COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

JAMES T. SMITH Plaintiff and FRANCES KELLY/GREGORY KELLY Intervening Plaintiffs v. PIERCE TOWNSHIP/KENT LANHAM Defendants	:	Case No. 2011 CVH 1138 Judge Haddad **DECISION**

PLAINTIFF'S AND INTERVENING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

"The authorities are agreed that injunction is an extraordinary remedy equitable in nature, and that its issuance may not be demanded as a matter of strict right. An application for an injunction is addressed to the sound discretion of the court and its allowance is a matter of grace." *Hritz v. United Steel Workers of America, AFL-CIO*, Warren App. No. CA2002-10-108, 2003-Ohio-5284, at ¶41. Whether it will be granted depends on the character of the case, the peculiar facts involved and other factors, among which are those relating to public policy and convenience. *Hritz*, at ¶41. Injunctive relief may be refused if granting it would be inequitable or unjust. *Hritz*, at ¶41.

"Equity does not create rights; it merely provides remedies for the protection and vindication of recognized rights that otherwise exist." *Hritz*, at ¶42. It applies in those instances where the law has failed to make provision for some right about to be violated.

Hritz, at 42. It is, therefore, a preventative remedy, which guards against future injury rather than affording redress for past wrongs. *Hritz*, at 42.. The purpose of a preliminary injunction is to preserve the status quo pending the outcome of the case on the merits. *Union Township v. Union Township Professional Firefighters' Local 3412* (Feb. 14, 2000), Clermont App. No. CA99-08-082, 2000 WL 189959 at 2.

A person seeking an injunction must make a case of a right at law, as well as one in equity which commends itself to the conscience of the court. *Hritz* at ¶43. "Therefore, to authorize interference by injunction the injury must be real, certain, substantial, serious, and direct." *Hritz*, at 43. Regard must be had for the rights of the complainant as well as for the injuries which may result to others as a result of the granting of the injunction. *Hritz*, at 43.

The power of a court to issue an injunction should not be impaired by too free an exercise thereof. The injunctive power should be exercised cautiously and sparingly. *Hritz*, at ¶44. "Courts will not exercise the authority when the right is doubtful or the facts are not clearly ascertained." *Hritz*, at ¶44.

The Court must consider the following when ruling on a motion for a preliminary injunction: "whether (1) the movant has shown a strong or substantial likelihood or probability of success on the merits, (2) the movant has shown irreparable injury, (3) the preliminary injunction could harm third parties, and (4) the public interest would be served by issuing the preliminary injunction." *Union Township v. Union Township Professional Firefighters' Local 3412*, supra. See also *Back v. Faith Properties, LLC*, Butler App. No. CA2001-12-285, 2002-Ohio-6107 at ¶26; *Planck v. Cinergy Power Generation Services*, Clermont App. No. CA2002-12-104, 2003-Ohio-6785 at ¶17; *DK Products Inc. v. Miller*, Warren App. No. CA2008-05-060, 2009-Ohio-436, ¶6. "Each

element must be proven by the movant by clear and convincing evidence." *Union Township* at 2. "Clear and convincing evidence is that degree of proof which produces in the mind of the trier of fact 'a firm belief or conviction as to the allegations sought to be established.'" *Union Township*, at 2. When determining whether the movant has demonstrated a likelihood of success on the merits by clear and convincing evidence, "the movant must support its claim through the strength of its own case, not by any weakness in the nonmoving party's case." *Union Township*, at 3. Further, "issuance of a preliminary injunction is appropriate 'where the [movant] fails to show a strong or substantial probability of ultimate success on the merits of [its] claim, but where [the movant] at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the [non-moving party] if an injunction is issued.'" *Union Township*, at 3.

The Court notes that the *Union Township* and *DK Products* courts referred to the four part standard for the issuance of a preliminary injunction as being composed of elements; however, the *Back v. Faith Properties, LLC* court refers to that same standard as being composed of factors. *Back*, at ¶25. See also *Michael's Finer Meats, LLC v. Alfery* (S.D.Ohio 2009), 649 F.Supp.2d 748, 756. For purposes of this preliminary injunction, the Court finds that the standard for the issuance of a preliminary injunction is composed of four established factors and not elements.

Likelihood of Success on the Merits

The first factor that the plaintiff and intervening plaintiffs must show by clear and convincing evidence is a likelihood of success on the merits. In this case, they must show, by clear and convincing evidence, that they are likely to succeed on their claims

that the items at issue are not public records, or, if they are public records, that they are exempt from disclosure under R.C. 149.43(A)(1)(a)-(aa).

The purpose of the Public Records Act is to allow citizens access to public records, thereby exposing the government to public scrutiny. *Cwynar v. Jackson Twp. Bd. of Trustees*, 2008-Ohio-5011, ¶21. Exposing government activity to public scrutiny is essential to the proper working of a democracy. *Cwynar*, at ¶21. It allows the public to evaluate the rationale behind government decisions in order to hold officials accountable. *Cwynar*, at ¶21.

Is it a public record?

A public record is defined in R.C. 149.43 as "records kept by any public office." *Cwynar*, at ¶34. Pursuant to R.C. 149.011, a "record" is any document, device or item . . ., including an electronic record . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. See *R.C. 149.011(G)*; *Cwynar*, at ¶34. The Public Records Act is construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records. *State ex rel. Dispatch Printing Co. v. Johnson*, 2005-Ohio-4384, ¶16. In order to constitute a public record, the request must: (1) be of a document, device, or item; (2) have been created or received by or coming under the jurisdiction of the agency; and (3) serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. *Johnson*, at ¶19. It has been held that the third prong requires proof that the item documents the structure, duties, general management principles, agency determinations, specific methods, processes or other acts of the agency. *Johnson*, at ¶22. Disclosure of a public document must further the

purposes of R.C. 149.43, i.e., disclosure must help monitor the conduct of the governing agency. *Johnson*, at ¶27.

After an analysis of the cases, the Court has determined that the relevant inquiry when determining whether an item constitutes a public record is: For what purpose was the document made and/or used? Does it document the organization, functions, policies, decisions, procedures, operations, or other activities of the office? If so, then it is a public record, despite the manner in which it was created.

In terms of the written statements of Officer Pennekamp, Acting Chief Bachman, and Detective Schuler, the Court has heard some conflicting testimony as to why these documents were created. There was some testimony presented that the documents were created in response to a public records request made by Curt Hartman. However, the evidence also shows that these documents have the potential to be used to support and document the employment decisions of Pierce Township. There was evidence to indicate that the officers made their statements in response to a request by their superiors. Mr. Elmer, Mr. Knoop, Mr. Conrad, and Ms. Batchler were all made aware of the statements, and had discussions surrounding the statements at some point. The evidence shows that these statements are likely to be used for future personnel decisions by the township; therefore, while they may have been created in response to a public records request, their use may also be to document the reasons behind the decision-making process. In this case, it is the plaintiff's and/or intervening plaintiffs' burden to prove by clear and convincing evidence that the documents are not public records, i.e., that they are not used to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. There has been conflicting testimony as to the reason the documents were created, and the majority of the evidence is in favor of a

finding that the statements involve personnel matters and may be used in the decision-making process regarding the employment status of the Chief and Mrs. Kelly. For this reason, the Court finds that the plaintiff and/or intervening plaintiffs have failed to prove by clear and convincing evidence that these statements are not public records.

In terms of the recorded conversation between Chief Smith and the officers, the Court finds that, at least in the beginning, the purpose of the recording was to protect the officers from potential retaliation from the Chief. However, since that time, the recording was turned over to Pierce Township, and has been used by the township to document potential misconduct of the Chief, separate and apart from the alleged "inappropriate" conduct between the Chief and Mrs. Kelly. The testimony supports the proposition that the recording may be used to show that the Chief has endeavored to manage the situation by attempting to persuade the officers to consider staying silent about the situation. The Court does not dispute that it is a possibility that the purpose of the recording was to document the observations of the officers in an effort to force the Chief into retirement; however, the plaintiff and intervening plaintiffs must prove this by clear and convincing evidence. They must also prove by clear and convincing evidence that Pierce Township, since the creation of the recording, is not using it to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. Based upon the testimony, the Court finds that the plaintiff and intervening plaintiffs have not satisfied there burden of proof.

The plaintiff and intervening plaintiffs have pointed to certain case law that they assert is on point and proves that the items at issue in this case are not public records. However, while the cases are similar in that they document alleged misconduct on the part of the employee, they are distinguishable in that the items at issue in those cases

did not result in the agency using them to document the reasons for their determinations on employment status and personnel matters. Therefore, while all the cases involved alleged misconduct, the Court finds that the use of the records by the agencies were different, thus the cases are distinguishable.

Based upon the foregoing, the Court finds that the plaintiff and intervening plaintiffs have failed to prove a likelihood of success on the merits of their claim that the items at issue do not constitute public records. For this reason, the Court must proceed as if the items in question are public records, and must determine whether an exemption applies.

Do any of the exemptions apply?

Once it is determined that an item constitutes a public record, full access must be made to the record unless it falls within one of the exceptions specifically enumerated in the act. *State ex rel. The Cincinnati Enquirer v. Bronson*, 2010-Ohio-5315, ¶19.

The plaintiff and intervening plaintiffs argue three different enumerated exemptions.[1] The Court will address those in the order in which they were presented in the complaints.

R.C. 149.43(A)(1)(g): TRIAL PREPARATION RECORDS

Pursuant to R.C. 149.43(A)(4), trial preparation record means: "[a]ny record that contains information that is specifically compiled in reasonable anticipation of, or in the defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney."

[1] The Court finds that the plaintiff and intervening plaintiffs have standing to argue this issue pursuant to *U.S. v. Miami University*, 294 F.3d 797.

The purpose of this provision, in the Court's eyes, is to protect the holder of the records from being forced to release their trial preparation records. However, there is nothing in the statute or in case law prohibiting the person from releasing their own trial records. In this case, the alleged trial preparation records are held by Pierce Township. If, in fact, the items at issue were created to defend against an action by the plaintiff and intervening plaintiffs against Pierce Township, they are Pierce Township's records to release. These are not records created by the plaintiff and intervening plaintiffs in preparation for trial. Therefore, this statutory exemption does not apply to them in this case. If Pierce Township wishes to release their trial preparation materials, they are certainly entitled to do so, but are not required to do so.

Further, there has been absolutely no evidence presented to indicate that these items were intended to be used at a trial in this matter. The majority of the evidence presented at the hearing was geared toward the exemptions for confidential law enforcement investigatory records and when the release is prohibited by a state or federal law. For the aforementioned reasons, the Court finds that the plaintiff and intervening plaintiffs have failed to prove by clear and convincing evidence that this exemption applies.

R.C. 149.43(A)(1)(h): Confidential Law Enforcement Investigatory Records

Pursuant to R.C. 149.43(A)(2), "[c]onfidential 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":

1) "The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised";
2) "Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity";
3) "Specific confidential investigatory techniques or procedures or specific investigatory work product";
4) "Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source".

A determination as to whether this exemption applies requires a two-step analysis: (1) Is the record a confidential law enforcement record?, and (2) Would release of the record create a high probability of disclosure of any of the four types of information previously specified? *Morgan v. City of New Lexington*, 2006-Ohio-6365, ¶48.

Under the first requirement, records are not confidential law enforcement records if they relate to employment or personnel matters rather than directly to the enforcement of the law. *Morgan*, at ¶49; *State ex rel. Mahajan v. State Medical Board of Ohio*, 2010-Ohio-5995, ¶30.

The plaintiff and intervening plaintiffs assert that these items are being used for investigative purposes, and that the Chief and Mrs. Kelly are uncharged suspects in this matter. In order to prove that the items are confidential law enforcement investigatory records, the plaintiff and intervening plaintiffs must first prove that the items are a

confidential law enforcement record. As previously stated, in Ohio, documents relating to employment or personnel matters do not fall into this exemption. The testimony has revealed that the purpose of these items is to document personnel matters involving whether the Chief and/or Mrs. Kelly will be permitted to continue their employment with Pierce Township. The evidence shows that there is no criminal investigation pending at this time, nor is there a civil investigation. The plaintiff and intervening plaintiffs have argued that there is an administrative investigation ongoing at this time; however, Ohio excludes from this exemption matters relating to employment and personnel. Since an overwhelming majority of the evidence shows that any investigation that is ongoing pertains to personnel matters regarding the Chief's and Mrs. Kelly's continued employment, the Court finds that the plaintiff and intervening plaintiffs have failed to prove by clear and convincing evidence that these are confidential law enforcement investigatory records. Since they have failed to prove the first prong, the Court need not discuss whether one of the four categories provided in the second prong apply.

R.C. 149.43(A)(1)(v): Records the Release of Which is Prohibited by State or Federal Law

This specific exemption applies when there is state or federal law that *prohibits* the release of the information. *Mehta v. Ohio University*, 2011-Ohio-3484, ¶63; *State ex rel. Callos Staffing Co., LLC v. Ohio Dept. of Job and Family Services*, 2011-Ohio-3662, ¶3.

While the plaintiff and intervening plaintiffs argue that these documents were obtained in violation of their Constitutional rights, they have pointed to no state or federal law on point that prevents their *release*. Further, the Court can find no legal

authority in Ohio providing that the custodian cannot *release* records simply because they were *obtained* in violation of state or federal law. As attorney Robert Herking stated previously, on the first day of the hearing, there are many cases on point that have held that some state or federal law must *prohibit* the *release* of the information. In fact, there are too many cases for the Court to cite to them all in this decision. In those cases, the *release* of information is specifically prohibited by a statute or other state law, which simply is not true in this case. Therefore, while the plaintiff and intervening plaintiff believe that the information might have been *obtained* in an unlawful manner, it is their burden to prove by clear and convincing evidence that the *release* of the items would violate some state or federal law.

While there is some evidence going to the fact that both the Chief and Mrs. Kelly believe that their constitutional right to privacy might have been violated, the plaintiff and intervening plaintiffs have failed to prove by clear and convincing evidence that there is a state or federal law on point that prohibits their *release*.

Having considered the record, in its entirety, the Court finds that the plaintiff and intervening plaintiffs have failed to prove by clear and convincing evidence that these items are not public records. Further, they have failed to prove by clear and convincing evidence that these items are exempt from release. For this reason, the Court finds that the plaintiff and intervening plaintiffs have failed to prove by clear and convincing evidence that they are likely to succeed on the merits of their case.

Irreparable Harm

The second factor that the movant must show by clear and convincing evidence is that one or all of them will suffer irreparable injury as a result of the release of the information. Since the plaintiff and intervening plaintiffs failed to prove a likelihood of

success on the merits, they must at least show serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the non-moving party if an injunction is issued.

"Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Division of State Fire Marshal*, Fayette App. Nos. CA2005-03-009, CA2005-03-011, 2006-Ohio-1002, at ¶24, citing *Crestmont Cadillac Corp. v. General Motors Corp.*, Cuyahoga App. No. 83000, 2004-Ohio-488, at ¶36. It is an injury "for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete." *Union Township* at 3, quoting *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343. "[A]dequate remedy of law 'means that the legal remedy must be as efficient as the indicated equitable relief would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete.' " *Ohio Pyro* at ¶25, quoting *Mid-America Tire, Inc. v. PTZ Trading Ltd.*(2002), 95 Ohio St.3d 367, 380, 2002-Ohio-2427, ¶81. Actual harm is not required as "a threat of harm is a sufficient basis on which to grant injunctive relief." *Convergys Corp. v. Tackman* (2006), 169 Ohio App.3d 665, 666-667, 864 N.E.2d 145, citing *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 274, 747 N.E.2d 268.

In terms of Chief Smith and Mrs. Kelly, they argue that the irreparable harm in this case would come from the fact that they will be perceived in the public eye as "uncharged suspects" and that their reputations will be sullied. However, the testimony has revealed that certain statements have appeared in a local paper about certain events

that occurred in Chief Smith's office, and that those statements have been attributed to Mrs. Kelly. As a result, certain aspects of that relationship have already been made public. Further, through the filing of this action in public court, the Court finds that Chief Smith has brought the issues involved in this case to the public's attention. Therefore, each party must prove that the release of the items at issue will cause greater and thus, irreparable harm to their reputations than has already been caused. While the items are, perhaps, more detailed than what has already been released to the public, the Court finds that the plaintiff and intervening plaintiff, Mrs. Kelly, have failed to prove by clear and convincing evidence that the release of the items would cause greater and thus, irreparable harm to their reputations than they have already suffered as a result of the public statements attributed to Mrs. Kelly and the Chief's filing of this lawsuit.

In terms of Gregory Kelly, the argument is that he will suffer irreparable harm, as a taxpayer, through the improper release of information that was illegally obtained. However, there has been no evidence presented to prove that Mr. Kelly, or any other taxpayer, would be harmed through the release of the information. For this reason, the Court finds that the intervening plaintiff, Gregory Kelly, has failed to prove by clear and convincing evidence that he or any other taxpayer will suffer irreparable harm as a result of the release of these documents.

The Preliminary Injunction Could Harm Third Parties and The Public Interest Would Be Served by Issuing the Preliminary Injunction

Generally, the Court would address these factors separately; however, given the nature of this case, these factors are related and the analysis must be combined.

Courts have held that "[i]t is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep

private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code." *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St.3d 258, 266. In enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighted and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168, 172.

In this case, the alleged harm is personal to Chief Smith and Mrs. Kelly. Any harm to the public as a result of the release of the documents, which may or may not have been obtained in violation of their right to privacy, does not outweigh the public policy and public interest in having the documents released. Neither the plaintiff nor intervening plaintiffs have presented evidence that the public interest will be served if the records are not released. In fact, as previously stated, the purpose of the Public Records Act is to allow citizens access to public records, thereby exposing the government to public scrutiny. *Cwynar v. Jackson Twp. Bd. of Trustees*, 2008-Ohio-5011, ¶21. Exposing government activity to public scrutiny is essential to the proper working of a democracy. *Cwynar*, at ¶21. It allows the public to evaluate the rationale behind government decisions in order to hold officials accountable. *Cwynar*, at ¶21.

Mr. Kelly's argument that the public will be harmed by the release of this information is not well-taken. If, in fact, the information was obtained illegally, the government is likely to undergo more scrutiny than if it is revealed that Chief Smith and Mrs. Kelly may have had some type of relationship in Chief Smith's office.

Based upon the competent, credible evidence presented, the Court finds that the plaintiff and intervening plaintiffs have failed to prove the third and fourth factors by clear and convincing evidence.

Conclusion

The Court is mindful of the serious concerns and considerations facing all the parties in this action, however, Ohio law requires broad access of public records.

Therefore, based upon the competent, credible evidence presented, the Court finds that the plaintiff and intervening plaintiffs have failed to prove, by clear and convincing evidence, that they are entitled to injunctive relief in this case. Specifically, the plaintiff and intervening plaintiffs have failed to prove, by clear and convincing evidence, a likelihood of success on the merits of their case, that they will suffer irreparable harm, that third parties will not be harmed if an injunction is issued, or that the public interest would be better served if the records are not released. Therefore, the Court hereby denies the plaintiff's and intervening plaintiffs' request for a preliminary injunction.

IT IS ORDERED, that this Decision shall serve as the Judgment Entry in this matter.

Victor M. Haddad, Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision was served upon the following by email or facsimile this 4th day of August, 2011.

Mark Mezibov/Susan Lawrence
David Torchia
Elizabeth Mason
Mary Lynne Birck
Curt Hartman
Robert Kelly
Robert Herking

Sherry Nagel

Sherry Nagel, Administrative Assistant