[Cite as *Krouse v. Ohio State Univ.*, 2018-Ohio-5014.]

PETER K. KROUSE Requester v. THE OHIO STATE UNIVERSITY Respondent	Case No. 2018-00988PQ Special Master Jeffery W. Clark REPORT AND RECOMMENDATION

{¶1} On May 11, 2018, requester Peter Krouse, a reporter with cleveland.com, made a public records request to Chris Davey, Associate VP for Communications at respondent The Ohio State University (OSU), for a copy of "a Cuyahoga County grand jury subpoena [that] was recently served on Ohio State for records related to Sharon Sobol Jordan * * * and any documents submitted in response to the subpoena." (Complaint at 5.) On May 18, 2018, Davey responded that OSU was unable to confirm or deny whether it had received a subpoena or responded thereto, citing Crim.R. 6. On May 21, 2018, Davey added the Family Education Rights and Privacy Act (FERPA) as a ground for denial. (Complaint at 3.) On June 21, 2018, Krouse filed a complaint under R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, OSU filed its response to the complaint on September 13, 2018. In compliance with a court order of September 17, 2017,[1] respondent filed a copy of the withheld records under seal.

{¶2} Ohio's Public Records Act, R.C. 149.43, provides a remedy for production of records under R.C. 2743.75 if the court of claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). The policy underlying the

[1] On October 16, 2018, the special master inadvertently reissued the order of September 17, 2018. The special master apologizes to respondent for the inconvenience, and to both parties for the delay.

Act is 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. Therefore, the Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. *State ex rel. Glasgow v. Jones,* 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13. Claims under R.C. 2743.75 are determined using the standard of clear and convincing evidence. *Hurt v. Liberty Twp*., 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

Claimed Exceptions

{¶3} R.C. 149.43(A)(1) sets forth specific exceptions from the definition of "public record" as well as a catch-all exception for "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). The public office bears the burden of proof to establish the applicability of any exception:

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

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.

{¶4} Where a public record does not fall under any statutory exception, the public office must disclose the record. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 29. Records custodians are not authorized to create new exceptions based on a balancing of interests or generalized privacy concerns. *Id*. at ¶ 31. The General Assembly is the ultimate arbiter of public policy, and a public office may not withhold records simply because it disagrees with the policies behind the law permitting their release. *Id*. at ¶ 37. *See State ex rel. James v. Ohio State Univ*., 70 Ohio St.3d 168, 172, 637 N.E.2d 911 (1994).

{¶5} For the same reasons, a public office may not utilize an exception that is limited to other agencies. *State ex rel. Beacon Journal Publg. Co. v. Akron*, 104 Ohio

St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 36-45 (police department could not assert exception applying only to similar reports of children services agencies); *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 266, 685 N.E.2d 1223 (1997) (auditor could not assert grand jury records exception applying only to other officials); *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 247-248, 643 N.E.2d 126 (1994) (state university could not assert federal Freedom of Information Act (FOIA), which does not apply to state agencies); *James* at 170 (university promotion/tenure evaluators could not assert they were "confidential informants" under exception applying only to law enforcement agencies).

Grand Jury Records – Crim.R. 6(E)

{¶6} Crim.R. 6(E) provides:

> **(E) Secrecy of proceedings and disclosure**. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other *matters occurring before the grand jury* may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. * * * *No obligation of secrecy may be imposed upon any person except in accordance with this rule*.

(Emphasis added.) OSU argues that Crim.R. 6(E) prohibits OSU from disclosing the grand jury subpoena issued to it, because a subpoena is a "matter occurring before the grand jury." (Response at 3.) Krouse does not dispute that grand jury subpoenas fall under this classification. Nevertheless, Krouse asserts that the express language of Crim.R. 6(E) does not bar witnesses from disclosing subpoenas:

> The obligation for secrecy is on those connected to the grand jury, such as grand jurors, prosecutors and court staff, and does not include possible witnesses or even a defendant.

(Complaint at 3.) In fact, the secrecy of grand jury records extends only as far as the terms of the exemption provide. Crim.R. 6(E) itself cautions that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." While Crim.R. 6(E) *may* be the basis for a public records exception, courts must determine in each case whether the rule *does* provide such an exception. *State ex rel. Beacon Journal Publishing Co. v. Waters,* 67 Ohio St.3d 321, 324, 617 N.E.2d 1110 (1993*)*.

{¶7} Grand jury subpoenas are "matters occurring before the grand jury," and thus subject to the terms of Crim.R. 6(E) that apply to that category of grand jury documents. *Waters, supra*. Prohibitions regarding matters occurring before the grand jury apply only to the officials listed in the rule,[2] and not to outside witnesses such as OSU. In *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 266-267, 685 N.E.2d 1223 (1997) the Court found that grand jury subpoena records kept by the auditor of state were not secret, because he was not a person specified in the rule regarding "matters occurring before the grand jury." The federal courts hold that grand jury witnesses bear no obligation of secrecy under the analogous language of federal Crim.R. 6(e). *United States v. Sells Eng'g*, 463 U.S. 418, 425, 103 S. Ct. 3133, 77 L. Ed.2d 743 (1983); *Butterworth v. Smith*, 494 U.S. 624, 629, 634, 110 S. Ct. 1376, 108 L. Ed.2d 572 (1993); *United States v. Jeter*, 775 F.2d 670, 674-675 (6th Cir.1985).

{¶8} Further, in *Butterworth* the U.S. Supreme Court found that a Florida grand jury rule prohibiting a witness from disclosing his own testimony violated the First Amendment right of a person to make truthful statements of information he acquired on his own. *Butterworth,* 494 U.S. at 627-629, 634-636.[3] Discussing the effect of such a

---

[2] Grand jurors, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony.

[3] *See also* Ohio Constitution, Article I, Section 11, which provides in relevant part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

rule on the accountability of government officials, the Court stated:

> The potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent.

Id. at 635-636. Here, Ohio Crim.R. 6(E) simply does not purport to restrict a witness from disclosing a grand jury subpoena, or documents provided in response.[4]

{¶9} As a witness subpoenaed to produce documents to the grand jury, I find that OSU was not an entity prohibited by Crim.R. 6(E) from disclosing those items. Crim.R. 6(E) therefore does not apply as a public records exception to the subpoena and other responsive records requested from OSU.

Family Education Rights and Privacy Act (FERPA)

{¶10} OSU asserts that the requested records are also excepted from disclosure by the federal Family Education Rights and Privacy Act (FERPA). Krouse has not filed any evidence, legal authority, or argument in opposition.[5]

{¶11} FERPA, where applicable, constitutes a prohibition on the release of records under the Public Records Act. *State ex rel. ESPN, Inc. v. Ohio State Univ*., 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 18-25. As relevant here, FERPA prohibits an educational institution from having

> a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. 1232g(b)(1).

{¶12} The term "education records" means materials "which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20

---

[4] OSU does not assert that it has dual capacity as an entity named in the rule. Nor does it assert that the records would disclose the deliberations or vote of the grand jury or the issuance of an indictment – information which is subject to separate terms of secrecy under the rule.

[5] The order of September 17, 2018 authorized Krouse to file a reply pleading to OSU's September 13, 2018 response.

U.S.C. 1232g(a)(4). The analogous category of "student disciplinary records" are "education records" subject to FERPA, *ESPN* at ¶ 28-31, including those related to non-academic or criminal misconduct by students. *United States v. Miami Univ*., 294 F.3d 797, 815 (6th Cir.2002). On review *in camera*, I find that all the records submitted under seal contain information directly related to a particular student, and were maintained by an educational institution. I conclude that the records responsive to the request are education records for the purposes of FERPA.

{¶13} FERPA permits an educational agency or institution to disclose education records if it has removed all "personally identifiable information" from the records. (Response, Exh. 2, p. 2.) *See United States v. Miami Univ*. at 811, 824. Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 CFR 99.3 (2009). Thus, in *ESPN* where the request was made for records related to "an NCAA investigation," OSU was permitted to redact only the personally identifiable information from records it had sought to withhold in full. "With the personally identifiable

information concerning the names of the student-athlete, parents, parents' addresses, and the other person involved redacted, FERPA would not protect the remainder of these records." *ESPN* at ¶ 33-35. This is consistent with the Public Records Act requirement that all non-exempt records be disclosed:

> 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.

R.C. 149.43(B)(1). Disclosure of government activity in the non-redacted remainder of education records satisfies a core purpose of the Act: "The Public Records Act serves a laudable purpose by ensuring that government functions are not conducted behind a shroud of secrecy." *ESPN* at ¶ 40.

{¶14} However, the request in this case was made for records as related to a named student, and the responsive records are thus "(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." The wording of Krouse's request justifies, if not compels, reasonable belief that Krouse knew the identity of the student to whom the education records relate. The wording of exemption (g) establishes a prohibition of disclosure based on knowledge held by the requester. Where such knowledge is established, the exemption prohibits the release of the "*information requested,*" which necessarily amounts to the "*records requested*," in their entirety. *See Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 485-486, 490-492 (Iowa 2012). I find that the wording of the request informed OSU that Krouse knew the identity of the student to whom the requested education records related, and that the records were therefore exempt in their entirety pursuant to 34 CFR 99.3 (2009), *Personally Identifiable Information*, subsection (g).

Conclusion

{¶15} Upon consideration of the pleadings, attachments, and responsive records filed under seal, I recommend that the court issue an order denying requester's claim for

production of records. I recommend that costs be assessed to the requester.

{¶16} *Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).*

JEFFERY W. CLARK
Special Master

Filed November 5, 2018
Sent to S.C. Reporter 12/14/18