

TOWARDS DARKNESS: OHIO'S PRESUMPTION OF OPENNESS UNDER THE PUBLIC RECORDS ACT

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I. INTRODUCTION

If investigative reporters have one polestar in the pursuit of the truth, it comes from the adage, “documents don’t lie.”¹ The power of the statement flows from the idea that documents—unlike memories, egos, and self-interests—act as unwavering memorials to things that have happened. Documents do not change when advantage commands it. They do not flinch when controversy comes. Documents do not cower when their contents threaten those who have power. Rather, the daily tide of bureaucratic memos, e-mails, reports, and files that drive American government merely convey the truth as those documents quietly capture it.² Sometimes that truth embarrasses.³ Sometimes it dooms.⁴ Occasionally, it

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¹ Mary Jane Fine, *Put Away the Heat, Sam Spade; Today’s Sleuths Pack Computers Listen, Sweetheart...Things Are Different Now. Private Eyes Aren’t Like Bogie Anymore.*, PHILA. INQUIRER (Aug. 13, 1991), http://articles.philly.com/1991-08-13/news/25805987_1_investigators-igi-sleuths. *But cf.* STEVE WEINBERG, *THE INVESTIGATIVE REPORTER’S HANDBOOK* 32. Sometimes documents can be wrong, but they are still useful. *Id.* “The best journalists possess the ‘documents state of mind’” *Id.* at 5.

² *See* ALASDAIR ROBERTS, *BLACKED OUT* 297 (2006); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 332 (Talcott Parsons et al. eds., trans., 4th ed. 1966) (explaining that a fundamental aspect of bureaucracy is recording information in its original version).

³ Former Ohio Attorney Marc Dann was forced to resign after a scandal was revealed, in part by public records, involving sexual harassment complaints in his office. Alan Johnson & James Nash, *Sexual Harassment Alleged: Two Attorney General’s Office Employees Complain of Supervisor’s Inappropriate Comments, Touching*, COLUMBUS DISPATCH, Apr. 6, 2008, at B1. As the story unfolded, reporters also used public records to discover numerous spending irregularities such as illegal use of campaign funds for personal lodging where the sexual harassment took place. *See* WBNS-TV, (continued)

liberates.⁵ Often, it burdens those in government who stand to lose because of it.⁶

The Supreme Court of Ohio, once a staunch defender of public records,⁷ is now in retreat.⁸ The court's recent decisions have stripped

<http://www.10tv.com/content/stories/2010/05/07/story-columbus-marc-dann-charges.html> (last visited Sept. 22, 2012). The release of public records revealed the financial aspects of the story that led to criminal charges against Dann and colleagues. *Id.* Dann ultimately pled guilty to related ethics charges and now faces discipline from the Supreme Court of Ohio. *Id.*

⁴ The Ohio State University football coach Jim Tressel was forced to resign following a scandal uncovered by Yahoo! Sports. The initial story relied on a confidential source to reveal that Tressel had failed to disclose his knowledge of NCAA violations several months before federal investigator discovered them. Charles Robinson & Dan Wetzel, *Tressel Knew of Gear Scheme Last April*, YAHOO! SPORTS (Mar. 7, 2011), <http://rivals.yahoo.com/ncaa/football/news?slug=ys-osuprobe030711>. Subsequently, reporters obtained e-mails released by OSU as public records; they revealed Tressel had several communications with Columbus attorney Chris Cicero about the situation eight months before investigators discovered OSU players had improperly swapped sports memorabilia for tattoos. WBNS-TV, <http://www.10tv.com/content/stories/2011/03/10/story-ohio-state-football-jim-tressel-chris-cicero.html> (last visited Sept. 22, 2012). Ultimately, the scandal decimated the team. The NCAA sanctioned Tressel, quarterback Terrelle Pryor left under duress, and the school suffered numerous sanctions including a bowl ban for the 2012 season. *Ohio State Gets One-year Bowl Ban*, ESPN, http://espn.go.com/college-football/story/_/id/7372757/ohio-state-buckeyes-football-penalties-include-bowl-ban (last updated Dec. 22, 2011, 7:17 AM).

⁵ See Paul Aker, *Investigation Finds More Apparent Deceptions By Toxicologist*, WBNS-TV (Nov. 17, 2010, 1:21 PM), <http://www.10tv.com/content/stories/2010/11/18/story-columbus-man-sentenced-prison-ferguson-testimony.html>. The reporter used various public records to determine a toxicologist, who had invalid credentials, was a key witness in a case that led to a questionable conviction; the defendant later received clemency because of the story. *Id.* See also Paul Aker, *Outgoing Strickland Grants Clemency to 159 People*, WBNS-TV (Jan. 11, 2011, 3:19 PM), <http://www.10tv.com/content/stories/2011/01/08/story-columbus-strickland-pardons.html>.

⁶ See Dave Murray, *How the Blade Uncovered Ohio's Rare Coin Scandal*, TOLEDO BLADE (Nov. 19, 2006), <http://www.toledoblade.com/State/2006/11/19/How-The-Blade-uncovered-Ohio-s-rare-coin-scandal.html>. The *Blade* used open records to expose a major story about Tom Noe stealing from a \$50 million state fund. *Id.* The paper had to sue to get the records needed for the story. *Id.* Noe was convicted on charges that directly resulted from the paper's reporting. *Id.* The *Blade* was a Pulitzer prize finalist for its work. *Id.*

⁷ See *Dayton Newspapers v. City of Dayton*, 341 N.E.2d 576, 578 (Ohio 1976) (“[W]e believe that doubt should be resolved in favor of disclosure of records held by governmental
(continued)

lawyers, journalists, ordinary citizens, and the wrongfully accused of the ability to access vital government documents.⁹ All of them find a wall standing where a door to volumes of investigative records once swung open.¹⁰ For most Ohioans, the cost of such opacity may seem hard to quantify. Without access to the records, the public cannot learn the truth about how well its government functions.¹¹

Still, one man did learn the cost.¹² For Ronald Larkins, closed records led to two decades behind the walls of an Ohio penitentiary.¹³ Larkins claimed his conviction for aggravated murder stood on a foundation of bogus evidence.¹⁴ But unlike so many other convicted criminals who claim the same, Larkins believed he could prove it.¹⁵ Larkins knew that records would show his physical features did not match those of the killer.¹⁶ All he needed was the file from the Cleveland Police Department.¹⁷

Larkins's pursuit of the records started after a jury convicted him in 1986.¹⁸ He fought for the records that would ultimately exonerate him until 1994.¹⁹ That was when his case finally made it to the Supreme Court

units. . . [R]ecords should be available to the public *unless* the custodian of such records can show a legal prohibition to disclosure.”) (footnote omitted).

⁸ See *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 92–96 (Ohio 1994) (overturning several cases that favored openness); DAVID MARBURGER & KARL IDSVOOG, *ACCESS WITH ATTITUDE: AN ADVOCATE’S GUIDE TO FREEDOM OF INFORMATION IN OHIO* 95–96 (2011) (stating the Supreme Court of Ohio is finding ways to exclude records by refusing to classify documents as records).

⁹ See *infra* pp. 368–72.

¹⁰ See *Steckman*, 639 N.E.2d at 91–94 (closing down numerous types of law enforcement records).

¹¹ See ROBERTS, *supra* note 2, at 23 (stating transparency permits the populace to critically assess its government); Thomas H. Tucker, “Sunshine”—*The Dubious New God*, 32 ADMIN. L. REV. 537, 537 (1980).

¹² See *State v. Ronald Larkins*, No. 85877, 2006 WL 60778, at *5 (Ohio Ct. App. Jan. 12, 2006).

¹³ *Id.* at *9.

¹⁴ *Id.* at *2.

¹⁵ *Id.*

¹⁶ *Id.* The facts also later show another witness told police Larkins was not the correct suspect, and yet another witness lied on the stand. *Id.*

¹⁷ *Id.* at *1–2.

¹⁸ *Id.* at *1.

¹⁹ *Id.*

of Ohio in *Steckman v. Jackson*.²⁰ Larkins seemed to have the law on his side.²¹ Ohio law presumed that records were open unless otherwise exempted.²² Although “trial preparation” documents are one of the exemptions, the exemption should not have withheld the records in Larkins’s case because a jury had already convicted him.²³

Such an argument might have worked at an earlier point in Ohio history, but that moment had passed by the time Larkins fought his battle.²⁴ The Supreme Court of Ohio ruled that the “chaos” of releasing records like those Larkins sought could not “be permitted to continue.”²⁵

In its landmark decision,²⁶ the court held that documents that were unavailable to a criminal defendant under Criminal Rule of Procedure 16 (Crim. R. 16) were no longer available as public records.²⁷ The court further ruled that any related records were no longer available.²⁸ It went further. The court decided to withhold related records indefinitely.²⁹ In this single decision, the court overruled precedent,³⁰ buried government records, and sealed the fate of a man who had, the facts would later show, suffered an unfair conviction.³¹

Twelve years after *Steckman*, Larkins got his records—and his freedom.³² Bishop Alfred Nickles filed a public records request for the

²⁰ 639 N.E.2d 83 (Ohio 1994).

²¹ See discussion *infra* Part III.B.

²² State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1164 (Ohio 1992); State *ex rel.* NBC v. City of Cleveland, 526 N.E.2d 786, 790 (Ohio 1988).

²³ See OHIO REV. CODE ANN. § 149.43(A)(1)(g) (West 1994). The statute defined trial preparation records as those created “in reasonable anticipation of litigation.” *Id.* § 149.43(A)(4). Because the trial had already concluded, Larkins had no other way to demand the records under Crim. R. 16(B). OHIO R. CRIM. P. 16(B)(1)(f).

²⁴ Compare State *ex rel.* Clark v. City of Toledo, 560 N.E.2d 1313, 1315 (Ohio 1990), with *Steckman*, 639 N.E.2d at 91–92 (explaining that courts had turned over files under *Clark* pursuant to records requests).

²⁵ *Steckman*, 639 N.E.2d at 92.

²⁶ OHIO’S OPEN GOVERNMENT RESOURCE MANUAL 167 (2006).

²⁷ *Steckman*, 639 N.E.2d at 92.

²⁸ *Id.*

²⁹ *Id.* (withholding related records until all “‘trials,’ ‘actions,’ and/or ‘proceedings’ have been fully completed”).

³⁰ *Id.* at 89.

³¹ State v. Ronald Larkins, No. 85877, 2006 WL 60778, at *8 (Ohio App. Jan. 12, 2006).

³² *Id.* at *2, *9–10.

very same documents.³³ This time, for reasons known only to the Cleveland Police Department, the department granted the request.³⁴

The files disgorged the truth about serious flaws in Larkins's case.³⁵ The police files showed that a key witness the State used to prosecute Larkins had initially identified the perpetrator as someone six inches shorter.³⁶ Another witness told police that one of the witnesses who identified Larkins might have actually been the real perpetrator.³⁷ The documents also revealed that the police promised probation in exchange for the testimony of another witness.³⁸ That witness denied the deal at trial.³⁹ Without the police reports, Larkins had no way to challenge the witness's deceitful response.⁴⁰

The appeals court considered the trove of hidden exculpatory information so prejudicial that it dismissed the case.⁴¹ In its decision, the appellate court opined:

Indeed, the state actively fought disclosure of the evidence after-the-fact by refusing Larkins'[s] public records request. While that refusal was ultimately found to be justified by the supreme court in *Steckman* . . . it could be argued . . . that the state's strenuous opposition to disclosing the records was meant to cover up its failure to divulge that evidence prior to trial.⁴²

Twenty years after a trial court handed him a life sentence for murder, state documents set Larkins free.⁴³

For Larkins, the documents offered some justice. For the rest of the community, they offered something else: a penetrating glimpse into how

³³ *Id.* at *2.

³⁴ *Id.*

³⁵ *Id.* at *2, *8–9.

³⁶ *Id.* at *8.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *9.

⁴⁰ *See id.*

⁴¹ *Id.* at *10.

⁴² *Id.* at *8.

⁴³ *Id.* at *10 (dismissing the murder indictment against Larkins was the proper sanction for the prosecutor's decision to withhold exculpatory evidence).

its government, the Cuyahoga County Prosecutor's Office, handled the case.⁴⁴

In this Comment, the author argues *Steckman v. Jackson* marks the departure of Ohio jurisprudence from the presumption that government records are open to the public. *Steckman* signaled a beginning to the current era of judicial activism. In this era, the Supreme Court of Ohio weighs expedience against the public's right to information.⁴⁵ As it does, the court ignores the intent of the legislature.⁴⁶ More fundamentally, the court ignores the Ohio constitution and its guarantee that the people should retain those rights the legislature has not altered.⁴⁷

The post-*Steckman* era exacts a price in the form of government oversight. No longer does the court presume reporters can pry into the inner operations of state agencies.⁴⁸ Journalists lose the ability to expose the problems of that government. The public loses its ability to examine those problems. It also loses the antiseptic free societies use to cleanse them.

This Comment explains how the problems encountered by Larkins are emblematic of the cost of Ohio's recent public records decisions. It shows the role public records serve in our representative democracy, Ohio's historic preference for them, and the Ohio Supreme Court's relatively recent revolt against openness exhibited in *Steckman* and cases that have followed. To do so, the author examines the zenith of openness as defined

⁴⁴ *Id.* at *8. See also Defendant-Appellee Ronnie Larkins' Memorandum in Response to the State of Ohio's Memorandum in Support of Jurisdiction at 8, *State v. Larkins*, 848 N.E.2d 858 (Table) (Ohio 2006) (No. 2006-0414). Attorney Kort Gatterdam described the State's conduct in this way: "The record is clear. It was not a single minor discovery violation that occurred in this case. It is a series of egregious, calculated, intentional, and prejudicial misconduct by the state over 23 years." *Id.*

⁴⁵ See discussion *infra* Part V.

⁴⁶ Compare *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94 (Ohio 1994) (expanding the "work product exception" found in section 149.43(A) to except "information assembled by law enforcement officials in connection with a probable or pending criminal proceeding" from disclosure), with *State ex rel. James v. Ohio State Univ.*, 637 N.E.2d 911, 913-14 (Ohio 1994) ("[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 . . .").

⁴⁷ OHIO CONST. art. 1, § 20.

⁴⁸ Compare *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 186 (Ohio 2002) (reasoning that the disclosure of information regarding jurors is not required because it does little to guarantee accountability of the government), with *James*, 637 N.E.2d at 913-14.

by cases that preceded *Steckman*. This Comment uses those cases to ask whether *Steckman* is the product of sound jurisprudence or a blurring of the branches of government. It then shows the practical impact of *Steckman* on journalists and ultimately the public. Finally, it makes a recommendation to prevent the rule of *Steckman* from infecting other areas of Ohio's public records law.

II. BACKGROUND

A. *Why Public Records Are Important*

1. *Good Journalism Demands Public Records*

Public records serve as a flashlight to illuminate the dark crevices of government.⁴⁹ In a news world crowded by public information officers, press releases, and spin-doctors, reporters rely on public documents to expose the unvarnished facts about government activity.⁵⁰ Amid that backdrop, public records produce enlightening stories about everything from government officials taking millions of dollars in illegal overtime payments,⁵¹ to contaminated state DNA labs,⁵² to corruption in the Ohio Attorney General's Office.⁵³ In each case, public records exposed

⁴⁹ *Montgomery Cnty. Pub. Defender v. Sirkok*, 842 N.E.2d 508, 512 (Ohio 2006) (citing *State ex rel. WHIO-TV-7 v. Lowe*, 673 N.E.2d 1360, 1364 (Ohio 1997)) (noting that the purpose of the Public Records Act is "to expose government activity to public scrutiny").

⁵⁰ See ROBERTS, *supra* note 2, at 118 (discussing how the media and groups such as the Reporters' Committee for Freedom of the Press treat the right to information as part of its "core constituency").

⁵¹ See Paul Aker, *Ohio's State Agencies Paying Top Bosses Thousands In OT*, WBNS-TV (Feb. 12, 2010, 11:24 AM), <http://www.10tv.com/content/stories/2010/02/12/story-ohio-state-agencies-overtime.html> (using public records to match job classifications with overtime payments to reveal \$2 million in unlawful payments).

⁵² See Paul Aker, *Pattern of DNA Testing Flaws at State Labs Uncovered*, WBNS-TV (Mar. 7, 2011, 5:51 PM), <http://www.10tv.com/content/stories/2011/02/28/story-columbus-dna-lab-testing-problems.html> (using public records requests to obtain state lab reports and closed case reports to show contamination in DNA testing equipment led to questionable results in criminal cases).

⁵³ See Johnson & Nash, *supra* note 3 (using public records to reveal allegations of sexual harassment).

unsavory government activity, just as they have throughout many other open societies.⁵⁴

2. *The Founders Understood Need for Transparency*

Those who cultivated our republic understood the importance of transparency in government. James Madison, the fourth President of the United States, considered transparency the foundation of a popular government.⁵⁵ Under Madison's view, a republic could not effectively govern itself if its leaders deprived that republic of the very information it required to assess the effectiveness of those leaders.⁵⁶ Madison believed "the right of freely examining public characters and measures" was so fundamental that it was guaranteed under the First Amendment.⁵⁷ That philosophy seems to have persuaded previous generations of Ohio's elected leaders. The Ohio Attorney General and State Auditor distributed to state offices a practical manual about handling government records.⁵⁸ It informed public servants of Madison's famous statement, "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."⁵⁹ Such wisdom was precisely the type that illuminated Ohio's early cases.⁶⁰

B. *The Early Cases*

In 1901, the blessings of our democracy and the costs of keeping it were still such fresh ideas that they rolled from a judge's pen into one of Ohio's first cases on public records.⁶¹ A Cincinnati judge resolved questions about whether English common law required the inspection of public records in favor of American style openness.⁶² As the court ruled that Cincinnati citizens had a right to inspect real estate records held by the

⁵⁴ See ROBERTS, *supra* note 2, at 23 (showing how public records have exposed government malfeasance throughout the world, from tainted national blood supplies in Japan, to torture in Chile, to bribery of government officials involved in British arms trade).

⁵⁵ Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957).

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ OHIO SUNSHINE LAWS 2008: AN OPEN GOVERNMENT RESOURCE MANUAL 1 (2008) [hereinafter OHIO SUNSHINE LAWS].

⁵⁹ *Id.*

⁶⁰ *Wells v. Lewis*, 12 Ohio Dec. 170 (1901).

⁶¹ *Id.*

⁶² *Id.* at 175.

municipal auditor, the judge made it clear that openness should rule irrespective of English tradition.⁶³ The judge in *Wells v. Lewis* declared:

In England the fountain head of justice is the king

But in this country we proceed upon an entirely different theory of government. Here the people are the fountain head of justice. The courts are their courts; and the government is their government

As public records are but the people's records, it would seem necessarily to follow that unless forbidden by a constitution or statute, the right of the people to examine their own records must remain.⁶⁴

In true Madisonian tradition, the *Wells* court tied the right of access to records to constitutionally guaranteed freedoms.⁶⁵ The *Wells* court held that unless the legislature decides to remove the right to inspect records, the Ohio constitution presumes citizens retain that right.⁶⁶

Following *Wells*, the idea that our system of popular government requires public records guided Ohio courts for decades.⁶⁷ Besides a presumption of openness, the only restriction on access to records was that one's examination of the records could not significantly impair the physical duties of government workers.⁶⁸ In 1960, the case of *State ex rel. Patterson v. Ayers*⁶⁹ crystallized Ohio's common law.⁷⁰ The *Ayers* court held:

The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore,

⁶³ *Id.* at 175–76.

⁶⁴ *Id.*

⁶⁵ *Id.* (“[T]o settle the question of the application of this principle to the people of this state it is declared in Bill of Rights, Art. I, Sec. 20, that, ‘This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.’”).

⁶⁶ *Id.* at 176.

⁶⁷ *Krickenberg v. Wilson*, 15 Ohio Dec. 779 (1905).

⁶⁸ *State ex rel. Louisville Title Ins. Co. v. Brewer*, 70 N.E.2d 265, 266–67 (Ohio 1946).

⁶⁹ 171 N.E.2d 508 (Ohio 1960).

⁷⁰ See Thomas J. Moyer, *Chief Justice Offers Historical Perspective on Public Records, Open Government*, SUPREME CT. OHIO & OHIO JUD. SYS. (Feb. 12, 2008), http://www.supremecourt.ohio.gov/PIO/news/2008/pubrecords_021208.asp.

anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same.⁷¹

That summation of Ohio common law had such strength that the legislature soon codified it.⁷²

III. THE OHIO REVISED CODE

A. *A Simple Beginning*

In 1963, the Ohio Legislature passed Ohio Revised Code section 149.43.⁷³ With sweeping simplicity,⁷⁴ the law made all records held by any Ohio government agency open to public inspection and duplication.⁷⁵ It required agencies to turn over any records they kept as soon as “reasonable.”⁷⁶ The legislature defined “public record” as any record state agencies had to keep except material related to adoption, psychiatric or physical exams, and probation or parole information.⁷⁷ Lawmakers also exempted records the federal government expressly forbid disclosing.⁷⁸

⁷¹ 171 N.E.2d at 509 (quoting 35 O. JUR. § 41 (1934)). See also David S. Jackson, *Privacy and Ohio’s Public Records Act*, 26 CAP. U. L. REV 107, 115 (1997).

⁷² OHIO REV. CODE ANN. § 149.43 (West 1963).

⁷³ *Id.* The law went into effect on September 27, 1963. *Id.* The penalty for failing to provide timely records was \$100 per instance. *Id.* § 149.99.

⁷⁴ The original statute contained only ninety words. *Id.* § 149.43.

⁷⁵ *Id.*

⁷⁶ *Id.* “As used in this section, ‘public record’ means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units . . .” *Id.* The Supreme Court of Ohio initially construed this definition broadly. Jackson, *supra* note 71, at 116. The court concluded that government agencies should disclose “records,” implying all records, unless the government agency could show “a legal prohibition” against their release. *Dayton Newspapers, Inc. v. City of Dayton*, 341 N.E.2d 576, 578 (Ohio 1976).

⁷⁷ § 149.43.

⁷⁸ *Id.* The statute additionally provided a remedy for noncompliance. *Id.* § 149.99. Courts could sanction any state agency up to \$100 for each failure to provide records. *Id.*

B. Judicial Treatment: 1963–1978

After Ohio's Public Records Act (PRA) became law, the courts acted in the tradition of their common law ancestors.⁷⁹ They required government offices to release student enrollment data,⁸⁰ building records,⁸¹ and jail roster information.⁸² Along the way, the Supreme Court of Ohio made it clear that the law presumed agencies must turn over records.⁸³ In its decision to force the City of Dayton to release jail records to the Dayton Daily News, the court echoed Ohio's common law refrain, as it stated: "[P]ublic records are the people's records . . . officials . . . are merely trustees for the people; therefore anyone may inspect such records at any time."⁸⁴ In deciding another press issue a year later, the court declared: "[W]e believe that doubt should be resolved in favor of disclosure."⁸⁵

C. Expanding Exemptions

By the mid-1990s, the Ohio Legislature made it clear the PRA left too much information exposed.⁸⁶ It methodically closed access to dozens of records.⁸⁷ Exemptions removed everything from youth corrections documents⁸⁸ to certain police officer information.⁸⁹ By the year 2000, the PRA had grown from ninety words and a handful of exemptions to

⁷⁹ See *Dayton Newspapers*, 341 N.E.2d at 578 (citing *State ex rel. Patterson v. Ayers*, 171 N.E.2d 508, 510 (Ohio 1960)); *State ex rel. Grosser v. Boy*, 330 N.E.2d 442, 444 (Ohio 1975) (holding that because record of student enrollment was not expressly exempted, it was permitted under section 149.43); *State ex rel. White v. City of Cleveland*, 295 N.E.2d 665, 668 (Ohio 1973). *White* was the first Ohio Supreme Court case to analyze section 149.43. 295 N.E.2d at 668. The court upheld a lower court's ruling that a municipality had a "duty" to disclose building and architectural plans. *Id.*

⁸⁰ *Grosser*, 330 N.E.2d at 444.

⁸¹ *White*, 295 N.E.2d at 666–68.

⁸² *Dayton Newspapers*, 341 N.E.2d at 577.

⁸³ *Id.* at 577–78.

⁸⁴ *Id.* at 577.

⁸⁵ *State ex rel. Plain Dealer Publ'g Co. v. Krouse*, 364 N.E.2d 854, 855 (Ohio 1977) (per curiam) (quoting *Dayton Newspapers*, 341 N.E.2d at 578).

⁸⁶ The Ohio legislature has enacted dozens of exemptions to the PRA since 1987. *E.g.*, OHIO REV. CODE ANN. § 149.43 (West Supp. 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

nineteen exemptions and more than 2,200 words.⁹⁰ Today, it contains twenty-eight exemptions.⁹¹ However, the actual number is even higher.⁹²

IV. THE COURT AS SLAVE TO LEGISLATIVE INTENT

A. *The Court Rejects Judicial Activism*

Initially, the Supreme Court of Ohio respected the boundaries, both those set by the legislature and those set by precedent.⁹³ The court decided that it should not switch its role as judicial referee with that of legislative advocate.⁹⁴ The justices found that the PRA left “no room for judicial balancing.”⁹⁵ The cases that follow reveal the jurisprudence of that era. In so doing, they also illuminate the trail from which the court ultimately veered in *Steckman*.

The Supreme Court of Ohio made the rule against judicial meddling particularly clear in *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*.⁹⁶ In *Toledo Foundation*, the court held that it should not be in the business of adding exemptions to Ohio’s Public Records Act.⁹⁷ As a result, the court concluded that when a private organization holds documents related to public activities, those documents are public

⁹⁰ *Id.* § 149.43 (West 2000). The author counted more than 2,228 words.

⁹¹ *Id.* § 149.43 (West Supp. 2012).

⁹² *Id.* The PRA cross-references several other statutes that also exempt various records. One authority in the area explains there are more than 300 exemptions scattered throughout other sections of the Code. MARBURGER & IDSVOOG, *supra* note 8, at 129. The PRA now dwarfs even the 2000 version. Compare § 149.43 (West 2000), with § 149.43 (West Supp. 2012). One function of the additional language is to precisely describe how records custodians should process requests. § 149.43 (West Supp. 2012). In numerous instances, the PRA defines the circumstances under which an agency may release a record. *Id.* By adding so much detail, the legislature has not only defined the law, but proven it has thoroughly contemplated when agencies should withhold records.

⁹³ See *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1164–65 (Ohio 1992) (stating the General Assembly had already balanced the competing interests and it was not the Ohio Supreme Court’s job to second guess that decision).

⁹⁴ *State ex rel. Fant v. Enright*, 610 N.E.2d 997, 998 (Ohio 1993). It took this position as it discarded the *Wooster* test, which was the analysis the court had used to weigh personal privacy interests against the need for public disclosure. *Id.*

⁹⁵ *Id.* The Chief Justice of the Supreme Court of Ohio wrote that the PRA required “strict interpretation.” Thomas J. Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247, 267 (2003).

⁹⁶ 602 N.E.2d 1159, 1164 (Ohio 1992).

⁹⁷ *Id.*

records.⁹⁸ The court rejected an argument that it is the function of the judiciary to balance personal privacy rights against the PRA's demand for disclosure.⁹⁹ In doing so, the court reasoned that a balancing of interests had already been considered and codified in the form of specific exception by the legislature.¹⁰⁰ The court drew upon long settled law that held Ohio courts should not "enlarge" restrictions the legislature had already contemplated.¹⁰¹

In 1988, the Supreme Court of Ohio took an even more resolute stance against government agencies that tried to pry cracks in the PRA.¹⁰² In *State ex rel. Cincinnati Post v. Schweikert*, the court refused to carve out a "work product" exception for a court administrator who had compiled various public documents.¹⁰³ Instead of finding a way to restrict access, the court used the opportunity to defer to the General Assembly's intent.¹⁰⁴

B. *The Height of Transparency*

1. *NBC: The Height of Transparency*

A later case stands alone as the most vivid example of the Ohio Supreme Court's previous commitment to openness. Therefore, one must understand *State ex rel. NBC v. City of Cleveland*¹⁰⁵ to truly appreciate its polar opposite, *Steckman*. *NBC* symbolized Ohio's presumption of disclosure.¹⁰⁶ *Steckman* symbolizes the move away from that presumption.¹⁰⁷ Both cases involved police records.¹⁰⁸

⁹⁸ *Id.* at 1163. The court ruled that a private fundraising foundation was a "public office" because of its close ties to a public university. *Id.* The court forced the foundation to turn over donor records. *Id.* at 1165.

⁹⁹ *Id.* at 1164.

¹⁰⁰ *Id.* at 1164–65.

¹⁰¹ *Id.* at 1164 ("[T]he court has a duty to enforce a statute . . . not 'to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for'" (quoting *State ex rel. Foster v. Evatt*, 56 N.E.2d 265, 282 (Ohio 1944))).

¹⁰² See *State ex rel. Cincinnati Post v. Schweikert*, 527 N.E.2d 1230, 1232 (Ohio 1988) (holding that section 149.43 must be construed broadly).

¹⁰³ *Id.* at 1231–32.

¹⁰⁴ *Id.* at 1232. The intent was to make documents available unless the law expressly provided otherwise. *Id.* "[T]he law's public purpose requires a broad construction of the provision defining public records. Because the law is intended to benefit the public through access to records, this court has resolved doubts in favor of disclosure." *Id.*

¹⁰⁵ 526 N.E.2d 786 (Ohio 1988).

¹⁰⁶ See *id.*

¹⁰⁷ See discussion *supra* Part IV.A.

In *NBC*, the Supreme Court of Ohio dramatically refused to extend the PRA.¹⁰⁹ The question was whether the court should expand exemptions that the legislature had already created.¹¹⁰ In Ohio's most transparent moment since *Ayers*, the court refused.¹¹¹ It declined to distort the General Assembly's intent.¹¹² Instead, the court limited the scope of exemptions for both confidential law enforcement investigatory records¹¹³ and trial preparation material.¹¹⁴

The *NBC* case started because a television station wanted to know more about a series of police shootings.¹¹⁵ The violence claimed the lives of a dozen Cleveland residents.¹¹⁶ In part, the documents NBC sought were those compiled due to a standing Cleveland Police order that required the department to investigate all shootings that involved police officers.¹¹⁷ The Cleveland Police Department used the information to monitor officers and determine whether to discipline them.¹¹⁸ The distinction was important. It meant the records were administrative in nature rather than the product of a criminal investigation.¹¹⁹ As a result, the court concluded the PRA did not exempt them from disclosure.¹²⁰

¹⁰⁸ See generally *NBC*, 526 N.E.2d 786; State *ex rel.* Steckman v. Jackson, 639 N.E.2d 83 (Ohio 1994).

¹⁰⁹ 526 N.E.2d at 786.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 790.

¹¹² *Id.* at 789–90.

¹¹³ *Id.* at 790. The confidential law enforcement investigatory record exemption prevents public access to records that “create a high probability of disclosure” that (a) identify an uncharged suspect; (b) lead to the identification of a confidential informant; or (c) reveal confidential investigatory techniques or procedures. OHIO REV. CODE ANN. § 149.43(A)(2) (West Supp. 2012).

¹¹⁴ *NBC*, 526 N.E.2d at 791. “‘Trial preparation record’ means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.” § 149.43(A)(4) (West Supp. 2012).

¹¹⁵ *NBC*, 526 N.E.2d at 787. Cleveland station WKYC-TV made the request. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 791. In all but one case, prosecutors had already determined whether they would prosecute. *Id.* at 787. Indeed, the State tried two of the officers. *Id.*

¹¹⁸ *Id.* at 790.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 791. The court stated that while the PRA did not expressly keep the records from exemption, this is how section 149.43 should be construed: “While Ohio’s public records law does not require the record to be compiled *solely* in anticipation of litigation,
(continued)

2. Law Enforcement Confidential Investigatory Exemption

With its holding, the court rejected the Cleveland Police's claim that the "specific investigatory work product" exemption should apply.¹²¹ This meant police could not withhold records simply because they generated them during the course of an investigation.¹²²

The Cleveland Police Department argued the specific investigatory work product exemption should shield the records because it generated them through an investigation.¹²³ It claimed the exemption applied regardless of the reason for the investigation.¹²⁴ The police department wanted all records excluded from public review under the investigatory work product exception¹²⁵ anytime a "Safety Department" officer investigated any incident.¹²⁶

The court found that the City's argument for closing all investigative records violated the spirit of Ohio's public records policy.¹²⁷ It punctuated that viewpoint as it again declared, "This court's philosophy [is] that . . . exceptions to disclosure enumerated in [section] 149.43 are to be construed strictly . . . and that all doubt should be resolved in favor of this disclosure."¹²⁸ The court went on to define the investigatory work product exception narrowly.¹²⁹

The court defined the work product of investigators¹³⁰ similar to the way the Supreme Court of the United States defined attorney work

this court has consistently held that 'exceptions to disclosure enumerated in section 149.43 are to be construed strictly against the custodian of public records'" *Id.* (quoting *State ex rel. Plain Dealer Publ'g Co. v. Lesak*, 457 N.E.2d 821, 823 (Ohio 1984) (Celebrezze, C.J., concurring)).

¹²¹ *Id.*

¹²² *Id.* The PRA does not define the exemption other than to say agencies may withhold law enforcement records that contain "specific investigatory work product." OHIO REV. CODE ANN. § 149.43(A)(2)(c) (West Supp. 2012).

¹²³ *NBC*, 526 N.E.2d at 791.

¹²⁴ *Id.*

¹²⁵ § 149.43(A)(2)(c) (defining the records as "[s]pecific confidential investigatory techniques or procedures or specific investigatory work product").

¹²⁶ *NBC*, 526 N.E.2d at 790. Safety Department officers included police officers. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (quoting *State ex rel. Plain Dealer Publ'g Co. v. Lesak*, 457 N.E.2d 821, 823 (Ohio 1984) (Celebrezze, C.J., concurring)).

¹²⁹ *Id.*

¹³⁰ *Id.*

product.¹³¹ As the Supreme Court did in *Hickman v. Taylor*,¹³² the Ohio court determined that work product was the result of mental effort.¹³³ In so deciding, the court chose to protect only investigative work that implicated the investigator's theories, plans, and subjective analysis.¹³⁴ The court refused to protect objective observations.¹³⁵ Even so, the court's ruling posed no threat of blowing holes in ongoing criminal cases. The legislature had already contemplated such a problem and made an exemption to prevent it.¹³⁶

3. Trial Preparation Records

In *NBC*, the court also narrowly defined the trial preparation records exemption.¹³⁷ It found that the law protected agencies from disclosing information “specifically” collected in pursuit of civil or criminal actions.¹³⁸ Therefore, investigators who collected documents they reasonably anticipated would lead to a trial were free to withhold them.¹³⁹

However, the court once again took the opportunity to say lower courts should resolve any doubts about the nature of such records in favor of disclosure.¹⁴⁰ It held that, because the City of Cleveland had not specifically created the police shooting records for the purpose of litigation, the department had to release the records.¹⁴¹ While the court would later partially overturn itself, it did so because of a different view of the facts, not the law.¹⁴²

¹³¹ *Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947).

¹³² *Id.*

¹³³ *NBC*, 526 N.E.2d at 790.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See OHIO REV. CODE ANN. § 149.43(A)(4) (West Supp. 2012) (“trial preparation” exception); § 149.43(A)(1)(g).

¹³⁷ 526 N.E.2d at 790.

¹³⁸ *Id.* at 791.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 790.

¹⁴¹ *Id.* at 791.

¹⁴² *State ex rel. NBC v. City of Cleveland*, 566 N.E.2d 146, 148 (Ohio 1991). This case, known as *NBC II*, resulted from the court's initial ruling that remanded the case to a lower court for an *in camera* review of the records. See *State ex rel. NBC v. City of Cleveland*, 526 N.E.2d 786, 791 (Ohio 1988). The lower court found the records were not confidential law enforcement records. *State ex rel. NBC v. City of Cleveland*, No. 52337, 1989 WL 121054, at *2 (Ohio Ct. App. Oct. 3, 1989). However, despite its strong
(continued)

Once again, the court protected the right to access public records. It amplified its already settled policy: documents were presumed open unless a government agency proved the legislature intended otherwise.¹⁴³ The era of sunny skies, open file cabinets, and fidelity to precedent would not last.

V. ANALYSIS: *STECKMAN V. JACKSON*

A. Overview

There is no learned man but will confess he hath much profited by reading controversies; his senses awakened, his judgment sharpened, and the truth which he holds more firmly established. In logic they teach that contraries laid together more evidently appear; and controversy being permitted, falsehood will appear more false, and truth more true.¹⁴⁴

The Supreme Court of Ohio concluded its decision in *Steckman v. Jackson* with the preceding quotation.¹⁴⁵ The statement seems appropriate; not for its prescience, but for its irony.¹⁴⁶

What follows illustrates how the court used *Steckman* to reverse precedent and invent an exemption. The analysis reveals how the court rationalized its holding based on an overwrought concern for convenience.¹⁴⁷ In its zeal to fix problems with the criminal justice system, the court significantly altered Ohio's public records law.¹⁴⁸ In the process, the court shunned its own explicit public policy.¹⁴⁹ That was a policy that

suggestion to the opposite in *NBC I*, on remand the court disagreed with the lower court about some of the records.

¹⁴³ *NBC*, 526 N.E.2d at 790 (“Under Ohio law, a person asserting an exception is required to prove the facts warranting such an exception.”).

¹⁴⁴ *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 97 (Ohio 1994) (quoting John Milton, *Aeropagitica*, in *INTERNATIONAL DICTIONARY OF THOUGHTS* 167, 167 (1969)).

¹⁴⁵ *Id.*

¹⁴⁶ *See* *MARBURGER & IDSVOOG*, *supra* note 8, at 242–43 (stating *Steckman* went too far).

¹⁴⁷ *See* *Steckman*, 639 N.E.2d at 91–92.

¹⁴⁸ *Id.* at 90.

¹⁴⁹ *See id.* at 94. The court stated it was faced with a problem created because of the legislature's decision to use “work product” in a manner the court did not think was efficient. *Id.* This contradicts the court's numerous previous holdings that it must strictly interpret the will of the legislature. *See* *Moyer*, *supra* note 95, at 259–62 (describing several cases of the era in which the court applied the “textual” interpretation of the statute).

embraced Madison's view on records in our democracy.¹⁵⁰ Worse, *Steckman* has become a gateway case. The court continues to decide other issues in *Steckman* fashion—based on expedience rather than the law.¹⁵¹

B. Case Background

Steckman came before the court as several consolidated cases.¹⁵² Together, they presented a variety of public records questions that sprang from criminal prosecutions.¹⁵³ *Steckman* raised the question of whether criminal defendants may invoke the PRA to obtain records that Crim. R. 16 did not expressly require.¹⁵⁴ While the question involved criminal defense, the answer spilled into records law that affects everyone.¹⁵⁵ In addressing the controversy, the court again took the opportunity to review the PRA exemptions for confidential law enforcement investigatory records and trial preparation records.¹⁵⁶ The court issued a divided opinion and knew the decision would stir controversy.¹⁵⁷

1. Criminal Rule 16

Steckman held that defendants could no longer obtain records from prosecutors related to their cases by using the PRA.¹⁵⁸ To arrive at that holding, the court created a PRA exemption.¹⁵⁹ It concluded that Crim. R. 16 prevented defendants from receiving records that the PRA would otherwise release.¹⁶⁰ In its opinion, the court did not pretend to base its ruling on the language of the PRA.¹⁶¹ It did not even attempt to determine

¹⁵⁰ See *supra* Part II.A.2.

¹⁵¹ See *supra* notes 147–149 and accompanying text.

¹⁵² *Steckman*, 639 N.E.2d at 85.

¹⁵³ *Id.* at 85–88.

¹⁵⁴ *Id.* at 89.

¹⁵⁵ See *id.* at 90–93 (deciding the question presented by criminal defendants, but not limiting its holding to them).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* The court was split 5–2. Justice Wright stated, “I think we have taken a substantial step back from [NBC] and its progeny.” *Id.* at 98 (Wright, J., dissenting). Justice Douglas wrote for the majority, “We do not seek controversy, but like a homing pigeon, it finds its way to our door.” *Id.* at 97.

¹⁵⁸ *Id.* at 90, 95.

¹⁵⁹ See *id.* at 90 (stating that Crim. R. 16 should take precedent over section 149.43, but not saying that the legislature had exempted such records).

¹⁶⁰ *Id.* at 89.

¹⁶¹ *Id.* at 90.

the intent of the legislature.¹⁶² Nor did it cite any case law to support its holding.¹⁶³

Instead, the rationale for *Steckman* included concerns that using the PRA diluted the power of Crim. R. 16.¹⁶⁴ The court further worried that supplying information to defendants put prosecutors at a disadvantage.¹⁶⁵ The court wanted to stop criminal defendants from circumventing the rules of discovery by using the PRA.¹⁶⁶ This tactic gave defendants evidence: defendants obtained records under the PRA that they could not obtain through discovery.¹⁶⁷ Yet, it kept prosecutors from receiving their own evidence that the rules of criminal discovery would have otherwise forced defendant attorneys to provide.¹⁶⁸

The court explained that the PRA made executing justice inefficient because it delayed criminal cases, especially those involving the death penalty.¹⁶⁹ Upon reflection, the court decided such concerns were too great to allow its previous rulings to stand; it said, “[O]ur past decisions have not served well the criminal justice system.”¹⁷⁰ It then overturned those decisions.¹⁷¹

2. Trial Preparation Records

The *Steckman* court essentially held that once a document becomes exempt under the PRA as a trial preparation record, it will remain so until a

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* “The playing field is not level as there is no reciprocal right of prosecutors to obtain additional discovery beyond Crim.R. 16(C).” *Id.* The author of the *Steckman* opinion, former Justice Andy Douglas, stated the court’s decision was the only viable solution to the troubling situation. Telephone Interview with Andy Douglas, Former Justice, Supreme Court of Ohio (Jan. 31, 2012). Douglas stated that while the decision in *Steckman* concededly departed from the court’s presumption of openness, it did so because it was the first time the court was forced to harmonize criminal rules of procedure with the PRA. *Id.* Douglas contended the crisis simply demanded a solution. *Id.*

¹⁶⁷ *Steckman*, 639 N.E.2d at 90. See also MARBURGER & IDSVOOG, *supra* note 8, at 241, 248 (2011) (“[D]efense attorneys in criminal cases were using the PRA to obtain the work product of investigators that they couldn’t get using the rules of discovery . . .”).

¹⁶⁸ *Steckman*, 639 N.E.2d at 90. See also OHIO R. CRIM. P. 16(C)(1) (West 2009) (repealed 2010).

¹⁶⁹ *Steckman*, 639 N.E.2d at 89–90.

¹⁷⁰ *Id.* at 90.

¹⁷¹ *Id.*

charged defendant is acquitted, pardoned, or dies.¹⁷² The decision used *Black's Law Dictionary* to determine what the General Assembly meant when it defined the trial preparation exemption as records “compiled in reasonable anticipation of . . . a civil or criminal action or proceeding.”¹⁷³ Based on its review of *Black's*,¹⁷⁴ the court concluded a “record does not lose its exempt status unless and until all ‘trials,’ ‘actions,’ and/or ‘proceedings’ have been fully completed.”¹⁷⁵ The court reasoned that since *Black's* did not make a distinction between court actions, the definition included all possible court actions.¹⁷⁶

The court specifically stated that all possible actions included potential post-conviction proceedings.¹⁷⁷ Justice Andy Douglas acknowledged the holding could lead to “harsh” outcomes, but stated that was necessary because a post-conviction proceeding could lead to a new trial.¹⁷⁸ That means in many cases, journalists have to wait decades to report how the Ohio government operated in any given case. For death row inmates, it means they may never see all of the records that helped condemn them.

¹⁷² *See id.* at 92–93 (holding that records retain exempt status through all potential post-conviction appeals, which implies the holding does not reach records related to uncharged suspects once the statute of limitations expires on the potential charge); *Perry v. Onunwor*, No. 78398, 2000 WL 1871753, at *3 (Ohio App. Dec. 7, 2000) (“[A]bsent proof that no further proceedings are possible, e.g., the defendant’s death perhaps, a custodian of confidential law enforcement investigatory records is under no duty to disclose them.”). It is unclear whether convicted defendants could obtain the records following their release from prison because the defendants could, at some later point, move to vacate the conviction.

¹⁷³ *Steckman*, 639 N.E.2d at 92 (quoting OHIO REV. CODE ANN. § 149.43(A)(4) (West 1994)).

¹⁷⁴ BLACK’S LAW DICTIONARY 1204 (6th ed. 1990) (defining “proceeding” to include “all possible steps in an action”).

¹⁷⁵ *Steckman*, 639 N.E.2d at 92.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.* at 92–93.

¹⁷⁸ *Id.*

3. Confidential Law Enforcement Investigatory Records (CLEIR)

The *Steckman* court redefined¹⁷⁹ CLEIR.¹⁸⁰ To do that, the court overturned its *NBC* ruling.¹⁸¹ The court's new position expressly discounted the common legal definition of work product drawn from *Hickman v. Taylor*.¹⁸² It rejected *Hickman*'s subjective analysis test.¹⁸³ The court did so even though it acknowledged the legislature intended just such a definition to guide the exemption.¹⁸⁴

The court shunned the subjective test in favor of a definition offered by *Black's Law Dictionary*.¹⁸⁵ *Black's* defines "work product" as any document created by attorneys in *anticipation of litigation*.¹⁸⁶ The court then chose to expand the definition to include documents created by law enforcement officials.¹⁸⁷

The *Steckman* court explained its CLEIR holding by stating that its previous decision in *Beacon Journal Publishing v. University of Akron*¹⁸⁸ failed to address the issue, and *Beacon Journal*'s progeny, *NBC*, merely perpetuated that unfounded decision.¹⁸⁹ However, in *Beacon Journal*, the court specifically addressed the exemption.¹⁹⁰ There, it stated, "[T]he exception . . . contains the qualifying word 'specific,' exempting only

¹⁷⁹ *Id.* at 93–94.

¹⁸⁰ OHIO REV. CODE ANN. § 149.43(A)(2) (West Supp. 2012) ("Confidential law enforcement investigatory record' means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following . . . (c) Specific confidential investigatory techniques or procedures or specific investigatory work product; . . .").

¹⁸¹ *Steckman*, 639 N.E.2d at 93–94.

¹⁸² *Id.* at 94 (citing 329 U.S. 495 (1947)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* ("We are now faced with the problem of the 'work product' concept being transferred, by the General Assembly, from its attorney-client genesis to the area of confidential law enforcement investigatory records.").

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (citing BLACK'S LAW DICTIONARY 1606 (6th ed. 1990)).

¹⁸⁷ *Id.* ("This definition (working papers) is broad enough to bring under its umbrella any records compiled by law enforcement officials.").

¹⁸⁸ *State ex rel. Beacon Journal Publ'g Co. v. Univ. of Akron*, 415 N.E.2d 310 (Ohio 1980).

¹⁸⁹ *Steckman*, 639 N.E.2d at 93.

¹⁹⁰ *Beacon Journal*, 415 N.E.2d at 314.

‘specific investigatory work product.’”¹⁹¹ The court went on to say, “Clearly, the wording of the statute indicates that the General Assembly sought to guard against these exceptions swallowing up the rule which makes public records available.”¹⁹² This disconnect seems to suggest the court failed to fully understand its own prior ruling.

Even though *Steckman* dramatically broadened the scope of the CLEIR exemption, the decision did not include all records generated by investigators.¹⁹³ Without citing precedent or providing any rationale, the court stated the exemption did not include “routine offense and incident reports.”¹⁹⁴ Also without any explanation, the court singled out one particular category of crime.¹⁹⁵ The court held the exemption did not encompass routine reports that involve drunk driving charges, including the results of blood alcohol tests.¹⁹⁶

C. Critical Review

1. Defying Precedent: Expanding Exemptions

Steckman stands apart. It was the court’s most radical rejection of its previous public records decisions. The decision swept aside decades of precedent.¹⁹⁷ *Steckman* made some of these changes obvious by directly referencing certain cases it rejected.¹⁹⁸ However, it also upset other aspects

¹⁹¹ *Id.* (quoting OHIO REV. CODE ANN. § 149.43(A)(2)(c)).

¹⁹² *Id.*

¹⁹³ *Steckman*, 639 N.E.2d at 94.

¹⁹⁴ *Id.* Later courts explained that during an initial response to an incident, police are not truly investigating a crime. See *State ex rel. Cincinnati Enquirer v. Hamilton Cnty.*, 662 N.E.2d 334, 337 (Ohio 1996).

¹⁹⁵ *Steckman*, 639 N.E.2d at 94.

¹⁹⁶ *Id.* Blood alcohol tests are the key—and often only—investigative device used to conclusively determine whether someone is legally impaired. Kehinde A. Ogundipe & Kenneth J. Weiss, *Drunk Driving, Implied Consent, and Self-Incrimination*, 37 J. AM. ACAD. PSYCHIATRY & L. 386, 387–88 (2009) (stating that blood alcohol evaluations are so critical to drunk driving prosecutions that states have implied consent laws). As such, it seems to undermine the claim that withholding substantive (objective) investigative material is imperative to successful prosecutions.

¹⁹⁷ See *supra* Part II.A, III.A–B (showing precedent is to defer to legislative history and resolve doubts in favor of disclosure, and that state records “are the peoples’ records”).

¹⁹⁸ See *Steckman*, 639 N.E.2d at 89. The court stated that the holdings of *Beacon Journal* and *NBC* “improperly consolidated and confused” specific investigatory work product exemptions. *Id.* at 92. The court further stated *NBC* progeny cases were wrong and that the “chaos cannot be permitted to continue.” *Id.* The court invoked the *Black’s Law*

(continued)

of records law—settled law—in ways the court did not clearly announce.¹⁹⁹ The court did this by upending its previous policy about adhering to legislative intent and resolving doubts in favor of disclosure.²⁰⁰

That decision departed from the court’s previous rule announced in *Toledo Foundation*.²⁰¹ *Toledo Foundation* held that once the General Assembly contemplated exemptions, the court had no authority to divine others.²⁰² *Toledo Foundation* also held that it was equally impermissible to “enlarge” those exemptions.²⁰³

a. Created an Exemption for Criminal Records

Despite the *Toledo Foundation* decision, the court changed course in *Steckman*.²⁰⁴ It created one exemption and radically expanded others.²⁰⁵ It did so even though the legislature showed no interest in this approach.²⁰⁶ As noted previously, Ohio’s General Assembly had already unequivocally contemplated which records it wanted released.²⁰⁷ In its deliberations, the legislature never expressed any desire to exempt records based solely on

Dictionary definition of work product, overriding the *Hickman* style definition it promulgated in *NBC*. *Id.* at 94. The court also rejected its earlier decisions that allowed defendants to have access to records related to their cases through the PRA, saying, “Having so found, [*Clark v. Toledo*] and its progeny are overruled.” *Id.* at 96 (citation omitted).

¹⁹⁹ *See id.* at 90. “Upon full consideration, a majority of this court now feels that some of our past decisions have not served well the criminal justice system.” *Id.* In coming to this conclusion, the court also declined to resolve doubt in favor of disclosure. *See id.* at 94. *Contra State ex rel. Cincinnati Post v. Schweikert*, 527 N.E.2d 1230, 1232 (Ohio 1988) (stating the court should resolve doubt “in favor of disclosure”).

²⁰⁰ *Steckman*, 639 N.E.2d at 92.

²⁰¹ *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1164 (Ohio 1992).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See Steckman*, 639 N.E.2d at 90.

²⁰⁵ *See id.* (stating the problems that section 149.43 created and subsequently holding that Crim. R. 16 overrides section 149.43 even though the legislature never expressed any desire for that outcome); *id.* at 94 (stating the court would not follow the *Hickman* definition of “work product” because of the “problem” the General Assembly created by using it in the criminal record context).

²⁰⁶ *See id.* at 90.

²⁰⁷ *See* OHIO REV. CODE ANN. § 149.43 (West Supp. 2012) (complete listing of all exemptions); sources cited *supra* note 92.

their potential use in a criminal proceeding.²⁰⁸ Rather, the legislature made it clear that it wanted all records released unless it expressly stated otherwise.²⁰⁹ Still, the *Steckman* court found that created too many burdens on the criminal justice system.²¹⁰

b. Expanded CLEIR

The *Steckman* court also ignored the intent of lawmakers related to CLEIR.²¹¹ *Steckman* acknowledged the General Assembly intended to define the work product exemption in a manner consistent with *Hickman*.²¹² The court previously acknowledged that in *NBC*.²¹³ There, the court used a *Hickman* test as its basis for defining the CLEIR exemption.²¹⁴ There, the court held that “objective” reports were not CLEIR, but subjective theories, impressions, and thoughts of investigators were.²¹⁵ However, the *Steckman* court called that definition a “problem.”²¹⁶ It overturned *NBC*, abandoned *Hickman*, and adopted the *Black’s Law Dictionary* definition.²¹⁷ The *Black’s* definition excluded far more material.²¹⁸ As a result, nearly anything beyond an initial incident

²⁰⁸ See § 149.43.

²⁰⁹ *Id.* § 149.43(B)(1) (“Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person . . .”). The statute defines a public record as “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units . . .” *Id.* § 149.43(A)(1). The statute expressly states what is not a public record, but the list does not include any reference to criminal discovery. *Id.*

²¹⁰ *Steckman*, 639 N.E.2d at 90. The court stated section 149.43 slowed the trial process, caused courts too much work in reviewing “boxes and boxes” of records, and created potential conflicts. *Id.*

²¹¹ See *id.* at 94.

²¹² *Id.*

²¹³ State *ex rel.* *NBC v. City of Cleveland*, 526 N.E.2d 786, 790 (Ohio 1988).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Steckman*, 639 N.E.2d at 94.

²¹⁷ *Id.* “Under this rule, any notes, working papers, memoranda or similar materials, prepared by attorneys [here, by law enforcement officials] in anticipation of litigation, are protected from discovery.” *Id.* (quoting BLACK’S LAW DICTIONARY 1606 (6th ed. 2009)). The court went on to state, “This definition (working papers) is broad enough to bring under its umbrella any records compiled by law enforcement officials.” *Id.* (emphasis added).

²¹⁸ *Id.*

report in a criminal matter is no longer a public record.²¹⁹ This is true regardless of whether the documents fall outside of the classic *Hickman* definition that the legislature envisioned.²²⁰

2. Policy Shift: Resolved Questions Against Disclosure

Besides the pivot on exemptions, *Steckman* symbolizes an even more profound issue—the court’s shift from its stated public policy that stood for a century.²²¹ *Steckman* refused to repeat a mantra the court had chanted since the 1970s: “We believe that doubt should be resolved in favor of disclosure.”²²² Instead, the court seized the moment in *Steckman* to resolve questions in favor of opacity.²²³ It overturned its own rulings to embrace a more restrictive interpretation of the PRA.²²⁴

a. Crim. R. 16 Conflict Resolved Against Openness

The court took this new approach as it invented the Crim. R. 16 exemption.²²⁵ It held that a criminal defendant could not obtain information under the PRA if the rules of criminal discovery would bar its release.²²⁶ The holding meant that most routine police reports, the disclosure of which was required by previous rulings,²²⁷ became exempt if they were subject to Crim. R. 16.²²⁸ The court, without case law guiding it, resolved the issue in favor of withholding records.²²⁹

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *supra* Part II.A.

²²² State *ex rel.* Plain Dealer Publ’g v. Krouse, 364 N.E.2d 854, 855 (Ohio 1977).

²²³ *Steckman*, 639 N.E.2d at 90.

²²⁴ *Id.* at 91–92. While the court did not use the guiding rule of law in *Steckman*, it has repeatedly stated since then that “[section] 149.43 is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.” *Cincinnati Enquirer v. Jones-Kelley*, 886 N.E.2d 206, 210 (Ohio 2008). Even so, since *Steckman*, the court occasionally has appeared to merely pay lip-service to the spirit of the statute while ruling against openness. See *Beacon Journal Publ’g Co. v. Bond*, 781 N.E.2d 180, 186 (Ohio 2002); *Besser v. Ohio State Univ.*, 732 N.E.2d 373, 377 (Ohio 2000).

²²⁵ See *Steckman*, 639 N.E.2d at 90.

²²⁶ *Id.*

²²⁷ State *ex rel.* *Beacon Journal Publ’g Co. v. Univ. of Akron*, 415 N.E.2d 310, 315 (Ohio 1980).

²²⁸ *Steckman*, 639 N.E.2d at 90. However, the court did require state agencies to release initial incident reports. *Id.*

²²⁹ *Id.*

Today, the rationale for this aspect of *Steckman* seems even less justified. In 2010, the court adopted “open file” discovery.²³⁰ The new rule requires prosecutors to release information that defendants could not get through discovery when the court decided *Steckman*.²³¹ This information includes certain trial preparation records that the PRA withholds from the public,²³² but discovery disgorges.²³³ Therefore, under revised Crim. R. 16, defendants can obtain more information using discovery than they could under the PRA, even as the court interpreted it before *Steckman*. The new rule eliminates one procedural end-round the court believed accused criminals were taking. With the effect of that end-round tactic now neutralized, the court must conclude the Crim. R. 16 exemption that *Steckman* created is no longer reasonable. Even the author of *Steckman* agrees.²³⁴

b. Trial Preparation Record Question Resolved Against Openness

The court also used its new approach to determine how long the trial preparation record exemption lasts by resolving the issue in about the most restrictive way possible.²³⁵ To reach that resolution, the court again turned to *Black’s Law Dictionary*.²³⁶ Based on *Black’s*, the court found the exemption should apply as long as there is any chance of a related court

²³⁰ See Charles L. Grove, *Criminal Discovery in Ohio: “Civilizing” Criminal Rule 16*, 36 U. DAYTON L. REV. 143, 145 (2011).

²³¹ See *id.* at 149 (stating key changes include the mandatory disclosure of witness statements and police reports).

²³² See OHIO REV. CODE ANN. § 149.43(A)(2)(b) (West Supp. 2012) (withholding information provided by a confidential source or witness that was promised confidentiality). The PRA also restricts trial preparation records. *Id.* § 149.43(A)(4).

²³³ See OHIO R. CRIM. P. 16(B)(1) (West 2009) (repealed 2010); Grove, *supra* note 230, at 149–50.

²³⁴ Telephone Interview with Andy Douglas, Former Justice, Supreme Court of Ohio (Feb. 16, 2012). Douglas stated that the court’s adoption of “mandatory ‘open file discovery’ would obviate the problem of *Steckman*.” *Id.* Douglas stated that he always wanted such a rule. *Id.* It is important to note that while the rule is now open file discovery, the rule only helps parties to the case obtain documents and not the public at large, because *Steckman* made those records off limits to everyone under the PRA. *Steckman*, 639 N.E.2d at 90.

²³⁵ See *Steckman*, 639 N.E.2d at 92.

²³⁶ *Id.*

hearing.²³⁷ This includes even the distant chance of a post-conviction hearing.²³⁸

In its decision, the court ignored the holding of another court that also contemplated the issue.²³⁹ That court resolved the issue in favor of openness.²⁴⁰ In *State v. Kokal*, the Supreme Court of Florida held that the term “anticipation of litigation” did not include possible post-conviction relief actions.²⁴¹ It so held even though the Florida statute expressly stated the records were not public “pending prosecutions or appeals.”²⁴²

The *Kokal* court found that excluding records due to possible post-conviction actions was too expansive of an interpretation for trial preparation records.²⁴³ It found the drawback of a *Steckman* type definition was that it would allow the state to withhold records indefinitely, because there is always a chance that a defendant could file for post-conviction relief.²⁴⁴ *Kokal* adopted the rationale of a lower court.²⁴⁵ The lower court reasoned that if the General Assembly actually wanted to exclude materials potentially involved in post-conviction relief proceedings, “it surely would have”²⁴⁶

Kokal went where *Steckman* refused to go.²⁴⁷ *Kokal* resolved questions in favor of convenience.²⁴⁸ *Steckman* resolved them in favor of

²³⁷ *Id.*

²³⁸ Compare *id.* at 92–93 (“[O]nce a record becomes exempt from release as a ‘trial preparation record,’ that record does not lose its exempt status unless and until all ‘trials,’ ‘actions’ and/or ‘proceedings’ have been fully completed. . . . Since the possibility of retrial remains, the defendant . . . would have on retrial more information than she or he would be entitled to possess if limited to discovery”), with *State v. Kokal*, 562 So. 2d 324, 326 (Fla. 1990) (holding that a *Steckman*-type definition is “much too broad”).

²³⁹ *Kokal*, 562 So. 2d at 326.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* See also FLA. STAT. ANN. § 119.011(3)(d)(2) (West 1987).

²⁴³ *Kokal*, 562 So. 2d at 326 (quoting *Tribune Co. v. Pub. Records*, P.C.S.O. # 79-35504 Miller/Jent, 439 So. 2d 480, 483 (Fla. Dist. Ct. App. 1986)).

²⁴⁴ See *id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Compare *id.*, with *Steckman*, 639 N.E.2d at 92.

²⁴⁸ *Kokal*, 562 So. 2d at 326–27.

darkness.²⁴⁹ The *Steckman* court not only abandoned its oft-repeated openness mantra, it declined to even mention a reason for doing so.²⁵⁰

3. *Work Product Resolved Against Openness*

Like trial preparation records, the court did not pretend to resolve questions about the specific investigatory work product exemption in favor of openness.²⁵¹ Instead, it discarded its previous cases on point.²⁵² The court stated those holdings created too much “chaos.”²⁵³ It chose to disregard the United States Supreme Court’s work product interpretation in *Hickman*.²⁵⁴ That was the same definition endorsed by the Ohio legislature.²⁵⁵ Instead, the court embraced the more restrictive definition advanced by *Black’s Law Dictionary*.²⁵⁶

The court acknowledged that its choice of authority came at the expense of legislative intent.²⁵⁷ It stated that its *NBC* opinion, which it decided just six years earlier, allowed too much disclosure.²⁵⁸ The court’s decision to overturn *NBC* was also important, because, in *NBC*, it said it was following the express will of the legislature.²⁵⁹ The *Steckman* court also ignored another important point made in *NBC*: the State has the burden to prove an exemption should apply.²⁶⁰

²⁴⁹ See *Steckman*, 639 N.E.2d at 92 (using *Black’s* to create a highly expansive definition of the exemption).

²⁵⁰ See generally *id.* (failing mention the numerous cases that required doubt to be resolved in favor of disclosure).

²⁵¹ See *id.* (holding that previous rulings in favor of openness cause too many problems).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 94.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See *id.*

²⁵⁸ See *id.* at 92.

²⁵⁹ State *ex rel.* *NBC v. City of Cleveland*, 526 N.E.2d 786, 788 (Ohio 1988). The court stated the will of the legislature was to have interpretation of exemptions read narrowly. *Id.* The *NBC* court went even further as it said the legislature decided to narrowly define the CLEIR exception in reaction to the court’s decision that held otherwise. *Id.* See, e.g., *Wooster Republican Printing Co. v. City of Wooster*, 383 N.E.2d 124, 130 (Ohio 1978).

²⁶⁰ *NBC*, 526 N.E.2d at 790. The court held that this determination was consistent with its precedent of “a strict construction of R.C. 149.43 and the resolution of doubt in favor of disclosure.” *Id.*

The *Steckman* court also overlooked similar language woven through many of the court's other holdings, which interpreted the PRA "strictly against the custodian of public records."²⁶¹ Furthermore, the court ignored a related idea that it should not usurp the legislature's role in deciding which records to withhold, an idea the court clearly stated three years earlier in *Toledo Foundation*.²⁶² However, as *Steckman* demonstrated, the court was no longer committed to that rule.²⁶³ Instead, the court used *Steckman* as a springboard for its new policy centered on expedience.²⁶⁴

VI. TOWARDS DARKNESS: ANALYSIS OF CASES AFTER *STECKMAN*

Steckman's legacy survives by how it shifted the way the Supreme Court of Ohio frames questions about public records. Undoubtedly, the court has made numerous decisions since *Steckman* that favor openness.²⁶⁵ Yet, other decisions reveal the court as a promoter of bureaucratic expedience rather than a defender of transparency.²⁶⁶

A. Post-*Steckman* Cases that Favor Openness

1. 9-1-1 Calls

The Supreme Court of Ohio has preserved transparency involving 9-1-1 calls.²⁶⁷ In *Cincinnati Enquirer v. Hamilton County*, the court found that Ohio's presumption of openness required government agencies to release 9-1-1 calls.²⁶⁸ A key aspect of the holding was the court's view of the indelible quality of public records.²⁶⁹ Once a record is public, nobody, not even police or prosecutors, can reverse the classification.²⁷⁰

²⁶¹ *Id.* (quoting *State ex rel. Plain Dealer Publ'g Co. v. Lesak*, 457 N.E.2d 821, 823 (Ohio 1984) (Celebrezze, J., concurring)); *Beacon Journal Publ'g Co. v. Univ. of Akron*, 415 N.E.2d 310, 314 (Ohio 1980).

²⁶² *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1164–65 (Ohio 1992).

²⁶³ *Steckman*, 639 N.E.2d at 90.

²⁶⁴ *Id.*

²⁶⁵ See discussion *infra* Part VI.A.

²⁶⁶ See discussion *infra* Part VI.B.

²⁶⁷ See, e.g., *Gilbert v. Summit Cnty.*, 821 N.E.2d 564, 567 (Ohio 2004); *State ex rel. Cincinnati Enquirer v. Hamilton Cnty.*, 662 N.E.2d 334, 338 (Ohio 1996).

²⁶⁸ 622 N.E.2d at 338 (finding that the PRA contained no restriction on the release of 9-1-1 tapes, regardless of their content).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

2. Steckman Does Not Reach Civil Litigation

In *Gilbert v. Summit County*,²⁷¹ the court ruled that records entangled in civil litigation differ from those involving criminal matters.²⁷² The *Gilbert* court decided that, unlike the holding in *Steckman*, the status of civil litigation as “pending” had no bearing on whether a record is public.²⁷³ The court therefore rejected an argument that claimed *Steckman* barred disclosure of the documents.²⁷⁴ Closure proponents argued that the court should also withhold records related to civil proceedings because they were analogous to criminal litigation.²⁷⁵ In its decision, the court returned to the doctrine that it forgot in *Steckman*: openness is Ohio’s policy and doubts should be resolved in favor of disclosure.²⁷⁶

As favorable as *Gilbert* was for openness, it produces obvious inconsistencies.²⁷⁷ In *Steckman*, the court carved out an exemption for records entwined in discovery.²⁷⁸ However, in *Gilbert*, the court declined to extend that logic because the PRA has no exemption related to civil discovery.²⁷⁹ The court offered a shred of a distinction. In *Gilbert*, it reasoned that the context was not the equivalent of *Steckman* because civil litigants were not using the PRA to obstruct justice in the same way as criminal litigants.²⁸⁰ However, even if that opinion is valid, the legislature has never recognized it.²⁸¹ Moreover, as one justice implied in her

²⁷¹ 821 N.E.2d 564 (Ohio 2004).

²⁷² *Id.* at 566. The records in question involved a federal audit of the Summit County Department of Job and Family Services. *Id.* at 565. *Gilbert*, who filed a civil action related to his employment termination, requested the records under the PRA after the discovery period in the case closed. *Id.* He learned of the records because of a newspaper article. *Id.*

²⁷³ *Id.* at 566.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See MARBURGER & IDSVVOOG, *supra* note 8, at 242–43 (stating that it is difficult to harmonize the double standard of *Steckman* and *Gilbert*).

²⁷⁸ State *ex rel.* Steckman v. Jackson, 639 N.E.2d 83, 90 (Ohio 1994).

²⁷⁹ *Gilbert*, 821 N.E.2d at 567.

²⁸⁰ *Id.*

²⁸¹ Under the new “open file” rule of criminal discovery, the criminal and civil discovery procedures are similar in the context of this public records issue. See OHIO R. CIV. P. 26(B)(1); OHIO R. CRIM. P. 16(B). Even before the change, critics asserted that civil discovery is equally susceptible to manipulation using the PRA, and the court, therefore, created a “double standard” under *Gilbert*. MARBURGER & IDSVVOOG, *supra* note 8, at 240–42.

concurring opinion, the court did not need to emasculate the PRA to deal with the problem of criminal litigants manipulating it.²⁸² Justice Stratton observed that even if the PRA disgorges records not otherwise available through discovery, a trial court is under no obligation to admit them.²⁸³ That is to say, Ohio's Public Records Act is about what the government must disclose, not what trial courts must admit.

3. Other Rulings Favoring Disclosure

Since *Steckman*, the court has construed the PRA in favor of openness in several other important cases.²⁸⁴ One such case is *State ex rel. The Plain Dealer Publishing Co. v. City of Cleveland*.²⁸⁵ There, the court held that state agencies shall disclose the resumes of people who seek appointed positions.²⁸⁶ The court later held in *State ex rel. Cincinnati Enquirer v. Krings*²⁸⁷ that agencies must ensure the release of certain documents even when that agency does not physically control them.²⁸⁸ The court forced the disclosure of documents held by a private company engaged in a public project.²⁸⁹ The *Krings* court declared that “[t]he inherent, fundamental policy of [the PRA] is to promote open government, not restrict it.”²⁹⁰ Since *Steckman*, Ohio's high court has *sometimes* followed its *Toledo*

²⁸² *Gilbert*, 821 N.E.2d at 568 (Stratton, J., concurring) (“[E]ven though a party may effectively circumvent a discovery deadline by acquiring a document through a public records request, it is the trial court that ultimately determines whether those records will be admitted.”).

²⁸³ *Id.*

²⁸⁴ *See, e.g., State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 691–92 (Ohio 2008) (finding a state representative's e-mails about state business were public records even though they were sent to a personal account); *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181, 1183–84 (Ohio 2006) (compelling disclosure of lead-risk assessments because health department was not covered by federal nondisclosure protections); *State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 819 N.E.2d 1087 (Ohio 2004) (granting access to disciplinary reports about police officers and awarding damages); *State ex rel. Wadd v. City of Cleveland*, 689 N.E.2d 25 (Ohio 1998).

²⁸⁵ 661 N.E.2d 187 (Ohio 1996).

²⁸⁶ *Id.* at 192 (rejecting arguments that it should enlarge the statute to exempt information that involves an individual's personal privacy).

²⁸⁷ 758 N.E.2d 1135 (Ohio 2001).

²⁸⁸ *Id.* at 1141 (holding a private company must release cost-overrun documents involving the construction of the Cincinnati Bengals' Paul Brown Stadium).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1140–41.

Foundation precedent.²⁹¹ Where it has, the court has held that the PRA allows no discretion to “judicially create” exceptions in favor of personal privacy.²⁹²

B. Post-Steckman Cases that Favor Darkness

While the cases discussed mark victories for transparency, they do not stand as the status quo. Other post-*Steckman* decisions reveal the court’s PRA jurisprudence as bent on activism.²⁹³ The key cases that follow demonstrate the court’s willingness to ignore the PRA and expand its exemptions.

1. Concealing Employee Records

One key result of the post-*Steckman* decisions was that taxpayers lost access to certain state employee records.²⁹⁴ The public could no longer see things such as home addresses and certain personnel files.²⁹⁵ Even some disciplinary reports became unreachable.²⁹⁶

a. The Court Invents “Good Sense”

The court struck the first blow with *State ex rel. Keller v. Cox*. *Keller* both expanded the holding of a distinguishable federal case²⁹⁷ and invented the “good sense rule.”²⁹⁸ The good sense rule allowed state agencies to

²⁹¹ See *State ex rel. Cincinnati Post v. Schweikert*, 527 N.E.2d 1230, 1232 (Ohio 1988) (rejecting a balancing test after the legislature clarified the statute).

²⁹² See *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 886 N.E.2d 206, 215–16 (Ohio 2008) (holding that a federal C.F.R. that protects the identities of children who receive foster care service does not preclude the release of names and addresses of foster care providers); *State ex rel. WBNS-TV Inc. v. Dues*, 805 N.E.2d 1116, 1124 (Ohio 2004).

²⁹³ See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (holding that police officers were entitled to be notified of public records requests for private information about the officers); *State ex rel. McCleary v. Roberts*, 725 N.E.2d 1144, 1150 (Ohio 2000) (refusing to obligate the recreation and parks department to release information because the release would risk that children could be victimized); *State ex rel. Keller v. Cox*, 707 N.E.2d 931, 932 (Ohio 1999) (protecting certain police officer files from disclosure).

²⁹⁴ See *Keller*, 707 N.E.2d at 933.

²⁹⁵ See discussion *infra* Part VI.B.2.

²⁹⁶ *Id.*

²⁹⁷ The distinguishable federal case is *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).

²⁹⁸ See *Keller*, 707 N.E.2d at 934 (exempting records based on the right to privacy rather than the PRA, and noting there must be a good sense rule).

withhold certain personnel records even though the legislature had not exempted them from public access.²⁹⁹ The court used the Sixth Circuit case *Kallstrom v. Columbus* to hold that sometimes an officer's constitutional right to privacy shields the release of records such as internal affairs and disciplinary reports.³⁰⁰

In *Kallstrom*, the Sixth Circuit ruled that the right to privacy barred the release of police records containing a law enforcement officer's highly personal information.³⁰¹ The *Kallstrom* court made it clear that the constitutional issue was only involved because the facts of the case.³⁰² The facts showed that releasing the information would put the officers at "substantial risk" of serious harm.³⁰³ That information included such things as police officers' driver license information, addresses, and telephone numbers for their family members.³⁰⁴ However, *Kallstrom* also specifically noted that it was not deciding whether the police department should withhold less sensitive information in the officers' files.³⁰⁵

In *Keller*, the state court bent the *Kallstrom* holding to take the exemption much further.³⁰⁶ The *Keller* facts were significantly different.³⁰⁷ In *Keller*, the threat of violence was far less pronounced.³⁰⁸ Yet, the *Keller* court withheld all personnel and internal affairs records.³⁰⁹ It did so without analyzing whether the information in the documents actually put the officers in imminent danger.³¹⁰ Therefore, the decision went beyond *Kallstrom*, which said only a serious threat to police officers triggers the

²⁹⁹ *Id.*

³⁰⁰ 136 F.3d at 1059.

³⁰¹ *Id.*

³⁰² *Id.* at 1064.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *See id.* at 1063 n.2 (instructing the district court to consider each piece of information individually and make a determination as to whether it should be released).

³⁰⁶ *See Keller v. Cox*, 707 N.E.2d 931, 934 (Ohio 1999).

³⁰⁷ *Id.* at 932–33.

³⁰⁸ *See id.* at 932 (stating the sole defendant was on trial for conspiracy to distribute drugs). *But see Kallstrom*, 136 F.3d at 1067 (involving numerous gang members with a "propensity for violence" who wanted revenge for a previous case).

³⁰⁹ *Keller*, 707 N.E.2d at 934.

³¹⁰ *See id.* at 935 (Cook, J., dissenting).

privacy right rule.³¹¹ One justice considered this distinction critical.³¹² In her dissent, Justice Deborah Cook pointed out that the *Keller* records did not necessarily implicate privacy rights and the court's decision was therefore an improper overreach.³¹³ The *Keller* court left itself some room to wiggle in criminal cases by stating, "On the other hand, any records needed by a *defendant* in a *criminal case* that reflect on discipline, citizen complaints, or how an officer does his or her job can be obtained . . . through internal affairs files in accordance with previous decisions of this court."³¹⁴ That ambiguous limitation may help criminal defendants; however, it is of no use to the average citizen who would like to use the PRA to obtain documents.

More damaging for transparency was *Keller*'s sudden invocation of the good sense rule.³¹⁵ In the shadow of *Steckman*, *Keller* judicially created an exemption.³¹⁶ The court determined it would use its *good sense* to trump the legislature's express will³¹⁷ about which police records government agencies should withhold.³¹⁸ The PRA largely requires agencies to disclose public records to *everyone*, irrespective of the requestor's motivation for seeking the records.³¹⁹ Even so, the *Keller* court decided it would treat differently those requests made by criminal defendants who seek information about police officers.³²⁰

³¹¹ See *Kallstrom*, 136 F.3d at 1064 (finding that the release of records rises to a "constitutional dimension" when it directly puts an officer or his family at risk); *Jackson v. City of Columbus*, 67 F. Supp. 2d 839, 862 (S.D. Ohio 1998).

³¹² *Keller*, 707 N.E.2d at 935.

³¹³ See *id.*

³¹⁴ *Id.* at 934 (emphasis added).

³¹⁵ *Id.*

³¹⁶ See *id.*

³¹⁷ See *id.*

³¹⁸ *Id.*

³¹⁹ OHIO REV. CODE ANN. § 149.43(B)(4) (West Supp. 2012) ("[N]o public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use . . .").

³²⁰ *Keller*, 707 N.E.2d at 934 ("[W]e are persuaded that there must be a 'good sense' rule when such information about a law enforcement officer is sought by a defendant in a criminal case."). *Contra Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1165 (Ohio 1992).

b. Non-Police Records Go Dark: Dispatch v. Johnson

Following *Keller*, the Supreme Court of Ohio closed access to other government employee records.³²¹ This time, it did so without resorting to the Constitution of the United States or the good sense rule.³²² Instead, the court based its decision on an issue that it had soundly decided long ago: the definition of a “record.”³²³ In *State ex rel. Dispatch Printing v. Johnson*, the court ruled that the addresses of state employees do not meet the PRA definition of records.³²⁴ The court concluded they were not records because they did not document the operation of state government.³²⁵ The court’s definition of records requires the following: (1) the information is recorded on some tangible medium; (2) a public office must have taken it into its possession or have the right to possess it; and (3) it must document the activities of the office.³²⁶

The court withheld the addresses despite (then recent) legislation that strongly implied the General Assembly construed addresses as public records.³²⁷ The *Dispatch Printing* ruling also ignored precedent that the court followed for two decades.³²⁸ That was: *all* records are the people’s unless the legislature states otherwise.³²⁹ In several other rulings, the court took the same controversial stance.³³⁰

³²¹ *State ex rel. Dispatch Printing Co. v. Johnson*, 833 N.E.2d 274, 284 (Ohio 2005).

³²² *Id.* (ruling the documents failed to meet the statutory definition of a record pursuant to section 149.011(G)).

³²³ *Toledo Found.*, 602 N.E.2d at 1161. *See also* Jackson, *supra* note 71, at 116–17.

³²⁴ *Dispatch Printing*, 833 N.E.2d at 286.

³²⁵ *Id.* at 280 (defining public records as records that “document the organization, functions, policies, decisions, procedures, operations, or other activities of” government).

³²⁶ *Id.* at 279 (interpreting the requirements of what constitutes a “record” under section 149.011(G)). *See also* OHIO SUNSHINE LAWS, *supra* note 58, at 51.

³²⁷ *See Dispatch Printing*, 833 N.E.2d at 283; MARBURGER & IDSVOOG, *supra* note 8, at 96.

³²⁸ *Dayton Newspapers, Inc. v. City of Dayton*, 341 N.E.2d 576, 577–78 (Ohio 1976). Here, the court found that the only restriction on access to documents held by state agencies is the explicit limitation by the legislature or physical hindrance. *Id.* That was the same rule set down by *Ayers* and its Ohio common law ancestor *Wells*. *See* discussion *supra* Part II.B.

³²⁹ *Dayton Newspapers*, 341 N.E.2d at 577–78.

³³⁰ *See* MARBURGER & IDSVOOG, *supra* note 8, at 102–04 (criticizing the holdings as nonsensical interpretations).

2. *Concealing Other Records*

a. *McCleary v. Roberts: Government Scrutiny Test*

In another key ruling, the court used the non-records rationale to prohibit public access to a city database.³³¹ The database contained information about children who used city pools.³³² It included images, addresses and family information.³³³ The city collected the information as a tool to combat criminal activity at city swimming pools.³³⁴

Despite the city's use of the records to execute a crime prevention plan, the court held that they were not public.³³⁵ The court based the decision on its notion that the records failed to illuminate the activity of government.³³⁶ Justice Douglas wrote on behalf of the majority that the person who made the request did "not intend to discover anything."³³⁷ Douglas went on to say the court failed to understand how the records would shed "further insight" into the city's photo identification program.³³⁸

b. *Analysis of Government Scrutiny Test Rationale*

Douglas's point may seem tempting at first: if the record does not reveal how government operates, then it fails to satisfy the intent of Ohio's PRA.³³⁹ The key reason that this rationale fails is because the PRA never stated a record must "shed light" on anything. The Ohio statute merely requires that the document chronicle "procedures" and "operations," *inter*

³³¹ State *ex rel.* *McCleary v. Roberts*, 725 N.E.2d 1144, 1145 (Ohio 2000).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 1147.

³³⁷ *Id.*

³³⁸ *Id.* at 1148.

³³⁹ Merit Brief Amicus Curiae Ohio Attorney General Betty D. Montgomery at 21, State *ex rel.* *McCleary v. Roberts*, 725 N.E.2d 1144 (Ohio 2000) (No. 99-0316) (arguing in support of petitioner). Attorney Mark R. Weaver, on behalf of the Ohio Attorney General, argued releasing "[t]he children's personal information sheds no light whatsoever into the workings of city government . . . the public loses no information regarding its city government if the children's sensitive personal information is protected." *Id.* Weaver also claimed releasing the information exposed children as targets for pedophiles. *Id.* at 1. However, the case did not involve any facts related to sexual offenders. *See id.* Additionally, while providing documentary evidence about the number of sex offenders then living in Ohio, the Attorney General produced no evidence that a sex offender had ever used public records to help perpetrate such a crime. *See id.*

alia of the agency.³⁴⁰ Therefore, based on a plain meaning interpretation of the statute, any document that shows what an agency is doing chronicles its operations. In *McCleary*, the city created the desired documents as part of an initiative to combat a severe crime problem.³⁴¹ It follows that records reflecting the functions of that government initiative also chronicle the operations of government.

Furthermore, even if the PRA required documents to shed ample light on government, the imagination of an Ohio Supreme Court justice and that of an enterprising journalist are hardly kindred. The justice might look at a document and say, “That information about kids who go to the pool sheds no light on the government agency.” Yet, an investigative reporter may well look at the data and say, “Aha! City pools are failing to serve kids that come from the poorest parts of town.”³⁴² That sheds light on many things, including the operation of government.

c. Analysis of Authority

While the rationale of *McCleary* seems questionable, equally troubling is the authority for the decision. The *McCleary* court relied on *Kallstrom* to support its decision.³⁴³ That it used *Kallstrom* is striking because of the court’s view of the holding in the case.³⁴⁴ In *Kallstrom*, the Sixth Circuit narrowly limited the disclosure of highly personal police officer information.³⁴⁵ It did so reasoning that its release, under the circumstances of that case, could put the officers at “substantial risk.”³⁴⁶ The court found that such risk infringed on the officers’ constitutional right to privacy.³⁴⁷

Even so, *Kallstrom* posited that, in general, the state should release

³⁴⁰ OHIO REV. CODE ANN. § 149.011(G) (West Supp. 2012).

³⁴¹ 725 N.E.2d at 1145.

³⁴² See Ron Nixon, *Enterprise Joins*, UPLINK, Jan./Feb. 2001, at 5. The article describes a computer analysis technique investigative reporters use that merges data from two sources; that data taken independently may contain meaningless information, which when “matched” allows reporters to develop important findings not strictly related to either initial data set. *Id.* See also Paul Aker, *Some Fired State Workers Getting Jobs Back*, WBNS-TV (Nov. 13, 2009, 12:22 PM), http://www.10tv.com/content/stories/2009/11/12/story_odrc.html (matching separate name databases to find rehired employees).

³⁴³ *McCleary*, 725 N.E.2d at 1147.

³⁴⁴ See *id.* (stating that *Kallstrom* stands for limiting records when they do nothing to further understanding of government).

³⁴⁵ *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1065 (6th Cir. 1998).

³⁴⁶ *Id.* at 1064.

³⁴⁷ *Id.* at 1065.

similar records because they present “a compelling state interest.”³⁴⁸ The court explained that state interest was the records’ ability to shed light on government activity.³⁴⁹ However, the *Kallstrom* court further found that the state’s response to that compelling interest (release of the records) was not tailored narrowly enough.³⁵⁰ That was because disclosing the information, in the instant case, put the officers at heightened risk.³⁵¹

Yet, the *McCleary* court interpreted the meaning of *Kallstrom* differently.³⁵² The court stated *Kallstrom* withheld records because their release “would do nothing to further the public’s knowledge . . . of governmental agencies.”³⁵³ That view contradicts *Kallstrom*’s stated assumption about the nature of such records.³⁵⁴

Irrespective of this apparent confusion, what is clear about *Kallstrom* is the decision left intact the definition of public records. *Kallstrom* did not hold that the documents in question failed to meet Ohio’s statutory definition of a public record.³⁵⁵ Moreover, *Kallstrom* emphasized that in other contexts, the release of the same kind of information may illuminate the public’s understanding of government.³⁵⁶ Still, that rationale, rich with

³⁴⁸ *Id.* The court stated:

In the judicial setting, courts have long recognized the importance of permitting public access to judicial records so that citizens may understand and exercise [control] oversight over the judicial system. We see no reason why public access to government agency records should be considered any less important. For purposes of this case, we assume that the interests served by allowing public access to agency records rises to the level of a compelling state interest.

Id. (citations omitted).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1063.

³⁵² See *State ex rel. McCleary v. Roberts*, 725 N.E.2d 1144, 1147 (Ohio 2000).

³⁵³ *Id.*

³⁵⁴ See *Kallstrom*, 136 F.3d at 1065.

³⁵⁵ See *id.* at 1064–65 (holding that constitutional right to privacy preempts section 149.33 in the narrow context of that case). The Sixth Circuit said that the fundamental right to “personal security” guaranteed by the Fourteenth Amendment activated a constitutional protection in *Kallstrom* only because the officers could show the release of the records in that situation posed a substantial threat of harm to them. *Id.* at 1062–63.

³⁵⁶ *Id.* at 1065.

historic wisdom,³⁵⁷ was not enough to persuade the Supreme Court of Ohio.

C. *McCleary Takes Hold*

In *State ex rel. Beacon Journal Publishing Co. v. Bond*,³⁵⁸ the court used the *McCleary* reasoning “with equal force” to find jury questionnaires do not qualify as records under the PRA.³⁵⁹ The court found that trial courts collected questionnaires as an administrative matter to ensure a fair trial.³⁶⁰ Therefore, the court decided the records failed to shed enough light on the operation of government to qualify as “public” under *McCleary*.³⁶¹ However, the court ultimately required the information be released based on a First Amendment analysis.³⁶²

D. *Secret Creep*

Public offices involved in secret trades may sound like an oxymoron, but that is the basis for an exemption that the court has given life since *Steckman*.³⁶³ The PRA exempts government agencies from divulging documents that contain trade secrets.³⁶⁴ Previously, the court found the exemption only applied to documents generated by private entities.³⁶⁵ However, the court changed its position on that point in *State ex rel. Besser v. Ohio State University*.³⁶⁶

³⁵⁷ See *id.* at 1064–65 & n.4 (citing several cases that show explain how records kept by government illuminate the activity of government).

³⁵⁸ 781 N.E.2d 180 (Ohio 2002).

³⁵⁹ *Id.* at 186.

³⁶⁰ *Id.* at 188.

³⁶¹ *Id.* at 186.

³⁶² *Id.* at 195 (concluding that while jurors have a privacy interest in withholding the disclosure of their personal information, that interest is trumped by the First Amendment’s guarantee of access to the courts unless a party can show a compelling reason to avoid disclosure).

³⁶³ *State ex rel. Besser v. Ohio State Univ.*, 721 N.E.2d 1044, 1049–50 (Ohio 2000).

³⁶⁴ OHIO REV. CODE ANN. §§ 1333.61, 149.43(A)(1)(v) (West Supp. 2012).

³⁶⁵ See *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1163 (Ohio 1992). Those documents were protected even if turned over to a public agency. *Id.*

³⁶⁶ 721 N.E.2d at 1049. The *Besser* court found that Ohio’s adoption of the Uniform Trade Secrets Act triggered the change. *Id.* Another state’s adoption of the Act persuaded the court that decided government entities can have trade secrets and that it should apply the Act to Ohio. *Id.* However, the court did not analyze how Ohio’s presumption of openness under the PRA should influence the law. See *id.*

Most recently, the court stretched the trade secret exemption even further.³⁶⁷ Cincinnati teachers who questioned the accuracy of exams developed by a nonprofit organization asked the school district to release the tests for review.³⁶⁸ The court concluded that the tests, procured with public money, were proprietary.³⁶⁹ As a result, the court blocked their release under the trade secret exemption.³⁷⁰ The controversial ruling only fuels concerns that the court has lost its way in records law.³⁷¹

VII. *STECKMAN*'S SHADOW: WHAT HAPPENS NOW

A. *Attitude Change*

Steckman changed the law in Ohio.³⁷² It also changed the atmosphere.³⁷³ Faded is the bright line the Supreme Court of Ohio once knew it should not cross.³⁷⁴ Access to documents faded with it—not just records, but categories of records. That legacy now creates hurdles for journalists, the public, and ultimately democracy.

Certainly, the Supreme Court of Ohio continues to perpetuate openness in many contexts.³⁷⁵ However, after *Steckman*, it increasingly ignored the

³⁶⁷ State *ex rel.* Perrea v. Cincinnati Pub. Sch., 916 N.E.2d 1049, 1053 (Ohio 2009). The court reasoned, in part, that the school district's effort to keep test material secret was evidence that it needed trade secret protection. *Id.* However, in partial dissent, Chief Justice O'Connor questioned whether the district really did try to maintain the secret status of the records. *Id.* at 1055 (O'Connor, J., concurring in part and dissenting in part).

³⁶⁸ *Id.* at 1051.

³⁶⁹ *Id.* at 1053.

³⁷⁰ *Id.* at 1055.

³⁷¹ MARBURGER & IDSVOOG, *supra* note 8, at 127 (2011) (“[T]he court has distorted the state’s trade secret law, wresting it from its context of preventing free-riding by competitors on others’ commercial innovations and investments. . . . The court’s unconvincing analysis opens the way for agencies to claim their own trade secrets in more troublesome situations.”).

³⁷² See discussion *supra* Part V.B.

³⁷³ See Kelli Lecker, *Rulings Have Limited Records Access*, OHIO COALITION FOR OPEN GOV'T: OPEN RECS. REP.: SPECIAL EDITION, Spring/Summer 2004 at 4, 11 (stating that *Steckman* showed a shift from openness because of judicial activism). The article quotes an attorney saying that all records were presumed open prior to *Steckman*, but then, “[j]udges started saying, ‘I’m not going to let this come out.’” *Id.*

³⁷⁴ See discussion *supra* Part IV.A.

³⁷⁵ See, e.g., Gilbert v. Summit Cnty., 821 N.E.2d 564, 566 (Ohio 2004) (holding that *Steckman* does not reach civil litigation); State *ex rel.* Cincinnati Enquirer v. Hamilton Cnty., 662 N.E.2d 334, 338 (Ohio 1996) (finding that the PRA contained no restriction on the release of 9-1-1 tapes, regardless of their content).

apparent will of the General Assembly.³⁷⁶ By inventing exemptions to the PRA, ignoring the law when instructed by good sense, and refusing to acknowledge many records as public, the court effectively eliminated Ohio's fundamental presumption of disclosure.³⁷⁷ Though critics of the PRA may laud the court for defending privacy,³⁷⁸ it has done so in a manner that fails to respect a coordinate branch of government; a branch that already contemplated the issues.³⁷⁹ Put simply, the court traded its role as judicial referee for that of judicial activist.

B. Problems for Journalism

The court's role reversal creates problems for journalists. Without access to records, the job of sorting out who is really telling the truth becomes more difficult, more time consuming, and more expensive. Important questions about what government officials do behind closed doors and out of the spotlight go unanswered. The likelihood of abuse, waste, and corruption increases.³⁸⁰

1. The Direct Impact

Did a county commissioner sexually harass a subordinate in the workplace?³⁸¹ Did the state crime lab contaminate lab samples in

³⁷⁶ See *State ex rel. McCleary v. Roberts*, 725 N.E.2d 1144, 1148 (Ohio 2000) (holding that a city identification database was not a record under the PRA); *State ex rel. Keller v. Cox*, 707 N.E.2d 931, 934 (Ohio 1999) (exempting personnel records, not based on the PRA, but based upon the right to privacy and the good sense rule).

³⁷⁷ See *McCleary*, 725 N.E.2d at 50–51 (Cook, J., dissenting) (finding that the decision “could undermine the disclosure-oriented” intent of the PRA); *Keller*, 707 N.E.2d at 935 (Cook, J., dissenting) (reasoning that the good sense rule is inconsistent with deference to precedent and legislative will); *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 98 (Ohio 1994) (Wright, J., dissenting); MARBURGER & IDSVOOG, *supra* note 8, at 242–43 (criticizing *Steckman* for failing to presume openness).

³⁷⁸ See *Jackson*, *supra* note 71, at 135.

³⁷⁹ See *Keller*, 707 N.E.2d at 935 (Cook, J., dissenting); *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1164–65 (Ohio 1992); discussion *supra* Part III.A.

³⁸⁰ See ALASDAIR ROBERTS, *BLACKED OUT* 4–6 (2006) (explaining how countries around the world with newly gained transparency have exposed serious corruption).

³⁸¹ Letter from J. Eric Holloway, Gen. Counsel to Ohio Attorney Gen. Mike DeWine, to author (Dec. 6, 2011) (on file with author). The letter inquires about a local prosecutor's referral for alleged sexual harassment by a sitting Perry County politician. *Id.* The Attorney General declined to produce any documents other than the prosecutor's initial request. *Id.* Holloway wrote any other records were “work product” and exempted by

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controversial convictions?³⁸² Why did a special prosecutor quit his appointment after he was asked to look into allegations that a well-known attorney was involved in murder?³⁸³ The answers to all of those questions remain locked away in government files.³⁸⁴ All of them—and the public officials they could expose—sit protected by *Steckman*.³⁸⁵

Steckman recently cast its long shadow over the Columbus Police Department.³⁸⁶ The Department closed its files to the public.³⁸⁷ It makes no exceptions even in those cases that involve defendants that have exhausted their normal appeals.³⁸⁸ Defense attorneys, private investigators, and reporters complained that the decision means they cannot review the files until the state sets defendants free, waits for them to die in prison, or

CLEIR. *Id.* Holloway cited *Steckman v. Jackson* and *Perry v. Onunwor*, stating, “[T]he investigatory work product exception remains available as long as any opportunity exists for direct-appeal or post-conviction relief, including federal habeas corpus proceedings.” *Id.*

³⁸² Letter from Maura O’Neill Jaite, Senior Assistant Attorney Gen. to Ohio Attorney Gen. Mike DeWine, to author (Feb. 10, 2011) (on file with author). The letter states that the Attorney General has declined to release DNA lab reports pertaining to thirty-seven cases. *Id.* Previous public records requests showed those cases involved lab contamination. *Id.*

³⁸³ E-mail from Steve Martin, Franklin Cnty. Sheriff’s Office Chief, to author (Mar. 31, 2011) (on file with author). The e-mail states that case records, notes, and recordings, many of which were disclosed in discovery, related to the capital murder conviction of James Conway would not be released based on the holding in *Steckman*. *Id.*

³⁸⁴ See Letter from Mike DeWine, Ohio Attorney Gen., to author (Dec. 6, 2011) (on file with author). The letter inquires about a local prosecutor’s referral for alleged sexual harassment by a sitting Perry County politician. *Id.* The Attorney General declined to produce any documents other than the prosecutor’s initial request. *Id.* The Attorney General’s counsel, J. Eric Holloway, wrote that any other records were “work product” and exempted by CLEIR. *Id.* Holloway cited *Steckman v. Jackson* and *Perry v. Onunwor*, stating, “[T]he investigatory work product exception remains available as long as any opportunity exists for direct-appeal or post-conviction relief, including federal habeas corpus proceedings.” *Id.*

³⁸⁵ See *id.*

³⁸⁶ See Randy Ludlow, *Killers’ Police Files Closed*, COLUMBUS DISPATCH, Mar. 29, 2010, at B1.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

executes them.³⁸⁹ Complaints that the policy could help cover up police misconduct and expose wrongful convictions were unpersuasive to the city's attorney.³⁹⁰ He defended the policy as based on Ohio case law. But, apparently unaware of the story of Ronald Larkins, the attorney also stated normal procedures for post-conviction relief should satisfy concerns about the wrongfully convicted.³⁹¹

2. *The Indirect Impact*

The legacy of *Steckman* lingers in other less direct ways. It signaled a new era in which the court is more reluctant to presume openness.³⁹² In this era, it is increasingly difficult for Ohio residents to obtain documents that are clearly public records.³⁹³ In 2004, a statewide news coalition audit revealed government agencies falsely claim records are not public.³⁹⁴ They stall.³⁹⁵ They obstruct.³⁹⁶ Frequently, officials claim they are just "too busy."³⁹⁷

The problem persists. Recently, a reporter wanted to know whether state workers were illegally taking advantage of federal funds targeted for low-income families.³⁹⁸ Auditors had already used government records to show such abuse happened at the federal level.³⁹⁹ However, the state

³⁸⁹ *Id.* ("Previously, investigators, journalists and relatives . . . were permitted—after the killer had exhausted appeals—to obtain case records and search for clues to confirm guilt or question convictions.").

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See discussion *supra* Part VI.B.

³⁹³ Andrew Welsh-Huggins, *Open Records Report: Special Edition; Ohio Public Records Offices Sore Poorly*, OHIO COALITION FOR OPEN GOV'T, Spring/Summer 2004, at 2, 10, <http://www.ohionews.org/pdf/ocogspring2004se.pdf>.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 10.

³⁹⁸ See E-mail from Commc'ns. Specialist Penny Martin for Ohio Dep't of Dev. (Dec. 5, 2011) (on file with author). In the e-mail, the state initially claimed it was withholding records due to the "personal information systems" statute (section 1347). *Id.* Upon objection by the author, supported by binding authority, the state was unable to provide any authority for withholding the records. See *id.* at Dec. 14, 2011.

³⁹⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM: GREATER FRAUD PREVENTION CONTROLS ARE NEEDED 18 (June 2010), <http://www.gao.gov/new.items/d10621.pdf> (stating the GAO identified 1,000 federal
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agency that kept the records refused to hand over the same data to the reporter.⁴⁰⁰ Agency staffers claimed personal privacy prevented them from releasing the information.⁴⁰¹ However, nobody from the agency could cite a binding statute or case that supported the position.⁴⁰² The question about whether state employees have abused the system remains unanswered.

VIII. CONCLUSION: RAGE, RAGE AGAINST THE DYING OF LIGHT⁴⁰³

James Madison said it. The *Wells* court said it. The architects of the Republic said it, frequently. Democracy, they cried, cannot flourish in the dark; the right to access documents is fundamental. The Supreme Court of Ohio must once again heed those voices. It must once again presume all records are open unless the constitution or statute expressly state otherwise. It can only do so by restraining itself as it had in the pre-*Steckman* era. That was when the court strictly followed the intent of the legislature.

Time and again, the Ohio legislature has demonstrated its will.⁴⁰⁴ It wants state agencies to release all records that it has broadly defined as public, unless it explicitly exempts them.⁴⁰⁵ Evidence that the legislature has carefully considered the exemption shows up in the code itself.⁴⁰⁶ It expanded exemptions on numerous occasions.⁴⁰⁷ Therefore, when the court enlarges, or worse, creates exemptions, it does so because it believes its wisdom is better than that of the General Assembly.

To correct this trend, the court must return to its faithful application of its openness doctrine that required courts to strictly resolve doubts in favor of disclosure. The court should announce its reinvigorated policy just as clearly as it announced it was overturning precedent in *Steckman*.

To do this, the Supreme Court of Ohio should reevaluate *Steckman*. It should analyze whether the decision was an unconstitutional overreach

employees who received financial benefits despite income levels that should have disqualified them).

⁴⁰⁰ See E-mail from Commc'ns. Specialist Penny Martin for Ohio Dep't of Dev. (Dec. 14, 2011) (on file with author).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, in THE POEMS OF DYLAN THOMAS 239, 239 (Daniel Jones ed., 2d ed. 2003).

⁴⁰⁴ See discussion *supra* Part V.C.

⁴⁰⁵ See discussion *supra* Part V.C.

⁴⁰⁶ See discussion *supra* Part V.C.

⁴⁰⁷ See discussion *supra* Part V.C.

based on the precepts advanced by the Ohio constitution⁴⁰⁸ and cogently articulated in *Wells*.⁴⁰⁹ It must also consider how “open file” criminal discovery has now eliminated those concerns that animated *Steckman*’s Crim. R. 16 exemption. Furthermore, the court should reevaluate expanded privacy exemptions based on its good sense rather than the express will of the General Assembly.

The court can no longer hide information about government employees merely because good sense and a tortured concern about fundamental privacy guide that path. It should no longer keep documents from journalists and criminal defendants based on the attenuated notion that those documents could, some day, be useful in a post-conviction proceeding. As the Supreme Court of Florida opined, doing so does not make sense. As the architects of America’s Republic found, it does not foster a representative democracy. As Ronald Larkins found, it can lead to tragic outcomes.

After Larkins was finally able to obtain the documents that *Steckman* denied him, he won his freedom.⁴¹⁰ The state of Ohio issued him a large payment for his wrongful conviction.⁴¹¹ Larkins died within a month of cashing the check.⁴¹²

⁴⁰⁸ OHIO CONST. art. 1, § 20.

⁴⁰⁹ *Wells v. Lewis*, 12 Ohio Dec. 170, 176 (1901).

⁴¹⁰ *State v. Larkins*, No. 85877, 2006 WL 60778, at *10 (Ohio Ct. App. Jan. 12, 2006).

⁴¹¹ Civil Case Inquiry for *Larkins v. State of Ohio*, COURT CLAIMS OHIO, http://search.cco.state.oh.us/scripts/cgiip.exe/WService=civilprod/ws_civilcasesearch_2007.r?mode=1&CaseNo=c2008-11028 (select PDF link to Warrant Notification Received docketed for April 26, 2011). The state awarded Larkins \$403,300 for false imprisonment April 19, 2011. *Id.*

⁴¹² Obituary, PLAIN DEALER, May 25, 2011 (stating Larkins’s date of death was May 18, 2011). Larkins never realized his post-release dream of purchasing a bait shop and home in Florida. Telephone Interview with Kort Gatterdam, Larkins’s Attorney, Carpenter Lipps & Leland LLP (Feb. 11, 2012).