



**Ohio House Government Accountability & Oversight Committee
House Bill 451 — Public Records
Testimony of Dennis R. Hetzel
President & Executive Director / Ohio News Media Association
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Chairman Blessing, Vice-Chair Reineke, Ranking Minority Member Clyde and other committee members, thank you for this opportunity to express what I would call “respectful opposition” to House Bill 451, which we believe is unnecessary and likely based upon a misinterpretation of a recent Ohio Supreme Court decision. The bill also is worded in a way that invites legal disputes and could limit the access to records that are and should remain appropriate to release to the public.

We have appreciated the opportunity to work with Rep. Retherford on this bill. It’s not an easy one to oppose, because we are all against the release of graphic content such as photos or videos that could be used to re-victimize crime victims. It is our contention that there is nothing in the existing case law or statutes to support a conclusion that this would happen – demonstrated by comments of supporters that this has never occurred to anyone’s knowledge.

Our opposition also is consistent with our position that to maintain the strong presumption of openness that is supposed to attach to public records in Ohio law, there should be some evidence of need. The standard needn’t and shouldn’t be “beyond a reasonable doubt,” but an expectation of minimal evidence of a problem that needs solving is reasonable. Supporters argue that a recent Ohio Supreme Court case, *Caster v. Columbus*, changed things to justify this legislation, but we disagree with that analysis.

The impetus for this legislation appears to stem from comments made by Mark Weaver, a respected attorney and public records trainer, in a presentation to law enforcement officials. I discussed this bill with Mr. Weaver, who said his brief comments arose from a question and answer period in which the *Caster* case was mentioned. He added that he has neither examined nor endorsed this bill.

Although I am not a lawyer, I think I am comfortable enough with the details of the *Caster* case to convey this to you: The *Caster* case did not change settled law about access to closed case files held by law enforcement. Ironically, it remains true and has been true for years that anyone can request information from a closed case file – including graphic content. The *Caster* case was about specific access to files in capital murder cases. Police agencies were

refusing to release closed files, arguing that since the defendant still had appeal rights, the case wasn't really closed. This led to the preposterous result that you could be in prison for a murder you didn't commit and not have access to the files until you're deceased. The years-long battle to overturn the position the Court articulated in *Steckman v. Jackson* was made possible by changes the Supreme Court made to open the rules of discovery in criminal cases. The Innocence Project at the University of Cincinnati and others supported Caster to allow access to case files in capital murder cases following conviction.

The point is this: Requesting records and receiving records are two different things. This is why there is no documented case of an offender receiving graphic photos after a case is closed. If such a request were made, it would be denied, and it would be upheld based on factors such as past Ohio Supreme Court decisions on the rights to privacy and the "catch-all" exemption in our Open Records law that keeps material exempt if it is made secret by other portions of state and federal law. We can provide a detailed, legal analysis of why this is so.

Indeed, less than six weeks ago, Jeffrey Clark, the special master for open records cases in the Ohio Court of Claims, released a lengthy, well-researched decision in a body camera recording case involving a Cleveland.com reporter and the Cuyahoga County Jail. Clark ordered redaction of portions of a video that showed a female inmate's breasts based existing state and federal law and case law. (The reference is Case No. 2017-00690-PQ)

In other words, current law is more than adequate to protect victims of sex crimes and others from being re-victimized by release of graphic images.

Still, one might argue that there is no harm in "clarifying" the law, but this also is problematic. New statutory language can often invite disputes, and that will happen with HB 451 as written. This new exemption "gg" in the open records law exempts "any depiction by photograph, film, videotape, digital image or visual or printed material" that would be offensive and objectionable to "a reasonable person of ordinary sensibilities" as an intrusion into a victim's "expectation of bodily privacy."

As our legal experts have analyzed this language, they are concerned about definitional issues such as what defines "a reasonable person of ordinary sensibilities" and "expectation of privacy" in today's world? There can be vast differences in perception. Of greatest concern to our members is the term "printed material" as this would seem to potentially include virtually any text; i.e. written descriptions. As you have heard me argue as to other bills involving



records, it is important for the reporting process and the public's confidence in the legal system to have comprehensive access to records in many cases. Access to that information does not equate to publication or broadcast of that information. There also are situations in which journalists and others – such as the Innocence Project -- engage outside experts to evaluate content contained in records. It is an unfortunate truth that sometimes those records are graphic in nature or description.

Should you go forward with this law, there are ways to address these problems. One would be to adopt provisions similar to what we have had elsewhere in the Revised Code to allow journalists to affirm a journalistic purpose, view the content of these files but not be allowed to copy the material. Another would be to adopt a provision contained in Rep. Antani's bill on body cameras (HB 425) that allows a petition to a court that the public interest outweighs the privacy concern. While this would be rare, such circumstances do occur.

Given the number of co-sponsors, we recognize the bill has broad support, so we thank you for this opportunity to be a voice urging you to hit the "pause" button for a bill that, in our view, could create new problems with access to public records and is not necessary to protect those whom we all agree need to be protected.

Thank you, and I would welcome any questions or suggestions you have.

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