

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

ANDREW WELSH-HUGGINS,

Requester-Appellee,

v.

OFFICE OF THE PROSECUTING ATTORNEY,
JEFFERSON COUNTY, OHIO,

Respondent-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 JE 0005

Civil Appeal from the
Court of Claims of Ohio
Case No. 2018-00793PQ

BEFORE:

Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Reversed.

Atty. John C. Greiner, Atty. Darren W. Ford, Graydon Head & Ritchey LLP, 312 Walnut Street, Suite 1800, Cincinnati, Ohio 45202 for Requester-Appellee and

Atty. Jane M. Hanlin, Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, OH 43952, for Respondent-Appellant.

Dated: September 13, 2019

Robb, J.

{¶1} Respondent Office of the Jefferson County Prosecutor's Office appeals the decision of the Court of Claims ordering it to permit Requester Andrew Welsh-Huggins to inspect and receive copies of the August 21, 2017 video recording of Nate Richmond shooting the Honorable Judge Bruzzese outside the Jefferson County Common Pleas Courthouse. The video footage is from a Jefferson County Common Pleas Courthouse exterior security camera. Respondent asserts the Court of Claims incorrectly interpreted the applicable provisions in R.C. 149.433 and erroneously shifted the burden onto it to prove the footage was not a public record. For the reasons expressed below, we hold Respondent met its burden and the video footage constitutes a security record under the Public Records Act.

Statement of the Case

{¶2} On August 21, 2017, the Honorable Judge Bruzzese was shot outside the Jefferson County Courthouse by Nate Richmond. The judge was walking into work when Richmond approached him and began shooting. The judge was able to return fire and a probation officer walking into work was also able to return fire. The judge was wounded but recovered; he was flown to a hospital in Pittsburgh and underwent surgery. Richmond died at the scene as a result of gunshot wounds inflicted by defensive fire.

{¶3} The shooting and response were recorded on the courthouse video surveillance. There was a camera positioned outside the door where courthouse personnel entered and exited. Part of the shooting and part of the response was also recorded on a street camera.

{¶4} Requester is from the Associated Press and on the day of the shooting he requested a copy of the external courthouse surveillance under the Public Records Act. Respondent denied the request indicating it was not a public record; it was an infrastructure record and/or security record which was going to be used in a criminal or civil action.

{¶5} The request was made by Requester numerous times over the next nine months and was always timely denied by Respondent. The reason for the request was

twofold. First, the Requester did not want to take law enforcement personnel's assessment that Richmond ambushed the judge. Second, the shooting of a judge going into the courthouse was seen as a great public interest.

{¶6} Following the repeated denials of the request, Requester filed a formal complaint in the Ohio Court of Claims pursuant R.C. 2743.75. 5/7/18 Complaint.

{¶7} Respondent filed a response to the complaint and a motion to dismiss asserting the video surveillance was not a public record because it was an infrastructure and/or security record. 9/11/18 Response and Motion to Dismiss. It argued the video shows security measures and responses. It also shows the camera's configuration, blind spots, and technical capabilities. Respondent argued the release of this video would give future attackers an advantage. Respondent filed the street camera video, the courthouse video surveillance, and still photographs of the attack. The courthouse video surveillance and the still photos were filed under seal. The still photographs were cropped so that no configuration systems were shown.

{¶8} Requester filed a motion in opposition to the motion to dismiss. 9/27/18 Response.

{¶9} The Special Master appointed to hear the matter requested additional information from Respondent, to which Respondent complied. 10/5/18 Order; 10/18/18 Supplement.

{¶10} Additional responses and replies were asserted by each party. One argument set forth by the Respondent was that the act of activating the video player software divulges infrastructure of the digital security surveillance system. It also asserted it should not be required to convert the media to another format.

{¶11} The Special Master recommended denial of the motion to dismiss with the case to be decided on the merits. 1/28/19 Report and Recommendation. As to the merits, the Special Master recommended an order to release the video surveillance. 1/28/19 Report and Recommendation. It found that none of the exceptions to public records applied, specifically the infrastructure and security records exceptions. 1/28/19 Report and Recommendation. It cited the Ohio Supreme Court for the proposition that footage of the location of doors, windows, and vents shows no more than what would be revealed

in a simple floor plan and thus, is not an infrastructure record. 1/28/19 Report and Recommendation. It also determined the footage was not a security record:

The video is not a planning, training, investigatory, or policy document maintained by the office for security purposes. (Supp. Response at 6.) The video contains no audio, and therefore no verbal commands, codes, perceptions, reasoning, choices, plans, or explanations are conveyed. While relevant law enforcement and security offices likely created after-action reports and applies lessons learned to their training and protocols, the courthouse video itself does not contain specific and unique vulnerability assessments or response plans. There is no evidence presented that the video recording at issue actually constitutes “information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage,” or was assembled, prepared, or maintained by a public office * * * to prevent, mitigate, or respond to acts of terrorism.”

1/28/19 Report and Recommendation.

{¶12} The report, however, indicated any image of any peace officer who it is confirmed to have had an undercover or plain clothes assignment at the time of the public records request or at the present time may be redacted. 1/28/19 Report and Recommendation.

{¶13} It then held Respondent was required to copy the record in an available format and any format that the public office’s equipment was programmed to export. 1/28/19 Report and Recommendation.

{¶14} Respondent filed timely objections and Requester filed responses. 2/5/19 Objections; 2/13/19 Response to Objections.

{¶15} The Court of Claims overruled the objections and adopted the Special Master’s Report and Recommendation. 2/10/19 J.E.

{¶16} Respondent timely appealed the Court of Claims’ decision. Respondent filed a stay in the Court of Claims, which was granted. 3/13/19 J.E.

{¶17} Respondent sets forth ten assignments of error. Many of the assignments can be addressed together as there are four main topics of the assignments – Infrastructure Record, Security Record, Creation of a New Record, and Shifting Burden.

Public Records Procedure, Policy,
and Exceptions at Issue

{¶18} Pursuant to R.C. 2743.75, Requester asked for the release of the video footage of the shooting claiming the video is a public record. R.C. 2743.75 states that the request can be made to the Court of Claims. R.C. 2743.75(D). The case proceeded through the statutory procedure set forth in division (D) and (F) of that section. Division (G) dictates any appeal from the Court of Claims' decision is to be filed in the "court of appeals of the appellate district where the principal place of business of the public office from which the public record is requested is located." R.C. 2743.75(G)(1). Consequently, our court is the proper court to hear the appeal and pursuant to division (G)(1) the appeal is to be given prompt consideration.

{¶19} "R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request, within a reasonable period of time." *State ex rel. Rogers v. Department of Rehabilitation and Correction*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 6. The policy underlying the Public Records Act is that "open government serves the public interest and our democratic system." *Id.*, citing *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. Given that policy, the public-records statute is to be "construed 'liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.'" *Rogers*, citing *State ex rel. School Choice Ohio, Inc. v. Cincinnati Pub. School Dist.*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 12, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

{¶20} There are statutory exceptions to public records. Two such exceptions are infrastructure records and security records as defined by R.C. 149.433. R.C. 149.433(B)(1) and (2) specially indicate infrastructure and security records are not public records and are not subject to mandatory release under R.C. 149.43:

(B)(1) A record kept by a public office that is a security record is not a public record under section 149.43 of the Revised Code and is not subject to mandatory release or disclosure under that section.

(2) A record kept by a public office that is an infrastructure record of a public office, public school, or a chartered nonpublic school is not a public record

under section 149.43 of the Revised Code and is not subject to mandatory release or disclosure under that section.

R.C. 149.433(B).

{¶21} Respondent argues the video footage falls under these two provisions.

Infrastructure Record
First, Second, and Seventh Assignments of Error

“The Special Master’s Report and Recommendations and the Trial Court’s Decision erroneously ignore the plain statutory language which makes the subject video an ‘Infrastructure record’ as defined by R.C. 149.433(A), as a matter of law.”

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously ignore R.C. 149.433(B)(2), which provides that an ‘Infrastructure Record’ is not a public record and is not subject to mandatory release or disclosure,” as a matter of law.”

“Divulging the subject video (even modified as recommended by the Special Master) would constitute the disclosure of an ‘Infrastructure Record’ and ‘Security Record.’”

{¶22} It is noted that some of the arguments asserted in these assignments of error address security records. Any discussion of security records will be addressed with the next set of assignments of error.

{¶23} R.C. 149.433 defines Infrastructure Record as:

“Infrastructure record” means any record that discloses the configuration of critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building.

“Infrastructure record” includes a risk assessment of infrastructure performed by a state or local law enforcement agency at the request of a property owner or manager.

“Infrastructure record” does not mean a simple floor plan that discloses only the spatial relationship of components of the building.

R.C. 149.433(A).

{¶24} Infrastructure records were specifically addressed in the Ohio Supreme Court's recent *Rogers* decision. *Rogers* dealt with a request for the release of security camera video footage related to a use-of-force incident at Marion Correctional Institution. *State ex rel. Rogers v. Department of Rehabilitation and Correction*, 155 Ohio St.3d 145, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 1. The video camera in that case was in plain view and the video was continuous and soundless and ran for two minutes and 28 seconds with the use-of-force incident lasting less than a minute. *Id.* at ¶ 4.

{¶25} The Department of Rehabilitation and Correction (DRC) argued the video was an infrastructure record because it disclosed security protocol and the structural configuration of the institution, including the network of security cameras which constitutes a critical system. *Id.* at ¶ 10. It further asserted “the scope and camera angles of the videos show various aspects of the infrastructure of the respective institutions and are a window into what is not captured by the camera.” *Id.*

{¶26} The Court found the DRC failed to meet its burden to show the video fell within the infrastructure exception. *Id.* at ¶ 13. It stated that the video only captured a portion of one hallway, including windows, doors and vents, and shows where that hallway intersects with another hallway. *Id.* at ¶ 11. The court concluded these “individual components of the hallway show ‘only the spatial relationship of components of the building.’” *Id.* In other words, it only reveals the simple floor plan, which by definition is not an infrastructure record. *Id.*

{¶27} As to the argument that the video shows the configuration of a critical system, i.e., the network of security cameras, the Court disagreed. *Id.* at ¶ 12. It concluded the video did not reveal the location of any video cameras other than the one that recorded the incident at issue. *Id.* It did not show alarms, correctional officer posts, or the configuration of any other critical systems. *Id.*

{¶28} Many of the arguments set forth by Respondent are similar to the arguments made by the DRC in *Rogers*. The footage from the security camera at issue is positioned above an entrance to the courthouse that can only be used by courthouse personnel. This is not an entrance for the public to use. The footage shows that some type of key fob is used by courthouse employees to open this door. The camera captures a view of the alley by the courthouse and shows the sidewalk and ramp leading to this entrance with

video images of people approaching and entering through this door. This camera also captures video of the parking lot on the other side of the alley. However, it does not show any electrical system, ventilation system, or mechanical system of the courthouse. The most this video shows as to the structural configuration of the courthouse is that this is a side entrance that is approachable by ramp or steps and a key/fob is needed to access this door. The location of nonpublic, secured entrances would appear on a “simple floor plan” and thus, revealing these entrances do not constitute infrastructure records. *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 26.

{¶29} The video does show the range of the camera and that it is seen through a fish eye effect. However, the video is good quality. The footage does show the camera’s limitation, but it does not indicate where other security cameras are located. In other words, this one camera does not disclose the configuration of the camera security system; display of one component of a critical system is not enough to qualify as the configuration of the critical system. A request for the entire outside security footage from all cameras could qualify as an infrastructure system since it would show the configuration of the critical system.

{¶30} These facts are similar to *Rogers*’ infrastructure analysis. Given what the camera shows, Respondent did not meet its burden to show that the video falls squarely within the exception for infrastructure records.

{¶31} These assignments of error lack merit.

Security Record
Third, Fourth, Fifth, Sixth, and Seventh Assignments of Error

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously ignore the plain statutory language which makes the subject video a ‘Security Record,’ as defined by R.C. 149433(A)(1), as a matter of law.”

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously ignore R.C. 149.433(B)(1), which provides that a ‘Security Record’ is not a public report and is not subject to mandatory release or disclosure, as a matter of law.”

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously ignore the fact that the subject video recording is ‘directly used for protecting or maintaining the security of a public office’ and it is ‘directly used for protecting and

maintaining the security of the employees and other officers of that office.’ Therefore, that record is a ‘Security Record’ within the meaning of R.C. 149.433(A)(3) and the holding in *State ex rel. Plunderbund Media v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶ 18-32 (2014).”

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously ignore the fact that the subject video recording involves direct threats against the highest judicial officials in the County Government and is used for protecting and maintaining the security of the judges, other elected office-holders and their staffs; and for maintaining the secure functioning of the county offices. The record is, therefore, a ‘Security Record’ and exempt from disclosure under R.C. 149.433(B) and the holding in *State ex rel. Plunderbund Media v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶ 18-32 (2014).”

“Divulging the subject video (even modified as recommended by the Special Master) would constitute the disclosure of an ‘Infrastructure Record’ and ‘Security Record.’”

{¶32} Security Record is defined in R.C. 149.433 as:

“Security record” means any of the following:

- (1) Any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage;
- (2) Any record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, including any of the following:
 - (a) Those portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and communication codes or deployment plans of law enforcement or emergency response personnel;
 - (b) Specific intelligence information and specific investigative records shared by federal and international law enforcement agencies with state and local law enforcement and public safety agencies;

(c) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism.

(3) An emergency management plan adopted pursuant to section 3313.536 of the Revised Code.

R.C. 149.433(A).

{¶33} The Court of Claims held the footage was not a security record because it contained no audio. Thus, there were no verbal command perceptions, reasoning choices, plans, or explanations conveyed. It noted that a department cannot simply label a record “security record” to preclude it from release.

{¶34} The two leading Ohio Supreme Court cases on security records are the *Rogers* case and *State ex rel. Plunderbund Media v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988.

{¶35} In *Plunderbund*, the requester wanted records from the Department of Public Safety documenting threats against the governor. *Plunderbund* at ¶ 3. The Department denied the request asserting it was a security record under R.C. 149.433(A) and (B).

{¶36} The Ohio Supreme Court was asked to decide if the requested document “contained information directly used for protecting or maintaining the security of” the governor “against attack, interference, or sabotage” under R.C. 149.433(A)(3)(a). *Id.* at ¶ 22.

{¶37} In support of its position that the records were not public records, the Department submitted sworn testimony of law-enforcement and telecommunications experts who stated that the investigative reports of threats contained information used for protecting or maintaining the security of the governor’s office. *Id.* at ¶ 23. Considering the information in the affidavits, the Court concluded they were security records. *Id.* at ¶ 28. It cautioned and reasoned:

This is not to say that all records involving criminal activity in or near a public building or concerning a public office or official are automatically “security records.” The department and other agencies of state government cannot simply label a criminal or safety record a “security record” and preclude it from release under the public-records law, without showing that it falls within the definition in R.C. 149.433.

But here, the records at issue involve direct threats against the highest official in the executive branch of Ohio government. Information included in these threats, according to the affidavits provided, is used for protecting and maintaining the security of the governor and his staff and family and for maintaining the secure functioning of the governor's office. The records are therefore “security records” and exempt from disclosure as public records under R.C. 149.433(B).

Id. at ¶ 29-30. *See also State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 23-24 (When there are verified threats against a public official, records ingress, egress, and timing are security records for purposes of protecting and maintaining the security of the public office.).

{¶38} The security records exception was also raised in the *Rogers* case which dealt with the release of video camera footage at Marion Correctional Institute. In *Rogers*, the DRC asserted the video footage showed the vulnerabilities and capabilities of the security protocols. *State ex rel. Rogers*, 2018-Ohio-5111 at ¶ 16. The Director of Northwest Region of the DRC indicated that “[s]ecurity videos—particularly those that capture a response to a use of force incident—show the institution's plan of attack and security features that the institution has in place so that the disturbance can be interrupted as quickly and safely as possible.” *Id.* The Ohio Supreme Court determined the DRC did not meet its burden and the recording was not a security record:

DRC has not met its burden to show that the requested video falls squarely within the security-record exception codified in R.C. 149.433(B). First, the evidence it offers to support the applicability of the claimed exception pales in comparison to the evidence we considered in *Plunderbund*. Here, DRC

has provided only two affidavits, one of which merely concludes that “it is [DRC] policy that security videos within correction institutions are not public records, and are therefore not disclosed in response to public records requests.” The Bobby affidavit contains more information regarding the applicability of the exception, yet even his testimony is general and insufficient to meet DRC's burden in this case. Beyond these bare allegations, DRC has not attempted to explain how the video recording at issue actually constitutes “information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage,” or was “assembled, prepared, or maintained by a public office * * * to prevent, mitigate, or respond to acts of terrorism.” R.C. 149.433(A)(1) and (2).

Id. at ¶ 19.

{¶39} Considering these two cases, Respondent wants this court to find that the case is more analogous to *Plunderbund* than to *Rogers*. There are distinguishing factors between the two cases. *Plunderbund* dealt with threats; it is not clear whether any of the threats were acted upon. *Rogers* dealt with an actual incident. Also, as the Ohio Supreme Court noted in *Plunderbund* an abundance of evidence was submitted to support the security records claim. In *Rogers*, the Court found the evidence to be conclusory and merely bare allegations.

{¶40} In the case at hand, Respondent provided an affidavit. This affidavit claimed the recording shows the technical capabilities of the video security system, including the ability to zoom, rotate and isolate certain areas. The video shows the blind spots and places an attacker could take cover and go undetected. The video also shows the emergency response means, methods, and procedures. Essentially, the affidavit indicates that the video shows the vulnerabilities of the security measures and the response to emergencies. Although the affidavit is based on hearsay and is not from an office that provides security to the courthouse, Requester did not object to the affidavit on that basis. Therefore, the affidavit provides a basis for holding the video is a security record.

{¶41} Considering the information in the affidavit, we hold that the video is a security record. The video shows the vulnerabilities of the courthouse's security and the security camera. The zoom, rotation, and isolation capabilities of the camera that are part of the video footage are part of the security system.

{¶42} Furthermore, the response to the incident and secondary emergency response are clearly a security record. Although there is no audio or explanations as to why officers are positioned in the manner they are placed, officers and emergency personnel's arrival and positioning is observable. The security aspect of a response to an emergency situation is just as important as the security to prevent an actual incident. Sometimes, minor incidents are used to draw people out of buildings using the response as means to make individuals or places vulnerable. That is why responses to incidents are a security record. The manner in which law enforcement and emergency personnel respond to incidents at a public office are security records.

{¶43} *Rogers* and *Plunderbund* clearly indicate one cannot label a record a "security record" as a means to keep it from disclosure. Instead, there must be some type of evidence indicating it is a security record as defined by R.C. 149.433(A). There was evidence provided in this case. Considering the evidence, we find this case more analogous to *Plunderbund* than to *Rogers*. Accordingly, we find merit with these assignments of error and reverse the Court of Claims decision.

{¶44} It is noted that at oral argument, Requester asked this court to award it reasonable attorney fees pursuant to R.C. 2743.75(G)(2). That section provides if the court of appeals determines the public office denied the aggrieved person access to the public records in violation of R.C. 149.43(B) and "obviously filed the appeal with the intent to either delay compliance with the court of claims' order from which the appeal is taken for no reasonable cause or unduly harass the aggrieved person", then the appellate court may award reasonable attorney's fees. Given that the video is a security record and there is no requirement to disclose it, there is no basis for attorney fees. Regardless, even if disclosure was required, nothing in the record indicates that Respondent filed the appeal with intent to delay the release of the video or to harass. The record indicates Respondent has acted timely throughout the entire proceeding and filed an appeal on the basis of arguable claims.

Creation of a New Record
Eighth and Ninth Assignments of Error

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously and unlawfully required the Respondent to perform a service, by which the Respondent would have to create a new record, contrary to law.”

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously and unlawfully require the Respondent to perform a service, by which the Respondent would have to compile information from an existing record in order to create a new record, contrary to law.”

{¶45} Respondent argues the ruling by the Special Master and the Court of Claims requires it to create a new and different record by redacting portions and then putting the video into a common public format. These are two separate arguments – a redaction argument and a public format argument. Respondent asserts the order allowing it to redact an undercover officer’s image is the creation of a new record. Essentially, it is contending if an undercover officer is in the video, the video should not be released. Likewise, putting the recording into a public format creates a new record according to Respondent.

{¶46} Our determination that the video constitutes a security record renders these assignments of error moot.

Shifting of Burden
Tenth Assignment of Error

“The Special Master’s Report and Recommendations and Trial Court’s Decision erroneously shifted the Burden of Proof to the Respondent.”

{¶47} As Respondent points out the Special Master acknowledged that the Requester has the burden of proof. Respondent also acknowledges that if the video is a public record then the burden shifts to the Respondent to claim the video falls into an exception. Respondent contends that burden shifting does not occur in this case because the security and infrastructure records are not exceptions, rather they are listed as not being public records. Consequently, it asserts the Special Master and the Court of Claims incorrectly shifted the burden when it stated that Respondent did not meet its burden to have the video recording fall under a security or infrastructure record.

{¶48} R.C. 149.43(A)(1) defines Public Record. The last sentence of that section states, “Public record does not mean any of the following.” It then lists many items that are not public records. R.C. 149.433(A) defines security record and infrastructure record. Section (B) of that statute states security records kept by a public office and infrastructure records of a public office are not public records and are not subject to mandatory release under R.C. 149.43. Thus, the items listed in R.C. 149.43 are categorized in the same manner as the items listed in R.C. 149.433.

{¶49} The Ohio Supreme Court in addressing an item that was claimed to not be a public record under R.C. 149.43(A)(1)(h) explained:

Having refused to provide requested records, the Patrol must show that the withheld records fall squarely within a statutory exception. 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. *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, citing *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 25. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception. *Cincinnati Enquirer* at ¶ 7.

State ex rel. Miller v. Ohio State Hwy. Patrol, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23 (2013)

{¶50} Thus, the items listed as “not public records” are treated as exceptions and the office seeking to not disclose the record has the burden of demonstrating the record at issue falls squarely within the exception.

{¶51} The Ohio Supreme Court’s decisions in *Rogers* and *Plunderbund* demonstrate the above principle equally applies to records claimed to be security or infrastructure records under R.C. 149.433. In *Plunderbund*, the Ohio Supreme Court discussed the affidavits provided by the Department of Public Safety which asserted the records were security records and did not require release. *State ex rel. Plunderbund*, 2014-Ohio-3679 at ¶ 24-27. After considering that information, the Court concluded the

information sought was a security record. *Id.* at ¶ 28. Essentially, the Court was holding the Department met its burden to prove the record was a security record. In *Rogers*, the Court expressly indicated at least three times that it was DRC's (department seeking to not disclose the record) burden to prove the record was a security or infrastructure record. *State ex rel. Rogers*, 2018-Ohio-5111 at ¶ 13, 19, 22. The Court specially stated, "Accordingly, DRC has not met its burden to show that the video 'falls squarely within the exception' for infrastructure records under R.C. 149.433(A)." *Id.* at ¶ 13. And it also stated, "The DRC has not met its burden to show that the requested video falls squarely within the security-record exception codified in R.C. 149.433(B)." *Id.* at ¶ 19. In concluding, it once again stated the DRC had not met its burden. *Id.* at ¶ 22 ("DRC has not met its burden to show that the requested video is exempt from disclosure as either an infrastructure record or a security record.").

{¶52} Accordingly, based on Supreme Court case law, Respondent's argument has no merit. The Court of Claims and/or the Special Master correctly shifted the burden; it was Respondent's burden to prove the video footage was an infrastructure or security record. However, as set forth above, the evidence provided by Respondent does indicate the video of the shooting and response is a security record.

Conclusion

{¶53} The video of the shooting and response to the shooting constitute a security record and therefore, it falls within an exception to public records and does not require disclosure. The Court of Claims decision is reversed and Respondent is not required to disclose the video to Requester.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, assignments of error 1, 2, part of 7 and 10 are without merit; assignments of error 3,4,5,6 and part of 7 have merit; assignments of error 8 and 9 are moot. It is the final judgment and order of this Court that the judgment of the Court of Claims of Ohio is reversed and Respondent is not required to disclose the video to Requester. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.