[Cite as *Shaffer v. Budish*, 2018-Ohio-1539.]

CORY A. SHAFFER Requester v. ARMOND BUDISH Respondent	Case No. 2017-00690-PQ Special Master Jeffery W. Clark REPORT AND RECOMMENDATION

{¶1} On August 9, 2017, requester Cory Shaffer, a crime reporter for Advance Ohio/Cleveland.com, made a public records request to Mary Louise Madigan, Director of Communications for respondent Cuyahoga County Executive Armond Budish, for "copies of any video used in the disciplinary hearings and/or arbitration hearings related to the June 23, 2016 termination of Brendan Johnson, a corporal in the Cuyahoga County Jail." (Complaint, p. 4.) On August 11, 2017, Madigan responded that the request was denied, 1) because "[v]ideo within the Correctional Facility constitutes a record of security and infrastructure" under R.C. 149.433(A), 2) by the "rationale" of an exception written for state prisons, R.C. 5120.21(F), and, 3) because electronic records are not public records pursuant to R.C. 1306.23. (*Id.* at 2-3.)

{¶2} On August 14, 2017, Shaffer filed a complaint under R.C. 2743.75 alleging denial of timely access to public records in violation of R.C. 149.43(B). The case proceeded to mediation, and on November 3, 2017, the court was notified that the case was not fully resolved. On November 17, 2017, Budish filed his motion to dismiss (Response). In compliance with the court's order of November 29, 2017 ("Order"), respondent filed an unredacted copy of the withheld videos, under seal. On December 20 and 21, 2017, respectively, Budish and Shaffer filed additional pleadings responding to requests posed by the special master in the order.

{¶3} The remedy of production of records is available under R.C. 2743.75 if the court determines that the public office denied the aggrieved person access to requested public records in violation of R.C. 149.43(B). 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. The policy underlying the Public Records 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. "[O]ne of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997). The Public Records Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure. *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Office*, Slip Op. at 2017-Ohio-8988, ¶ 15.

{¶4} R.C. 2743.75(F)(1) states that determination of public records claims shall be based on "the ordinary application of statutory law and case law." Case law regarding the alternative public records remedy under R.C. 149.43(C)(1)(b) provides that a relator must establish by "clear and convincing evidence" that they are entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol,* 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14. Therefore, the merits of this claim shall be determined under the standard of clear and convincing evidence, i.e., "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. *See Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

Motion to Dismiss

{¶5} Respondent moves to dismiss the complaint on the grounds that, 1) he has now provided Shaffer with a redacted version of one requested video ("Video 1"), rendering production of that video moot, and, 2) that he properly withheld another video ("Video 2")[1] pursuant to statutory and constitutional exceptions to the Public Records Act. (Response at 3-7.) In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

{¶6} Shaffer's complaint sets forth factual allegations and supporting correspondence that, if proven, would entitle him to a finding of denial of access in violation of R.C. 149.43(B), and an order to produce the requested records. I therefore recommend that the motion to dismiss be DENIED, and that the court determine the case on the merits.

Suggestion of Mootness

{¶7} In an action to enforce R.C. 149.43(B), a public office may produce the requested records prior to the court's decision and render the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, ¶ 17-22. Respondent states he has provided Shaffer with a redacted copy of Video 1. (Response at 3.)

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[1] Respondent initially referred to a single remaining video, "Video 2." (Response at 3-4.) He later acknowledged two remaining videos, from cameras worn by two corrections officers. (Scandling Aff., and Exhibit A.) The court will refer to "Video 2" in addressing issues common to both videos, and to "Video 2(a)" or "Video 2(b)" when necessary to distinguish one from the other.

{¶8} Shaffer "confirms respondent's claim that no dispute exists with relation to the first requested video" (Shaffer additional statement at 1.), an admission that this portion of the request has been satisfied. *Striker* at ¶ 19; *State ex rel. DiFranco v. City of Euclid*, 8th Dist. Cuyahoga No. 97823, 2012-Ohio-5158, ¶ 2. I therefore recommend that Shaffer's claim as it pertains to production of Video 1 be DENIED as moot.

Contents of Video 2

{¶9} Review of Video 2 *in camera* shows Tactical Unit officers confronting, physically controlling, and transporting a female inmate. Officers direct the inmate to remove her shirt, handcuff her, and remove her slacks before she is secured in a restraint chair and covered with a blanket. The inmate is wheeled first to a decontamination room to wash pepper spray from her eyes, and then to the infirmary. The inmate's breasts and underwear are visible for about four minutes of the 17 minutes and 44 seconds of Video 2(a) and about one minute of the 14 minutes and 29 seconds of Video 2(b). The inmate is transported through corridors and doorways on two floors of the jail, and taken by elevator between them. The videos were created by body-worn cameras visible in images of the officers taken by each other.

{¶10} Video 2 was generated and used by the Cuyahoga County jail for official purposes, including as evidence in discipline and arbitration hearings. (Response at 3; Budish additional statement at 1.) Cuyahoga County was required to copy the accused officer and union with documents used to support the charges. (Budish additional statement, Collective Bargaining Agreement between Cuyahoga County and the Correction Officer Corporals' Bargaining Unit, Article 44, Section 2.) The video is thus a record responsive to Shaffer's request for records of discipline and arbitration hearings regarding use of force by the corrections officer. (Budish additional statement, fn. 1.)

Claimed Exceptions

{¶11} R.C. 149.43(A)(1) sets forth specific exceptions from the definition of "public record" as well as a catch-all exception for "[r]ecords the release of which is

prohibited by state or federal law." R.C. 149.43(A)(1)(v). The public office bears the burden of proof to establish the applicability of any exception:

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

State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus.

{¶12} Where a public record does not fall under any statutory exception, neither the courts nor other records custodians may create new exceptions based on a balancing of interests or generalized privacy concerns. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 29-31. The General Assembly is the ultimate arbiter of public policy, and a public office may not withhold records simply because it disagrees with the policies behind the law permitting their release. *Id.* at ¶ 37; *see State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 637 N.E.2d 911 (1994):

> b. [I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.

For the same reasons, a public office may not utilize an exception that is limited to other agencies. *State ex rel. Beacon Journal Publg. Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 36-45 (police department could not assert exception applying only to similar reports of children services agencies.); *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 266, 685 N.E.2d 1223 (1997) (auditor could not assert grand jury records exception applying only to other officials); *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 247-248, 643 N.E.2d 126

(1994) (state university could not assert federal Freedom of Information Act ("FOIA"), which does not apply to state agencies); *James* at 170 (university promotion/tenure evaluators could not assert they were "confidential informants" under exception applying only to law enforcement agencies).

{¶13} In applying statutory exceptions, every part of the statute must be given effect, and words in the statute must be construed according to common usage. R.C. 1.47(B); R.C. 1.42. Where a public office claims an exception based on risks that are not evident within the records themselves, the office must provide more than conclusory statements in affidavits to support that claim. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400-404, 732 N.E.2d 373 (2000). Respondent asserts that portions of Video 2 are subject to withholding under R.C. 149.433, R.C. 1306.23, R.C. 149.43(A)(3), R.C. 3701.17(A)(2), the right to privacy under the Fourteenth Amendment, R.C. 5120.21(D), and 45 C.F.R. 164 (HIPAA).

Security and Infrastructure Records – R.C. 149.433

{¶14} Infrastructure and security records are not public records. R.C. 149.433(B). Respondent argues that specific visual and audio segments fall under this exception. (Scandling Aff., Exhibit A.) The claimed application of "infrastructure records" and "security records" will be addressed separately.

Infrastructure Records

{¶15} R.C. 149.433(A) provides, in pertinent part:

> c. "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.
>
> • * *
>
> d. "Infrastructure record" *does not mean a simple floor plan that discloses only the spatial relationship of components of the building*.

(Emphasis added.)

{¶16} In his initial response, respondent did not name any of the critical systems listed in R.C. 149.433(A), nor did he assert the existence of any unlisted critical system. Respondent stated only that:

> e. The video shows pod locations, Correction Officer posts, elevators, stairwells and countless other fundamental infrastructure items critical to the security function of the jail. *See* Affidavit of Warden Ivey attached as Exhibit 1 * * *. Because vivid portrayals of fundamental security infrastructure systems are inextricably intertwined throughout the video, the release of Video 2 would fully jeopardize operations in the jail.

(Response at 6.) The first affidavit of Warden Ivey (Ivey Aff. I) does not address any of the items listed by respondent, offering only a conclusory statement:

> f. The video in dispute portrays intricate details of jail infrastructure and security systems that cannot be compromised.

(Ivey Aff. I, ¶ 4.) This statement is insufficient alone to carry respondent's burden, and is not supported by review of Video 2 *in camera. Besser* at 400. In response to the court's order requesting additional pleading and evidence detailing how any image discloses the configuration of the building as a critical system beyond the level of a simple floor plan, Respondent added that "events occurring in" the jail

> g. disclose critical systems in the jail * * *. The portions of Video 1 and Video 2(a) and 2(b) that show the inmates outside of their cells disclose the configuration of critical systems in the Cuyahoga County Correctional facility including but not limited to secure operations and communications, divulge security codes, the infrastructure or structural configuration of the building, * * *.

(Budish additional response at 2-3.) Respondent added the following to his previous list of claimed infrastructure images: layout of secure compound, cell locations, vents, secure ingress/egress including to the medical facility, non-functioning elevator, layout of various floors including floor and pod numbers, doorways and exits, ceiling tiles and their condition, fire alarms and equipment, control rooms including technical equipment,

camera locations, decontamination area, and audible codes and commands pertaining to security. (*Id*. at 3-4.)

{¶17} I find that none of the images or audio listed by respondent satisfy the definition of an "infrastructure record." First, items that would appear in a "simple floor plan that discloses only the spatial relationship of components of the building" are expressly excluded from the definition. R.C. 149.433(A); *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 26 (location of nonpublic, secured entrances would appear on a "simple floor plan"). Contrary to this provision, respondent seeks to withhold images of built-in components of the jail building including pod locations, correction officer posts, elevators, stairwells, locations of secure ingress and egress, entries and exits from pods, the layout of floors including floor and pod numbers, doorways and exits, control rooms, and decontamination areas. Disclosure of these images shows only "the spatial relationship of components of the building," and these items are therefore excluded from the definition of "infrastructure record." *Id*.

{¶18} Next, to qualify as an infrastructure record under the express language of R.C. 149.433(A), a record must disclose the *configuration* of a critical system, and not just display one or a few components. In common usage, the "configuration" of a system is the arrangement or relationship of its elements. Examples of records showing infrastructure configuration would include electrical schematics, HVAC plans, computer network diagrams, plumbing layouts, and security code generation algorithms. Video 2 reveals only isolated system components, which do not serve to disclose their underlying configuration. Scattered images of vents do not equate to an HVAC system diagram. Images of fire alarms and fire equipment, technical and computer equipment in the control room and medical unit, and scattered camera locations do not disclose the *configuration* of the jail's fire safety, communications, computer, or security systems. Records of system use or non-use do not disclose the "configuration" of the system.

Id. at ¶ 25-26. Images of "ceiling tiles and their condition" do not reveal the configuration of a critical system. Respondent does not meet his burden to show how any of the listed images disclose the configuration of a critical system, or how any of the images of built-in building components are not included in a simple floor plan. Nor does review of the video *in camera* support respondent's assertion of the exception. I find that none of the images in Video 2 are shown to meet the definition of an infrastructure record.

{¶19} Separately, respondent has waived the infrastructure records exception by making the information available to the public. *Id*. at ¶ 29. On review of Video 1 as provided to Shaffer,[2] I find that an officer twice states the jail code "10-25" (10:01:40-10:01:43), an officer reports the location "4F pod" (10:01:41), and "tactical officer responses in an emergency situation" are shown (10:01:46-10:01:53).[3] Respondent thereby released the only "audible emergency response code" listed for either video,[4] the location of an inmate's pod, and "tactical officer responses and security protocol used for disturbance control." (Budish additional statement at 3.) Requester notes more comprehensively that extensive video from inside the Cuyahoga County jail was broadcast on television in 2013, and is currently available online. Episode 1 of "Lockup: Cuyahoga County" is a 41 minute video, part of a six-part National Geographic documentary filmed in the current jail building, presumably with the approval of Cuyahoga County.[5] The episode displays Cuyahoga County jail corridors, pod locations, correction officer posts, elevators, stairways, locations of secure ingress and

[2] The segment is posted online: http://www.youtube.com/watch?v=w_DsZeOJyuo (Response at 4, fn. 3.) (Accessed January 3, 2018.). Numbers in parenthesis refer to video timestamps.

[3] The disclosure of these specific items is contrary to respondent's assertion that they had been redacted from Video 1 (Response at 4; Scandling Aff., Exhibit A, Video 1, "Activity" column.),

[4] Other codes referenced by Budish, such as "jail clean up codes" to mop up water and "OC" (pepper spray) (Scandling Aff. at 4.), are not shown to be emergency or security codes.

[5] Episode 1: https://www.youtube.com/watch?v=wJ2Lm_SrRww&t=677s (Accessed Jan. 3, 2018.) *See* Episode guide and pay viewing: http://www.tvguide.com/tvshows/lockup-cleveland-extended-stay/episodes/545956/ (Accessed Jan. 12, 2017.). *See also* Preview of Episode 3 "Wombmates," showing women's cells and pods: http://www.msnbc.com/documentaries/watch/lockup-extended-stay-cleveland-wombmates-25457219600 (Accessed Jan. 3, 2018.)

egress on multiple floors including the medical facility, vents, entryways and exits from pods, the layout of various floors of the jail including pod numbers, numerous doorways and exits, ceiling tiles and their condition, fire alarms and equipment, control rooms including technical equipment, camera locations, floor numbers, and use of a restraint chair – in short, the same types of images visible in Video 2. The public disclosure of these building and system components belies the assertion that secrecy of the images in Video 2 "cannot be compromised," and that their disclosure would "fully jeopardize operations in the jail." *See State ex rel. Vindicator v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 36 (In light of previous releases of case records, and internet access to the same and similar information, a sealing order "would do little, if anything, to protect the privacy of the defendants"); *Besser v. Ohio State Univ*., 89 Ohio St.3d 396, 403, 732 N.E.2d 373 (2000) (information readily ascertainable from other sources is not "trade secret"); *State ex rel. Jenkins v. Cleveland*, 82 Ohio App.3d 770, 785, 613 N.E.2d 652 (8th Dist.1992) (some of the information that would allegedly endanger life or physical safety "is available through other public records"). On the independently sufficient basis of waiver, I find that any image or audio of an item that respondent has previously disclosed may not be redacted from Video 2.

{¶20} I conclude that respondent has failed to meet his burden to show that any part of Video 2 satisfies the definition of an "infrastructure record," and, separately, has waived this exception by voluntary public disclosure of the same and functionally similar images and audio filmed in the current Cuyahoga County jail building.

Security Records

{¶21} Respondent asserts that the images and audio listed as infrastructure records are also "security records," applying the following language of R.C. 149.433(A):

{¶22} "Security record" means any of the following:

> (1) A record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage.

"Public office" includes its officials and employees. *State ex rel. Plunderbund Media, L.L.C., v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, ¶ 20. Examples of recognized security records include investigation files of threats made against the governor, *Id*. at 3-7, 19-31, key-card-swipe data for a county executive against whom verified threats were made, *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 24, the cell phone number of an officer providing security to an elected official, and an email regarding the advisability of the official attending an event. *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 69-70, 78 (10th Dist.), a list of officer names (where agency documented substantial risk of interference through harassment), and prospective disclosure of a demonstration-control staging area, and responding officer equipment. *Gannett GP Media, Inc. v. Ohio Dept. of Pub. Safety*, Ct. of Cl. No. 2017-00051, 2017-Ohio-4247, ¶ 31, 39-40. Under an analogous exception, the Eighth District Court of Appeals found that prospective release of a "strike plan" revealing specific procedures, plans and techniques at a time of potential civic unrest could be withheld to protect officer safety. *State ex rel. Cleveland Police Patrolmen's Assn. v. Cleveland*, 122 Ohio App.3d 696, 699-701, 702 N.E.2d 926 (8th Dist.1997).

{¶23} The *Plunderbund* Court cautioned public agencies that the security records exception is not available based on conclusory labeling of records, but must satisfy the full statutory definition in each instance:

> h. 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.

Id. ¶29. For example, in *State ex rel. Miller v. Pinkney*, 149 Ohio St.3d 662, 2017-Ohio-1335, 77 N.E.3d 915, the Cuyahoga County sheriff's office labeled all offense and

incident reports in which the county executive was identified as a reportee, complainant, or victim, as “security records.” After examination *in camera,* the Supreme Court determined that the reports were “not security records and are subject to release with the redaction of exempt information.” *Id.* ¶ 1-4, Appendix (documents appear to contain innocuous information, unfounded threats, and/or were several years old). In *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 65, the Supreme Court found that, notwithstanding the Cuyahoga County fiscal officer’s assertion, he failed to establish that master CD’s documenting procedure and operation to make backup copies of instruments recorded were “security records.” In *FitzGerald* at ¶ 6-8, 24, Cuyahoga County correctly withheld key-card-swipe data for only the one employee against whom verified threats had been received, and released the same data for employees who had not received threats. The Court then determined that when the threatened employee left his position, his data were no longer “security records.” *Id.* ¶ 27-28, 30. In analogous cases under R.C. 149.43(A)(2)(d), the Eighth District found that more than bare allegations in an affidavit are required to meet the government’s burden to show that a record would disclose information that would endanger the life or physical safety of officers, victims, witnesses, or confidential information sources. *State ex rel. Nelson v. Cleveland P.D.*, 8th Dist. Cuyahoga No. 62558, 1992 Ohio App. LEXIS 4134, *5-7 (August 6, 1992); *State ex rel. Jenkins v. Cleveland*, 82 Ohio App.3d 770, 785, 613 N.E.2d 652 (8th Dist.1992). For the same reason, an attempted application of R.C. 149.43(A)(2)(d) was rebuffed in *Conley v. Corr. Reception Ctr.*, 141 Ohio App.3d 412, 414-416, 751 N.E.2d 528 (4th Dist.2001) where an inmate requested work schedules and photographs of officers who had worked in his segregation unit on two past dates, to identify those he claimed had battered him. The court held that the correctional institution was required to present “an affirmative showing that disclosure would endanger the officer.” *Id.* at 416. The court

observed that even granting that the inmate had a motive to harm his alleged assailants was not enough to establish a high probability of danger as a matter of law, especially since the inmate had been transferred. The court noted that "[a] different case would be presented if the [inmate]'s request involved future work schedules, or similar information which could be used to discern specific law enforcement tactics or techniques on a given day and location." *Id.* at 417. In *Plunderbund*, DPS provided detailed testimony connecting the disclosure of that information to future risks to the governor and his successors. *Plunderbund* at ¶ 24-31.

{¶24} The level of evidentiary proof required by the foregoing cases has not been met here. Respondent gave no explanation in his response as to how any of the information in Video 2 is "directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," making only the conclusory statement that "disclosure would expose the * * * security of Respondent's jail," and "[b]ecause vivid portrayals of fundamental security infrastructure systems are inextricably intertwined throughout the video, the release of Video 2 would fully jeopardize operations in the jail." (Response at 5-6.) In response to the court's order directing respondent to provide additional pleading and evidence supporting the claimed exceptions, respondent added that release of Video 2 would "divulge security codes" and "audible codes and commands pertaining to security." (Order; Budish additional response at 2, 4.) Respondent added a conclusory statement that the video contains "information that could be used to interfere with the safety and security of the corrections facility, the employees that staff the facility, and the jail inmates in our custody and control." In support, respondent cited a second affidavit of Warden Ivey, filed under seal (Ivey Aff. II), and litigation counsel's own affidavit indexing "what portions of the video Respondent withheld as security/infrastructure records." (Budish additional response at 3; Scandling Aff., Exhibit A.) But the second affidavit of Warden Ivey merely authenticates the videos submitted under seal as those used in a

discipline/arbitration proceeding, and like Ivey Aff. I contains no testimony explaining or asserting any portion of Video 2 as a "security record." Conclusory allegations in pleadings that information "could be used to interfere" are not sufficient to establish an item as a "security record." In contrast with *Plunderbund* and *FitzGerald,* which involved direct threats against particular officials, respondent shows no direct threats against the correctional facility, officers, or inmates, either individually or as a group. By no stretch of the imagination does a year-old video of an officer realizing that an elevator is not functioning that day "reveal the vulnerabilities of the facility thereby jeopardizing security." (Budish additional response at 3-4.) Respondent provides no evidence that inmates or corrections officers are any more subject to attack, interference or sabotage if the public views this video. Further, examination of Video 2 *in camera* demonstrates that the listed images were visible to the inmate(s) present in the video, and all listed audio was apparently made within their hearing. Respondent does not counter this evidence of open disclosure with any evidence that the jail's 10-codes and other radio shorthand are not routinely overheard and understood by inmates.

{¶25} Separately, and for the same reasons discussed under Infrastructure Records, respondent has waived the security records exception for the images and audio previously released in Video 1, and in the six-part National Geographic "Lockup" series filmed in the current Cuyahoga County jail building.

{¶26} I conclude that respondent has failed to meet his burden to prove that any of the content of Video 2 is a "security record," and separately, that respondent has waived this exception as to the listed images and audio by voluntary disclosure of the same and functionally similar images and audio.

Electronic Records

{¶27} Respondent asserted that unspecified portions of Video 2 are subject to the exception contained in R.C. 1306.23. (Budish additional pleading at 4.) However, in response to the court's order to detail each portion of the video subject to any

exception, R.C. 1306.23 is not listed in respondent's Exhibit A. I conclude that respondent has abandoned this exception by failure to identify specific images or audio to which it applies, but will briefly address why the exception does not apply in any case.

{¶28} R.C. Chapter 1306 is Ohio's adoption of the Uniform Electronic Transactions Act. The chapter applies by its terms only to electronic records and electronic signatures "relating to a transaction." R.C. 1306.02(A). "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. R.C. 1306.01(P). R.C. 1306.23 then provides that

> i. [r]ecords that would disclose or may lead to the disclosure of records or information that would jeopardize the state's continued use or security of any computer or telecommunications devices or services associated with electronic signatures, electronic records, or electronic transactions are not public records for purposes of section 149.43 of the Revised Code.

The requirements are conjunctive. Thus, R.C. 1306.23 does not remove every electronic record in every public office from the status of public record, but only those that both relate to transactions, and, in that context, would jeopardize the office's continued use or security of computer or telecommunications devices or services associated with electronic signatures, records, or transactions.

{¶29} Respondent argues only that the videos are "electronic records," and provides no other argument or evidence. (Budish additional statement at 4.) As with the security and infrastructure exceptions discussed above, more than bare labeling is required. On review of Video 2 *in camera*, I find that the videos and their contents are not electronic records "relating to a transaction" as defined in Chapter 1306. Even if they were, nothing in the video appears to disclose information that would "jeopardize the state's continued use or security of any computer or telecommunications devices or services." I conclude that respondent has failed to show that R.C. 1306.23 would apply to any portion of Video 2.

Medical Records

{¶30} "Medical records" are excepted from public records disclosure. R.C. 149.43(A)(1). The Public Records Act defines medical records as follows:

> j. "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

R.C. 149.43(A)(3). The definition has three conjunctive requirements:

1. The document must pertain to the medical history, diagnosis, prognosis, or medical condition of a patient, and,
2. The document must have been generated in the process of medical treatment, and,
3. The document must be maintained in the process of medical treatment.

{¶31} Cuyahoga County and The MetroHealth System ("MetroHealth") have contracted for MetroHealth to provide health services through an annex hospital outpatient department clinic ("infirmary") housed in the Cuyahoga County jail. (see Agreement between Cuyahoga County and MetroHealth, attached to Budish additional statement.) The Cuyahoga County Sheriff's Department ("CCSD") is solely responsible for the custody of jail detainees, including their physical security, housing, access to medical treatment, and transportation. (*Id.*, Section III, E.) In conformity with this division of responsibilities, officers of the CCSD Tactical Unit transported the inmate from her housing unit to the infirmary, and the video did not show any MetroHealth or other medical personnel present during the process. Respondent does not provide any testimony from MetroHealth or other affiant that any of the Tactical Unit officers were engaged in the process of medical treatment at any time. Respondent does not provide evidence, or even assert, that the officers' body-worn camera videos were generated or maintained in the process of medical treatment. The video instead appears to have

been created to document the physical control and transport of an inmate. The videos thus fail requirements 2 and 3 of the statutory definition when considered as a whole.

{¶32} However, respondent asserts that various statements and questions by corrections officers, statements and actions of the inmate, a corridor sign for the medical unit, and specific images and audio captured inside the jail's infirmary are images of "medical records." (Budish additional statement at 4-6; Scandling Aff., Exhibit A.) The court may thus examine the video to determine whether these images capture preexisting records of patients' medical history, diagnosis, prognosis, or medical condition that *were* generated or maintained in the process of medical treatment.

{¶33} Turning first to the period prior to entry into the infirmary, the video shows that corrections officers ventured no "diagnosis, prognosis, or medical condition" of the inmate, who was not their medical "patient." No medical professional was present during her transportation. In the first segment listed as a medical record (Video 2(a) at 9:38:30-31), a Tactical Unit officer asks, "She full precautions?" and a voice answers, "Yes." This exchange has no inherent medical significance.[6] The next listed segment (*Id.* at 9:38:44-9:39:22; Video 2(b) at 9:37:00-06) shows inmate actions that respondent claims depict a medical conclusion. (Scandling Aff., Exhibit A at 2.) Respondent makes no representation that this footage was given to or used by medical personnel for use as "medical history." Next, at Video 2(a) 9:46:11-9:47:37; Video 2(b) 9:44:02-9:45:24, officers preparing to flush the inmate's eyes ask her about recent drug usage and existing physical conditions. Following denials and angry shouting, a voice notes "Refused to answer all questions," and water is applied. This exchange is not shown to be more than administrative protocol associated with washing the eyes of a person exposed to pepper spray. In the next segment (*Id.* at 9:42:49-53; Video 2(b) at 9:40:38-40), respondent claims that the image of a medical unit sign in the corridor

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[6] Contrary to respondent's assertion that this communication must be protected, his public pleading offers extrinsic evidence that "'full precautions' mean[s] she was on suicide watch" (Budish additional statement at 5), rather than providing this information in his affidavit under seal.

reveals the inmate's medical condition. (Budish additional statement at 10.). However, the sign no more discloses medical history, diagnosis, prognosis, or medical condition than the signage at the entrance of a hospital, group home, hospice, or specialty clinic. Wheeling the inmate past the sign reveals, at most, the equivalent of "the fact of admission to * * * a hospital," which is not a "medical record." R.C. 149.43(A)(3). Requirement 1 of the definition is that it must be a document "that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient." I find that none of the images or audio in Video 2, prior to entry into the infirmary, meet this element of the definition.

{¶34} With regard to requirements 2 and 3, respondent provides no evidence that any individual pre-infirmary images or verbalization were "generated and maintained in the process of medical treatment." *State ex rel. National Broadcasting Co. v. Cleveland*, 82 Ohio App.3d 202, 214, 611 N.E.2d 838 (8th Dist.1992); *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 10, 552 N.E.2d 243 (Cuyahoga CP.1990). There is no evidence that medical staff participated in or asked for Video 2 to be generated. There is no evidence that medical staff ever received or maintained a copy. Respondent appears to recognize that pre-infirmary statements were not "in the process of medical treatment" when he refers to Video 2 as "replete with personal medical information that is divulged by the inmate *prior to* and during *the process of medical treatment*." (Emphasis added.) (Budish additional statement at 5.) The only testimony regarding record generation and maintenance is that the video was used in disciplinary and arbitration proceedings.

k. The Ohio Supreme Court has concluded that,

l. In order to fit within the 'medical record' exception to the public records law, 'a record must pertain to a medical diagnosis *and* be generated and maintained in the process of medical treatment.' (Emphasis *sic.*) *State, ex rel. Toledo Blade Co. v. Telb* (C.P. 1990), 50 Ohio Misc.2d 1, 10, 552 N.E.2d 243, 251. In *Telb*, the court held that to be excepted from disclosure, the records sought must meet

> the conjunctive requirements of the statute. In the instant matter, records held by the Ombudsman Office may involve diagnosis and treatment, but they are not 'maintained in the process of medical treatment' and therefore are not exempt from disclosure.

State ex rel. Strothers v. Wertheim, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997); *Ward v. Johnson's Indus. Caterers*, 10th Dist. Franklin No. 97APE11-1531, 1998 Ohio App. LEXIS 2841, *18-19 (June 25, 1998); *State ex rel. Strothers v. Rish*, 8th Dist. Cuyahoga No. 81862, 2003-Ohio-2955, ¶ 24-32. I find that the video and audio items recorded prior to entry into the infirmary also fail requirements 2 and 3 of the definition.

{¶35} The medical records exception must be construed strictly against the custodian, who has the burden to establish the that a requested record meets the requirements of the statute. *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 37, 41-43. I conclude that respondent has failed to show that any of the images or audio recorded prior to entry into the infirmary meet the conjunctive requirements of R.C. 149.43(A)(3).

{¶36} Turning next to the period following entry into the infirmary, respondent alleges that listed segments of the video show the inmate receiving treatment, disclose a "treatment whiteboard," and capture the screens of infirmary computers. (Scandling Aff. at 4-5, 8.) Video 2 thus captured existing medical records, and recorded medical history as it was generated in the process of medical treatment. I find that these images and audio meet the definition of medical records, and may be redacted from the videos as detailed in Extent of Redactions, below.

{¶37} However, I find that no other post-infirmary items meet the definition of a medical record. Video of the nurse taking the inmate's blood pressure did not reveal the reading obtained (Video 2(a) 9:50:24-9:52:41), and thus does not disclose a test result. Images of another inmate's mere presence does not disclose his medical history, diagnosis, prognosis, or medical condition. Respondent claims that images of a corrections officer filling out a mostly off-screen form is a "medical record." However,

immediately preceding audio (Video 2(b) 9:48:11-13) documents the officer asking a corrections officer, not medical staff, for an "OC sheet," referring to oleoresin capsicum (pepper spray). The court takes notice that such forms are used to document an officer's use of the chemical, not medical treatment.[7] Respondent alleges that "[s]imply revealing the location in the jail where the inmate is being housed after being transported from her cell would reveal her medical condition." (Budish additional response at 10.) However, without extrinsic knowledge, video of the inmate moving to a location identified only by floor and room number conveys no inherent medical information.

Protected Health Information

{¶38} Respondent asserts that unspecified portions of Video 2 are subject to the exception contained in R.C. 3701.17 *Protected health information*. (Budish additional pleading at 9-10.) However, R.C. 3701.17 is part of the chapter titled "Department of Health," and applies by its terms only to information reported to or obtained by the Ohio department of health or a board of health of a city or general health district:

> m. Protected health information *reported to or obtained by the director of health, the department of health, or a board of health of a city or general health district* is confidential and shall not be released without the written consent of the individual who is the subject of the information * * *

R.C. 3701.17(B). The General Assembly specifies that R.C. Chapter 3701 is not applicable to other persons and entities, or their duties under law: "Nothing in this section authorizes any action that prevents the fulfillment of duties or impairs the exercise of authority established by law for any other person or entity." R.C. 3701.03. The only reported case applying R.C. 3701.17 as an exception to the public records act involves the records of a general health district. *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499.

[7] A packet of what appear to be OC sheets was mounted on the door to the decontamination room, where an officer attempted unsuccessfully to extract a copy. (Video 2(b) 9:43:49-9:46:07.)

{¶39} While respondent describes the statute as prohibiting the release of protected health information in the hands of any "public health authorities" (Budish additional pleading at 9.), that term is not used in R.C. Chapter 3701, although it is used in *Lipson O'Shea* as shorthand for the statutory R.C. 3701.17 entities. The shorter term "health authorities" appears in the chapter, but it references entities other than the state board of health, city boards of health, and health districts, and is used only in statutes regarding the exchange of health notices and enforcement of quarantine and isolation orders.[8] Respondent also asserts that

> n. Because the video identifies an individual and involves medical treatment it is protected health information and may not be released in summary, statistical, or aggregate form, and is not a public record under section 149.43 of the Ohio Revised Code. *See Cuyahoga Cnty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St. 3d at 449 (stating same).

(Budish additional statement at 5.) The cited case does not contain the statement claimed. The reference to "summary, statistical, or aggregate" protected health information is in apparent reference to R.C. 3701.17(C), which provides just the opposite:

> o. (C) Information that does not identify an individual is not protected health information and may be released in summary, statistical, or aggregate form. Information that is in a summary, statistical, or aggregate form and that does not identify an individual is a public record * * *.

{¶40} I find that R.C. 3701.17 applies only to the state department of health, and boards of health, does not apply to records kept by the county jail infirmary, and may not be applied to withhold any portion of the county jail recording in this case.

Fourteenth Amendment Right to Privacy

{¶41} Respondent asserts that disclosure of images of the unclothed body of a female inmate would be "in violation of the right of privacy both as to bodily integrity and

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[8] *See, e.g.*, R.C. 3701.23, R.C. 3701.28, R.C. 3701.56, R.C. 3701.81.

due to medical reasons" under the Fourteenth Amendment to the U.S. Constitution. (Response at 4; Budish additional pleading at 6; Scandling Aff., Exhibit A at 2, 4, 6.) Respondent cites no federal or state case law in support of this proposition.

{¶42} There is no general constitutional right of nondisclosure of personal information. *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir.2008). A Fourteenth Amendment informational privacy interest, existing or proposed, must implicate a right that is either "fundamental" or "implicit in the concept of ordered liberty." *Id.* at 442-446. The Sixth Circuit Court of Appeals "has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (Bloch)." *Id.* at 440. The Ohio Supreme Court has recognized additional constitutional privacy rights that are not alleged or implicated here, *e.g.*, *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 725 N.E.2d 1144 (2000) (personal information of children); *State ex rel. Beacon Journal Publg. v. Akron*, 70 Ohio St.3d 605, 640 N.E.2d 164 (1994) (employee social security numbers). Records protected under the Fourteenth Amendment right to privacy are "records the release of which is prohibited by state or federal law." *State ex rel. Enquirer v. Craig,* 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 13. Where state action infringes upon a fundamental informational-privacy right, such action will be upheld only where the governmental action furthers a compelling state interest, and is narrowly drawn to further that state interest. *Kallstrom v. Columbus, 136 F.3d 1055, 1062 (6th Cir.1998) (Kallstrom I)* at 1064; *Craig* at ¶ 14.

{¶43} Respondent provides no factual support for his proposition that disclosure of the inmate images in Video 2 could result in a threat to the inmate's "bodily integrity," i.e., a threat of serious bodily harm or death, *Kallstrom I* at 1064, 1068, or document a current "perceived likely threat." *Kallstrom v. Columbus,* 165 F.Supp.2d 686, 695 (S.D.Ohio 2001) (*Kallstrom II*). I conclude that the fundamental informational-privacy

right based on threatened physical harm does not apply to the records in this case. I find that respondent also fails to provide any factual or legal support for his proposition that disclosure of inmate images in Video 2 would be in violation of a previously unrecognized "right of privacy * * * due to medical reasons."

{¶44} Respondent does not assert the second informational-privacy right established in the Sixth District, regarding information of a "sexual, personal, and humiliating nature." However, the facts before the court present an obvious situation where this right must be considered. In *Bloch v. Ribar*, 156 F.3d 673, 683-686 (6th Cir.1998) the court addressed the Fourteenth Amendment right to privacy as it touched on personal sexual matters and found that the plaintiff, a rape victim, had "a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical [sic] purpose is being served." In *Jones v. City of Brunswick*, 704 F.Supp.2d 721 (N.D.Ohio 2010) the District Court relied on *Bloch* in denying defendants' motion for summary judgment, holding that a reasonable jury could find that a booking photograph showing the arrestee in her underwear was "sexual, personal, and humiliating." *Id.* at 742-743.[9] On review of the video in this case, I find that the images of the inmate's breasts and underwear are of a sexual, personal, and humiliating nature.

{¶45} The analysis next continues to the balancing of "the government's interest in disseminating the information against the [Plaintiff's] right to informational privacy," to determine whether the informational right to privacy has been violated. *Bloch* at 685. First, the courts presume that the interest served by allowing public access to public records rises to the level of a compelling state interest, *Kallstrom I.* at 1065; *State ex rel. Cincinnati Enquirer v. Streicher*, 1st Dist. Hamilton No. C-100820, 2011-Ohio-4498, ¶ 31. Shaffer identifies himself as a member of the press, and argues that the withholding

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[9] There is no constitutional right to privacy that prohibits the publication of booking photos *per se*. *State ex rel. Lippitt v. Kovacic*, 70 Ohio App.3d 525, 591 N.E.2d 422 (8th Dist.1991). An inmate's court records of conviction and sentencing are also public record. Sup.R. 45.

of video of the correction officer's use of force would "shield this public record, depicting a public employee's actions, from those who truly employ him, the people of Cuyahoga County." (Reply at 4.) As the district court concluded in releasing information regarding the *Kallstrom* officers: "The Court appreciates the need to protect the health and safety of law enforcement officials and their families. But the health and safety of this democracy depend on a press that can function without additional burdens being imposed based on its ability to publish information concerning government activities." *Kallstrom II* at 703. Having implicated the inmate's informational privacy right in specific images, and recognized the compelling governmental interest in disclosure of the record of government activities under the Public Records Act, the two must be weighed to determine whether disclosure of the subject images would violate the right to privacy.[10]

{¶46} On balance, I find that the governmental, public interest in disclosure of these images does not outweigh the inmate's privacy interest implicated by disclosure to the press or the public. The corrections officer's actions in controlling, securing, and transporting the inmate may be substantially comprehended without these parts of the inmate being visible. *See Craig,* 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, at ¶ 21. As information not shown to be necessary to public review of the officers' actions, or to serve any other penological interest, the images primarily implicate a private interest over which the public interest does not predominate. *Bloch* at 686. This conclusion is consistent with the finding in *Jones* that the less intrusive images in that case were actionable. I conclude that respondent may redact images of the inmate's breasts and underwear from the video, in a manner that does not obscure any officer's presence or actions.

Inmate Records

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[10] The § 42 U.S.C. 1983 civil rights issues in *Jones* regarding the government interest in asking an inmate to remove clothing, and in taking the visual images, are not before this court. *Jones* at 728-735, 744. Only the public disclosure of the images is at issue under R.C. 2743.75 and R.C. 149.43.

{¶47} Respondent asserts that images of the inmate's face, audio of her name, her location in the jail, her "nude body displayed," and her behavior are subject to the exception contained in R.C. 5120.21 and OAC 5120-9-49. (Response at 5-7; Budish additional pleading at 3, 6 and 10; Scandling Aff., Exhibit A.) The statute is part of R.C. Chapter 5120, titled "Department of Rehabilitation and Correction," and applies by its terms only to the Ohio department of rehabilitation and correction (DRC). R.C. 5120.21(F) states:

> p. (F) Except as otherwise provided in division (C) of this section, *records of inmates committed to the department of rehabilitation and correction as well as records of persons under the supervision of the adult parole authority* shall not be considered public records as defined in section 149.43 of the Revised Code.

(Emphasis added.) OAC 5120-9-49(A), promulgated under the statute, conforms to this limitation to DRC records: "A 'record' means any item that is kept by the department of rehabilitation and correction (department) * * *."

{¶48} The cases cited by respondent for application of R.C. 5120.21(F) are inapposite. Respondent annotates *Brown v. Cuyahoga Cty.*, 517 Fed. Appx. 431, [2013 U.S. App. LEXIS 5268] (6th Cir.2013) as "making such exemption applicable to County jail facilities." (Response at 5.) *Brown* contains no such holding. Instead, the court expressly sets aside a peripheral argument involving the statute, without determination or analysis of the issue. *Brown* at 435. Respondent also cites *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41,42, 374 N.E.2d 641 (1978) as "direct" authority for the proposition that "[i]t is well settled that files and records of inmates of the jail are not public record, and are therefore exempt from disclosure." (Response at 6-7.) To the contrary, *Harris* did not involve records of a county jail, but of a state prison.

{¶49} I conclude as a matter of law that R.C. 5120.21 and OAC 5120-9-49 apply only to the records of the state DRC, do not apply to the inmates of a county jail, and therefore may not be applied to withhold any portion of the records in this case.

Health Information Portability and Accountability Act (HIPAA)

{¶50} Respondent asserts that portions of Video 2 must be withheld under the terms of the Health Information Portability and Accountability Act ("HIPAA"). The privacy provisions of HIPAA apply to a "covered entity," i.e., health plan, health care clearinghouse, or health care provider, and to "protected health information." 42 U.S.C. 1320d; 45 C.F.R. 160.103. However, assuming *arguendo* that the Cuyahoga County jail outpatient infirmary is a HIPAA covered entity, and that some images following entry into the infirmary constitute HIPAA protected health information, HIPAA does not supersede the Ohio Public Records Act, and thus cannot apply in this case.

{¶51} In *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 25-26, the Ohio Supreme Court found that,

> q. A review of HIPAA reveals a "required by law" exception to the prohibition against disclosure of protected health information. With respect to this position, Section 164.512(a)(1), Title 45, C.F.R. provides, "A covered entity may * * * disclose protected health information to the extent that such * * * disclosure is *required by law* * * *." (Emphasis added.) And the Ohio Public Records Act requires disclosure of records unless the disclosure or release is prohibited by federal law. R.C. 149.43(A)(1)(v).
>
> r. Hence, we are confronted here with a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law.

The Court noted that the secretary of the Department of Health and Human Services had explained that 164.512(a) was intended to preserve access to information considered important enough by state or federal authorities to require its disclosure by law, and that the federal Freedom of Information Act ("FOIA") is one law requiring disclosure of records under this exception to HIPAA protection. *Id.* at ¶ 27-28. The Court held:

> s. Even if the requested [records] did contain "protected health information" as defined by the Health Insurance Portability and Accountability Act ("HIPAA"), and even if the Cincinnati Health

> Department operated as a "covered entity" pursuant to HIPAA, the [records] would still be subject to disclosure under the "required by law" exception to the HIPAA privacy rule because Ohio Public Records Law requires disclosure of these reports, and HIPAA does not supersede state disclosure requirements.

Id. paragraph two of the syllabus, *see generally Id.* at ¶ 19-28, 34.

{¶52} Under the "required by law" exception, as interpreted in *Daniels*, I find that no portion of the requested record is subject to withholding under HIPAA.

Extent of Redaction

{¶53} The Public Records Act provides that only those portions of a record falling squarely within an exception may be withheld:

> t. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.

R.C. 149.43(B)(1). Where a video recording is not exempt in its entirety, only the portions of the recording that fall squarely within a public records exception may be withheld. *State ex rel. Cincinnati Enquirer v. Ohio Dept. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258, ¶ 45-50. *See also Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 2013-Ohio-5736, 6 N.E.3d 631, ¶ 29-31 (8th Dist.), affirmed by *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 4, 12. Respondent may obscure only the specific images or audio that are subject to an exception, as detailed in the following tables:

Permitted Redactions - Video 2(a)

Time	*Exception*	*Image or Audio to Redact*
9:38:38-9:41:42	14th Amendment	Images: Breasts and underwear
9:46:22-9:47:44	14th Amendment	Image: Underwear
9:48:21-9:48:35	14th Amendment	Images: Breasts and underwear
9:49:31-9:49:37	R.C. 149.43(A)(3)	Image: Computer screen

9:49:40-9:49:43	R.C. 149.43(A)(3)	Image: Whiteboard
9:50:55-9:51:03	R.C. 149.43(A)(3)	Image: Whiteboard
9:51:50-9:52:04	R.C. 149.43(A)(3)	Audio: Discussing a patient's symptoms
9:52:42-9:52:47	R.C. 149.43(A)(3)	Image: Whiteboard
9:52:47-9:53:08	R.C. 149.43(A)(3)	Audio: Officers relaying medical history
9:53:00-9:53:13	R.C. 149.43(A)(3)	Image: Examination of inmate (nurse and inmate)
9:53:16-9:53:20	R.C. 149.43(A)(3)	Image: Whiteboard
9:53:34-9:53:40	R.C. 149.43(A)(3)	Image: Whiteboard

Permitted Redactions – Video 2(b)

Time	*Exception*	*Image or Audio to Redact*
9:38:20-9:39:32	14th Amendment	Images: Breasts and underwear
9:48:28-9:48:30	R.C. 149.43(A)(3)	Image: Whiteboard
9:48:30-9:48:45	R.C. 149.43(A)(3)	Image: Computer screen

While Shaffer may stand on his access rights as determined herein, the parties remain at liberty to negotiate redaction in any way that reduces the time and expense of video and audio editing.

Conclusion

{¶54} Upon consideration of the pleadings, attachments, and responsive records filed under seal, I recommend that the court DENY AS MOOT Shaffer's claim as to Video 1. I further recommend that the court issue an order GRANTING Shaffer's claim for production of Video 2, subject to redaction of specific portions of the video excepted from release as medical records or records subject to the constitutional right of privacy, as detailed under Extent of Redaction. I further recommend that the court order that Shaffer is entitled to recover from respondent the costs associated with this action, including the twenty-five dollar filing fee. R.C. 2743.75(F)(3)(b).

{¶55} *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).*

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