

IN THE SUPREME COURT OF OHIO

The Cleveland Clinic Foundation and  
 Fairview Hospital, )  
 )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 Richard Levin )  
 Tax Commissioner of Ohio, )  
 )  
 Beachwood City School District )  
 Board of Education and )  
 )  
 Cleveland Municipal School District )  
 Board of Education, )  
 )  
 Appellees. )

Appeal from the Ohio  
 Board of Tax Appeals  
**08-0411**  
 Board of Tax Appeals  
 Case Nos.:  
 2005-V-1726  
 2006-V-99  
 2006-H-117

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**NOTICE OF APPEAL OF APPELLANTS THE CLEVELAND CLINIC FOUNDATION  
 AND FAIRVIEW HOSPITAL**

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Stephen G. Sozio (0032405) (Counsel of Record)  
 Tracy K. Stratford (0069457)  
 Robert J. Colacarro (0074706)  
 JONES DAY  
 North Point  
 901 Lakeside Avenue  
 Cleveland, Ohio 44114  
 Tel. No. 216-586-3939  
 Fax No. 216-579-0212  
 sgsozio@jonesday.com  
 tkstratford@jonesday.com  
 rjcolacarro@jonesday.com

Counsel for Appellants The Cleveland  
 Clinic Foundation and Fairview Hospital

Alan Schwepe  
 Assistant Attorney General  
 State Office Tower, 25th Fl.  
 30 East Broad Street  
 Columbus, Ohio 43215

Counsel for Appellee  
 Richard Levin,  
 Tax Commissioner of Ohio

David H. Seed  
 Daniel McIntyre  
 BRINDZA, MCINTYRE & SEED LLP  
 1111 Superior Avenue, Suite 1025  
 Cleveland, Ohio 44114

Counsel for Appellees Beachwood City  
 School District Board of Education and  
 Cleveland Municipal School District  
 Board of Education

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**Notice of Appeal of Appellants The Cleveland Clinic Foundation and Fairview Hospital**

Appellants The Cleveland Clinic Foundation and Fairview Hospital hereby give notice of their appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in case Nos. 2005-V-1726, 2006-V-99 and 2006-H-117 on January 25, 2008. A true copy of the Decision and Order being appealed is attached hereto and incorporated herein by reference.

The appellants complain of the following error in the Decision and Order of the Board of Tax Appeals:

1. The Board of Tax Appeals compelled The Cleveland Clinic Foundation and Fairview Hospital to produce certain documents and information, some of which constitute trade secrets, and refused to seal those documents and information as trade secrets under R.C. 1333.61 et seq.

Respectfully submitted,



Stephen G. Sozio (0032405) (Counsel of Record)  
Tracy K. Stratford (0069457)  
Robert J. Colacarro (0074706)  
JONES DAY  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
Tel. No. 216-586-3939  
Fax No. 216-579-0212  
sgsozio@jonesday.com  
tkstratford@jonesday.com  
rjcolacarro@jonesday.com

Counsel for Appellants  
The Cleveland Clinic Foundation and  
Fairview Hospital

**CERTIFICATE OF SERVICE**

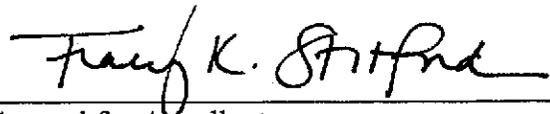
I hereby certify that a true and correct copy of this Notice of Appeal was sent by certified mail to the following counsel of record this 22nd day of February 2008:

Marc Dann  
Attorney General of Ohio  
Alan Schwepe  
Assistant Attorney General  
State Office Tower, 25th Floor  
30 East Broad Street  
Columbus, Ohio 43215

Counsel for Appellee Richard Levin,  
Tax Commissioner of Ohio

David H. Seed  
Daniel McIntyre  
BRINDZA, MCINTYRE & SEED LLP  
1111 Superior Avenue, Suite 1025  
Cleveland, Ohio 44114

Counsel for Appellees Beachwood City School  
District Board of Education and Cleveland Municipal  
School District Board of Education



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Counsel for Appellants  
The Cleveland Clinic Foundation and  
Fairview Hospital



APPEARANCES:

- |                                      |   |
|--------------------------------------|---|
| For the Property Owner               | - Jones Day<br>Stephen G. Sozio<br>Charles M. Steines<br>901 Lakeside Avenue<br>Cleveland, OH 44114   |
| For the Appellee<br>Tax Commissioner | - Marc Dann<br>Attorney General of Ohio<br>Janyce C. Katz<br>Assistant Attorney General<br>State Office Tower, 25th Floor<br>30 East Broad Street<br>Columbus, OH 43215 |
| For the BOEs                         | - Brindza, McIntyre & Seed LLP<br>David H. Seed<br>1111 Superior Avenue, Suite 1025<br>Cleveland, OH 44114  |

Entered January 25, 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Tax Appeals considers these matters pursuant to motions to compel discovery filed by the Beachwood City School District Board of Education and Cleveland Municipal School District Board of Education (collectively "BOE") and motions for a protective order filed by the Cleveland Clinic Foundation ("CCF").<sup>1</sup> The BOE asks the board to order CCF to fully respond to its outstanding discovery requests, and CCF requests that this board issue a protective order. Also before this board are proposed Stipulation and Confidentiality Orders signed and submitted by CCF and the BOE. The appellee Tax Commissioner is not a party to said agreements.

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<sup>1</sup> CCF originally motioned this board to conduct an ex parte hearing, perform an in camera inspection of documents responsive to the BOE's discovery requests, and then seal certain documents as "trade secrets" pursuant to R.C. 1333.61(D). This board denied CCF's motions as presented and is construing them instead as motions for a protective order. See *Cleveland Clinic Foundation v. Wilkins* (Interim Orders, Apr. 6, 2007), BTA Nos. 2005-V-1726, et al., unreported.

The board now considers these matters upon the motions, the briefs filed by the parties, including attached exhibits, the hearing record ("H.R.") regarding the motions for protective order, and the remaining records.<sup>2</sup>

At issue in these appeals is whether CCF's property is entitled to exemption from real property taxation under R.C. 5709.12 and 5709.121 based on alleged charitable use of the properties. CCF appeals the Tax Commissioner's final determination denying its tax exemption application for the Beachwood facility for tax year 2004 and denying a remission of taxes, penalties and interest for 2002 to 2003. The BOE appeals the commissioner's final determination granting tax exempt status to the Taussig and the Fairview facilities for tax year 2002 with remission of taxes, penalties and interest for 1999, 2000, and 2001.

The BOE motions this board to compel CCF to respond to its discovery requests, which encompasses original and supplemental requests and all CCF responses that stated objections to those requests. The BOE's discovery involves document production and interrogatories relating to, inter alia, CCF's physician and executive compensation, joint ventures, spin-offs, conflicts of interest, pricing and debt

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<sup>2</sup> These appeals involve real property tax exemption based on three separate final determinations issued by the Tax Commissioner. The records indicate that the subject properties, all owned directly or indirectly by CCF, are medical facilities known as the Beachwood Family Health and Surgery Center ("Beachwood," BTA No. 2005-V-1726), the Cleveland Clinic's Taussig Cancer Center ("Taussig," BTA No. 2006-V-99), and the Fairview Hospital ("Fairview," BTA No. 2006-H-117) (Fairview is part of the Cleveland Clinic Health System and is a wholly owned affiliate of CCF; Fairview's statutory transcript ["S.T."] at 280). In all three cases, CCF, the BOE, and the commissioner are represented by the same counsel, respectively. The discovery disputes arising from these three appeals are essentially identical. For efficiency and economy, this board has consolidated these matters to address the motions.

collection, and marketing for the 1999 to January 1, 2006 period.<sup>3</sup> See, for instance, Fairview case at BOE's motion to compel, Exs. 30-33.<sup>4</sup> The BOE asserts that its requests all address legal issues raised by the exemption statutes, including whether CCF is a charitable institution and whether its property is used exclusively for charitable purposes. CCF filed responsive pleadings in opposition to granting the BOE's motions to compel, claiming that discovery responses would contain trade secrets and that many of the BOE's requests are irrelevant, overly broad, duplicative, and onerous.<sup>5,6</sup>

CCF asks this board to issue a protective order to restrict disclosure of certain categories of alleged trade secrets and to limit its responses to certain BOE discovery requests.<sup>7</sup> CCF asserts that the alleged confidential information constitutes trade secrets under R.C. 1333.61. CCF additionally argues it should not be compelled to provide confidential information in discovery without confidentiality agreements in

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<sup>3</sup> Beachwood discovery covers the period from 2001 to January 1, 2006. Beachwood case at BOE's motion, Ex. 30.

<sup>4</sup> In the Fairview case, exhibit 30 consists of the BOE's first set of 79 interrogatories and 59 document requests; exhibit 31 consists of CCF's responses, including objections; exhibits 32-33 provide correspondence from BOE counsel to CCF counsel, which proposes revised and additional discovery requests and seeks clarification of and follow-up to CCF's responses. The Beachwood and Tussig cases contain generally similar discovery requests and exchanges.

<sup>5</sup> See appendix to CCF's opposition to motion to compel, which includes objections to interrogatories and document requests regarding, inter alia, CCF's compensation and bonuses, purchase agreements, joint ventures, travel, marketing, lobbying, debt collection, chargemaster, agreements with insurers, and responses to the Grassley Senate Finance Committee inquiry.

<sup>6</sup> We note also that while the commissioner filed briefs in support of the BOE's motion, the records indicate the discovery dispute before this board relates to the BOE and CCF.

<sup>7</sup> See CCF's post-hearing brief regarding compensation, internal financial statements, chargemaster, financial arrangements with third parties, contracts with insurers, and marketing costs. See also brief in support of CCF's opposition to motion to compel at 7-10.

place to prohibit disclosure of that information.<sup>8</sup> Both the BOE and Tax Commissioner filed responsive pleadings in opposition to granting CCF a protective order that seals discovery documents as trade secrets, arguing that CCF failed to identify a clearly defined injury to its operations should the confidential information be provided.

At the motions hearing before this board, Michael O'Boyle, CCF's chief operating officer, and Robert Coulton, Jr., CCF's executive director of professional staff affairs, testified that many of the discovery requests seek confidential business information, which, if disclosed, could cause harm to CCF's business. O'Boyle testified that information regarding CCF's chagemaster, contracts with insurers, internal financial statements, marketing costs, and financial arrangements with third parties are confidential, proprietary data considered to be trade secrets. H.R. at 54-59, 61-64, 65-72, 73-77, 77-81. Furthermore, O'Boyle stated that this information is not publicly disclosed or published by CCF and that if it were disclosed, it would put CCF at a competitive disadvantage and provide competitors with confidential trade secret information. *Id.* Coulton, Jr. echoed O'Boyle, testifying that information as to CCF's professional staff (physicians, scientists) and executive compensation is also confidential, proprietary data considered to be trade secrets and is not publicly disclosed or published. H.R. at 134-141. He said that if it were disclosed, it would put

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<sup>8</sup> At this board's June 7, 2007 motions hearing for a protective order, the BOE and CCF submitted revised proposed stipulation and confidentiality orders to cover documents exchanged in discovery deemed to contain confidential material, which the commissioner declined to sign. We approve these agreements, as modified, *infra* at 9-10.

CCF at a competitive disadvantage and provide competitors with confidential trade secret information. H.R. at 135, 141. Both witnesses testified that CCF takes reasonable precautions to internally restrict access to this information.

Ohio has a liberal discovery policy, which, subject to privilege, enables opposing parties to obtain from each other all evidence that is material, relevant and competent, notwithstanding its admissibility at trial. *Fletcher v. Nationwide Mut. Ins. Co.*, 2003-Ohio-3038, at ¶ 14. See, also, Ohio Adm. Code 5717-1-11(A); Civ.R. 26(B)(1); *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693. Management of the discovery process is within the sound discretion of the tribunal. *Fletcher*, supra. See, also, Ohio Adm. Code 5717-1-11(D); Civ.R. 26(C).

This board's discovery ruling also must be made in the context of the relevant legal standards for real property tax exemption. In Ohio all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to that rule and statutes granting exemption must be strictly construed. *Id.*; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. See, also, R.C. 5715.271 ("the burden of proof shall be placed on the property owner to show that the property is entitled to exemption"). "In deciding whether property is exempt under the charitable use provisions of R.C. 5709.12 and 5709.121, tax authorities must first determine whether the institution seeking exemption is a charitable or noncharitable institution. \*\*\* If the institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121." *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396. To

make these determinations, the statutes necessarily require an applicant to provide information concerning its finances and how it uses its real property. *Id.*; R.C. 5715.27. See, also, DTE form 23.

In each case, CCF claims entitlement to real property tax exemption under the aforementioned charitable use code provisions. See, for example, Taussig case, S.T. at 292. In challenges to the commissioner's determinations, however, CCF objects to the BOE's extensive discovery requests, claiming that the BOE's discovery "is not tethered to existing legal standards" and amounts to a "fishing expedition." CCF's brief opposed to BOE's motion to compel at 1-2. We disagree. According to the applicable legal standards, discovery inquiries that could lead to relevant information to support or undermine grounds for real property tax exemption would be consistent with the statutory requirements. The BOE's discovery necessarily probes CCF's finances related to areas such as operations, compensation, and marketing, responses to which could lead to relevant evidence regarding CCF's status as a charitable institution and the charitable use of its properties. Consequently, we find that the BOE's discovery requests are within the ambit of legal issues raised by the exemption statutes, including whether CCF is a charitable institution and whether its property is used exclusively for charitable purposes.<sup>9</sup> Because it is foreseeable that CCF's responses could lead to relevant information, we find that the information

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<sup>9</sup> We also find that CCF's responses to parallel inquiries regarding federal tax exemption could lead to relevant information in these cases. See, for instance, Beachwood case at BOE's motion to compel, Ex. 30 at interrogatory numbers 13-14 and request for production of documents numbers 9-10 regarding CCF's responses to Grassley Senate Finance Committee inquiry.

requested is within the scope of discovery. Civ.R. 26(B)(1); *Tschantz*, supra. Accordingly, we grant, in part, the BOE's motions to compel, subject only to the following limitations in response to CCF's motions for a protective order.

Ohio Adm. Code 5717-1-11(D) and Civ.R. 26(C) require that a party requesting a protective order demonstrate good cause for the issuance of the order. See *Koval v. Gen. Motors Corp.* (C.P. 1990), 62 Ohio Misc.2d 694 (to show "good cause" a party requesting a protective order must demonstrate that disclosure of allegedly confidential information will work a clearly defined injury to the requesting party's business). CCF objects to the BOE's discovery requests, claiming that some responses would contain trade secrets and many of the requests are overbroad and burdensome. This board believes that, based on the testimony presented at the motions hearing, CCF has demonstrated that portions of the requested material may qualify as confidential commercial information and, therefore, is willing to fashion an appropriate protective order that would allow the parties to prepare their cases while still protecting that information during discovery.<sup>10</sup> Further, we also agree with CCF that, in some instances, the BOE's discovery requests are overbroad and onerous.

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<sup>10</sup> Specifically, as contemplated by Ohio Adm. Code 5717-1-11(D) and Civ.R. 26(C)(7), we find that information regarding CCF's physician and executive compensation, internal financial statements, chargemaster, financial arrangements with third parties, contracts with insurers, and marketing costs may qualify as confidential commercial information. The board emphasizes, however, that such finding applies solely to discovery and that it should not be construed to foreshadow or predetermine any ruling regarding a request to restrict public access to this board's hearing or documents sought to be admitted into evidence. See *State ex rel. Allright Parking v. Cleveland* (1992), 63 Ohio St.3d 772, 775-776; *State ex rel. Plain Dealer v. Ohio Dep't of Ins.* (1997), 80 Ohio St.3d 513, 523-524; R.C. 5715.27(G).

Consequently, this board finds good cause for the issuance, in part, of a protective order, as set forth below.

In addition, CCF and the BOE seek to have this board exercise jurisdiction over the terms of the stipulation and confidentiality agreements (“agreements”) prepared and signed by the BOE and CCF to cover documents exchanged in discovery deemed to contain confidential material and issue an order that would govern the discovery process between these two parties.

This board has previously approved parties’ agreements concerning the handling of materials, between themselves, during the discovery process. See, e.g., *Dayton Power & Light Co. v. Adams Cty. Bd. of Revision* (Interim Order, Mar. 2, 2001), BTA No. 2000-T-1402, unreported; *Cincinnati Gas & Elec. Co. v. Clermont Cty. Bd. of Revision* (Interim Order, Mar. 1, 1999), BTA No. 1998-K-706, et seq., unreported. However, the board will not approve or undertake to enforce any agreement whereby the parties purport to agree among themselves to limit, restrict, or otherwise expand the activities or obligations of the Board of Tax Appeals.

Therefore, the board approves the agreements, subject to the following modifications. Paragraph number 7 shall read:

“In the event that either party disagrees with the treatment of any material as confidential, the parties shall first attempt to resolve their dispute informally. If the dispute is not resolved informally, the party contesting the confidentiality of the documents or information shall move the Board of Tax Appeals (within 21 days of receiving the document or information) for an order releasing the contesting party from this Confidentiality Order as to that document or information; otherwise the document or information shall remain confidential as set forth herein.

Any disputed document or other material shall be treated as confidential until the Board of Tax Appeals rules on the motion. The burden of proving any document or information 'confidential' is placed on the party who asserts the need for confidentiality."

Paragraph 13 shall read:

"The Board of Tax Appeals retains jurisdiction to make such amendments, modifications and additions to this Confidentiality Order, so long as it has jurisdiction over the underlying appeals, as it may from time to time deem appropriate."

Based on the foregoing modifications, this board approves the Stipulation and Confidentiality Orders between CCF and the BOE.

We believe these agreements, which describe the BOE's handling of CCF's discovery responses marked as confidential, afford the same safeguards that a protective order would provide. However, as an added precaution, the board additionally orders the BOE to not disclose confidential discovery responses to any third party outside these appeals except as consistent with the terms of the agreements. We also order the BOE to make no copies of any CCF discovery document marked as confidential except those permitted by the terms of the agreements or to be used at hearing. Finally, we order the BOE to return all documents marked as confidential to CCF consistent with the terms of the agreements. Accordingly, pursuant to Ohio Adm. Code 5717-1-11(D) and Civ.R. 26(C)(7), we grant CCF's motions for a protective order as to discovery responses deemed by CCF and the BOE to contain confidential material.

We additionally note that the granting of a protective order as to confidential commercial information to be exchanged in discovery is consistent with this board's previous order, in which we denied CCF's motion to designate as trade secrets certain categories of information. See footnote one, supra. While this board is willing to control the exchange of sensitive documents in discovery, it is unwilling to go so far as to seal those documents as trade secrets under R.C. 1333.61. These cases do not involve a competitor attempting to obtain CCF's proprietary information through the discovery process and CCF, in fact, makes no claim of harm should the BOE or commissioner obtain its alleged trade secrets. CCF even agrees that discoverable information, including alleged trade secrets, will be produced to allow for the parties "to present evidence, cross-examine witnesses, or otherwise proceed in these cases." CCF's reply in support of its motion to seal at 2. Instead, once in the possession of the BOE or commissioner, CCF merely anticipates that its discovery responses may then be subject to a public records request. However, since these appeals do not involve actions under the Uniform Trade Secrets Act or a public records request, it is unnecessary to reach this issue for purposes of discovery. See, for example, *State ex rel. Allright Parking v. Cleveland* (1992), 63 Ohio St.3d 772; *State ex rel. Seballos v. School Emp. Retirement Sys.* (1994), 70 Ohio St.3d at 667; *State ex rel. Plain Dealer v. Ohio Dep't of Ins.* (1997), 80 Ohio St.3d 513; *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St.3d 396; *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131. Consequently, based on the law and records before us, we decline

to seal documents to be exchanged through discovery that are now subject to a protective order and a confidentiality agreement.

This board further finds that certain BOE discovery requests are overbroad and onerous. Specifically, the Beachwood appeal involves an exemption application for tax year 2004 and a request for remission of taxes, penalties and interest for 2002 to 2003. The Taussig and Fairview appeals relate to exemption for tax year 2002 with remission of taxes, penalties and interest for 1999, 2000, and 2001. The BOE provides no basis for requesting information outside these years. Consequently, this board orders that CCF's responses can be limited to the relevant years for each property.

This board also finds that several of the BOE's requests are onerous in scope. For instance, we agree with CCF that production of all receipts for annual reimbursed travel expenses for all of CCF's board members, trustees, and administration is burdensome.<sup>11</sup> We also agree that the BOE must narrow its scope as to what it requests regarding joint ventures by providing CCF with definitions and more precision.<sup>12</sup> Additionally, we find that the BOE's original requests regarding the chargemaster are onerous. See, for instance, BOE's Fairview motion to compel, Ex. 30 at document request numbers 37, 51. We note, though, that after negotiations between the parties, the BOE proposed supplemental request number one, which

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<sup>11</sup> See, for instance, brief in support of CCF's opposition to motion to compel in Beachwood case at 8, referencing interrogatory number 18 and corresponding document request number one.

<sup>12</sup> Id. at 3, 9-10, referencing interrogatory numbers 16, 17 and corresponding document request number five.

narrowed the scope of the information it seeks from the chargemaster to representative samples. *Id.* at Exs. 32-33. We find that supplemental request acceptable and this board orders CCF and the BOE to similarly negotiate in good faith and agree on reasonable samples as to reimbursed travel expenses and joint ventures.

Finally, the commissioner has not filed any motions in any of the appeals under consideration by this board. The records indicate the discovery dispute relates to the BOE's discovery requests served on CCF. Yet, for alleged legal and policy reasons relating to applications for tax exemption and the public records act, the commissioner declined to sign the confidentiality agreement entered as to the BOE and CCF. See commissioner's brief in response to CCF's brief in support of motions to seal at 8, citing R.C. 5715.27(G) ("documents of any kind related to [real property tax exemption] applications" filed with the commissioner are explicitly public records). Rather than excluding the commissioner from access to CCF's discovery responses to the BOE, this board will instead fashion a separate remedy that protects CCF's confidential commercial information while at the same time allows the commissioner to participate in preparation for the hearings in these appeals. *Arnold v. Am. Natl. Red Cross* (1994), 93 Ohio App. 3d 564, 576 (the court must balance the competing interests to be served by allowing discovery to proceed against the harm which may result).

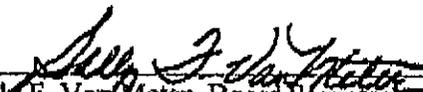
Given this decision granting a protective order, the commissioner may reconsider the stipulation and confidentiality agreement being entered as to the BOE and CCF. If so, the terms of that agreement, which includes a mechanism to alert CCF

and to allow it to respond if a public records request is made on the commissioner regarding confidential discovery responses, and this protective order will apply to the commissioner.

If the commissioner does not sign the confidentiality agreement entered by the BOE and CCF, then we order CCF to maintain a copy of its confidential responses provided to the BOE and arrange with the commissioner and his counsel to review these responses at the Columbus office of CCF's counsel. The commissioner's counsel may make notes based on the document review, but no copies are to be provided to the commissioner.

Accordingly, consistent with the above decision, this board grants in part and denies in part the BOE's motions to compel and CCF's motions for protective order and approves the Stipulation and Confidentiality Orders, as modified, between CCF and the BOE. Within 14 days of this order the parties are instructed to provide this board with revised agreed case schedules of events leading up to evidentiary hearings to be concluded by no later than September 30, 2008.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

  
Sally F. Van Meter, Board Secretary