

[Cite as *Cincinnati Enquirer v. Univ. of Cincinnati*, 2020-Ohio-4958.]

THE CINCINNATI ENQUIRER, A
DIVISION OF GANNETT GP MEDIA,
INC.

Requester

v.

UNIVERSITY OF CINCINNATI

Respondent

Case No. 2020-00144PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

{¶1} The Public Records Act provides relief to requesters when the Court of Claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). R.C. 149.43(C)(1); R.C. 2743.75. The policy underlying the 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. “The Public Records Act serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy.” (Citation omitted.) *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 40.

{¶2} On January 3, 2020, Max Londberg, a reporter for requester Cincinnati Enquirer, made a public records request to respondent University of Cincinnati (UC) for

- all records shared with Andrea Goldblum, former UC Title IX coordinator, by Lt. David Brinker of UC Police regarding William Houston, the same William Houston shown in the attached photo. All other records shared by anyone else with UCPD with Goldblum regarding Houston.

- All other public records maintained by UC regarding William Houston. and/or an investigation into William Houston, and/or complaints made against William Houston. These should include but may not be limited to:

preliminary reports, sworn affidavits, interview transcripts, police complaint reports, police incident reports, email/text/fax/all other written communications records in the Share Drive or share folder (the same one referenced in the Feb. 12, 2019 notes of Bleuzette Marshall’s activities on said day for reference on page 19 of the attached PDF), complaints and/or

“no contact” orders filed by UC’s Title IX Office, records of any internal investigation conducted by the university’s Administrative Review Committee.

(Complaint, Exh. A at 2.) On January 3, 2020, UC acknowledged receipt of the request. (*Id.*, Exh. A at 1-2.) On January 11, 2020, Londberg made a second, partly overlapping request for:

All public files (including but not necessarily limited to: personal notes, written communications, interview transcripts, etc.) pertaining to the investigative case created by Andrea Goldblum on 2/13/19 regarding William Houston and backlash that followed his reception of a triumph cord due to his criminal history in late January-early February 2019.

(*Id.*, Exh. D.) UC sent a response on February 14, 2020 that may be summarized as:

January 3, 2020 Request – Denied. Any law enforcement or other records provided by Lt. Brinker to Goldblum “become education records” protected by FERPA. The “request for ‘records maintained by UC regarding William Houston’ fails to identify the records wanted with sufficient clarity. * * * However, we did review records held by UC’s Police Division and did not locate any law enforcement records responsive to this request.”

January 11, 2020 Request - Denied. The request for “the investigative case created by Andrea Goldblum ... regarding William Houston” seeks education records protected by FERPA. “Moreover, the remainder of the request seeking ‘backlash that followed his reception of a triumph cord’ fails to identify the records sought with sufficient clarity. * * * Please clarify this request to provide a timeframe, custodian, and topic.”

(*Id.*, Exh. B.) Requester’s and UC’s counsel engaged in additional correspondence that did not resolve the requests. (*Id.*, Exhibit C; Response, attached email.)

{¶3} On February 27, 2020 the Enquirer filed a complaint under R.C. 2743.75 alleging denial of access to public records by UC in violation of R.C. 149.43(B). Following partially successful mediation, UC filed a combined response brief and motion to dismiss (Response) on May 22, 2020. On the same date, UC filed a copy of the withheld UCPD records under seal. On June 10, 2020, the Enquirer filed a reply. On June 17, 2020, UC filed a further response as directed by the order of June 5, 2020. On

July 9, 2020, the Enquirer filed a response to the order of July 7, 2020. On July 30, 2020, UC filed additional sealed records and a response to the order of July 7, 2020. On August 26, 2020, UC filed a pleading (Supplemental Response) with a redacted, public version of its July 30, 2020 filings. On August 27, 2020, the Enquirer filed a response to UC's August 26, 2020 filings.

Motion to Dismiss

{¶4} In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the claimant can prove no set of facts warranting relief after all factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor. *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581, 669 N.E.2d 835 (1996). As long as there is a set of facts consistent with the complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 10.

{¶5} The motion to dismiss asserts that all records responsive to the requests are required to be withheld under the federal Family Education Rights and Privacy Act (FERPA), and that the request for records "regarding William Houston and backlash that followed his reception of a triumph cord" is overly broad. On review, the complaint neither concedes nor demonstrates these defenses. I therefore recommend the court deny the motion and determine the claim on the merits.

Burdens of Proof

{¶6} In an action to enforce Ohio's Public Records Act (PRA), the burden is on the requester to prove an alleged violation. In mandamus enforcement actions,

[a]lthough the PRA is accorded liberal construction in favor of access to public records, "the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence."

State ex rel. Caster v. Columbus, 151 Ohio St.3d 425, 428, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 15. Entitlement to relief under R.C. 2743.75 must likewise be established by

clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153 ¶ 27-30 (5th Dist.).

{¶7} However, when a public office asserts any exception to the release of records under the Act, the burden of proving the exception rests on the public office. *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Office*, 153 Ohio St.3d 63, 2017-Ohio-8988, 101 N.E.3d 396, ¶ 15. Exceptions to disclosure must be strictly construed against the public-records custodian. *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 7. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception. *Id.*; *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. Any doubt should be resolved in favor of disclosure. *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169, 637 N.E.2d 911 (1994).

Records Remaining at Issue

{¶8} In its response to the order of July 7, 2020, requester advised that the records remaining in dispute fall into two categories:

1. “[R]ecords regarding the named student that were shared with a former Title IX coordinator by a Lieutenant with the UC Police Department,” and,
2. “records relat[ing] to an investigative case file created by the former Title IX coordinator relating to a ‘backlash’ over the same student receiving a ‘triumph cord’ at his graduation ceremony.”

(Requester’s July 9, 2020 Response at 1-2.) Because the initial validity of a public records request is a threshold determination to be made before evaluating whether the public office has proven any other defense, the second category will be analyzed first.

Ambiguous or Overly Broad Request

{¶9} It is “the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.” *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21. A request that is ambiguous or overly broad may be denied. R.C. 149.43(B)(2).¹ Judicial determination of whether an office has properly denied all or part of a request as ambiguous or overly broad is based on the facts and circumstances in each case, *Zidonis* at ¶ 26.

{¶10} UC asserts that the portion of Londberg’s January 11, 2020 request seeking public files “pertaining to the investigative case created by Andrea Goldblum on 2/13/19 regarding William Houston and backlash that followed his reception of a triumph cord due to his criminal history in late January-early February 2019” is ambiguous and overly broad, and was thus properly denied. UC avers that it complied with R.C. 149.43(B)(2) by inviting “[p]lease revise this request to provide a custodian and a timeframe” (Complaint, Exh. C), implying that this is how UC’s relevant records are maintained and accessed, and that Londberg declined to revise the request. (Response at 11-12.) However, on plain reading the request seeks records “pertaining to the investigative case created by Andrea Goldblum on 2/13/19,” clearly identifying both the date the investigative case commenced, and the creator – who was also the likeliest custodian. The timeframe is further delineated by the date of the publicity that prompted the investigation, “in late January-early February 2019.” The request provides the relevant record identification criteria desired by UC, and is unambiguous as to the particular investigative case file sought.

¹ R.C. 149.43(B)(2) If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request * * *.

{¶11} UC appears to argue that the January 11, 2020 request was actually two separate requests; one for an investigation “regarding William Houston,” and the second for a separate investigation, commenced the same day, “regarding * * * backlash that followed his reception.” I find no grammatical basis to parse the wording in this manner, or any evidence that the Enquirer so intended. The “backlash” language serves to further specify the investigative case sought to one with a particular focus, commenced on a specific date. *Compare State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶¶ 23-27 (requests for email limited “temporally, by subject matter, and * * * by the specific employees concerned” were not overly broad).

{¶12} To be sure, had the request been for records of “backlash” from an event, without the accompanying author and the investigative case creation date, the term “backlash” standing alone would have been too ambiguous in meaning to reasonably inform a public office of the records sought. See *Kesterson* at ¶¶ 28-30; *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶¶ 22; *State ex rel. Fant v. Tober*, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591, *3-4 (April 28, 1993), *aff’d*, 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993). For the same reason, I find the term “pertaining to” that was used in the request is too indefinite to reasonably inform UC of what records, beyond the investigative case file itself, are sought. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶¶ 14-15; *Gannett GP Media, Inc. v. Ohio Dept. of Pub. Safety*, Ct. of Cl. No. 2017-00051-PQ, 2017-Ohio-4247, ¶¶ 10 (requests for records “regarding” a topic are inherently problematic).

Embedded Request

{¶13} A proper request embedded within an otherwise ambiguous or overly broad request may be enforceable. In *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶¶ 1, 17-24, a request for six months-worth of a state representative’s email was found overly broad, but an embedded request – “including,

but not limited to [a particular bill]” – was sufficiently narrow to be a proper request. See *Axelrod v. Ohio DOC, Div. of Sec.*, Ct. of Cl. 2018-01458PQ, 2019-Ohio-1821, ¶ 9-10.

{¶14} Londberg’s January 11, 2019 request contains a severable request for the “public files (including but not necessarily limited to: personal notes, written communications, interview transcripts, etc.) [of] the investigative case created by Andrea Goldblum on 2/13/19 regarding William Houston and backlash that followed his reception of a triumph cord due to his criminal history in late January-early February 2019.” The request was made to the agency that keeps the records and reasonably identifies the case file by date commenced, subject matter, and the agency official who created the file(s). I find that this embedded request is not ambiguous or overly broad. However, I find that the severable portion of the request seeking records beyond the case file that in any way “pertain to” the investigation is ambiguous and overly broad, and is therefore properly denied.

Family Education Rights and Privacy Act (FERPA)

{¶15} UC asserts that both the Police Division records and the investigative file of the Title IX Coordinator are “education records” under FERPA. FERPA, where applicable, constitutes a prohibition on 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). The term “education records” means “those records, files, documents, and other 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 U.S.C. 1232g(a)(4).

UC Police Division (UCPD) Records

{¶16} The UCPD records responsive to the February 3, 2019 request, filed under seal, are summarized as follows:

p. 000001	Fax cover sheet
p. 000002	First page of police initial incident report
p. 000003-4	Second police initial incident report
p. 000005-9	Third police initial incident report
p. 000009-13	Supplements to third police incident report
p. 000014	Cover letter from university legal department
p. 000015	University housing-initiated initial incident reporting form
p. 000016-17	Student Conduct charge sheet
p. 000018-20	Preliminary Conference Notes and Notice
p. 000021	Release form
p. 000022-24	Hearing notes
p. 000025-26	Victim and university email
p. 000027	Student Conduct notice
p. 000028	Student Conduct email to alleged victim
p. 000029	Fax cover sheet
p. 000030-34	Fourth police initial incident report

UC asserts that all these documents are “education records” because most contain a student name. (Response, Privilege Log.) The Enquirer argues that the UCPD records are not “education records” because they were obtained, used, and maintained for the purposes of law enforcement.

{¶17} FERPA provides that “[t]he term ‘education records’ does not include * * * records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.” 20 U.S.C. 1232g(a)(4)(B)(ii). The exemption is amplified at 34 CFR §99.8 *What provisions apply to records of a law enforcement unit?* The regulation states that

[r]ecords of a law enforcement unit means those records, *files*, documents, and other materials that are –

- (i) Created by a law enforcement unit;
- (ii) Created for a law enforcement purpose; and
- (iii) Maintained by the law enforcement unit.

(Emphasis added.) 34 CFR §99.8(b)(1).² The Code cautions that

A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(Emphasis sic.) 34 CFR §99.8(a)(2). The pleadings, the affidavits of Lieutenant David H. Brinker, and review of the records filed under seal demonstrate that officers of the UCPD gathered and compiled a file of other-agency incident reports for law enforcement purposes, subsequently maintained at the UCPD, that met the above definition. Independently, the records were subject to disclosure regardless of their status as law enforcement records because they did not meet the definition of “education records” in the first instance.

{¶18} Lt. David Brinker has been employed at all times relevant to this action as the UCPD Investigations Lieutenant. (Response of August 26, 2020, Brinker Aff. (“Brinker Aff. II”) at ¶ 2-3.) A non-exclusive list of Lt. Brinker’s duties includes responsibility to supervise and direct Investigative Unit personnel and to oversee intelligence-gathering pertaining to threats to community members. (*Id.*, Exh. A – Job Description.) Lt. Brinker is also required to “assist with resolution of departmental and community problems/needs to accomplish departmental missions and goals.” (Brinker Aff. II at ¶ 4.) Lt. Brinker is UCPD liaison to various entities, including the Director of

² UC repeatedly notes that the withheld records were not from a law enforcement *investigation*, as though only those could constitute “records of a law enforcement unit.” The statute contains no such limitation on the diversity of records “created for a law enforcement purpose.”

Police, the Division of Student Affairs at UC, UC's Advancement and Transition Services Program, UC's Transition and Access Program, the Joint Terrorism Task Force of Cincinnati's FBI Office, the City of Cincinnati and Hamilton County Prosecutor's Office, local law enforcement investigative units, and other community partners. (*Id.*) Lt. Brinker has not held any non-law enforcement position with UC. (Response of July 30, 2020 at 2.)

{¶19} On September 26, 2016, Lt. Brinker sent an email to a Department of Rehabilitation and Correction (DRC) parole officer (PO) with the subject line "Is this him." The email contained a picture of a UC student. (Sealed records at 000041.)³ On September 28, 2016, the PO replied, asking for the student/offender's class schedule and a contact at the UC Title IX office for discussion "about him being on/near campus." (*Id.*) Lt. Brinker provided the contact information that day, but not the class schedule (*Id.* at 000040).

{¶20} On September 29, 2016, a detective sergeant from a state university police division sent an email to one of Lt. Brinker's detectives, with "the reports we spoke about" attached.⁴ The detective forwarded these to UCPD Captain Dudley Smith and Lt. Brinker. (*Id.* at 000038.) The attachments included a 2014 municipal P.D. incident report and multiple 2014 incident reports from two universities regarding the UC student. (*Id.*)

{¶21} On September 30, 2016, the PO advised Lt. Brinker of his purpose to conduct a home visit with the student/offender "to review his rules and make sure he fully understands them as well as explain the warrantless search process, sex offender registration, and prohibited weapons to [relevant persons] in the event that we do officially accept his case." (*Id.* at 000039-000040.) The PO added, "Due to the nature of

³ The redacted versions of the sealed documents, marked with the same Bates numbers, are attached to Brinker Aff. II, filed with respondent's supplemental brief of August 26, 2020.

⁴ This contradicts UC's representation that the PD "received several documents * * * *purported to be from the parole officer* for a student at the University of Cincinnati." (Brinker Aff. I at ¶ 3.)

his case and proximity to bars/campus would you or another officer like to be present for that home visit?" (*Id.*) Lt Brinker replied: "Ok do you want to meet at our PD at 1530?" (*Id.*) They arranged to meet in a garage under the UCPD building. (*Id.* at 000043.)

{¶22} Lt. Brinker forwarded the PO's September 30, 2016 email to the Interim Title IX Coordinator, as it included an invitation for her to attend the home visit as well. (*Id.* at 000039.) On October 3, 2016, she declined, "but appreciate in [sic] information that may be relevant to the Title IX Office." (*Id.*; Brinker Aff. II at ¶ 11.) The record does not reflect whether Lt. Brinker forwarded any information to her.

On October 13, 2016, the PO sent a final email to Lt. Brinker asking, in part:

Can you please send me a copy of all of those reports you have on him?
The ones from [redacted] that you had mentioned when I met with you and
any others that you may have.

(Sealed records at 000043.) Lt. Brinker responded later that day,

I'm not trying to be difficult regarding the reports, but we issued a request for the documents and can not forward them according to our General Counsel.

However, if you reach out to [the police divisions from which the reports were obtained] I would think they can provide them to you since the reports originated with them.

(*Id.*) Following this activity, Lt. Brinker kept the other-agency incident records in a file folder in his office "in case the information in the documents became relevant to any other matter at the University." (Brinker Aff. I at ¶ 4; Brinker Aff. II at ¶ 8-9). He did not open a UCPD case or investigation. (*Id.*)

{¶23} Three years later, in February of 2019, Lt. Brinker engaged in a phone conversation with Executive Director Andrea Goldblum of the UC Office of Gender Equity and Inclusion. During the call, Goldblum mentioned a student who Lt. Brinker recognized as the subject of the 2014 reports in his file. At Ms. Goldblum's request, he shared the records with her. (Brinker Aff. I at ¶ 5-7.)

{¶24} The 2016 exchange of information, documents, and in-person support between UCPD officers, another state university's detective sergeant, and the visiting parole officer constituted law enforcement activities. The other-agency incident reports were solicited. They were discussed with another state university police division, then sent to the UCPD detective, and then forwarded to and maintained by Lt. Brinker. Lt. Brinker's affidavits and the officer's emails do not reflect that these actions were performed as a non-law enforcement function on behalf of UC as an educational institution.⁵ UC does not assert that these records were created or compiled in 2016 for a current "non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution." See 34 CFR §99.8(b)(2). UC asserts no other public records exemption for the withheld UCPD records, nor are any apparent on the face of the documents other than social security numbers and personal contact information redacted in the copies as received by UCPD.

{¶25} UC's efforts to recharacterize the records are unpersuasive. First, UC asserts that the records were not "created" by UCPD (Aug. 26, 2020 Supplemental Response at 3) and therefore do not fall under the 34 CFR §99.8(b)(1) definition: "Records of a law enforcement unit means those records, files, documents, and other materials that are - (i) Created by a law enforcement unit." However, Lt. Brinker affirms that he did create a *file* of these documents in his UCPD office. (Brinker Aff. I at ¶ 4.) Further, UCPD purposely gathered and compiled the documents – creating their status as records of UCPD. As noted below, the Ohio Public Records Act includes "receipt" as a means by which documents become an agency's records.

{¶26} In any case, documents need not be "law enforcement records" to be requested from an educational institution's law enforcement unit. As with its personnel,

⁵ The UCPD detective negotiated delivery of the other-agency incident reports on September 29, 2016, one day before Lt. Brinker notified the Title IX Coordinator of the student/offender home visit, and four days before she expressed any interest in records relevant to her office.

financial, and other non-law enforcement records, UCPD as a public office must provide any of its public records upon request. “Public record” means any *record kept by* any public office. R.C. 149.43(A)(1). The definition of whether a document is a “record” is found at R.C. 149.011(G):

“Records” includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created *or received by* or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

(Emphasis added.) Law enforcement agencies keep a wide variety of records to document their duties and activities, including personnel files, traffic cases, financial records, criminal investigation files, training records, crime-prevention programs, equipment acquisition, etc. See UC’s Schedule for Records Retention and Disposition, Public Safety Division. (Respondent’s July 30, 2020 Response, Exh. B.) UCPD’s full inventory of “records” are public unless an exemption applies, such as “education records” defined in FERPA.

{¶27} As the email chronology above shows, the requested other-agency police reports did not originate, and were not gathered, as UC “education records.” It is thus irrelevant whether they were reports of law enforcement investigations, non-investigation law enforcement records, or non-law enforcement records. To be clear, 20 U.S.C. 1232g(a)(4)(B)(ii) and 34 CFR §99.8(b)(1) provide a law enforcement records *exception* to the “education records” *exemption*. This means only that documents which are otherwise “education records” are not exempt *if they are also* law enforcement records, not that the full inventory of records at a university police division are “education records” *unless* they are law enforcement records.

{¶28} UC argues that the 2016 UCPD activity took place only because the offender was a UC *student*. (Response at 3.) The evidence instead shows that the PO first contacted UCPD because the offender was a *resident* within UCPD’s jurisdiction,

for his purpose of making a home visit. The offender's status as a student was irrelevant to this purpose. Nor does the evidence show that records were exchanged because the offender was a student, though Lt. Brinker withheld records from the PO for that reason. However, even had the contact been made and assistance rendered because the offender was a student, that circumstance standing alone does not make ensuing law enforcement documentation an "education record."

{¶29} Finally, the fact that Lt. Brinker later shared non-exempt law enforcement records with a UC employee in the Office of Gender Equity and Inclusion did not transform the copies retained by UCPD into "education" records, and did not strip them of their status there as public records. A non-exempt public office may not "borrow" an exemption from another office to whom the records were later sent. *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 315-316, 750 N.E.2d 156 (2001) (repair records of public works department remained public, regardless of copies' later protected status in the hands of a police department); *Heisig v. MetroHealth Sys.*, Ct. of Cl. No. 2016-00806PQ, 2018-Ohio-4925, ¶ 6 (fact that agency record was filed with a court under seal had no effect on continuing availability of the document from the public agency). The purposes of the Public Records Act would be thwarted if records of a law enforcement agency could be concealed merely by sharing them with an educational institution.

{¶30} Lt. Brinker and a UCPD detective worked with DRC to verify the identity of a student/offender, provide back-up at the PO's home visit, and exchange contact information for further information acquisition, for the law enforcement purposes of post-release control, interagency liaison, manpower assistance, and UCPD intelligence-gathering to protect the community ("Due to the nature of his case and proximity to bars/campus"). Three UCPD officers were involved in this activity. I find that the correspondence constitutes overwhelming evidence that the records obtained and maintained by Lt. Brinker document official UCPD functions and activities. The documents readily meet the definition of agency "records," and "public record."

{¶31} I find that the withheld documents are not “education” records, but are records of UC’s law enforcement unit. FERPA neither requires nor prohibits the disclosure by an educational institution of its law enforcement unit records, 34 CFR §99.8(d). The Ohio Public Records Act, however, does require disclosure of such records. *See generally State ex rel. Schiffbauer v. Banaszak*, 142 Ohio St.3d 535, 2015-Ohio-1854, 33 N.E.3d 52. I find that UC has not met its burden of proof to show that the records kept by Lt. Brinker fall squarely under the “education record” exemption in FERPA.

Investigative Case Created by Andrea Goldblum

In another exception to the exemption, “education records” do not include

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student.

34 CFR 99.3 *Education records* (b)(5). The request for the investigative case created by Andrea Goldblum “on 2/13/19 regarding William Houston and backlash *that followed his reception of a triumph cord,*” apparently at graduation, dates her records as created after Houston ceased to be a student. Nor can police records that preceded a person’s university attendance, and become relevant only when his fitness for a graduation award is questioned, “*directly relate to the individual’s attendance as a student.*”

{¶32} I conclude that records contained in Goldblum’s case file are not “education records” as defined in FERPA and were improperly withheld. In the event that personally identifying information of students other than Houston exist in such records and arguably qualify as education records, UC may redact that information, providing an explanation, including legal authority, for each redaction. R.C. 149.43(B)(3). UC is required to make available all information in such records that is not exempt. R.C. 149.43(B)(1); *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶¶ 33-35.

Conclusion

{¶33} I recommend the court order respondent to provide requester with unredacted copies of the UCPD records filed under seal. I further recommend the court order respondent to provide requester with all “public files (including but not necessarily limited to: personal notes, written communications, interview transcripts, etc.) [of] the investigative case created by Andrea Goldblum on 2/13/19 regarding William Houston and backlash that followed his reception of a triumph cord due to his criminal history in late January-early February 2019” that have not already been released. I recommend the court order that requester is entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that it has incurred. I recommend that costs be assessed to respondent.

{¶34} *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).*

JEFF CLARK
Special Master