids TPD officers in the logistics of setting up surveillance of gang activity, executing search and arrest warrants and, if other agencies are involved, in coordinating with their agents to carry out these operations. On this point, Noon testified:

[T]here are other outside agencies [and] when we have a briefing, I'm able to use that map to assist what other outside agencies are with us at that time, [with] whatever particular crime we're looking at, or crimes or groups of people, [and] I can set them aside to let them know that these are the boundaries that we're going to try to stay within, the areas that we're going to try to stay within, [and] that the chances of seeing some of the criminal activity we're looking for will be at.

Toledo police gang task force, i.e., [BATFE]. Monitor crime activities in those specific areas, monitor the crime reports from these specific areas and develop informants [and] other sources of information.” When Noon created the map, the TPD gang task force was investigating “any crime that takes place. We weren’t truly specific. We tried to stay within the scope of the gangs themselves, but I mean, obviously, other criminal activity took place.” Noon indicated that task force investigations and surveillance work now focuses on “general felony crimes” believed to be gang-related.

{¶ 27} The TPD/BATFE gang map, in its present form, is *a cumulative intelligence product* shared by multiple agencies. Noon explained how he uses it:

I use the map as far as [BATFE] provides information of gun, gun recoveries and some other gun information that is due to the Department of Justice. So I use some of that to check it with what the map [shows], * * * different locations, to see if one specific area has more gun-related incidents[.] * * * I match that up with the crime reports and I'm able to see that there could be a possibility that there's a situation * * * taking place between two individual groups, or maybe individuals in a group, or maybe the group itself, depending on who and what.

D. Consequences of Disclosure

{¶ 28} Noon explained that the map could allow a determined gang member to identify a confidential informant working in the marked areas of his gang's territory, even though no informants' names are on the map. Noon stated:

If they feel that an informant is in that specific area and has been able to give us a specific boundary, and that we were in that area and all of a sudden he's done what informants do to try to gather information for us, * * * *I think someone [i.e., a gang member] looking at the map could say that they know the area, and why is this individual asking or attempting to get some information from me on whatever criminal activity that takes place or whatever criminal activity they're [doing].* * * * [I]s it a secret that there's

a [TPD] gang task force? No, there's no secret to it, but I don't believe that the gangs are fully aware of what investigative and what intelligence that we are trying to derive from people and to gather about the gangs.

(Emphasis added.)

{¶ 29} Noon suggested the adverse effect of publically revealing the map on TPD's efforts to suppress gang-related crime:

The understanding is * * * [the gangs] know the areas that they operate in * * * [and] there's also areas where we know that they are, have a hidden house or what we call a "stash house" or [a] "dope house," that they may operate out of those, which is not where we typically see them at. *They're going to know that we know about that location.* It could be a general store they know that we see them out in front of all the time and that this little area right here is usually where they hang [out], but they don't know that we know about a house that may be three blocks over that we've kept in the same general geographic area, that they may not know that we know that. (Emphasis added.)²

{¶ 30} As Detective Noon made clear, where the criminal gangs operate *overtly* is known – by both TPD and the gangs – but where gang members meet, plan crimes, keep weapons, drugs, or stolen property and operate *covertly* is another matter. The gangs do

² Noon explained that a "stash house" is "where [gang members] keep their guns, money. Stolen property. All the fruits of the criminal activity that they take [there]."

not know how far TPD's knowledge of their more secretive activities extends. Noon explained why putting the map on public display could educate the gangs on the scope of what police know and thereby hinder efforts to interdict gang-based street crime. In relevant part, he testified:

Q. Are there areas marked [on the map] that the gang members don't know you know about?

A. * * * I'm not aware if they know we know about these locations are not. But based upon the information we've gathered, I know that gang activity from a specific gang takes place in the geographical area that I have outlined [on the map].

* * * I use the carry out as an example, but it's a true example, that in most of the gang areas we have some sort of neighborhood carryout where * * * a lot of contact is made because that's your general place of meeting.

* * * So we do have a lot of contact. [Gang members] know we're going to watch this carryout in the specific general area. * * * I don't know if they know we're looking five blocks over here to the right [where] we know there's a trap house [i.e., drug house] or another location where we know they meet, or someone has just moved in there, or somebody has a girlfriend and that's where they meet up too, or that's where they can hide

the fact that they're, you know, dealing [in] the narcotics or firearms or whatever.

Q. [So] you think that they probably know that you know that the carryout area is an area where there's likely to be a lot of gang activity?

A. A lot of contact is made with gang members in that specific spot.

Q. And by a lot of contact you mean between you, * * *

A. Yeah, between the gang task force and officers you know, the street officers, yes. * * *

Q. You just said that they may not know that there's an area four blocks away that you're surveilling?

A. That's correct.

Q. And that area might also be in blue [on the map]?

A. In the geographical area, yes sir.

* * *

Q. Are there specific areas of Toledo that you have identified as locations where gang activity, that you believe gang members do not know that you know about?

A. I would say *they know that we know where certain gang activity takes place*, but as far as *everywhere* we know, I can't say if they know we know that or not.

* * * *I've had informants tell me that * * * they were informed by other gang members that they were surprised we hit a house here or hit a house there, you know, with a gang search warrant or something to that effect.* But, I couldn't tell you [whether] they feel we're aware of all their locations. (Emphasis added.)

II. Analysis

A. What is Not a Public Record

{¶ 31} R.C. 149.43, stripped to its essential provisions as they apply here, states:

(A)(1) * * * “Public record” does not mean any of the following:

* * *

(h) Confidential law enforcement investigatory records;

* * *

(2) “Confidential law enforcement investigatory record” means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

* * *

(c) Specific confidential investigatory techniques *or* procedures *or* specific investigatory work product[.] (Emphasis added.)

{¶ 32} The tenets of public records law in Ohio are essentially bright-line – that is, they are few, pithy, generally straightforward in application, and readily understandable

by the government custodian of the record and the person or organization seeking it. The Public Records Act is to be construed liberally in favor of access. Doubts arising in a dispute over a given record are to be resolved in favor of its disclosure. Where a statutory exemption is claimed as the basis for withholding the record, it is to be strictly construed against the custodian asserting it, who bears the burden of showing that “the requested record falls squarely within the [exemption].” *See State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 11-12.

{¶ 33} The task of applying a statutory exemption to a particular document is best accomplished through *in camera* inspection, which we have done. *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St. 3d 431, 437, 732 N.E.2d 960 (2000). The majority opinion correctly states the two-step test for determining whether the TPD/BATFE gang map is a “confidential law enforcement investigatory record” under R.C. 149.43 (A)(2). *See, e.g., State ex rel. Musial v. N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, 835 N.E.2d 1243, ¶ 19. First, I agree that the gang map plainly involves a law enforcement matter of a criminal nature. Second, and where I part company with the majority, the release of the map “would create a high probability of disclosure” of the type of item that R.C. 149(A)(2)(c) identifies as “specific investigatory work product.”

B. Specific Investigatory Work Product

{¶ 34} “Specific investigatory work product” was initially defined as “information assembled by law enforcement officials in connection with a probable or pending criminal proceeding [because] said information is compiled in anticipation of litigation.”

State ex rel. Steckman v. Jackson, 70 Ohio St.3d 420, 421, 639 N.E.2d 83 (1994). The Supreme Court later clarified this statement in more specific terms. Such “assemblages” include “*any notes, working papers, memoranda, or similar materials compiled by law enforcement officials in anticipation of a subsequent criminal proceeding.*” (Emphasis added). *State ex rel. Leonard v. White*, 75 Ohio St.3d 516, 518, 664 N.E.2d 527 (1996).

1. Non-routine “Product” of Investigative Effort

{¶ 35} *Steckman* explicitly distinguished between the materials police create to aid their investigations and the more common records resulting from completed enforcement actions, such as arrests. *Steckman* held that the work-product exemption “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. *Routine offense and incident reports* are subject to immediate release upon request.” (Emphasis added.) *Steckman* at 435.

{¶ 36} That the TPD/BATFE gang map is a unique, or at least a *non-routine*, investigatory item under *Steckman* cannot seriously be disputed. Indeed, in the *only* appellate decision cited by either party that involved a police map, *State ex rel. Fields v. Cervenik*, 8th Dist. No. 86889, 2006-Ohio-3969, the Eighth District found it exempt from disclosure under R.C. 149.43(A)(2)(c). Admittedly, the *Cervenik* court provided scant detail about the map, one of many disputed records compiled during a robbery investigation, describing it only as “a map edited by a Euclid police officer.” *Id.* at ¶ 84. The court, perhaps a bit more tellingly, put the officer’s map in the same category as

“[the] personal notes of a Euclid police officer.” Both were deemed “exempt because they disclose specific confidential investigatory techniques/procedures *or specific investigatory work product.*” (Emphasis added.) *Id.* Notwithstanding the abbreviated description, the Eighth District’s premise for exempting the map may be easily inferred: that by “editing” an ordinary map with personal notations for investigative use, the Euclid officer thereby *created* a working tool or “product” that was non-routine in character.

{¶ 37} Counsel for the Blade points out, as does the majority opinion, that Detective Noon conceded that the gang map does not reveal “sources” of information in the traditional sense, does not name confidential informants, nor identify “specific confidential investigatory *techniques or procedures.*” That may be true; however, what is being missed is that the map itself is a *non-routine “product”* of “specific investigatory work” by TPD and BATFE to aid their enforcement operations against the criminal acts of gang members. As an investigative *product* developed for that purpose, it easily fits within the reach of the last clause of R.C. 149.43(A)(2)(c).

2. Crimes are “Evident”

{¶ 38} Noon testified that the map has been involved in two federal prosecutions of gang members, so it is not unreasonable to anticipate its future use against gang members in felony prosecutions in the Lucas County Court of Common Pleas. The gang map, in other words, is a *fluid* asset presently used in a joint federal and state effort to suppress an equally fluid crime problem. Notwithstanding those facts, it matters not a whit that no “specific crime” is charged or pending against a gang member, as long as it

is “evident” that a crime (or crimes) has occurred in relation to which the map was assembled. On this point, the majority cites *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St. 3d 185, 648 N.E.2d 808 (1995) and *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261, 685 N.E.2d 1223 (1997), for the proposition that the map must have been created “in connection with an *actual pending or highly probable* criminal proceeding.” *Gannett Satellite* at 267. That language, however, must be read in light of the Supreme Court’s express statement in *State ex rel. Leonard v. White, supra*:

“*Once it is evident that a crime has occurred, investigative materials developed are necessarily compiled in anticipation of litigation and so fall squarely within the Steckman definition of work product. Consequently, we hold that where it is evident that a crime has occurred, although no suspect has yet been charged, any notes, working papers, memoranda, or similar materials compiled by law enforcement officials in anticipation of a subsequent criminal proceeding are exempt from disclosure as R.C. 149.43(A)(2)(c) work product.*” (Emphasis added.) *Id.*, at 75 Ohio St.3d at 518, 664 N.E.2d 527.

{¶ 39} Almost weekly in the newspaper there appear reports of gang shootings, assaults, robberies, murders or attempted murders, and at night the same crimes are recounted on the television news. Crimes have obviously happened, and continue to happen, making their occurrence “evident.” As often as not no immediate arrest can be made because the perpetrator’s identity is unknown. Acknowledging all of this hardly

requires an act of judicial notice. This was the factual context underlying the map’s creation, as Noon’s testimony suggested. *Compare Craig, supra*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, at ¶ 2-5. (recounting violent crimes perpetrated by “The Iron Horsemen, a nationwide outlaw motorcycle gang,” as the factual context for analyzing the Cincinnati Enquirer’s request for the investigative records of a police shootout with gang members).

{¶ 40} Again, the *Leonard* court stated:

[A] criminal proceeding is “probable” within the meaning of paragraph five of the *Steckman* syllabus and “highly probable” under [*State ex rel. Police Officers for Equal Rights v. Lashutka*] even where the police have not yet identified a suspect, as long as it is clear that a crime has in fact been committed. In cases such as this, the investigative record is necessarily compiled in anticipation of litigation. (Emphasis added.) *Id.*, 75 Ohio St.3d at 518, 664 N.E.2d 527.³

³ The *Leonard* court explicitly distinguished *Police Officers* and one other case, stating:

Neither *Police Officers* nor *State ex rel. Master v. Cleveland* (1996), 75 Ohio St.3d 23, 661 N.E.2d 180, requires a contrary result. In *Police Officers*, * * * we granted a writ of mandamus to compel access to records relating to police personnel files and internal affairs investigations. The requested records in *Police Officers* did not relate to any criminal investigation. *In fact, there was no indication that any crime had been committed.*

Similarly, in *Master*, where we held that the R.C. 149.43(A)(2)(c) work product exception did not apply, *it was not evident that a crime had actually occurred.* When it is not evident that a crime has occurred, the

3. No “Connection” to a Specific Case Required

{¶ 41} The majority opinion states that “the map in question was not created in connection with any particular case” and “Noon did not associate the map with any particular case.” Per *Leonard*, it did not have to be. There is no requirement that the gang map first be “associated” with a case before it qualifies as “specific investigatory work product.” In R.C. 149.43(A)(2)(c), the term “specific” refers to an individuated “product” (i.e., the map here, or a similar item of “investigative material”), one that is generated during an investigation and is unique or indigenous to that investigation, not to a *particular* criminal case or proceeding. “Product,” as used in this context, refers to the sorts of non-routine items created during *investigatory* police work that *Steckman* originally distinguished from the more prosaic incident reports or arrest records involving charged offenses. The TPD/BATFE gang map has nothing in common with either of the latter.⁴

investigative materials are compiled by law enforcement officials to determine if any crime has occurred and not necessarily in anticipation of litigation. (Emphasis added.) *Id.* at 518.

⁴ Counsel for the Blade, citing *Gannett Satellite, supra*, 80 Ohio St.3d 261, 685 N.E.2d 1223, contends that not all police-held information becomes exempted work product “simply by reason of its being parked in an investigator’s file.” But that assertion, while perhaps tautologically true, ignores the nature of the disputed records in *Gannett Satellite*: “newspaper articles, contracts and records [of a public sanitary district], and records of campaign contributions.” *Id.* at 267. Those innocuous, *non-investigative* documents were “the subject of a grand jury subpoena” from a special prosecutor; they were *not* assembled as unique, working components of a police investigator’s file. *Id.* Because the criminal gang map here bears not the slightest similarity to the documents at issue in *Gannett Satellite*, that case is inapposite.

4. The Map as an Investigative Tool

{¶ 42} Of greater concern is that the majority opinion seems to discount – or, perhaps, second-guess – the value of the TPD/BATFE map from the investigator’s viewpoint as it assists him in focusing on particular gangs and tracking their criminal activities. The majority characterizes the map “as a tool or reference,” stating “[i]t does not record actual crimes or note the addresses of locations believed to be associated with criminal activity.” Arguably, since R.C. 2923.42 makes active gang participation a second-degree felony, the lined and colored sections on the map do exactly that: they denote areas where particular gangs (or their “sets”) are operating, based on their known or suspected crimes and other police-gathered data. Therefore, in that sense, the map does reflect “criminal activity.” But again, R.C. 149.43(A)(2)(c) contains no such requirement before it may be deemed an investigatory *product*. Even if the map’s only practical value is as one tool in the investigator’s tool box, nothing more is needed to make it a “product” of his larger effort to interdict those responsible for gang crime.

{¶ 43} We should not, moreover, be substituting our sense of what the map reveals or doesn’t reveal, or its usefulness, for that of a trained police investigator. How the gang map appears to us – what information we *might* see in it or not, or *might* derive from it or not - may well be, and probably is, more myopic than what Detective Noon and other seasoned gang-officers see in it. The map, to our eyes, may seem “unremarkable,” but we should not so lightly deprecate the value of an *investigative asset* that took 15 months of intelligence work to complete. Worse, of course, is what a determined gang member

might glean from the map, or some marking on it, if it is reproduced in the newspaper.

The dynamics of that risk we surely cannot predict, and in ordering the release of an asset presently seeing tactical use against multiple criminal gangs, the majority's analysis fails to address that risk. The result is an improvident precedent.

C. Unintended Consequences

{¶ 44} The city has raised the specter of the deterrent effect of a holding which forces police to open up the contents of their active investigative files to anyone who asks. Today a criminal gang map is sought; tomorrow it might be a slightly more detailed map tracking the nefarious handiwork of an unidentified serial killer stalking the city. The city argues that its investigating officers, knowing that a media requestor could freely access anything they assembled during the investigation, would choose to self-censor. Rather than putting together a map or similar item, like a suspect profile that might help them identify or capture this criminal, they would simply refrain from making one at all. And why might that be so?

{¶ 45} In the first place, police simply cannot risk exposing every piece of information they have about a crime to its perpetrator *before* his arrest, especially where his identity remains unknown. That criminals monitor the newspaper, television news shows, and the internet for information that might indicate what police know about their crimes, and what steps police are taking in pursuing them, may be considered common knowledge. Indeed, it would be naïve to assume otherwise. Secondly, it is a well-known investigatory tactic, even when some general information about a crime is given out

during a news briefing, for police to withhold certain critical details which only they and the perpetrator know. This approach gains them time to run down leads, to confirm or dispel information about suspects, and avoids revealing how closely an arrest might follow. No less important in this tactic of restraint is that it avoids educating the perpetrator on *what the police don't know* but are trying to find out – whether about him, his associates, certain details in how the crime was committed, or some other significant clue.

D. Public Policy

{¶ 46} In *State ex rel. Fields v. Cervenik*, supra, the Eighth District observed that *Steckman* had “radically reshaped Ohio’s public record law by declaring that almost all police investigatory records are exempt from disclosure.” *Cervenik*, 8th Dist. No. 86889, 2006-Ohio-3969 at ¶ 7. Indeed, the *Leonard* court similarly stated that *Steckman* had “redefined” the work product exemption of R.C. 149.43(A)(2)(c), holding that “any notes, working papers, memoranda, or similar materials” were “necessarily compiled in anticipation of” a later criminal proceeding. (Emphasis added.) *Leonard*, 75 Ohio St.3d at 518, 664 N.E.2d 527. “[Such materials] fall squarely within the definition of work product,” regardless of whether a suspect has been charged or even identified. *Id.* The policy behind a more robust reading of R.C. 149.43(A)(2)(c) than existed before *Steckman* is obvious: an overly narrow one would stymie “police departments’ efforts to effectively investigate and apprehend criminals.” *Id.*

III. Conclusion

{¶ 47} Ohio’s public records law should enjoy a broad judicial construction in favor of access to records and information held by the government. In aspiring to promote openness, transparency of process, and accountability, R.C. 149.43 furthers the democratic principle that the people have a right to know what their government is doing. But that right necessarily exists at a high level of generality and is not unlimited. It has never been thought, when implemented practically, to extend to *all* information at *all* times and under *all* circumstances. *State ex rel. Wallace, supra*, 89 Ohio St. 3d at 438, 732 N.E.2d 960.⁵ For that reason, the General Assembly included within R.C. 149.43 many particularized and necessary exemptions that allow certain records, or discreet types of information in them, to be withheld for reasons which that body determined were more compelling than the right of the public, or the news media, to see them. The judicial eye should view these exemptions stringently, but not in disregard of the reasons for their inclusion or of what they were meant to protect.

{¶ 48} More to the point here, any judicial construction of R.C. 149.43(A)(2)(c) must be balanced against the compelling need to let police investigators do their jobs *effectively*. Given the reality of violent street crime, public safety requires it. *Steckman* struck that balance by “redefin[ing]” broadly the nature of those items investigators may

⁵ “[E]ven in a society where an open government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny. Certain safeguards are necessary.” *Id.*

legitimately withhold as their work product. *Leonard*, 75 Ohio St. 3d at 518, 664 N.E.2d 527. In my view, if the TPD/BATFE gang map is not such an item, I don't know what would be. If the Supreme Court wishes to revisit *Steckman* and to recast the "specific investigatory work product" language of R.C. 149.43(A)(2)(c) more narrowly than I read it, this case may provide that opportunity. Until then, I dissent.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.