

IN THE SUPREME COURT OF OHIO

ANDREW WELSH-HUGGINS,	:	Case No. 2019-1481
Appellant,	:	On Appeal from the Jefferson County
v.	:	Court of Appeals, Seventh Appellate
OFFICE OF THE PROSECUTING	:	District
ATTORNEY, JEFFERSON COUNTY,	:	Court of Appeals
OHIO,	:	Case No. 19 JE 0005
Appellee.	:	

**BRIEF OF AMICI CURIAE OHIO COALITION FOR OPEN GOVERNMENT, OHIO
ASSOCIATION OF BROADCASTERS, REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS AND 10 ADDITIONAL MEDIA ORGANIZATIONS
IN SUPPORT OF APPELLANT ANDREW WELSH-HUGGINS**

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I. INTRODUCTION AND SUMMARY

Pursuant to its statutory mandate to resolve public-records disputes in an "expeditious and economical"¹ manner, a special master of the Court of Claims found that exterior courthouse surveillance footage requested by Appellant Andrew Welsh-Huggins was subject to release under the Public Records Act, R.C. 149.43. *Welsh-Huggins v. Office of the Prosecuting Atty., Jefferson Cty.*, Ct. of Cl. No. 2018-00793PQ, 2019-Ohio-473, ¶ 21. Welsh-Huggins, a reporter with the Associated Press, requested footage depicting the shooting of Judge Joseph Bruzzese, Jr. of the Jefferson County Court of Common Pleas in August 2017. Judge Bruzzese and a nearby probation officer returned fire, and the assailant died at the scene. The incident garnered both local and national media attention.²

The special master weighed the evidence submitted by the parties and reviewed the requested footage in camera before rejecting "conclusory assertions" by the records custodian that the footage constituted a "security record" under R.C. 149.433(A). *Id.* The special master found that the footage did not satisfy any prerequisite for that exemption in the Public Records Act because (1) it did not "contain[] information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," (2) it was not "assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism," and (3) it was not "[a]n emergency management plan" adopted pursuant to R.C.

¹ R.C. 2743.75(A).

² *E.g.*, *Man Who Shot Judge is Father of Steubenville Player Convicted of Rape*, Akron Beacon-Journal (Aug. 21, 2017), <https://www.beaconjournal.com/akron/news/man-who-shot-judge-is-father-of-steubenville-player-convicted-of-rape>; Christine Hauser and Christina Caron, *Ohio Judge Returns Fire After Ambushed on Way to Court*, The New York Times (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/us/ohio-judge-gun-ambush.html>.

3313.536. *Id.*; R.C. 149.433(A). The Court of Claims adopted the special master's report over objections by the records custodian, and ordered release of the footage. *Welsh-Huggins v. Office of the Prosecuting Atty., Jefferson Cty.*, Ct. of Cl. No. 2018-00793PQ, 2019-Ohio-964.

The Seventh District Court of Appeals reversed the judgment of the Court of Claims, erroneously finding that the footage was a security record. *Welsh-Huggins v. Office of the Prosecuting Atty., Jefferson Cty.*, 7th Dist. No. 19 JE 0005, 2019-Ohio-3967, 133 N.E.3d 550. In reaching that conclusion, the court failed to apply a deferential standard of review; instead, it reweighed the evidence *de novo* and relied exclusively on an affidavit that, by the court's own admission, was "based on hearsay and . . . not from an office that provides security to the courthouse." *Id.* at ¶ 40-41.

Amici Curiae urge this Court to reinstate the judgment of the Court of Claims for two reasons. First, while *Welsh-Huggins* correctly shows in his Merit Brief that the Seventh District misconstrued Court of Claims procedure under R.C. 2743.75, Amici Curiae are further concerned that the appellate court did not appreciate how limited its role is under that statute. By conducting a *de novo* review, the Seventh District improperly injected complexity, uncertainty, and expense into a process intended by the General Assembly to be anything but. R.C. 2743.75(A).

Second, the Seventh District's decision broadly threatens access to otherwise public records. Its expansive view of security records under R.C. 149.433(A) is contrary to both specific precedent of this Court, *State ex rel. Rogers v. Dep't. of Rehab. & Correction*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, and this Court's general guidance that exceptions to the Public Records Act must be narrowly "construed against the public-records custodian" and

"squarely" apply. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23; *see also State ex rel. School Choice Ohio, Inc. v. Cincinnati Pub. Sch. Dist.*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 12 (Public Records Act must be construed "liberally in favor of broad access" with "any doubt . . . resolved in favor of disclosure of public records"). The Seventh District's view of the footage at issue is further inconsistent with the view of jurisdictions outside Ohio that have evaluated public access to the same or similar records and have ruled in favor of disclosure.

II. STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae joining this brief are the Ohio Coalition for Open Government, Ohio Association of Broadcasters, Reporters Committee for Freedom of the Press, The E.W. Scripps Company, Gannet Co., Inc., International Documentary Association, Investigative Reporting Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Freedom of Information Coalition, The News Leaders Association, Society of Environmental Journalists, and Society of Professional Journalists.

The news media frequently relies upon public records to report on matters of public concern. As organizations that advocate on behalf of the news media, amici curiae have an interest in ensuring that courts correctly interpret the Public Records Act, including the procedures by which denials of access to public records are resolved.

III. THE COURT OF APPEALS FAILED TO APPLY A DEFERENTIAL STANDARD OF REVIEW CONTRARY TO R.C. 2743.75

The proper standard of review for Court of Claims decisions in public-records cases under R.C. 2743.75, where objections are made, is abuse of discretion. Since the Seventh District did not show that the Court of Claims acted unreasonably, arbitrarily or unconscionably

in adopting the special master's findings, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), this Court should reverse the judgment of the Seventh District.

Four years ago, the General Assembly unanimously voted to enact R.C. 2743.75 "to provide for an expeditious and economical procedure that attempts to resolve disputes alleging a denial of access to public records in violation of division (B) of section 149.43 of the Revised Code." R.C. 2743.75(A). The law vests the Court of Claims with jurisdiction to adjudicate "complaints based on alleged violations" of the Public Records Act, and creates a swift process for resolving such disputes. R.C. 2743.75(A); May 18, 2016 Sponsor Testimony by Senate President Faber ("Faber Testimony"), p. 1 ("Taken together, high legal fees and a drawn-out court action can make it prohibitively expensive for most Ohioans to challenge a denied request. Senate Bill 321 will alleviate this problem by creating a faster and more affordable alternative to the current system."). Section 2743.75 requires the parties to attempt mediation, and if that fails, a special master shall prepare a report and recommendation for review by the Court of Claims. R.C. 2743.75(D)–(F). This process is designed to resolve such disputes within 45 days. Faber Testimony, p. 2.

The use of special masters under R.C. 2743.75 mirrors the use of magistrates in common pleas courts under Ohio Civ. R. 53(D). Like magistrates, "the special master shall submit to the court of claims a report and recommendation based on the ordinary application of statutory law and case law as they existed at the time of the filing of the complaint." R.C. 2743.75(F)(1). *Accord*: Ohio Civ. R. 53(D)(3)(a). Any party may file written objections to the report, which "shall be specific and state with particularity all grounds for the objection." R.C. 2743.75(F)(2). *Accord*: Ohio Civ. R. 53(D)(3)(b). If no party objects, then the Court of Claims "shall promptly issue a final order adopting the report and recommendation, unless it determines

that there is an error of law or other defect evident on the face of the report and recommendation." R.C. 2743.75(F)(2). *Accord:* Ohio Civ. R. 53(D)(4)(c). But if objections are filed, then the Court of Claims "shall issue a final order that adopts, modifies, or rejects the report and recommendation." R.C. 2743.75(F)(2). *Accord:* Ohio Civ. R. 53(D)(4)(d).

Given the parties' opportunity to object to a special master's report, and the discretion of the Court of Claims to adopt, modify or reject that report, appellate courts should apply the same deference they afford to trial courts acting on magistrate decisions, *i.e.*, reverse *only* when there is an abuse of that discretion. *Mayle v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-541, 2010-Ohio-2774, ¶ 15 ("the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision is an abuse of discretion").³ Pursuant to that standard of review, a lower court's "determination will only be reversed where it appears that [its] actions were arbitrary or unreasonable." *State Farm Mut. Auto. Ins. Co. v. Fox*, 182 Ohio App.3d 17, 2009-Ohio-1965, 911 N.E.2d 339, ¶ 11 (2d Dist.). *Accord:* *Blakemore*, 5 Ohio St.3d at 219 ("The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."). Thus, the court

³ *Accord:* *Dyrdek v. Dyrdek*, 4th Dist. Washington No. 09CA29, 2010-Ohio-2329, ¶ 12 ("An appellate court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion."); *Krohn v. Krohn*, 6th Dist. Wood No. WD-16-010, 2016-Ohio-8379, ¶ 7 ("We review the decision of a trial court overruling objections to a magistrate's decision for an abuse of discretion."); *Foy v. Vaughn*, 7th Dist. Columbiana No. 14 CO 30, 2015-Ohio-3575, ¶ 14 ("An appellate court reviews a trial court's ruling on a magistrate's decision for abuse of discretion."); *Miller v. Harrison*, 9th Dist. Summit No. 22400, 2005-Ohio-3324, ¶ 9 ("A trial court's decision whether or not to adopt the decision of a magistrate is reviewed by this Court under the abuse of discretion standard of review."); *Woodward v. Kleese*, 11th Dist. Trumbull 2007-T-0002, 2007-Ohio-5218, ¶ 19 ("In reviewing a trial court's decision to adopt or reject a magistrate's decision, an appellate court looks for abuse of discretion.").

of appeals "is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

Such deference is also consistent with the General Assembly's intent to provide "an expeditious and economical procedure" for resolving public-records disputes. R.C. 2743.75(A). As former OCOG President Dennis Hetzel testified in support of the statute,

"Most government officials try to do the right thing under the law, but it's a tremendous advantage to the government if your only recourse is to hire a lawyer and go to court if you're denied access. An expedited, fair appeals process levels the playing field. It's obvious why this is so: Most citizens or organizations will eventually give up when faced with a potential lengthy and costly court battle as the only option. Even media organizations, which seriously take their obligation to be watchdogs of government, do not have the resources to pursue these cases to the extent that they would have in the past."

May 24, 2016 Testimony of Dennis Hetzel, before Ohio House Government Accountability & Oversight Committee. De novo review, as applied by the Seventh District below, would thwart those goals by incentivizing appeals, thus, increasing the time and cost needed to secure public records. Stated differently, de novo review would eviscerate the very purpose for which R.C. 2743.75 was enacted.

A deferential abuse-of-discretion standard is also appropriate given the expertise of the Court of Claims. The General Assembly designated the court as the "sole and exclusive authority in this state that adjudicates or resolves complaints based on alleged violations" of the Public Records Act ("except for a court that hears a mandamus action"). R.C. 2743.75(A). Thus, it recognized the Court of Claims as the expert in routine public-records cases, and its decisions should be given deference on appeal. *See, e.g., Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979) (cautioning courts from substituting their

"judgment for that of the agency, especially in areas of administrative expertise" in agency appeals); *Riffe v. Ohio Real Estate Appraiser Bd.*, 130 Ohio App.3d 46, 50, 719 N.E.2d 587 (9th Dist.1998) ("Courts must give 'due deference' to interpretation of the technical and ethical requirements of a profession provided by its administrative body.").

IV. THE COURT OF APPEALS' DECISION THREATENS ACCESS TO OTHERWISE PUBLIC RECORDS

This Court has repeatedly held that the Public Records Act must be construed "liberally in favor of broad access" with "any doubt . . . resolved in favor of disclosure of public records." *E.g., State ex rel. School Choice Ohio, Inc. v. Cincinnati Pub. School Dist.*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 12. A records custodian bears the burden to show that any withheld records "fall squarely within the exception" claimed. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

The exception at issue here is the "security record" provision of R.C. 149.433(A), which means any of the following:

"(1) Any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage;

(2) Any record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, including any of the following:

(a) Those portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and communication codes or deployment plans of law enforcement or emergency response personnel;

(b) Specific intelligence information and specific investigative records shared by federal and international

law enforcement agencies with state and local law enforcement and public safety agencies;

(c) National security records classified under federal executive order and not subject to public disclosure under federal law that are shared by federal agencies, and other records related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism.

(3) An emergency management plan adopted pursuant to section 3313.536 of the Revised Code."

(Emphasis added.)

As the special master recognized below, examples of such records include:

"[I]nvestigation files of threats made against the governor, *State ex rel. Plunderbund Media, L.L.C., v. Born*, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶3-7, ¶19-31; contemporary key-card-swipe data for a county executive against whom verified threats were made, *State ex rel. Ohio Republican Party v. FitzGerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 24; the cell phone number of an officer providing security to an elected official, and an email regarding the advisability of the official attending an event, *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 69-70, 78 (10th Dist.); and a list of documented at-risk officers, a future demonstration-control staging area, and responding officer equipment. *Gannett GP Media, Inc. v. Ohio Dept. of Pub. Safety*, Ct. of Cl. No. 2017-00051, 2017-Ohio-4247, ¶ 31, 39-40."

Welsh-Huggins v. Office of the Prosecuting Atty., Jefferson Cty., Ct. of Cl. No. 2018-00793PQ, 2019-Ohio-473, ¶ 17 (emphasis added).

In *State ex rel. Rogers v. Dep't. of Rehab. & Correction*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, this Court refused to extend the security-record exemption to surveillance footage depicting a use-of-force incident in a prison, even though the records custodian argued that the footage could be reverse-engineered to reveal security planning,

policies, techniques, personnel, equipment, and capabilities. *Id.* at ¶ 18. The footage was merely from "a single video camera on a specified day and time and [did] not contain any information as to the network of cameras operating in and around the prison." *Id.* at ¶ 21. The *Rogers* court also did not allow the records custodian to establish the exemption with conclusory affidavits absent an explanation of how the surveillance footage "actually constitute[d]" one of the categories of security records under R.C. 149.433(A). *Id.* at ¶ 20.

Here, after viewing the footage and weighing the evidence, the special master found that the records custodian did not establish that the requested footage fell squarely within the security records exception; indeed, the special master explained that the records custodian did not demonstrate that information in the video was being "*directly used* for protecting or maintaining the security of a public office against attack, interference, or sabotage." *Welsh-Huggins*, 2019-Ohio-473 at ¶ 20 (internal citations omitted) (emphasis added). Specifically,

"The video is not a planning, training, investigatory, or policy document maintained by the office for security purposes. . . . The video contains no audio, and therefore no verbal commands, codes, perceptions, reasoning, choices, plans, or explanations are conveyed. While relevant law enforcement and security offices likely created after-action reports and applied lessons learned to their training and protocols, the courthouse video itself does not contain specific and unique vulnerability assessments or response plans. There is no evidence presented that the video recording at issue actually constitutes "information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage," or was "assembled, prepared, or maintained by a public office * * * to prevent, mitigate, or respond to acts of terrorism."

Welsh-Huggins, 2019-Ohio-473 at ¶ 20 (emphasis in original).

The Seventh District, nevertheless, reversed. Relying solely on a hearsay-laced and conclusory affidavit, the appellate court found that the requested footage revealed "the

technical capabilities of the video security system, including the ability to zoom, rotate and isolate certain areas," including "blind spots and places an attacker could take cover and go undetected." *Welsh-Huggins v. Office of the Prosecuting Atty., Jefferson Cty.*, 7th Dist. No. 19 JE 00052019-Ohio-3967, ¶ 40. This is the very rationale that this Court rejected in *Rogers*, where footage from "a single video camera on a specified day and time and [did] not contain any information as to the network of cameras operating in and around the prison," was not a security record. *State ex rel. Rogers*, 2018-Ohio-5111 at ¶ 21.

The Seventh District further argued that the video showed the actual "emergency response means, methods, and procedures" following the shooting of Judge Brussze. *Welsh-Huggins*, 2019-Ohio-3967, ¶ 40. However, R.C. 149.433(A)(2) requires that such records be tied to preventing, mitigating, or responding to "acts of terrorism" and depict "specific and unique response plans" or "deployment plans of law enforcement or emergency personnel." While the requested footage may show an unfolding crime on the courthouse steps, it does not, as the Seventh District assumes, show any plans (or whether they were followed). Indeed, the Seventh District's rationale violates well-established precedent from this Court that routine incident reports and dash-cam footage are subject to release under the Public Records Act. *State ex rel. Beacon Journal Pub. Co. v. Univ. of Akron*, 64 Ohio St.2d 392, 398, 415 N.E.2d 310 (1980); *State ex rel. Cincinnati Enquirer v. Ohio Dep't. of Pub. Safety*, 148 Ohio St.3d 433, 2016-Ohio-7987, 71 N.E.3d 258.

Finally, if the Seventh District's decision were left to stand, Ohio would distance itself from jurisdictions that afford access to such records, despite Ohio courts' longstanding liberal construction of the Public Records Act. *E.g. Does v. King Cty.*, 192 Wash. App. 10 (2015) (university surveillance footage of shooting is a public record, despite contention by

university that disclosure could enable future individuals to evade system); Ky. Rev. Stat. 61.878(1)(m) (limiting security record exception to instances involving potential terrorist attacks); Colo. Rev. Stat § 24-72-204-(2)(a)(VIII)(A) and (B) (allowing release of general location of security systems). This Court should not allow Appellee to chip away at Ohio's public records law.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Seventh District Court of Appeals and reinstate the judgment of the Court of Claims in favor of Appellant Andrew Welsh-Huggins.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th day of April, 2020, I filed the foregoing Brief of Amici Curiae Ohio Coalition for Open Government, Ohio Association of Broadcasters, Reporters Committee for Freedom of the Press and 10 Additional Media Organizations in Support of Appellant Andrew Welsh-Huggins, and I certify that I have mailed the same to the following parties and counsel of record by regular U.S. mail.

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Ohio Coalition of Open Government ("OCOG") is a nonprofit corporation whose supporters include citizens, Ohio newspapers, Ohio broadcasters, local news websites, and others who share a common interest in informing the public about enforcing and studying the laws that obligate public offices to follow Ohio's "sunshine laws" related primarily to open records and open meetings. OCOG was formed in 1992 by the Ohio News Media Foundation, a nonprofit corporation affiliated with the Ohio News Media Association.

Ohio Association of Broadcasters is the not-for-profit organizations representing the interest of local radio and television stations in the state Ohio. Its membership is comprised of more than three hundred commercial and non-commercial station members. The association functions to protect the ability of over-the-air radio and television stations to operate their businesses and serve their local communities.

Reporters Committee for Freedom of the Press ("RCFP") is an unincorporated nonprofit association. RCFP was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, RCFP provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks

Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Gannett Co., Inc. is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

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