BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD, et al.,

Plaintiffs/Relator,

v.

MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Defendants/Respondents.

Case No. CV 2018 09 2028

Judge Charles L. Pater

OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

(REDACTED VERSION)

OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

The plaintiffs, through undersigned counsel, hereby oppose the Madison Local School District Board of Education's motion for a protective order (filed January 31, 2019). The Board's motion should be in large part DENIED for the reasons that follow.

INTRODUCTION

The defendants seek a protective order to seal the majority of evidence in this case from public view despite Ohio's constitutional commitment that "[a]ll courts shall be open." Ohio Const. art. I, § 16. They would upset the well-settled presumption that all Ohio court records be made accessible to the public in order to preserve the public's right to know and assess the functioning of its government. And what justification do they offer for this sweeping secrecy? Only vague assertions that the release of *any* of this information will somehow make Madison school staff and students less safe. Not only are such assertions unsupported, they are directly contradicted by the fact that much of this information is *already* public, that this Court has just ordered that more information be made public, and that disclosing the remaining information has no safety implications. Accordingly, the defendants cannot satisfy their burden to demonstrate by "clear and convincing evidence" that any specific document or fact *must* be kept secret or that the Court should take the extraordinary step of keeping these proceedings almost entirely from public view.

To be clear, the plaintiffs do not dispute—and have never disputed—[redacted] And, indeed, none of the summary judgment briefs or exhibits contain the names of such individuals, who are referred to simply as John Does. But the defendants' request for a protective order extends far beyond that. They assert that all documents they have marked "Highly Confidential" be kept entirely sealed, including hundreds of pages of deposition testimony. And the defendants seek to seal "*any* live testimony provided to the Court," regarding any matter they alone have deemed "Highly Confidential," Mot. at 1 (emphasis added), implicating core First Amendment questions regarding access to the Courts. Their request is overbroad and should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Confidentiality Agreement. The plaintiffs have consistently disputed the need for much of the information in this case to be kept secret from the public. However, given the Board's desire to maintain secrecy and the plaintiffs' desire to facilitate the discovery process, the parties entered into a Confidentiality Agreement. *See* Mot., Ex. A ("Agreement"). Under the Agreement, the parties agreed that the defendants could designate documents "Highly Confidential" that would be restricted to "attorneys' eyes" only until an order from this Court resolving the confidentiality disputes. *Id.*[1]

2. The defendants' motion. On January 31, 2019, the defendants filed a motion to restrict public access to all the information they unilaterally designated "'Highly Confidential' . . . to the extent [it is] contained in the parties' motions for summary judgment, exhibits filed with the

[1] The defendants incorrectly assert that "both parties recognized the sensitive nature of the Highly Confidential information in the case" and "accordingly" entered into the Agreement. Mot. at 3. *See* Agreement 2–4. Moreover, the Agreement allows the defendants to mark documents "Confidential" (rather than "Highly Confidential") that could be made available to the plaintiffs themselves. But the defendants have not marked any documents as "Confidential," preventing the plaintiffs from seeing key information in this case. *Id.* at 3–4.

court, the transcripts of deposition testimony filed with the court, and any live testimony provided to the Court in this case." Mot. at 1. While the motion was pending, the parties agreed (with the Court's permission) to file provisionally redacted copies of their summary judgment documents with the Clerk of Court. Because the defendants have designated so much material "Highly Confidential," the plaintiffs' public version of its motion for summary judgment is highly redacted and 14 of their 23 exhibits are under seal. [redacted]

3. The scope of the disagreement. The defendants seek a protective order covering five large (and vague) categories of testimony and documents. *See* Mot. at 2, 8. To aid the Court, the plaintiffs list below their disputes with respect to these categories.

1. The plaintiffs *agree* that "the identities" (including names and positions) "of the individuals authorized to carry a concealed weapon in a school safety zone" may be kept confidential.

2. The plaintiffs *disagree* that the Firearms Authorization Policy, *see* Pls' MSJ, Ex. C, and any testimony regarding that Policy needs to be kept from public view.

3. [redacted]

4. The plaintiffs *disagree* that the "details regarding the administration and implementation of the Policy" need to be kept secret, including:

   - [redacted]

5. The plaintiffs are not sure what is covered in the defendants' broad and nonspecific request that "communications regarding security details" be kept secret from the public, but to the extent that they include any details mentioned in 2–4 above, or do not reveal the names or identities of the John Does, the plaintiffs *disagree* that such communications should be protected.

ARGUMENT

I. Given the constitutional interests at stake, Ohio law sets a high bar for keeping court filings secret.

The Ohio Supreme Court has recognized that both the First Amendment to the U.S. Constitution and Section 16, Article I of the Ohio Constitution guarantee "the public's right to open courts." *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 8. This right to open courts includes a right to access evidence relevant to court proceedings that has been filed with the court. *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 490, 758 N.E.2d 286 (1st Dist.2001). As a result, Ohio has fashioned rules governing court procedures that "clearly contemplate that discovery documents on file with the court shall not be sealed from the public absent 'good cause shown,' thus creating a presumption in favor of public access to such materials." *Id.* Therefore, "requests for protective and confidentiality orders should be viewed by trial courts with abundant skepticism and granted only begrudgingly." *Id.* at 490–91.

This understanding of the public's right to access court documents is enshrined in the Rules of Superintendence for the Courts of Ohio. Under Superintendence Rule 45(A), all court records are "presumed open to public access." And while Rule 45(E)(2) provides an exception to public access, it establishes a high bar before a protective order may be issued: a court must "find[] by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." The factors that may be considered in determining if a "higher interest" exists are laid out in the Rule: "(a) Whether public policy is served by restricting public access; (b) Whether any state, federal, or common law exempts the document or information from public access; (c) Whether factors that support restriction of public access exist, including risk of injury to

persons . . . ." *Id.* And even if a court were to conclude that a "higher interest" requires limiting public access, Rule 45(E)(3) requires that the court "use the least restrictive means available" to keep secret only the bare minimum of information required. *See* Sup. R. 45(E)(3)(a)–(e).

II. Allowing public access to the disputed information, [redacted] does not increase the risk of harm to anyone.

The defendants' motion for sealing all information designated "Highly Confidential" primarily argues that disclosing any information about [redacted] training, the Board's policy, or its implementation "could result in serious physical harm" to teachers and students. *See* Mot. at 7. But, [redacted] their contention is wholly unsupported. Such unsubstantiated claims fall far short of establishing by clear and convincing evidence that the presumption in favor of public access is overcome. Quite the opposite: their argument is undercut by the fact that much of the "Highly Confidential" information is *already* public, [redacted], and their inability to maintain a consistent position on what indeed needs to be kept secret from the public.

A. The plaintiffs do not oppose [redacted]

The only specific security risks that defendants identify *anywhere* in their brief relate to the risks associated with disclosing [redacted] namely, that they would become targets for an armed shooter and their family could be harassed by those who opposed the Board's policy. *See* Mot. at 7–11. The defendants' expert, for example, opines that "anonymity of armed staff in schools" is important for their safety and ability to protect students, but does not opine that any other information deemed "Highly Confidential" needs to be so treated. *See* Aff. of John Benner, Mot., Ex. B at ¶¶ 15–16. Because there are articulable safety concerns backed by expert evidence, the plaintiffs do not oppose the Board's desire to keep the identities of [redacted]

confidential. Ensuring confidentiality of [redacted] identities is not difficult: identifying information [redacted] can be redacted from any documents and the parties can refer to them as John Does. The parties have already done so. *See* Defs' MSJ at 1.

But this security justification cannot be extended beyond identifying the John Does themselves—and the Board's own inconsistency as to confidentiality underscores the point. At one time, the defendants argued that it would be a security risk to even disclose *whether* it was authorizing any teachers to be armed. Compl., Ex. 7 (Board Letter dated Aug. 15, 2018). Then it disclosed that fact unredacted and without a request for a protective order on the public docket. *See* Defs' Emergency Mot. to Quash Subpoenas at 1 ("The John Does are Madison employees who are authorized by the Board to carry a concealed weapon in a school safety zone."). Then, they argued orally to the Court on January 10, 2018 that they could not even hint at the number of authorized staff in open court. But in the first paragraph of their public summary judgment briefing, [redacted], even though the Court allowed them the opportunity for redaction pending the outcome of this motion. *See* Defs' MSJ at 1 (citing to testimony of John Doe 3). The defendants' moving-target approach to confidentiality only undermines their claim for secrecy.

B. The defendants fail to muster a safety rationale for keeping any other document or testimony secret from the public.

The defendants cannot bootstrap their argument that the *identities* of the John Does must be kept confidential for security concerns into a broader argument that the entirety of the documentation and testimony regarding the Policy and its implementation be kept secret from the public. The defendants broadly assert that "the administration and implementation of the Policy, its training requirements, and communications regarding security details" should not be disclosed because it will make Madison schools "less safe." Mot. at 8. But, tellingly, they cannot point to any

specific piece of information that, if made public, would create a credible threat to security. That alone should be enough to deny their protective order. A review of the documents the defendants wish to shield from the public reveals that their exposure would not undermine security.

1. The Firearm Authorization Policy. Consider, first, the contents in the Firearm Authorization Policy; the defendants do not explain how disclosing it would compromise security.[2] And they cannot [redacted].[3]

Nor is there a reason keep testimony about the Policy confidential. For example, the plaintiffs' summary judgment brief cites testimony from Superintendent Tuttle-Huff explaining [redacted] For unclear reasons, the defendants have

[2] The fact that Madison *has* a Firearms Authorization Policy is not a secret. *See* Mot. at 2.

[3] The same is true for [redacted] Pls' MSJ, Ex. J.

designated this testimony "Highly Confidential." Similarly, in arguing about [redacted] Here too, there is no security reason to keep this testimony secret. Likewise, the plaintiffs cite to transcript testimony [redacted] There is also no safety reason to keep this information hidden.

2. Training materials. Next, the defendants assert that "details regarding training" of [redacted] must be kept secret. Mot. at 2. The plaintiffs recognize that the Court has held that the training plan [redacted] is not a matter of public record because it is appropriately part of the school's emergency management plan. *See* Entry at 8–9. But, as it turns out, most of the details regarding the training are already public. [redacted] Buckeye Firearms Foundation Mot. to Intervene at 3 ("certain teachers and staff members of the Madison Local Schools . . . have participated in the FASTER program.") (filed unredacted without objection from the Board). The contents of that training are public via FASTER's robust website and publications.[4] And FASTER has even invited media to film its training, which has been shown around the country and world.[5] [redacted]

[4] *See e.g.,* School Authorization Checklist at 17-18 available at https://perma.cc/Z7YM-C9CR (accessed Feb. 6, 2019).

[5] For example, a recently-aired documentary in the United Kingdom takes viewers inside a FASTER training. *See "Teachers Training To Kill: A new Channel 4 documentary explores a special camp,"* https://perma.cc/8SQH-JA42 (promo for video documentary) (accessed Feb. 5, 2019).

[redacted] It shouldn't be.

3. The Board's process for vetting [redacted] In asking this Court to protect all information regarding the "administration and implementation" of the Policy, the defendants also seek to hide basic information about the process the Board follows for selecting and vetting [redacted] But the Board already announced the process to the public in its "Letter to the Community" this past summer, telling parents that its process requires two rigorous interviews before a committee, a mental health evaluation, and training. Pls' MSJ, Ex. N. So by its own actions it has demonstrated that revealing this information will not harm security. And this Court ordered that the Board must disclose under the Ohio Public Records Act the "methodology . . . [it] will employ to determine who it will authorize to carry firearms." Entry at 6–7. [redacted]

4. [redacted]

[redacted]

5. Rules for [redacted]

[redacted]

[redacted]

The upshot: None of this information reveals anything meaningful about Madison's security measures that would allow an attacker to "analyze, neutralize, and/or avoid Madison's security measures" as the defendants claim. *See* Mot. at 8. The defendants have failed to provide clear and convincing evidence that all this information must be shielded from public view.

III. The defendants cannot hide behind the Ohio Public Records Act.

Perhaps recognizing that they have no credible security claim, the defendants argue that because Ohio law allows the Board not to disclose some of this information upon a public records request, it accordingly should be kept under seal in these judicial proceedings. Mot. at 5–6. But the defendants are wrong both that (1) all this material is excepted from the Ohio Public Records Act; and (2) that the scope of the Act should control disclosure in these judicial proceedings.

A. Ohio law does not exempt disclosure of the materials at issue.

The defendants argue that the so-called "Highly Confidential" material is protected from disclosure as a "security record" or as "information related to a school's emergency management plan" under Ohio's Public Records Act. *See* Mot. at 5. Not so. The defendants pretend like it is settled law that all these documents and testimony would be withheld under the Act. But this Court has determined that many of the documents they seek to hide are public records subject to disclosure even outside of litigation. *See* Entry at 6–7. And based on the reasoning in the Court's decision, the information the defendants want protected would not fall within the Act's exemptions.

First, the information is not critical to security and hence is not exempt under R.C. 149.433(A)(3)(a). Ohio law exempts from the Act only "information *directly* used for protecting or maintaining the security of a public office against attack." *Id.* (emphasis added). And the Ohio Supreme Court has interpreted this language to implicate only information that if released would clearly affect the safety of the public, such as "security and safety violations" that would "expose security limitations and vulnerabilities" that could be used to attack a public officer. *State ex rel. Plunderbund Media v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶¶ 24, 29. So too this Court explained that information that would provide "unauthorized access to deadly weapons" falls within this exception. Entry at 6. Yet none of the material the defendants seek to seal (aside from the identities [redacted]) would have a direct impact on safety.

Second, the majority of information the defendants seek to withhold is not part of the school's emergency management plan. The plan is a standardized form developed by the Ohio department of education. Ohio Admin. Code 3301-5-01; *see also* R.C. 3313.536(B)–(F). [redacted].[6] And while the Board's written "'procedure for responding to . . . threats and emergency events,'" is properly part of the plan, *see* Entry at 9 (quoting R.C. 3313.53), Ohio law neither requires nor allows inclusion in the plan of the large amount of information that the defendants want to hide, [redacted]

[6] [redacted]. *See* https://bit.ly/2M436zl (accessed Feb. 7, 2019).

[redacted] If the John Does' identities are redacted, even the Superintendent cannot muster a safety reason why all this material must be kept secret. *See* Aff. of Lisa Tuttle-Huff, Mot., Ex. D at ¶ 6.

The Board, moreover, cannot simply stuff documents it has otherwise created or collected into the plan and claim that they can be withheld. *Id.* (declaring that "[a]ll matters related to the [Policy], including all related documents" are part of the plan); Lefkowitz Aff., Ex. D [redacted] Ohio courts have expressly rejected similar attempts to make an end-run around disclosure requirements in the context of attorney-client privilege, holding that a client cannot give documents to an attorney to make them privileged. *See In re Story*, 159 Ohio St. 144, 111 N.E.2d 385, 387 (1953). If the rule were otherwise, it "would lead to an absurd result" that would hamper the legal disclosure of information. *In re Keough*, 151 Ohio St. 307, 314, 85 N.E.2d 550 (1949). That principle applies with equal force here.

B. Even if the Policy and implementing documents are exempt from Ohio's public records law, they should be public in these proceedings.

To the extent that some of the contested materials are properly in the school's emergency management plan, they should still be public in this proceeding. It is well settled that information exempted from public records law "does not protect records from a proper discovery request in the course of litigation." *Henneman v. City of Toledo*, 35 Ohio St. 3d 241, 244–45, 520 N.E.2d 207 (1988). These cases recognize an important distinction: Information may have a somewhat heightened security or privacy risk that is sufficient to prevent disclosure to a citizen who may be merely curious about the information, but when that information becomes relevant to a lawsuit and the vindication of legal rights, the public's right of access is even more significant. In *Henneman*, for example, the Court held that discovery was appropriate even where there was a strong security concern—ongoing criminal investigations that could be compromised by disclosure. *Id.* at 245.

And even though school board documents could be withheld under the deliberative process exemption to the Act, an Ohio appeals court held (applying *Henneman*) that such material was subject to discovery, overturning the trial court's grant of a protective order. *See Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp. Local 530*, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist.1995). This Court should reach the same conclusion here.

IV. Disclosure furthers public policy by protecting the legitimacy of the Court's ruling, and revealing local government operations, on such an important and highly-contested topic.

There is a strong public policy in favor of disclosing the contested information. There is an "unquestionably 'substantial'" public interest in open court records because "[t]he historically public nature of court proceedings and records protects the inherent fairness of the proceedings." *Dzina v. Dzina*, 2002-Ohio-2753, ¶ 21 (8th Dist.). And it is particularly important to unseal records that are "necessary to understanding a court's interpretation of a particular issue, specifically those issues that are 'crucial to the public.'" *SEC v. Abdallah*, N.D.Ohio No. 1:14 CV 1155, 2015 WL 12766492, at *2 (May 19, 2015) (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir.1983)). This is just such a case. Members of the public have passionate views about arming teachers in schools, and no issue could be more "crucial to the public" than the safety of Ohio's children. And—whether people agree or disagree with the ultimate outcome in the case—it is critical to the decision's legitimacy that the public be able to understand the parties' arguments and the Court's reasoning. This can only be achieved by keeping the filings, and the underlying evidence, open to the public as much as possible without compromising anyone's safety.

Furthermore, there is a well-established public interest in "shed[ding] light on . . . government's performance, thereby enabling Ohio citizens to understand better the operations of their government." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 & fn.4 (6th Cir.1998). This

interest is so "compelling" that courts have required the disclosure of deeply personal information, including city employees' personnel files, psychologist reports, background investigation reports, and personal history questionnaires. *See id.* So too here. The information that the plaintiffs have included with their motion for summary judgment is not only relevant to the legal dispute, but also facilitates the public's knowledge about how its local government has performed in adopting and implementing a resolution that intimately impacts citizens' lives. Transparency and accountability are, indeed, fundamental to democracy. That is why court records are presumptively accessible.

V. There is no justification for sealing live testimony provided to the Court.

The defendants further request that the public be restricted from viewing "*any* live testimony provided to the Court in this case" that touches on the broad swath of information it deems "Highly Confidential." Mot. at 1, 12 (emphasis added). The result would be a closed trial. The defendants' request presumably applies to any argument by counsel that relays evidence the defendants want to keep secret—so the summary judgment hearing would be closed too. That is extreme. The public has a right to attend proceedings in this case as they do with every other. Closing the courtroom would contravene the Ohio Constitution's clear directive that the courts shall be open.[7]

CONCLUSION

For these reasons, the plaintiffs respectfully request that the Court deny the defendants' motion for a protective order, except as to the names and identities of [redacted]

[7] The only live testimony that implicates security is that of the John Does because it would reveal their identities. But it would be premature to address that issue now because the case could be resolved on motions for summary judgment. If the Court requires their testimony to resolve factual disputes, narrower options are available, such as stipulating to deposition testimony.

Respectfully submitted,

/s/ Rachel Bloomekatz
RACHEL BLOOMEKATZ (Ohio Bar No. 91376)
GUPTA WESSLER PLLC
1148 Neil Avenue
Columbus, Ohio 43201
Phone: (202) 888-1741
Fax: (202) 888-7792
rachel@guptawessler.com

ALLA LEFKOWITZ (PHV-20596-2019)
JAMES MILLER (PHV-20599-2019)
EVERYTOWN LAW
450 Lexington Ave. #4184
New York, NY 10017
(mailing address)
Phone: (646) 324-8365
alefkowitz@everytown.org
jedmiller@everytown.org

Attorneys for Plaintiff-Relator

February 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, a copy of the foregoing opposition to the motion for partial dismissal was served via email on the following:

Alexander L. Ewing
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069
513.870.8213
513.870.0999 (fax)
aewing@fbtlaw.com

/s/ Rachel S. Bloomekatz
Attorney for Plaintiff-Relator

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Court: Butler County Court of Common Pleas

Case Caption: Gabbard, et al. v. Madison Local School District Board of Education, et al.

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Attorney Information: Alla Lefkowitz
(PHV-20596-2019)
EVERYTOWN LAW
450 Lexington Ave. #4184
New York, NY 10017
(mailing address)
Phone: (646) 324-8220

Document Description: Plaintiffs' Opposition to Defendants' Motion For Protective Order **(REDACTED)**

Date of Transmission: February 7, 2019

Transmitting Fax No.: 917-410-6932

Number of pages: 17 pages (inclusive of this page)