

## Public Access to Police Body Camera Footage--It's Still Not Crystal CLEAR

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## PUBLIC ACCESS TO POLICE BODY CAMERA FOOTAGE—IT'S STILL NOT CRYSTAL CLEIR

*Jack Greiner\* and Darren Ford\*\**

### INTRODUCTION

In December 2016, the Ohio Supreme Court released decisions in two momentous public records cases.<sup>1</sup> The first decision involved video footage from the dashboard cameras of two state highway patrol officers.<sup>2</sup> In that case, the Court held that the majority of information recorded by the cameras was a public record, and not exempt under the exceptions for certain types of law enforcement and prosecutorial records.<sup>3</sup>

The second decision involved video footage from a police body camera, but the Court's holding did not establish whether the footage at issue was a public record.<sup>4</sup> Rather, the Court addressed only whether the Hamilton County Prosecuting Attorney had unreasonably delayed release of the body camera footage, which captured University of Cincinnati officer Ray Tensing shooting Samuel Dubose.<sup>5</sup> Because the Hamilton County Prosecuting Attorney released the video shortly after suit was filed, the Court concluded that the case was moot, and that assuming the footage was a public record, the delay between the request and ultimate release was reasonable.<sup>6</sup>

In January 2017, Cincinnati Police arrested Cincinnati Bengal Adam Jones for assault and disorderly conduct.<sup>7</sup> Though body-cameras recorded much of the incident in a nine-minute video, the Cincinnati Police Department (CPD) did not release the entire recording until after

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1. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258; *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595, 2016-Ohio-8195, 71 N.E.3d 1076.

2. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258.

3. *Id.* at ¶ 50.

4. *State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595, 2016-Ohio-8195, 71 N.E.3d 1076, ¶ 21.

5. *Id.* at ¶ 22.

6. *Id.* at ¶¶ 21-22.

7. Kevin Grasha and Cameron Knight, *Adam 'Pacman' Jones Pleads, Police Release Full Arrest Video*, CINCINNATI ENQUIRER, May 16, 2017, <https://www.cincinnati.com/story/news/2017/05/16/adam-pacman-jones-pleads-obstructing-police/324744001/>. The case was filed in Hamilton County, Ohio. The case number was /17/CRB/132 [hereinafter *Jones Pleads*].

a county judge dismissed the charges against Jones.<sup>8</sup>

As police action comes under more scrutiny, increased transparency matters even when no one suspects police abuse. Few professions place people in scenarios as dangerous as those which police officers face. Most police officers handle dangerous situations with good judgment. But when an objective record is necessary to examine how a situation unfolded—whether to vindicate an officer’s decision or punish bad police work—body camera footage provides an unbiased, even if sometimes imperfect, witness.

This Article will analyze the current state of the Ohio Public Records Act and the exception for confidential law enforcement investigation records as they relate to the release of footage from police body cameras. Part I will summarize the development of the relevant law through a series of significant cases decided by the Supreme Court of Ohio. Part II will use a case study to demonstrate the appropriate analysis for showing that footage from police body cameras do not constitute confidential law enforcement investigation records. Part III will explore the related issue of the timing of the release of public records, arguing that waiting until the completion of trial is still too late. Finally, Part IV will conclude that the Ohio Supreme Court’s decisions open the window for increased transparency with respect to police body camera footage, but wrongly keep the window closed on the timing issue.

## I. BACKGROUND

### A. *Ohio Public Records and the CLEIR Exception*

Ohio Revised Code § 149.43(B) provides that public offices shall promptly make available all non-exempt public records to anyone who requests them.<sup>9</sup> R.C. § 149.43(A)(2), however, exempts confidential law enforcement investigatory records.<sup>10</sup> Known as the CLEIR exception, it exempts from release “any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature,” but only if that record’s release creates a high risk of disclosing one of four types of information: (1) an uncharged suspect’s identity; (2) information from a witness who has been promised confidentiality, when that information could disclose the witness’s identity; (3) specific confidential investigatory techniques or procedures or specific

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8. *Id.*

9. R.C. § 149.43(B)(2016).

10. R.C. § 149.43(A)(2)(2016).

investigatory work product; and (4) information whose release could endanger law enforcement personnel, a victim, a witness, or a confidential source.<sup>11</sup>

If a record falls within one of the four categories, a public office may refuse to release the record. The Supreme Court of Ohio has issued a number of opinions examining the third category, which pertains to specific confidential investigatory techniques or specific investigatory work product.<sup>12</sup>

In *State ex rel. Steckman v. Jackson*, the Ohio Supreme Court held that information gathered by law enforcement officials relating to a “probable or pending criminal proceeding,” or gathered in anticipation of litigation, is work product and therefore exempt from release under R.C. 149.43(A)(2)(c).<sup>13</sup> The Supreme Court in *Steckman* attempted to correct what it perceived to be an abuse of R.C. 149.43 by criminal defendants.<sup>14</sup> Criminal defendants frequently requested prosecutors’ files pursuant to Criminal Rule 16 and any other records gathered by police departments pursuant to R.C. 149.43.<sup>15</sup> According to the Court, long delays in criminal trials often resulted when criminal defendants used R.C. 149.43 to request information unavailable to them under Criminal Rule 16.<sup>16</sup> The Court attempted to control this perceived abuse of R.C. 149.43 by holding that information not subject to discovery under Criminal Rule 16 was not subject to release as a public record. reasoning that such information constituted trial preparation records and work product under R.C. 149.43(A)(2)(c).<sup>17</sup>

### B. Routine Incident Reports

One principle that *Steckman* reiterated, however, and which remains authoritative, is that routine offense and incident reports are subject to release immediately upon request.<sup>18</sup>

In *State ex rel. Beacon Journal Publishing Company et al., v. Maurer*,

11. *Id.*

12. See, e.g., *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83; *State ex rel. Beacon Journal Publishing Company et al., v. Maurer* (2001), 91 Ohio St.3d 54; *State ex rel. Cincinnati Enquirer v. Hamilton County* (1996), 75 Ohio St.3d 374, 378; *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258

13. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83, 94.

14. *Id.* at 89.

15. See *id.* at 92.

16. *Id.* at 89.

17. *Id.* at 94. Post-*Steckman*, once a record became exempt as a “trial preparation record,” it remained exempt until all trials, actions, or proceedings were exhausted. *Steckman*, at 92. The Supreme Court of Ohio has since overruled that part of *Steckman* in *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598.

18. *Id.* at 91, 94.

the Court stated that incident reports initiate, but are not part of, investigations.<sup>19</sup> *Maurer* rejected the argument that an incident report qualifies for the CLEIR exception.<sup>20</sup> Public offices accordingly were required to make incident reports available immediately upon request.<sup>21</sup> The same logic applied to 911 calls in *State ex rel. Cincinnati Enquirer v. Hamilton County*.<sup>22</sup> Since 911 calls usually precede incident reports, “they are even further removed from the initiation of the criminal investigation than the form reports themselves.”<sup>23</sup>

The unredacted incident reports released in *Maurer* revealed the names of the police officers who shot and killed the man during the incident.<sup>24</sup> These officers were uncharged suspects in a shooting death within the meaning of R.C. 149.43(A)(2)(a). But because their names appeared in the incident report, the “public records cloak” had descended upon everything contained within that incident report.<sup>25</sup> Records containing information otherwise falling within one of the four categories of information covered by the CLEIR exception could not be “defrocked of their status” as public records.<sup>26</sup>

### C. Work Product Exception

*Maurer* acknowledged that the CLEIR analysis begins with a two-step test.<sup>27</sup> First, does the record meet the definition of a confidential law enforcement record? Second, would the record’s release increase the risk of disclosure of one of the four types of information?

In the dash-cam footage case, Justice French sharply distinguished these two steps.<sup>28</sup> At issue in *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety* (“ODPS”) were three recordings taken from dash-cams. Justice French first asked whether the recordings “pertain[ed] to a law-enforcement matter of a criminal or quasicriminal nature.”<sup>29</sup> According to Justice French, the recordings “easily” met this element

19. *State ex rel. Beacon Journal Publishing Company et al., v. Maurer* (2001), 91 Ohio St.3d 54, 56, 2001-Ohio-282, 741 N.E.2d 511, 513.

20. *Id.* at 54.

21. *Id.* at 57.

22. *State ex rel. Cincinnati Enquirer v. Hamilton County* (1996), 75 Ohio St.3d 374, 378.

23. *Maurer*, 741 N.E.2d at 514 (quoting *Hamilton Cty.*, 75 Ohio St.3d at 378).

24. *Id.* at 513.

25. *Id.*

26. *Id.* at 514.

27. *Id.* at 513.

28. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 38-40.

29. *Id.* at ¶ 39.

because the trooper had observed traffic violations.<sup>30</sup>

The second step called for a “case-by-case review” to determine whether the recordings contained investigative work product.<sup>31</sup> The investigative discretion exercised by the troopers in making the recordings factored heavily into the analysis. And since the troopers exercised no discretion in what they recorded, the only segment of the recordings the Court held could have been permissibly withheld was a 90-second portion in which the trooper took the suspect to the patrol car, gave him his *Miranda* rights, and questioned him.<sup>32</sup> The Court’s reasoning here suggests that the troopers’ decision to conduct the questioning within range of the dash-cam was intentional, and done for the purpose of preserving evidence for a likely future prosecution. Accordingly, the captured information constituted “investigative work product compiled in anticipation of litigation.”<sup>33</sup>

Most of the footage, however, was not exempt. First, much of what was recorded was “the same information in the incident reports, which ODPS released promptly without redaction.”<sup>34</sup> For instance, during the chase, the trooper noted for the dash-cam the various traffic violations she witnessed the suspect commit.<sup>35</sup> These details appeared on the unredacted incident report.<sup>36</sup> Furthermore, the unredacted incident report contained investigative steps the dash-cam did not record, such as the trooper’s administrative search.<sup>37</sup>

Second, the troopers were “expected to record all pursuits and traffic stops,” even when no criminal prosecution may have followed.<sup>38</sup> The dash-cams began filming as soon as the troopers activated their lights and sirens.<sup>39</sup> For this reason, the Court found that troopers do not exercise discretion when activating their dash-cams, in contrast to dash-cam footage of crash scenes, which troopers may make in their discretion if they believe the footage would provide useful evidence.<sup>40</sup> The Court observed that the State would have a stronger argument for exempting dash-cam footage from release if “a dash-cam recording was

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30. *Id.*

31. *Id.* at ¶¶ 45, 50.

32. *Id.* at ¶ 46.

33. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety* (“ODPS”), 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 46.

34. *Id.* at ¶ 47.

35. *Id.*

36. *Id.*

37. *Id.*

38. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 48.

39. *Id.*

40. *Id.*

prepared in anticipation of litigation.”<sup>41</sup> Filming the police chase, however, was a result of turning on their sirens, not an investigative decision.<sup>42</sup>

Finally, large portions of the recordings did not even involve investigatory functions.<sup>43</sup> The dash-cam captured individuals taking pictures and video of the crash site and conversations with “no investigative value.”<sup>44</sup>

*ODPS* explicitly affirmed the principle that “police incident reports are subject to disclosure,” citing both *Steckman* and *Maurer*.<sup>45</sup> But *ODPS* also recognized that *Maurer* “did not adopt a per se rule” that all incident reports are subject to release, citing a 2004 case, which acknowledged that the identity of a child rape victim may be redacted from an incident report under an exemption for such disclosure created by a separate Ohio statute.<sup>46</sup>

Though the Court found that most of the *ODPS* recordings did not fall under the CLEIR exception, *ODPS* may have chipped away at *Maurer*’s holding that an uncharged suspect’s name could not be redacted from an incident report. *Maurer*’s primary holding—that an incident report itself is not “work product” under 149.43(A)(2)(c)—remains good law. But the reasoning of the *ODPS* Court may support the argument that the mere fact that information appears in an incident report does not automatically subject information to disclosure. As Justice French stated, “[a] case-by-case review is necessary.”<sup>47</sup>

## II. POLICE RESPONSES TO EMERGENCY CALLS SHOULD NOT AUTOMATICALLY CREATE A CONFIDENTIAL LAW ENFORCEMENT INVESTIGATORY RECORD

The analysis of the dash-cam footage in *ODPS* shows what the Court is willing to consider in determining the applicability of the CLEIR exception to police video footage. First, consistent with the notion that the inquiry should be on a case-by-case basis, the Court did not identify a list of possible conditions that would exempt information contained in

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41. *Id.*

42. *Id.*

43. *Id.* at ¶ 49.

44. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 49.

45. *Id.* at ¶ 44.

46. *Id.*; see *State ex rel. Beacon Journal Publishing Co. v. City of Akron* (2004), 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 44 (“although police offense-and-incident reports are generally subject to disclosure, documents containing information that is exempt under state or federal law may be redacted”) (later superseded by statute).

47. *ODPS*, at ¶ 45.

a police video. Instead, the Court held that the 90 seconds of post-*Miranda* interrogation that could be redacted constituted specific investigatory work product because the trooper “intended to secure admissible statements for the prosecution’s later use at trial.”<sup>48</sup> Thus, a police officer’s intentional use of a video device to record an interrogation is relevant to whether information constitutes specific investigatory work product. Although the inquiry is fact-specific (and the law enforcement agency bears the burden of establishing its application), the *ODPS* Court described exactly what the trooper did to evidence her intent in making the recording:

Harvey [the trooper] takes Teofilo [the suspect] to her patrol car, reads him his *Miranda* rights, and questions him . . . Harvey conducted her questioning of Teofilo inside the patrol car, away from public view. And by informing Teofilo of his rights as required by *Miranda v. Arizona*, Harvey intended to secure admissible statements for the prosecution's later use at trial.<sup>49</sup>

#### A. *The Adam Jones Case Study*

As applied to body-cam footage—using the Adam Jones incident as a case study—*ODPS* is the best predictor of how the Court would analyze the issue of disclosure. Both situations involved police video footage. Both situations ended with the suspect being *Mirandized*, questioned, and arrested.<sup>50</sup> CPD did not release the entire Jones footage until after the judge dismissed the charges (a second issue examined below).<sup>51</sup> However, CPD did release the footage of the events up until the police officer read Jones his *Miranda* rights.<sup>52</sup> At first glance, this seems consistent with *ODPS*. But as the *ODPS* Court itself acknowledged, each case must be analyzed on a case-by-case basis.

A review of the entire Jones recording shows that, unlike the suspect in *ODPS*, Jones was not shielded from public view when he was *Mirandized*. Rather, he was standing outside on a public street, surrounded by police officers, witnesses, and his own companions. The officer announced his intention to place Jones in the back seat of the cruiser so the officer could speak with other witnesses. But first, they

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48. *Id.* at ¶ 46.

49. *Id.* (citations omitted).

50. *Id.* at ¶ 11; *Full Video of Adam ‘Pacman’ Jones Arrest*, CINCINNATI ENQUIRER (Mar. 9, 2018), <https://www.cincinnati.com/videos/news/2018/03/09/full-video-adam-pacman-jones-arrest/101758716/> [hereinafter *Full Video*].

51. *See supra* note 7.

52. *Id.*



had to search Jones for weapons. There is no indication that the reason for the police call was weapons or drugs. The search of Jones' person was for the safety of the officers and surrounding public, and not for the purpose of securing evidence for a future prosecution. Another officer opened the back door, but it was several minutes before Jones got into the cruiser. The officers struggled to search Jones, who became angry and resistant. Jones continued to shout at his companions to record the situation. One officer replied, "It's all being recorded." Several officers could be seen in the recording trying to subdue Jones and place him into the back seat. They told him to sit down in the back seat, but he refused. The recording is six minutes in before Jones gets into the police cruiser.<sup>53</sup>

Second, after the officer finished reading Jones his *Miranda* rights, the officer told Jones, "I'm the guy arresting you, so you got to convince me you shouldn't be arrested." The officer asked if Jones wanted to tell him his version of what happened. This is also different from the exempted portion from the *ODPS* recording. When Jones asked his companion to record the situation, the officer said, "It's all being recorded, but she can record it too if she wants to, that's fine." The officer's questions were limited to asking Jones for his version of events. Jones denied that he assaulted anyone. After Jones was in the cruiser, the officer asked a security guard what happened. The recording centers on the security guard as he explained to the officer that Jones had caused a disturbance in the hotel. Later, the officer questioned one of Jones' companions, who argued with the security guard about a cell phone. Last, the officer spoke with another officer who witnessed some of the events.<sup>54</sup>

After the *Miranda* warning, the police officers' interactions with Jones took place almost entirely outside of the patrol car. Unlike in *ODPS*, the police attempted to question Jones outside of the patrol car. This questioning did not lead to any meaningful exchange of information between Jones and the officer, because Jones strongly resisted his detention and denied that he assaulted the security guard. Instead of hearing much of Jones' version of events surrounding the alleged assault, what instead ensued was a struggle between Jones and the officers as they attempted to search his person for dangerous items before placing him in the back seat of the police cruiser. This struggle was the basis for a second criminal charge against Jones: disorderly conduct.<sup>55</sup>

In this way, the Jones incident is similar to what took place in *ODPS*.

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53. *See supra* note 50.

54. *Id.*

55. *Id.*

Just as the trooper in *ODPS* recorded the fleeing vehicle, providing a basis for an eventual arrest, so too did the Jones recording capture a basis for Jones' ultimate arrest, rather than the police officers' investigation of the assault for which they were originally called.<sup>56</sup> The parts of the *ODPS* recording that captured the suspect fleeing from the troopers were not exempt from disclosure, because that information later appeared in the incident report as basis for a criminal charge.<sup>57</sup>

Third, when the *ODPS* Court stated that the police lack discretion for when their dash-cams activate, the Court assumed that police also lack discretion in whether they will respond to a call concerning a vehicle that will not pull over.<sup>58</sup> If they are called to assist, they must respond. If they respond, they must turn on their lights. If they turn on their lights, their dash-cam begins recording.

The Court's assumptions about police responsibility should apply to body-cam footage as well. Pursuant to Cincinnati Police Department policy, "[o]fficers are required to activate their [Body Worn Camera] system during all law enforcement-related encounters and activities" and may deactivate their body-cams "only at the conclusion of the event or with supervisor approval."<sup>59</sup> Intentional or accidental failure to record and upload body-cam footage subjects an officer to possible discipline.<sup>60</sup>

Procedure 12.540 shows that Cincinnati police officers do not have discretion in choosing whether or not they will use their body-cams. If they are engaged in a law enforcement-related activity, the body-cam must be recording. *ODPS* considered lack of discretion an important factor favoring release of dash-cam footage when it contrasted two Ohio State Highway Patrol Policies:

[T]roopers are expected to record all pursuits and traffic stops, regardless of whether a criminal prosecution may follow. The dash-cams here began to record automatically as soon as the troopers activated their emergency lights and siren, so the troopers did not exercise any investigatory discretion in activating their dash-cams. In contrast, OSHP does not require troopers to record crashes and leaves it to the discretion of troopers to determine when evidence at a crash scene is necessary for prosecution. In those circumstances, respondents would have a

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56. See *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 47.

57. *Id.*

58. *Id.* at ¶ 48.

59. *Body Worn Camera Policy and Procedure 12.540*, City of Cincinnati, <https://www.cincinnati-oh.gov/police/assets/File/Procedures/12540.pdf> (last visited at March 12, 2018).

60. *Id.*

better argument that a dash-cam recording was prepared in anticipation of litigation. The troopers here, however, did not make any investigative decisions to activate their dash-cams.<sup>61</sup>

So too, Cincinnati police officers are required by official policy, under threat of formal discipline, to activate their body-cams when performing law enforcement activities. Under *ODPS*, Procedure 12.540 operates analogously to the OHSP policy requiring troopers to record all pursuits and traffic stops. Because Cincinnati police officers do not make any investigative decisions in activating their body-cams, there is no compelling argument that any particular piece of body-cam footage is prepared in anticipation of litigation.

What is lacking in *ODPS* is a reliable guiding principle to assist courts in their case-by-case review of public information nondisclosures when a public office claims the work product exception. But one helpful principle would be Chief Justice O'Connor's work-product argument in her concurrence in *Caster*. She advocates a return to the pre-*Steckman* definition of "work product," which would not include objective facts and data collected by law enforcement. Her proposed definition of "work product" would exclude material like the Jones footage.<sup>62</sup>

The Jones events took place on a city street with members of the public standing nearby, even conversing with the police officers.<sup>63</sup> Such objective content should not be withheld from disclosure on the basis that it is investigatory work product. On two occasions, when Jones called upon his companions to record the events, two different officers advised Jones and everyone else within earshot that it was already being recorded, most likely referring to their own body-cams. In asking his companions to record, Jones sought an objective record of the events as they unfolded. The police officer's response to Jones' request—that it was already being recorded—was not just a way to address Jones' concern for gathering an objective record, but arguably also an affirmation that the recording would be made available to him in criminal discovery.<sup>64</sup>

But even under *ODPS*, because of the significant weight the decision gives to differing facts, and because so much of the Jones recording portrays a struggle to get Jones into the police cruiser rather than investigatory work product, the CPD's refusal to release the entire

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61. See *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 48.

62. *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598, ¶¶ 60-65.

63. See *supra* note 50.

64. *Id.*

recording until after resolution of the charges was unjustified. And the timing of CPD's release of the recording raises another issue: at what point does the CLEIR exception expire?

### III. THE COMPLETION OF TRIAL IS STILL TOO LATE

The Supreme Court of Ohio overruled *Steckman* in part in *Caster*.<sup>65</sup> *Steckman* had held that once a record becomes exempt as a "trial preparation record," it remains exempt until all trials, actions, or proceedings have been exhausted.<sup>66</sup> The Court acknowledged the harshness of the holding, but it was based on the importance of bringing an end to criminal defendants' perceived abuse of R.C. 149.43 to avoid the limits of Criminal Rule 16.<sup>67</sup>

*Caster* states that *Steckman* did not explicitly hold that "the specific-investigatory-work-product exception extends beyond the completion of the trial."<sup>68</sup> Nevertheless, post-trial withholding seemed to be the implication for one of the cases consolidated under *Steckman*.<sup>69</sup> After *Steckman*, the Court would hold in *State ex rel. WLWT-TV5 v. Leis* that "the specific-investigatory-work-product exception applies beyond the completion of direct appeals."<sup>70</sup> The "central reason" the Court decided both *Steckman* and *WLWT-TV5* the way it did was "the seeming disparity between the information a defendant could obtain to use at retrial compared to what the defendant could obtain through discovery under former Crim. R. 16."<sup>71</sup>

By the time the Court decided *Caster*, however, Criminal Rule 16 had changed considerably.<sup>72</sup> The revised Criminal Rule 16 "expands the State's duty to disclose materials and information beyond what was required under the prior rule."<sup>73</sup> Upon a defendant's written request, the state must, prior to trial, provide any "written or recorded statement by a witness in the state's case-in-chief" and all "reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents."<sup>74</sup> These amendments greatly increased defendant access to information prior to trial.

But even though *Caster* rightly overruled *Steckman*, it maintained that

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65. *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 47.

66. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83, 92.

67. *Id.*

68. *Caster*, ¶ 33.

69. *Id.*

70. *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 1997-Ohio-273, 673 N.E.2d 1365.

71. *Caster*, at ¶ 35.

72. *Id.* at ¶ 37.

73. *Id.* at ¶ 37 (quoting 2010 Staff Note to Crim. R. 16(B)).

74. *Id.*

the CLEIR exception did not expire until the end of trial. The *Steckman* Court hinged its analysis on restoring to Criminal Rule 16 its intended limits by taming a perceived abuse of R.C. 149.43. Criminal Rule 16 has been revised, but the vestigial *Steckman*-era restriction on R.C. 149.43 remains.

The Cincinnati Police Department displayed its understanding of the law when it did not release the full Adam Jones video until after the judge dismissed the charges and the case was resolved. Just as *Steckman* sought to harmonize the Public Records Act with Criminal Rule 16, the Supreme Court of Ohio should seek to do the same by loosening the restrictive interpretation that the specific-investigatory-work-product exception remains in force until after the trial ends. The *Steckman* concern for defendants' cheating the process has evaporated with the revised Criminal Rule 16, which essentially provides for open-file discovery.

*Caster* sets the expiration date on the work-product exception at the end of trial, but this is an inappropriately late point at which to make public records available. On this issue, Chief Justice O'Connor's concurrence is not as astute as it is on work product, arguing that "disclosure to a defendant is not the same as disclosure to the public, and public policy supports withholding nonroutine law enforcement records."<sup>75</sup> She states that restricting public access to records prevents the media from "trying an active case in the news." *Id.* The First Amendment is not on her side here. In fact, it is at odds with the contention that reporting on trials is bad public policy.

The Chief Justice also argues that, if a criminal defendant is innocent, permitting disclosure could permit the real perpetrator to access information which could help him or her evade detection.<sup>76</sup> But this concern is no more legitimate during trial than it is after trial. A yet-to-be detained perpetrator may still request public records after the trial's resolution, and use that information to continue evading capture. Delaying disclosure until the trial ends does not address this concern. She argues that the release of materials revealing law-enforcement investigatory strategies is dangerous, "particularly if knowledge of such strategies would empower criminals to avoid detection."<sup>77</sup> But again, setting the end of trial as the point at which public records become available for disclosure does not resolve this concern. Besides, R.C. 149.43(A)(2)(c) prohibits the release of *confidential* investigatory strategies, not merely "law-enforcement investigatory strategies." If the Public Records Act is to be "liberally construed in favor of public

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75. *Caster*, at ¶ 70.

76. *Id.*

77. *Id.* at ¶ 66.

access,”<sup>78</sup> then adding restrictions on top of the Act has no place in judicial reasoning.<sup>79</sup>

In partially overruling *Steckman*, *Caster* indicated that the law required an expiration date on the unavailability of public records. However, the completion of trial unnecessarily delays the point when public records should be available. The First Amendment confers to the press a freedom that shall not be abridged. On its face, R.C. 149.43 does not abridge that freedom. But the Ohio Supreme Court’s judicial interpretation of R.C. 149.43 limits the transparency which that statute was intended to deliver.

#### IV. CONCLUSION

Ohio’s lower courts and public agencies respond to the rules handed down by Ohio’s high court, as evidenced when the Cincinnati Police Department did not release the full Jones arrest recording until after his charges were dismissed. The considerations the Court recognized in *ODPS* show that a member of the public seeking release of body-cam footage should marshal any facts tending to show that a police officer lacks discretion in activating his or her body-cam. Within *ODPS* are the arguments that will be important to increasing public transparency where police activity is concerned.

However, the First Amendment’s guarantee of freedom of the press is a strong counterargument to the Court’s justification for delaying disclosure until the close of trial or other likely proceedings. But until the Court acknowledges this argument and arguments like it, the window of public transparency in Ohio remains less than clear.

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78. *Id.* at ¶ 69

79. Rule 16 may provide the appropriate milestone for releasing CLEIR materials. Once the defendant receives the material, it is hard to see why the court should continue to delay public access.