BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD
c/o Gupta Wessler PLLC
1148 Neil Ave.
Columbus, OH 43201
Plaintiff-Relator,

v.

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION
c/o President David French
1324 Middletown Eaton Rd.
Middletown, OH 45042

LISA TUTTLE-HUFF, in her official capacity as Superintendent of the Madison Local School District,
1324 Middletown Eaton Rd.
Middletown, OH 45042
Defendants-Respondents,

Case No. CV 2018-09-2028

Judge Charles L. Pater

OPPOSITION TO MOTION FOR PARTIAL DISMISSAL

ORAL ARGUMENT REQUESTED

PLAINTIFF-RELATOR'S OPPOSITION TO MOTION FOR PARTIAL DISMISSAL

Plaintiff-relator Erin Gabbard, through undersigned counsel, hereby opposes Madison Local School Board's partial motion to dismiss (filed October 10, 2018). The Board's motion should be DENIED for the reasons that follow.

INTRODUCTION

From the outset, transparency regarding the Board's decision to arm teachers and other staff has been a key issue for plaintiff-relator Erin Gabbard and other parents in the Madison community. *See* Compl. ¶4. That's unsurprising—like all parents, Ms. Gabbard is deeply concerned about the safety of her children at school. So, when the Board adopted a Resolution to allow it to arm teachers without the full training required by state law, she actively sought

information to help her evaluate whether the District was taking appropriate safety measures. As Ms. Gabbard stated, whether the Board has "appropriate policies and procedures in place to minimize the risks of accidents, mistakes, misjudgments or overreactions by those being authorized to carry or access firearms," is critical to her decision to keep her kids enrolled. *Id.* ¶¶8–9. Contrary to the Board's false characterization, the public record claim is not about attorneys' fees; it is about whether the Board is keeping the plaintiff-relator's children safe at school.[1]

The Board seeks to dismiss Ms. Gabbard's petition for mandamus, but its attempt fails at every turn. *First*, it attaches a supplemental public records response it sent to counsel only hours before it filed the Rule 12(B)(6) motion. That violates one of the fundamental rules of motions to dismiss; they must be decided on the complaint alone. Even if it was appropriate to consider newly-introduced evidence on a motion to dismiss, neither the supplemental response, nor any of the numerous factual assertions in the motion, are tendered via affidavit and therefore cannot be properly considered as evidence. *Second*, the Board categorically asserts that all the requested records are "security records" exempt from disclosure just because they touch on the topic of security. But that is not how the Ohio Supreme Court has defined the security record exemption. Under the Court's cases, the Board has to prove that disclosure of the requested records would

[1] The Board's false and unsupported claim that "[t]he Petition is added solely to incorporate an attorney's fee provision into what is otherwise a case about school safety," MTD at 2, should be stricken. First, as detailed in the Board's own brief, Ms. Gabbard has been diligently seeking information pertaining to the resolution since it was passed. MTD at 2–5. Because the requests were largely denied, she is now availing herself of the judicial remedy outlined in R.C. 149.43(C). The Board has absolutely no grounds for ascribing false and unseemly motivations to the plaintiff-relator's petition. Second, the purported motivation for filing a claim is not relevant to the adjudication of a motion to dismiss. As the Board knows, the purpose of a motion to dismiss is to test the sufficiency of the complaint. MTD at 6. Finally, as the Board is aware, the plaintiff-relator and the other plaintiffs in this action have faced harassment and threats of violence on social media from certain individuals since this lawsuit was filed. In this context, claiming that the plaintiff-relator's request for documents is made solely for attorneys' fees is inflammatory and irresponsible.

compromise security; it has not done so, and it cannot do so (especially on a motion to dismiss) because Ms. Gabbard is not requesting the names of armed teachers, specific response protocols or threat assessments, or any other information that undermines security. *Lastly*, the Board tries to hide all the records under the "emergency management plan" exemption, but many of the requested documents (*e.g.*, background research and communications) could not conceivably be in the plan, and if they are, they are inappropriately included. At minimum, factual questions remain that preclude dismissal, and the necessity of further discovery and factual development makes conversion of the Board's motion into one for summary judgment inappropriate.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Resolution. With minimal notification to parents or the public in advance that it was considering arming teachers and other staff members, on April 24, 2018, the Board passed the "Resolution to allow armed staff in school safety zone." Compl. ¶40. The Resolution allows, upon the Superintendent's designation, a teacher or other school staff member to go armed at school as long as he or she has a concealed carry permit and has completed a 26-hour training program called "FASTER." *Id.* ¶¶42–46. The Board and its representatives have taken confidential steps to implement the Resolution. *Id.* ¶44.

2. Parents are concerned that the Resolution—and its implementation—puts their children at *increased* risk of harm. The Board's decision to arm teachers and other school staff raises two pressing concerns for the parents who are plaintiffs in this lawsuit. *First*, they are concerned that the 26-hour FASTER program provide insufficient training for an employee who goes armed at school, in violation of R.C. 109.78(D). Compl. ¶54. That concern is addressed by the plaintiffs' preliminary injunction motion, filed simultaneously with this opposition.

Second, Ms. Gabbard wants to be able to meaningfully evaluate whether her kids are safe in Madison schools in order to decide whether to keep her children enrolled in the face of the dangers

the Board has introduced into the classroom by allowing insufficiently trained armed teachers. *Id.* ¶¶7–9, 85. That meaningful evaluation requires transparency—namely, access to public records. Specifically, she wants to know why the District decided that arming teachers was the best way to keep her children safe at school; what research Board members reviewed; which experts they consulted; and what factors they weighed. *Id.* ¶60. She also wants to know what policies are in place to prevent—to the extent possible—tragic accidents, misjudgments, and errors. For example, (1) what kind of vetting is required for a teacher to be approved to carry a firearm at school, and under what circumstances would such approval be rescinded; (2) what are the rules of engagement; (3) what are the policies for storing weapons; and (4) what is the curriculum of the required training program. *Id.* ¶65. These transparency concerns are not window dressing on "what is otherwise a case about school safety," MTD at 2—they go to the heart of whether the Board is making sound safety decisions for the Madison community.

3. Public records requests. Given these concerns, immediately following the Resolution's adoption, Ms. Gabbard (and other parents) began asking the Board and Superintendent questions. Compl. ¶60. Ms. Gabbard sent multiple letters to the Board (on April 26, 2018 and June 19, 2018), which were followed by letters drafted by counsel (on July 9, 2018 and August 7, 2018). *Id.* ¶¶60–79. The Board spends much of its motion contesting that Ms. Gabbard's April 26 email was not a proper public records request. MTD at 3, 7–8. That is irrelevant.[2] As the Board concedes (at 7), the subsequent letters by counsel properly presented the requests at issue. The requests that are still disputed are for records of:

a. The rules of engagement for armed staff;
b. The policies for safe storage of firearms;
c. Standards for evaluating staff when deciding whether to arm them;

[2] The petition does not assert a claim that the Board failed to timely respond to the April 26 request or any other request, so it is irrelevant in which letter particular requests were made.

d. Standards for withdrawing written authorization if an armed employee has acted improperly with the firearm or otherwise becomes disqualified from carrying a gun;

e. Research considered by the Board in considering the April 24, 2018 Resolution, including but not limited to, the following documents referenced in the "Board Letter to Community" (Compl. Ex. 17):

(a) documents comprising or memorializing the "significant due diligence" the Board asserts that it conducted "in preparation of its policy" to arm staff;
(b) communications between the Board or its representatives and the "2 districts in Ohio that have allowed armed teachers," along with any documents memorializing those communications;
(c) communications between the Board or its representatives and the District's "SRO and Sherriff Jones about pros and cons and choosing capable individuals," along with any documents memorializing those communications;
(d) the "data" considered by the Board concerning "6 years of Ohio districts allowing concealed carry" and also concerning other "states that have been allowing faculty and staff to carry a handgun;"
(e) Research considered by the board concerning "instances of issues with staff and guns in school;"
(f) communications between the Board or its representatives and representatives of "the FASTER program for information on their training;" and

f. The Board's plan for training armed staff. *See* Compl. ¶100.

4. The Board's response prior to this lawsuit. The Board largely refused to disclose the requested records. *See* Compl. ¶¶67–70, 80–84. For all the requests listed above (a–f), the Board asserted that it had no duty to disclose these records for "security" reasons, stating:

> This record is a security record, pursuant to Ohio Revised Code 149.433 (exemption "[a]ny record that contains information directly used for protecting or maintaining the security of a public office against attack["]); and Ohio Rev. Code 3313.536(**I**)("Copies of the emergency management plan [and protocol for addressing serious threats to the safety of property] . . . are security records and are not public records pursuant to section 149.433 of the Revised Code.").

Id. ¶68; Compl. Ex. 7 (substantially similar).

Undermining the Board's assertion that none of these documents could be released for security reasons, the Board sent a "Letter to the Community" on July 28, 2018, describing some of the "due diligence" the Board undertook before adopting the Resolution and explaining in general terms the "protocol for approving a faculty or staff member." Compl. Ex. 17.

5. The Complaint. Without transparency, and fearing for the safety of their children, several Madison parents brought this lawsuit on September 12, 2018. The Complaint has two counts: (1) an action for declaratory judgment, and (2) a petition for mandamus.

The petition for mandamus seeks to compel the defendants to disclose the requested public records. In support of her petition, Ms. Gabbard delineated the Board's clear duty to produce public records, redacted as necessary. *See* Compl. ¶¶101–04, citing R.C. 149.43. And she attacked the Board's failure to produce them on several grounds. She alleged that the defendants improperly invoked the security records exception because "[d]isclosing the requested records would not compromise the security of the District's schools," as she was "not requesting that the Court order disclosure of the names of the teachers or other employees that have applied or have been authorized to be armed," the "floor plans of any buildings," or "the details of any particular or direct threat assessment or response." *Id.* ¶¶106–109. She also alleged that the requested records "are not (nor were at the time of each request) part of an emergency management plan adopted pursuant to R.C. 3313.536" and, to the extent that some of these records were included in the school's emergency management plan, they cannot immunize documents that otherwise exist outside of that plan or that can otherwise be disclosed." *Id.* ¶105.

6. The Board's supplemental response and partial motion to dismiss. Two hours before filing its motion to dismiss, the Board sent Ms. Gabbard's counsel a "supplemental response" to the public records request. *See* MTD Ex. A. The response again asserted a "security record" exception to disclosure for all of the above-listed requests. *Id.* But, for the first time, it also disclosed that "no responsive public records exist," in response to most of the requests seeking the Board's research before adopting and implementing the Resolution. *Id.* For all its promised "due diligence," the Board claims not a single record evidencing its research exists. *Id.*

The additional records the Board disclosed at this eleventh hour were sparse. It disclosed: (1) an email about its insurance policy that had previously been disclosed; (2) a single email from a school resource officer forwarding a mass email from the Buckeye Firearms Association (and a coupon to join the NRA); and (3) copies of the confidentiality policy Board members, school employees, and SROs have to sign regarding armed teachers. *Id.*

With this supplemental response attached, the Board hours later filed its motion for partial dismissal, focused only on the petition for mandamus.

ARGUMENT

I. The standard of review for motions to dismiss under Rule 12(B)(6).

When considering a Rule 12(B)(6) motion to dismiss, the trial court "may dismiss the case only if it appears beyond doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover." *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶23 (10th Dist.); *State ex rel. Montgomery v. Maginn*, 147 Ohio App.3d 420, 2002-Ohio-183, 770 N.E.2d 1099, ¶20 (12th Dist.). The Court should not make factual determinations. A motion to dismiss brought pursuant to Rule 12(B)(6) "must be judged on the face of the complaint alone," *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459, 664 N.E.2d 931, including exhibits incorporated into the complaint. *Columbus Green Bldg. Forum* at ¶23. "[T]he material allegations of the complaint are taken as admitted and all reasonable inferences must also be drawn in favor of the nonmoving party." *Montgomery* at ¶20.

"The trial court may consider matters outside the pleadings in consideration of a Civ.R. 12(B) motion only if it converts a dismissal motion to a motion for summary judgment." *Popson v. Henn*, 17 Ohio App. 3d 1, 7, 477 N.E.2d 465 (6th Dist.1984). If a court intends to convert a motion to dismiss into a motion for summary judgment, however, it must notify the parties of this intent at least fourteen days before a hearing on the motion. *Federated Dep't Stores, Inc. v. Lindley*, 30 Ohio

St.3d 135, 137, 507 N.E.2d 1114 (1987). In addition, all parties must be given "reasonable opportunity to present all materials made pertinent to such a motion by Rule 56," *id.*, including sufficient time to conduct discovery necessary to oppose the motion for summary judgment, *Tandem Staffing v. ABC Automation Packing, Inc.*, 9th Dist. Summit No. 19774, 2000 WL 727534, *2 (June 7, 2000). Denials of motions to dismiss are preferred "over conversion when a Civ.R. 12(B)(6) motion attempts to rely on evidence outside of the complaint . . . because an answer and formal summary judgment motion is more procedurally normal and allows more time for development of various discovery matters that may be necessary for use in defending a summary judgment motion." *Park v. Acierno*, 160 Ohio App.117, 2005-Ohio-1332, 826 N.E.2d 324, ¶31 (7th Dist.).

II. The Board's motion to dismiss improperly introduces new facts.

The Board's motion for partial dismissal fails on its face because it violates one of the cardinal rules of Rule 12(B)(6) motions: it introduces new facts. *Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459, 664 N.E.2d 931. In its motion, the Board repeatedly relies upon a supplemental public records response to argue that it has fulfilled its legal obligations under R.C. 143.149. MTD at 2, 5, 11. Yet that exhibit was not part of the complaint, and it did not exist at the time the complaint was filed. In fact, it was sent to the relator only *hours* before this motion was filed. It is black letter law that, for a motion to dismiss, the Court may only look to the complaint, not to documents created in response to the litigation. *Pontious* at 569. On this basis alone, the Court must deny the Board's motion.

Regardless, the Board's supplemental response raises more questions than it answers, further reflecting that a motion to dismiss is inappropriate. The supplemental response, in large part, purports to correct the Board's failure to note in previous responses when it did not have any responsive records to a request. *See* MTD Ex. A. But the Board's contention that "no responsive records exist" to so many requests is factually questionable, and not supported by the requisite

evidence. There is, for example, no indication (beyond mere assertion) in the supplemental response that the Board conducted a diligent search for the records. *See State ex rel. DiFranco v. City of S. Euclid*, 144 Ohio St.3d 565, 2015-Ohio-4914, 45 N.E.3d 981 (Supreme Court issued a writ ordering the production of documents where the government agency failed to include an affidavit or other evidence backing up its claim that it had produced all responsive records.); *cf. State ex rel. Sinchak v. Chardon Local Sch. Dist.*, 11th Dist. Geauga No. 2012-G-3078, 2013-Ohio-1098 (Summary judgment was appropriate where the respondent school district submitted the affidavit of the superintendent, which addressed the diligent search for records conducted by the school district.).

The Board's new unsupported assertions that "no responsive public records exist" for many of the requests is particularly questionable in light of its previous public statements to the Madison community. In its July 28 "Letter to the Community," the Board told its constituents about "[r]esearch [it conducted] regarding concealed carry of firearms in schools." It represented that it examined six years of Ohio "data" and out-of-state "data," and "research[ed] . . . many other instances of issues" (i.e., harm) with "staff and guns in school." Compl. Ex. 17. When Ms. Gabbard first asked specifically for this research and data, the Board said it would not disclose it based on a security exception (discussed below). *See* Compl. Ex. 7. Now, in its supplemental response, the Board says that "no responsive records exist" despite all the "due diligence" it told the community it undertook. MTD Ex. A. It is difficult to square those statements. At the very least, the disconnect between the Board's previous statements and its present representation that no responsive records exist warrants further inquiry during discovery, precluding dismissal.

III. The Board both misconstrues the exceptions to the public records laws and provides no evidence demonstrating that the exceptions apply.

Besides improperly relying on newly-created evidence and asserting facts contrary to the complaint, the Board's motion to dismiss also fails because it rests upon the misinterpretation of

two exceptions to Ohio public records law—the security exception, R.C. 149.433(A) and the emergency management plan exception, R.C. 3313.536(I). The defendants have a clear duty to produce public records under Ohio law, including the records (a–f) enumerated above. *See* R.C. 149.43(B). The defendants, as the custodian of the records, have "the burden to establish the applicability of an exception." *State ex. Rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶10. "Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian." *Id.* "The Public Records Act reflects the state's policy that 'open government serves the public interest and our democratic system," and consistent with that policy, courts must "construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Data Trace Info. Servs. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 225, 2012-Ohio-753, 936 N.E.2d 1288, ¶26. The Board has failed to satisfy its burden.

A. The Board's overbroad interpretation of the "security records" exception must be rejected.

The Board's refusal to provide the requested records rests on its extremely broad—and improper—interpretation of the "security record" exception. It has asserted this exception to every single one of the contested records requests (a–f), including requests for background research, pre-enactment communications with external parties, and basic policies for vetting staff for concealed carry. The Board asserts that, because the Resolution's stated goal is "provid[ing] additional ***security*** for the students," *anything* having to do with the Resolution is a "security record" exempt from disclosure. MTD at 9 (emphasis in the original). It would have this Court hold that anything *on the topic of* security, or *related to* security, is exempt, irrespective of whether disclosure compromises security. Yet it cites not a single case for that broad proposition. That's unsurprising: the Ohio Supreme Court has instead adopted a narrow interpretation of the "security record" exception.

The Ohio Supreme Court has two lead cases on the security-record exception. The linchpin in both cases: the state's proof that release of records would compromise security. This requirement is based on the plain language of the statute itself, which states that a "security record" is "[a]ny record that contains information *directly* used for protecting and maintaining the security of a public office against attack, interference, or sabotage." R.C. 149.1433(A)(3)(a) (emphasis added). For example, in *State ex rel. Plunderbund Media v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, a media organization sought disclosure of records documenting threats against the governor, including past threats and closed investigatory files. As the Court emphasized: "The department and other agencies of state government cannot simply label a . . . safety record a 'security record' and preclude it from release under the public-records law, without showing that it falls within the definition of R.C. 149.433." *Id.* at ¶29. Instead, the Court held that the *Plunderbund* documents were "security records" under R.C. 144.433(A)(3)(a) because the state submitted multiple unrebutted affidavits explaining that "each threat and investigation . . . potentially reveals security and safety violations," which would "expose security limitations and vulnerabilities," such that "disclosure 'increases the risks to the safety' of the governor and others." *Id.* at ¶24 (internal quotation marks omitted).

Likewise, in *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, a group sought key-card-swipe data showing when Ed FitzGerald, a former county executive, entered and exited county parking facilities and buildings. *Id.* at ¶1. The Court focused on direct threats against Fitzgerald and the affidavits explaining how "release of that data would have diminished the county's ability to protect him." *Id.* at ¶2. Because of those threats, the data "contained information directly used for protecting or maintaining" security. *Id.* at ¶24. However, once those threats ended and the county switched office buildings, the Court concluded

that the old key-swipe data was no longer a "security record" and had to be disclosed, *id.* ¶27, even though such information unquestionably was still related to the issue of security.

Unlike *Plunderbund* or *FitzGerald*, the Board has failed to provide evidence that disclosure would compromise safety. The custodian of records cannot meet its burden "if it has not *proven* that the requested records fall squarely within the exception." *Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, at ¶10 (emphasis added). Yet the defendants have produced no proof that releasing the documents would compromise security. While the motion to dismiss presents some dubious attorney speculation about how disclosing the requested records could create security concerns, *see* MTD at 12, it does not attach a single affidavit or other evidence supporting these bald assertions. Defense affidavits, of course, would be inappropriate at the motion to dismiss stage, but the lack of proof here further reflects that considering the Board's motion under Rule 56 would also be improper. *See Park*, 160 Ohio App.117, 2005-Ohio-1332, 826 N.E.2d 324, at ¶31.

If anything, the record indicates that disclosure of the requested records would not compromise school safety. For example, consider the relator's request for pre-enactment research conducted by the Board. Those records would reveal the Board's decision-making process in enacting the Resolution; they do not pertain to any specific threat nor even the security system the Board has implemented. These records are quintessential public records for giving sunshine to the Board's governing process. Similarly, in response to the relator's request for Board communications with the FASTER program, the Board released only one email between it and representatives of the FASTER program (a blast email newsletter from the Buckeye Firearms Association) because it admitted that it did not "reveal any information that could compromise security efforts." MTD Ex. A. That example alone demonstrates that *all* the Board's communications with FASTER and other advocacy groups are not *directly* used for security.

Additionally, the Board's refusal to produce records in response to the request for the standards for evaluating staff to be armed or withdrawing such authorization is undercut by the Board's own conduct in publicly announcing part of the vetting procedure. *See* Compl. ¶¶73–74. At a minimum it raises factual issues about which details of the plan are genuinely security records. For instance, disclosure of a blank application form or mental health certification would not compromise security; and the Board fails to show otherwise. Even for completed documents, "Ohio courts have [repeatedly] required the release of personnel background records," under the Public Records Act, including "psychologist reports," "background investigation reports," and "personal history questionnaires" for police officers. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 n.4 (6th Cir.1998). The requests pertaining to the general standards for granting and withdrawing authorization to teachers are, if anything, less directly related to security than the pre-hire records that are routinely released for police officers. *See id.*

Because disclosing the records implicated by the relator's requests would not compromise security—and the Board has provided no evidence to show otherwise—they are not "security records" and the Board has a duty to produce them.[3]

B. The Board's overbroad invocation of the "emergency plan" exception must be rejected.

The motion to dismiss further asserts that every single one of the withheld records "are exclusively maintained in the school's emergency management plan." MTD at 11. As a preliminary matter, this statement (which is not supported by an affidavit or any other evidence) is

[3] The Board never asserted in its response to any of the public records requests, including in the supplemental response filed on the same day as its motion for partial dismissal, that the requested records fell within the "terrorism" exception. That absence undermines the Board's passing reliance upon it now. MTD at 10. At any rate, it is inapplicable here because the active shooter scenarios the policy targets are not aimed at terrorist threats as defined in R.C. 2909.21(A)(1) and none of the materials in the record indicate that the Board was thinking about terrorism when it passed the Resolution.

contrary to the rule that, on a motion to dismiss, a court must accept as true all well-pleaded allegations in the complaint. *Montgomery*, 147 Ohio App.3d 420, 2002-Ohio-183, 770 N.E.2d 1099, at ¶20. Here, the relator specifically alleged that the requested records are not part of the emergency plan. Compl. ¶105. Therefore, the Board cannot rely on newly-introduced assertions to the contrary.

Further, even if the Board's assertions were properly before the Court, they are questionable as a factual and legal matter. The Ohio Public Records Act excepts from disclosure "[a]n emergency management plan adopted pursuant to section 3313.536 of the Revised Code." R.C. 149.433(A)(3); *see also* R.C.3313.536(I) ("[c]opies of the emergency management plan" and other emergency contact information exempt from R.C. 149.433). Both the form and contents of that plan are narrowly circumscribed; school districts cannot just include any material they desire. Ohio law requires that a plan "consist of a single document to address all-hazards that may negatively impact the school; including but not limited to active shooter . . . events." Ohio Admin Code 3301-5-01. It must be a "submitted on standardized forms developed and made available by the department of education." *Id.*; *see also* R.C. 3313.536(F) (requiring "standardized form"). The plan's contents are set by statute: "[a] protocol for addressing serious threats to . . . safety," and "[a] protocol for responding to any emergency events that occur and compromise . . . safety," including a floor plan, a site plan, and an emergency contact information sheet. R.C. 3313.536(B).

The Board asserts this exception as to *every single one* of the disputed requests even though many of the requested records would not fall within the plan at all. Background research and communications with FASTER do not fall within the plan—they are not "protocols" for addressing threats or responding to emergencies, and they are not part of the plan's "single," "standardized," document itself. Yet the Board repeatedly invokes this exception to every request at issue. Consider, for example, the email newsletter from the Buckeye Firearms Association that

the Board disclosed with its supplemental letter; it also asserts that this email is covered by the emergency plan exception. MTD Ex. A. It is doubtful that the Board placed these newsletters in its plan. Moreover, the Board's own statements raise doubt as to whether all the requested documents are in the plan. The Board previously asserted that the documentation of its firearm authorization policy is "directly tied to" (not in) the emergency management plan. Compl. Ex. 7. Now the Board says that it is "exclusively maintained" in the plan. MTD at 11. Which is it? The Board's wanton use of the emergency-plan exception casts doubt on the credibility of its use.

Even assuming that all of the responsive documents are literally in the plan, the requested documents are not properly part of the plan under Ohio law. As described above, the emergency-plan exception to public records request is a narrowly circumscribed exception applicable only to the plan itself—a "single document" with specific content delineated by the state board of education. *See* R.C. 3313.536(I). It is not a repository of every document related to the Resolution, and the Board cannot treat it as such just to shroud its actions in secrecy. Nor can it cover documents that, even if included in the plan, also exist outside of it. Instead, the emergency plan exception includes the basic response protocols, site plans, and the contact information for those with particular roles in case of emergency. It does not include the contents of training programs, the types of mental health evaluations armed staff must undergo, the conditions upon which authorization to carry arms will be withheld, and the like. To cover all such documents within the emergency plan rule, the Court would have to expand the exception so far as to let it cover any record related to security or emergencies. But not even the "security record" exception does that. The Court should not create such a broad loophole to the Ohio Public Records Act.

CONCLUSION

For these reasons, plaintiff-relator respectfully requests that the Court deny the Board's motion for partial dismissal.

Respectfully submitted,

/s/ Rachel Bloomekatz

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October 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2018, a copy of the foregoing opposition to the motion for partial dismissal was served via email on the following:

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