

IN THE SUPREME COURT OF OHIO

THE CLEVELAND CLINIC :  
FOUNDATION, INC. AND : CASE NO. 08 -0411  
FAIRVIEW HOSPITAL, :  
 :  
Appellants, :  
 :  
vs. :  
 :  
RICHARD A. LEVIN, : Board of Tax Appeals  
TAX COMMISSIONER OF OHIO, *et al.*, : Case Nos. 2005-V-1726, 2006-V-9,  
 : and 2006-H-117  
 :  
Appellees. :

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MOTION TO DISMISS FOR LACK OF JURISDICTION  
BY APPELLEE, RICHARD A. LEVIN,  
TAX COMMISSIONER OF OHIO

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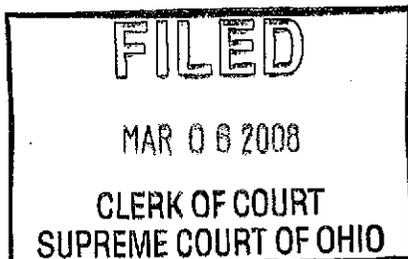
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Education



IN THE SUPREME COURT OF OHIO

THE CLEVELAND CLINIC	:	
FOUNDAION, INC. AND	:	CASE NO. 08 -0411
FAIRVIEW HOSPITAL,	:	
	:	
Appellants,	:	
	:	Board of Tax Appeals
vs.	:	Case No. 2005-V-1726
	:	Case No. 2006-V-99
	:	Case No. 2006-H-117
RICHARD A. LEVIN,	:	
TAX COMMISSIONER OF OHIO, <i>et al.</i> ,	:	<b>MOTION TO DISMISS FOR LACK</b>
	:	<b>OF JURISDICTION BY APPELLEE</b>
Appellees.	:	<b>RICHARD A. LEVIN, TAX</b>
	:	<b>COMISSIONER OF OHIO</b>

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The Appellee, Richard A. Levin, Tax Commissioner of Ohio, hereby moves the Court to dismiss the interlocutory appeal of Appellants The Cleveland Clinic Foundation, Inc. and Fairview Hospital as the discovery Order of January 25, 2008 of the Board of Tax Appeals for the following reasons. For one, although it references the issue, that order is not the original order adjudicating the issue raised in the Notice of Appeal, i.e. whether discovery exchanged in proceedings before the Board of Tax Appeals should be sealed as trade secrets under R.C. 1333.61. That decision was actually rendered in an earlier interlocutory order of April 6, 2007. (A copy of this Order is attached as Appendix A.) Accordingly, any appeal of this issue is untimely, and the appeal must be dismissed.

Even more significantly, the discovery Order of January 25, 2008 of the Board of Tax Appeals is a provisional remedy under R.C. 2505.02 that does not deny a meaningful or effective remedy by an appeal following a final judgment by the Board of Tax Appeals. The parties have agreed to a Stipulation and Confidentiality Order, as modified by the Order of January 25, 2008,

that limits who has access to any documents obtained through discovery as well as requiring that the documents be returned to the Appellants upon completion of the litigation.

Further, the documents at issue fall under the subject matter waiver doctrine so that the documents which are relevant to the issues before the Board of Tax Appeals are no longer entitled to their confidential, privileged or trade secret status. A copy of the Order of January 25, 2008 of the Board of Tax Appeals is attached as Appendix B. A memorandum in support is attached and incorporated herein.

Respectfully submitted,

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Commissioner of Ohio

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

Appellants, The Cleveland Clinic Foundation, Inc. and its affiliated hospital, Fairview Hospital, (collectively, “the Appellants”) applied for exemptions from ad valorem real property taxes pursuant to R.C. 5709.12 and R.C. 5709.121. The Cleveland Clinic Foundation, Inc. sought the exemption for the Taussig Cancer Center (BTA Case No. 2006-V-99), and the Beachwood Family Health and Surgery Center (BTA Case No. 2005-V-1726). Fairview Hospital (BTA Case No. 2006-H-117) and the Taussig Center concern tax years 1999, 2000 and 2001. The Beachwood Family Health and Surgery Center seeks exemption for tax years 2002, 2003 and 2004. The Appellants appealed the exemption determinations of Appellee Richard A. Levin, Tax Commissioner of Ohio, (“the Tax Commissioner”) to the Board of Tax Appeals (hereinafter “the BTA”). Discovery was initiated and a dispute arose over production of documents. The Appellants claimed certain documents requested in discovery contained proprietary trade secrets and other confidential research, development of commercial information (“the Alleged Confidential Material”). The Appellants filed motions to seal the documents containing the Alleged Confidential Material. The BTA consolidated the three cases for the sole purpose of deciding the common discovery issues.

On April 6, 2007, the BTA issued an interlocutory discovery Order. In this Order, the BTA noted on pages three and four<sup>1</sup>:

In its motions, CCF alleges that the BOE has propounded extensive discovery requests, seeking details about CCF’s financial information and strategic planning. CCF argues that “[m]any of the BOE’s discovery requests are overboard and seek documents

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<sup>1</sup> When the BTA references “CCF” it means the Cleveland Clinic Foundation and Fairview Hospital. “BOE” refers jointly to the Beachwood City School District Board of Education and the Cleveland Municipal School District Board of Education.

containing CCF's trade secrets that are patently not relevant or have only tangential relationship to the issues in this appeal.

CCF additionally chronicles its inability to obtain an order from this board concerning a protective agreement between the parties, which would have deemed materials obtained through discovery to be confidential. CCF now asks this board to conduct an ex parte hearing to perform an in camera inspection of the documents responsive to the BOE's discovery requests, seeking to have this board place said documents under seal as trade secrets. (Footnote omitted.)

Order of April 6, 2007, Appx. A, at pp. 3-4.

The BTA denied the Appellants' motions to seal the documents containing the alleged confidential material, and converted the motions to ones for protective orders. The BTA concluded that a request to seal was an inappropriate remedy in that R.C. 1333.61 does not bar discovery of trade secrets, and that the sealing of records only pertains to documents admitted as evidence at an evidentiary hearing – an event that had not yet occurred. See Appx. A. A hearing was ordered to be held to determine if a protective order should be issued placing any other more appropriate restrictions on the discovery of alleged trade secrets or other confidential research, development or commercial information. Appx. A, pp. 6 - 7.

This hearing was held on June 7, 2007. During this hearing, the Appellants, the Beachwood City School District Board of Education and the Cleveland Municipal School District Board of Education presented for the BTA's approval a proposed stipulation and confidentiality order relating to the production of the documents containing the Alleged Confidential Information ("the Proposed Stipulation"). A copy of the Proposed Stipulation is attached as Appendix C. The Tax Commissioner did not join into the Proposed Stipulation. Order of January 25, 2008, Appx. B, fn. 8.

In its Order of January 25, 2008, the BTA approved the Proposed Stipulation between the Appellants and the school districts, but modified paragraphs seven and thirteen (13) of it. The BTA's modifications to the Proposed Stipulation are not before the Court as the Notice of Appeal does not raise these modifications as being in error. The BTA's January 25, 2008 Order gave the Tax Commissioner the opportunity to join in the Proposed Stipulation as modified by the Order of January 25, 2008.

Prior to this appeal being perfected, the Tax Commissioner had indicated his desire to join the Proposed Stipulation so that he could obtain the documents being produced by Appellants to the school boards. However, the Tax Commissioner was never able to execute the Proposed Stipulation before the appeal was filed.

On February 22, 2008, Appellants filed their Notice of Appeal with this Court. The sole error set forth in the Notice of Appeal is that:

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.

Emphasis added.

As set forth *infra*, the Appellants' appeal is untimely as the alleged error regarding *sealing* of documents did not occur in the January 25, 2008 Order, but instead in the April 6, 2007 Order. Thus, the notice of appeal was filed beyond the thirty (30) days set forth in R.C. 5717.04.

Alternatively, even if the Appellants have properly set forth issues from the January 25, 2008 Order, it is still only an interlocutory order. It is well settled that such an order is only appealable under R.C. 2505.02 as a provisional remedy if an appeal at the end of the litigation

would not afford a meaningful or effective remedy by an appeal following a final judgment. As the Tenth District Court of Appeals has indicated, an interlocutory discovery order is only appealable if it provides for unfettered discovery “with the danger of being unable to unring the proverbial bell.” *The Dispatch Printing Co. v. Recovery Limited Partnership*, 166 Ohio App. 3d 118, 2006 Ohio 1347, at ¶9.

Presumably, the Proposed Stipulation submitted at the June 7, 2007 hearing, and as amended by the BTA, somehow compels the Appellants to produce documents containing the alleged confidential material secrets which the BTA previously refused to seal. In essence, the Appellants are asking the Court to protect them from themselves by undoing the Proposed Stipulation with the school boards. An interlocutory appeal does not lie to undo such an agreement.

Further, the subject matter waiver doctrine is applicable to the discovery agreed upon by the parties. This doctrine provides that if you initiate a legal action you cannot refuse to provide relevant discovery by asserting that it is confidential, privileged or otherwise not entitled to be produced to the other parties. *Covington v. The MetroHealth System* (2002), 150 Ohio App. 3d 558, 2002-Ohio-6629, app. denied (2003) 98 Ohio St. 3d 1538, 2003-Ohio-1946; *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App. 3d 322, 330-331; *Ward v. Graydon, Head & Ritchey* (2001), 147 Ohio app. 3d 325, 2001-Ohio-8654, appeal dismissed (2002), 94 Ohio St. 3d 1507. Applying this doctrine dictates that the Appellants, as the applicants for real property exemption, be required to produce discovery that relates to whether they are entitled to that exemption under R.C. 5709.12 and R.C. 5709.121.

**II. TO THE EXTENT THAT AN APPEAL FROM AN INTERLOCUTORY ORDER CAN OTHERWISE BE PERFECTED TO THIS COURT, THE NOTICE OF APPEAL RAISES AN ISSUE THAT WAS NOT FILED WITHIN THIRTY (30) DAYS OF THE APRIL 6, 2007 BTA ORDER ADJUDICATING IT AS REQUIRED R.C. 5717.04**

R.C. 5717.04 requires that the notice of appeal from a decision of the BTA be perfected within thirty (30) days of the order or decision being appealed. The notice of appeal is required to set forth the errors being appealed. S.Ct.Prac.R. II(3)(A)(1). The court only has jurisdiction to address those errors set forth in the notice of appeal. *A. Schulman, Inc. v. Wilkins* (2006), 112 Ohio St. 3d 1208, 2006-Ohio-6677.

As set forth *supra*, the Appellants' Notice of Appeal set forth a single assignment of error asserting that the BTA failed to seal documents asserted to be trade secrets under R.C. 1331.61 *et seq.* The Notice of Appeal specifically references the Order of January 25, 2008, as the one being appealed. However, in footnote one of the January 25, 2008 Order, the BTA provides:

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. 13333.61(D). This board denied CCF's motions as presented and is construing them instead as motions for protective order. See *Cleveland Clinic Foundation v. Wilkins* (Interim Orders, Apr. 6, 2007), BTA Nos. 2005-V-1726, *et al.*, unreported.

Appx. B, fn. 1.

Footnote one makes it clear that it was the Order of April 6, 2007 that addressed the issue of whether trade secrets should be sealed as contrasted to simply being subject to other protections, and thus, the error asserted in the Notice of Appeal.<sup>2</sup> The Notice of Appeal was filed on February 22, 2008 which is more than thirty (30) day period to perfect an appeal of the Order

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<sup>2</sup> For the same reasons set forth in the next section, the Order of April 6, 2007 is an interlocutory order that is not appealable pursuant R.C. 2505.02. The Tax Commissioner does not waive that issue by addressing the untimely perfection of the appeal.

of April 6, 2007. Thus, the Court is without jurisdiction to entertain the appeal, and it must be dismissed.

**III. TO THE EXTENT THAT THE NOTICE OF APPEAL RAISES AN ISSUE ADJUDICATED BY THE BTA ORDER OF JANUARY 25, 2008, THAT ORDER IS NOT AN APPEALABLE PROVISIONAL REMEDY UNDER R.C. 2505.02**

**A. Adequate Protections Exists so There is no Immediate Need for Appeal**

In *Southside Community Dev. Corp. v. Levin*, 116 Ohio St. 3d 1209, 2007-Ohio-6665, the Court held that interlocutory appeals of non-final determinations of the BTA must be made in compliance with R.C. 2505.02. R.C. 2505.02(A)(3) defines a provisional remedy as including an order concerning discovery of privileged matter. However, R.C. 2505.02(B)(4) provides that only certain provisional remedies are appealable:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

**(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties to the action.**  
(Emphasis added.)

The burden of showing that documents are confidential or privileged rests upon the party seeking to exclude the documents from discovery. *Legg v. Hallet*, Franklin App. No. 07AP-170, 2007-Ohio-6595, at ¶25; *Covington v. The MetroHealth Sys.*, 150 Ohio App. 3d 558, 2002-Ohio-6629. “Privilege must rest upon some specific constitutional or statutory provision.” *State ex rel. Grandview Hosp. & Medical Ctr. v. Gorman* (1990), 51 Ohio St. 3d 94, 95. An abuse of

discretion standard is used to review the granting or denial of a protective order. *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St. 3d 59, 61; *Covington, supra*.

Thus, the issue of whether an appeal is proper is dependent upon whether there will be a meaningful or effective remedy if the appeal is made after a final order in the matter. Or as the Tenth District Court of Appeals has indicated, an interlocutory discovery order is only appealable if it provides for unfettered discovery “with the danger of being unable to unring the proverbial bell.” *The Dispatch Printing Co., supra*. Only then would there be an abuse of discretion.

In its Order of January 25, 2008, the BTA stated the following:

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. Further, we also agree with CCF that, in some instances, the BOE’s discovery requests are overbroad and onerous. Consequently, this board finds good cause for the issuance, in part, of a protective order, as set forth below.

Appx. B, at pp. 8-9

The BTA proceeded to approve the proposed Stipulation between the Appellants and the school boards. The BTA modified paragraphs seven and thirteen (13) of the proposed Stipulation. Paragraph seven provided a method to resolve disputes over the asserted confidentiality of any documents produced. The asserted confidentiality is retained until the BTA actually rules on the dispute. Paragraph thirteen (13) simply provides that the BTA retains jurisdiction to make further amendments to the Proposed Stipulation is that would be come necessary.

The BTA placed further restrictions on the handling of the discovery. On page 10 of the Order of January 25, 2008, the BTA stated:

We believe these agreements, which describe the BOE's handling of CCF's discovery response 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 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.

Appx. B, p. 10.

The BTA also extended an opportunity for the Tax Commissioner to either review or obtain the discovery being provided by the Appellants to the school boards. The Tax Commissioner could obtain the discovery by entering in to the Proposed Stipulation. Otherwise, the Tax Commissioner would simply be allowed to review copies of the documents produced, but without the actually receiving copies of the documents.

By adopting, with modifications, the Proposed Stipulation submitted by the Appellants and the school boards, there simply is no basis for the Appellants to assert that there is a need for an immediate appeal. Any documents marked confidential remain confidential until the BTA would review the documents to determine their status. Only limited copies of the documents are permitted. All copies are to be returned at the completion of the litigation. There is no immediate harm that has or can occur. Or, in the words of the Tenth District Court of Appeals, the bell has not been rung.

Based on the protections agreed upon by the Appellants and the modifications by the BTA, the Order of January 25, 2008 is not a provisional remedy that immediately can be appealed under R.C. 2505.02(B)(4). Thus, the appeal must be dismissed for lack of jurisdiction.

**B. The Cleveland Clinic Foundation, Inc. and Fairview Hospital are Required to Produce Documents that Relate to Eligibility for the Exemption.**

In *Community Health Professionals, Inc.*, the Court stated:

Therefore, as this court stated in *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396, 1997 Ohio 262, 674 N.E.2d 690, “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.”

In *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 2 O.O.3d 275, 357 N.E.2d 381, we set forth the complete test to determine whether property is exempt from real estate taxation in accordance with R.C. 5709.121. There, we stated: “To fall within the terms of R. C. 5709.121, property must (1) be under the direction or control of a charitable institution or state or political subdivision, (2) be otherwise made available ‘for use in furtherance of or incidental to’ the institution’s ‘charitable \* \* \* or public purposes,’ and (3) not be made available with a view to profit.” *Id. at 125*, quoting R.C. 5709.121.

*Community Health Professionals, Inc.*, 2007 Ohio 2336, at ¶¶18-19.

The Appellants applied for ad valorem real property tax exemption pursuant to R.C. 5709.12 and R.C. 5709.121. Thus, they placed both the charitable nature of the applicant as well as the charitable use of the real property at issue. Under the subject matter waiver doctrine, the application for the ad valorem real property tax exemption waived any ability to make a claim of privilege or confidentiality.

In *Covington, supra*, the Tenth District Court of Appeals stated the following in paragraphs twenty-eight (28) and twenty-nine (29) of the decision:

In denying plaintiff's motion for a protective order, the trial court stated that "plaintiff may not initiate a lawsuit to compel defendant to return payments made under the settlement agreement and then deny defendant the evidence necessary to defend itself in the lawsuit." (Jan. 10, 2002 Decision, 4.) The court's statement is in accord with the subject matter waiver doctrine first enunciated in *Hearn v. Rhay* (E.D.Wash.1975), 68 F.R.D. 574, 581, and subsequently followed by courts in other jurisdictions and in Ohio, including this court. See *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 330-331, 612 N.E.2d 442; *H & D Steel Serv., Inc. v. Weston, Hurd, Fallon, Paisley & Howley* (July 23, 1998), *Cuyahoga App. No. 72758*, 1998 Ohio App. LEXIS 3422; *Ward v. Graydon, Head & Ritchey* (2001), 147 Ohio App. 3d 325, 2001 Ohio 8654, 770 N.E.2d 613, appeal dismissed (2002), 94 Ohio St. 3d 1507, 764 N.E.2d 1037; *G. Rand Smith Co., L.P.A. v. Footbridge Capital, LLC*, *Union App. No. 14-01-39*, 2002 Ohio 2189; *Schottenstein, Zox & Dunn*, *supra*.

Under the subject matter waiver doctrine, *Hearn* and its progeny employ a tripartite test to determine if a privilege has been waived. Pursuant to the test, if (1) assertion of a privilege is the result of some affirmative act, such as the filing of a lawsuit, by the asserting party, (2) through the affirmative action the asserting party has placed the allegedly protected information at issue by making it relevant to the case, and (3) application of the privilege would deny the opposing party access to information vital to its defense, a court should find that the asserting party has waived the privilege through its affirmative conduct. 68 F.R.D. at 581. In accord, *Schottenstein, Zox & Dunn*, *supra*.

*Covington*, 2002-Ohio-6629, at ¶¶28-29.

This matter meets all three elements of the foregoing test. The Appellants' applications for exemption meet the first part of the test. As set forth *Community Health Professionals, supra*, the charitable nature of the Appellants and the use of the real property are at issue. Thus, the second part of the test is met. As for the third part of the test, the Appellants acknowledged the school boards and the Tax Commissioner needs the information for its defense. In its Order of January 25, 2008, the BTA stated:

CCF even agrees that discoverable information, including alleged trade secrets, will be produced to allow for the parties "to present

evidence, cross-examine witness, or otherwise proceed in these cases.” CCF’s reply in support of its motion to seal at 2.

Appx. B, p. 11.

Based on the foregoing, the Appellants have waived, and are estopped from asserting, any claim to privilege or confidentiality by the filing of its application for ad valorem real property tax exemption pursuant to R.C. 5709.12 and R.C. 5709.121. As such, there is no need for an immediate appeal under R.C. 2505.02 as there is no undoable harm that can occur. There simply no claim of privilege or confidentiality that can be asserted. Accordingly, there is no jurisdiction to entertain the appeal pursuant to R.C. 2505.02.

#### **IV. CONCLUSION**

The Court does not have jurisdiction to entertain the Appellants’ interlocutory appeal. It was the April 6, 2007 Order of the BTA that refused to seal the records that were asserted to be trade secrets. No timely appeal of this order was perfected.

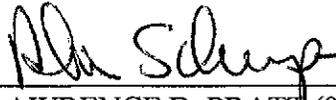
Further, there is no immediate harm that will occur if the discovery is produced. The Appellants agreed to produce the documents under the Proposed Stipulation. As modified by the BTA’s Order of January 25, 2008, even greater protections are extended to the Appellants.

Finally, the subject matter waiver doctrine bars the Appellants from raising a claim of privilege, confidentiality or trade secrets as for the documents required to be produced in discovery. The Appellants acknowledge that these documents are necessary for the school boards and the Tax Commissioner to defend the applications for exemptions.

For all the of the foregoing reasons, the interlocutory appeal of Appellants The Cleveland Clinic Foundation, Inc. and Fairview Hospital should be dismissed for lack of jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Motion to Dismiss for Lack of Jurisdiction was sent by regular U.S. Mail this 6<sup>th</sup> day of March, 2008, to: Charles M. Steines, Esq., and Stephen G. Sozio. Esq., Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114; and David H. Seed, Brinda McIntyre & Seed LLP, 1111 Superior Avenue, Suite 1025, Cleveland, Ohio 44114



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ALAN P. SCHWEPE  
Assistant Attorney General

**OHIO BOARD OF TAX APPEALS**

Cleveland Clinic Foundation, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 William W. Wilkins, Tax )  
 Commissioner of Ohio, and the )  
 Beachwood City School District )  
 Board of Education, )  
 )  
 Appellees. )

CASE NO. 2005-V-1726

(REAL PROPERTY TAX  
EXEMPTION)

ORDER

(Denying Motions for Ex Parte In  
Camera Inspection and Granting  
Hearing for Protective Order)

Cleveland Municipal School District )  
 Board of Education, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 William W. Wilkins, Tax )  
 Commissioner of Ohio, and )  
 The Cleveland Clinic Foundation )  
 (Taussig Cancer Center), )  
 )  
 Appellees. )

CASE NO. 2006-V-99

(REAL PROPERTY TAX  
EXEMPTION)

ORDER

Cleveland Municipal School District )  
 Board of Education, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 William W. Wilkins, Tax )  
 Commissioner of Ohio, and )  
 Fairview Hospital, )  
 )  
 Appellees. )

CASE NO. 2006-H-117

(REAL PROPERTY TAX  
EXEMPTION)

ORDER

**APPEARANCES:**

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Entered **APR 6 2007**

These matters<sup>1</sup> are now considered by the Board of Tax Appeals following the filing of motions by appellant/appellee Cleveland Clinic Foundation ("CCF") asking this board to seal, or otherwise protect from disclosure, certain records requested by the appellee/appellant school districts<sup>2</sup> ("BOE") involved in the above captioned appeals during discovery. Specifically, CCF asks this board to conduct an in camera, ex parte hearing to determine whether documents sought by the BOE in discovery are subject to be sealed as "trade secrets" under R.C. 1333.61(D). For the

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<sup>1</sup> The above captioned appeals involve the question of exemption from real property taxation for three different hospital facilities, based upon three separate final determination letters issued by the Tax Commissioner. In all three cases, the boards of education are represented by the same counsel, CCF is represented by the same counsel, and the commissioner is represented by the same counsel. The discovery disputes arising from these three appeals appear to be identical, specifically the identical motions of CCF in each appeal to have this board seal records exchanged in discovery. In the interests of efficiency and economy this board has consolidated these three matters for the purpose of addressing the motion of CCF discussed herein.

<sup>2</sup> The Beachwood City School District Board of Education and the Cleveland Municipal School District Board of Education.

reasons that follow, this board denies CCF's motions as presented and instead construes the motions as motions for a protective order. Both the BOE and the Tax Commissioner have filed responsive pleadings in opposition to CCF's motions.

The record before this board reflects that the subject properties, owned by CCF, are outpatient clinic and surgery centers 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). At issue is whether the subject properties are entitled to exemption from ad valorem real property taxation because of the alleged charitable use of the properties under R.C. 5709.12 and 5709.121. In his final determinations, the commissioner denied CCF's applications for exemption for the Beachwood facility and granted exempt status for the Taussig and the Fairview facilities.

In its motions, CCF alleges that the BOE has propounded extensive discovery requests, seeking details about CCF's financial information and strategic planning. CCF argues that "[m]any of the BOE's discovery requests are overbroad and seek documents containing CCF's trade secrets that are patently not relevant or have only tangential relationship to the issues in this appeal." CCF Motion at 2.<sup>3</sup>

CCF additionally chronicles its inability to obtain an order from this board concerning a protective agreement between the parties, which would have

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<sup>3</sup> The BOE in each appeal has filed a motion to compel discovery.

deemed materials obtained through discovery to be confidential.<sup>4</sup> CCF now asks this board to conduct an ex parte hearing to perform an in camera inspection of the documents responsive to the BOE's discovery requests, seeking to have this board place said documents under seal as trade secrets.

Ohio Adm. Code 5717-1-11 sets forth this board's rules concerning discovery, and provides in relevant part:

“(A) Discovery may be permitted by deposition upon oral examination or written questions; written interrogatories; production of documents or tangible things or permission to enter upon land or other property; and requests for admissions. The ‘Ohio Rules of Civil Procedure’ shall be followed for discovery purposes to the extent they are not inconsistent with other board rules, and subject to the following limitations:

“\*\*\*

“(D) Upon the motion of a party and for good cause shown, the board may issue a protective order restricting discovery of a trade secret or other confidential research, development or commercial information.”

Civ.R. 26 sets forth the general rules for conducting discovery, and provides in relevant part:

“[B](1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at

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<sup>4</sup> This board previously declined to approve a confidentiality agreement proposed by CCF and the BOE. See *Cleveland Clinic Found. v. Wilkins* (Interim Order, Sept. 29, 2006), BTA No. 2005-V-1726, unreported.

the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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“(C) Protective orders. Upon motion by any party or by the person from whom the discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including the designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or to be disclosed only in a designated way; (8) that parties simultaneously file specified documents and information enclosed in sealed envelopes to be opened as directed by the court.”

Previously, this board has granted motions to seal portions of an evidentiary record after a showing that the documents at issue constitute a “trade secret” as defined in R.C. 1333.61(D). See, e.g., *Cincinnati Gas & Electric Co. v. Clermont Cty. Bd. of Revision* (Interim Order, Oct. 27, 2000), BTA No. 1998-K-707, unreported; *Dayton Power & Light Co. v. Adams Cty. Bd. of Revision* (Interim Order, Feb. 20, 2002), BTA No 2000-T-1402, unreported. See, also, *Honda of America Mfg., Inc. v. Wilkins* (Jan. 12, 2007), BTA No. 2005-A-529, unreported. This board’s consideration of motions to seal portions of evidentiary records, as well as requests to place restrictions upon discovery engaged in extra-judicially by the parties, is borne

from the conflict that exists between reasonable discovery and this board's obligations under the Ohio Public Records Act (R.C. 149 et seq.) and the Uniform Trade Secrets Act (R.C. 1333.61 et seq.).

Regarding discovery involving trade secrets, in *Nationwide Mut. Ins. Co. and The Goodyear Tire and Rubber Co. v. Franklin Cty. Bd. of Revision* (Interim Order, July 20, 2001), BTA No. 2001-S-233, unreported, at 4-5, this board held:

"[T]he property owners have objected to the interrogatories and document production requests on the basis that the material sought is privileged, claiming such information fell within the R.C. 1333.51 [now R.C. 1333.61] definition of 'trade secrets.' Even if the appellants are correct in their claim that the information sought qualifies as trade secrets under R.C. 1333.51, this Board does not find that R.C. 1333.51 itself or the fact that information is considered trade secrets bars the ability of an opposing party to obtain such information through the discovery process." (Explanation added.)

Similarly, in *Great Northern Shopping Center v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Mar. 3, 1995), BTA Nos. 1994-M-397-404, 1994-M-405-408, unreported, this board held:

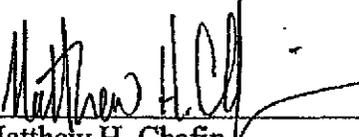
"R.C. 1333.51 [now R.C. 1333.61] defines property which can be considered a 'trade secret' and prohibits the unauthorized use of such information. R.C. 1333.51 and its companion statute do not, however, preclude the discovery of 'trade secret' information. Rather, the control of the discovery process is contained in Civ. R. 26(C). That section protects the disclosure \*\*\* of the information itself may cause irreparable harm to a party." *Id.* at 9. (Explanation added.)

Thus, it is premature for this board to seal any records.<sup>5</sup> Should any such documents eventually be offered at hearing before this board, it would then be appropriate for CCF to make its motion to seal at that time. Therefore, CCF's motion to seal certain records requested in discovery is denied.

However, this board will construe CCF's motion as a request for a protective order given the allegation that certain documents sought in discovery may constitute trade secrets or other confidential research, development, or commercial information. Therefore, this board will conduct a hearing to receive testimony and evidence to establish whether a protective order be granted in the captioned appeals pursuant to Civ.R. 26(C), to govern the exchange of discovery between the parties. The board anticipates ruling on the BOE's motion to compel only after determining whether CCF's discovery responses will be subject to a protective order.

The parties will be notified by separate notice from this board's assignment commissioner as to the time and date of the hearing to receive evidence and testimony concerning CCF's motion for a protective order.

On behalf of the Board of Tax Appeals,  
Pursuant to O.A.C. 5717-1-10

  
Matthew H. Chafin  
Attorney Examiner

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<sup>5</sup> Well beyond the subject matter jurisdiction of this board, R.C. 1333.61 et seq. provides for injunctive relief for actual or threatened misappropriation, civil damages, and punitive damages.

**OHIO BOARD OF TAX APPEALS**

Cleveland Clinic Foundation )  
(Beachwood Family Health and )  
Surgery Center), )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and the )  
Beachwood City School District )  
Board of Education, )  
Appellees. )

CASE NO. 2005-V-1726

(REAL PROPERTY  
TAX EXEMPTION)

ORDER

(Granting in Part and Denying in Part  
Motions to Compel and Motions for  
Protective Order and Approving, as  
Amended, Stipulation and  
Confidentiality Orders)

Cleveland Municipal School District )  
Board of Education, )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and )  
The Cleveland Clinic Foundation )  
(Taussig Cancer Center), )  
Appellees. )

CASE NO. 2006-V-99

(REAL PROPERTY  
TAX EXEMPTION)

Cleveland Municipal School District )  
Board of Education, )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and )  
Fairview Hospital, )  
Appellees. )

CASE NO. 2006-H-117

(REAL PROPERTY  
TAX EXEMPTION)

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 **JAN 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 chargemaster, 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

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**BOARD OF TAX APPEALS  
STATE OF OHIO**

<b>CLEVELAND CLINIC FOUNDATION</b>	)	
	)	
Appellant,	)	<b>Case No. 2005-V-1726</b>
	)	
v.	)	
	)	<b>REAL PROPERTY TAX EXEMPTION</b>
<b>RICHARD LEVIN,</b>	)	
<b>TAX COMMISSIONER OF OHIO, and the</b>	)	
<b>BEACHWOOD CITY SCHOOL DISTRICT</b>	)	
<b>BOARD OF EDUCATION,</b>	)	
	)	
Appellees.	)	

**STIPULATION AND CONFIDENTIALITY ORDER**

The undersigned parties in the above-captioned matter have reached agreement on the following proposed confidentiality order and ask the Board of Tax Appeals to enter this Order:<sup>1</sup>

1. This Confidentiality Order (“Confidentiality Order” or “Order”) shall govern the designation and handling of certain information produced in discovery in this appeal as defined by the Order. This Confidentiality Order shall not apply to any document or information that is, or becomes, available publicly without violation of this Order, or such information which, prior to disclosure, is properly in the possession or knowledge of the party to whom disclosure is made.

2. Any party to this appeal who produces documents or information in this action may designate as confidential pursuant to this Confidentiality Order any documents or information that the producing party believes in good faith is subject to protection under Rule

<sup>1</sup> In the event that the Tax Commissioner does not stipulate to this Confidentiality Order, the undersigned parties move to have the Order entered so that it binds all parties to this case, including the Tax Commissioner.

26(C)(7) of the Ohio Rules of Civil Procedure and that contains or refers to confidential information. Any party may designate documents produced by it as confidential ("Confidential Material") by prominently marking each such document "Confidential" in such a manner as not to obliterate or render illegible the document.

3. Any party wishing to designate as confidential any portion of deposition testimony or documents submitted as exhibits to depositions may do so on the record during the deposition, or within 14 days after receipt of the deposition transcript and exhibits, by providing written notice of the designation to the parties and any other affected person. During the interim 14 -day period, deposition transcripts and exhibits shall be deemed to be confidential. The party making the designation shall be responsible for assuring that those portions of the deposition transcript and exhibits designated as confidential are marked as such and are appropriately bound by the reporter.

4. Documents designated as confidential shall be treated as such under this Confidentiality Order, shall be subject to protection under Rule 26(C)(7) of the Ohio Rules of Civil Procedure, shall be used by their recipient only for this litigation, and shall not be used for business, competitive, or other non-litigation purposes, unless and until authorization to make other use of such information is given by agreement of counsel for the producing party in writing. For the purposes of this Order, "litigation" shall mean the above-captioned matter and any subsequent appeal.

5. Except as set forth herein, no confidential material shall be delivered, exhibited or disclosed to persons other than counsel of record representing the named parties in this appeal, any paralegal, stenographer, clerical or other employee of such counsel assisting in the prosecution or defense of this appeal, and the Board of Tax Appeals or any of its personnel,

including any court reporter. In addition, confidential material may be delivered, exhibited or disclosed to the following persons:

- a. Any member of the Board of Education and its administration and supervisory team;
- b. Any expert, investigator, or consultant utilized by counsel to assist in the preparation of this litigation, or to testify at the hearing or any other proceeding in this litigation;
- c. Any actual or potential witness or deponent who is not employed by The Cleveland Clinic Foundation, provided there is a reasonable basis to believe the witness will give relevant testimony regarding the confidential material;
- d. Any person identified as having authored or previously received the material;
- e. Court reporters engaged for depositions and those persons, if any, specifically engaged for limited purposes of making photocopies of documents;
- f. Any person employed by The Cleveland Clinic Foundation who is testifying at a deposition; and

6. Counsel desiring to reveal confidential material to any of the persons referred to in ¶ 5(a) through (f) above, shall inform such person that the material is subject to a confidentiality order, and shall provide such person with a copy of this Order prior to disclosure of any Confidential Material. Any such person who receives a copy of this Order and is provided with any Confidential Material shall be deemed to agree to be bound by this Order and

expressly agrees not to disclose such confidential information. Moreover, any person bound by this Confidentiality Order also shall be deemed to be subject to the jurisdiction of the Board of Tax Appeals for any proceedings relative to enforcement of this Confidentiality Order. Any person designated in ¶ 5(a) through (f) must sign the "Agreement To Be Bound By Confidentiality Order" (attached hereto as Exhibit A) prior to being provided with any Confidential Material. A copy of the signed Agreement shall be kept by the attorney of the party providing confidential material to a person designated in ¶ 5(a) through (f) and the attorney shall make a copy of such signed Agreement available upon termination of the litigation to the party that designated the material as confidential.

7. In the event that at any time 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 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.

8. The procedures set forth herein shall not relieve the parties of their obligation under the Ohio Rules of Civil Procedure of producing documents or of making timely responses to discovery requests. Nothing herein shall affect the producing party's obligation to show "good cause" for the protection of the information under Rule 26(C) upon motion filed pursuant to ¶ 7.

9. When a party desires to file with or otherwise disclose to the Board of Tax Appeals any paper (including, without limitation, affidavits, memoranda, answers to interrogatories, answers to requests for admission, responses to requests for production or depositions) that discloses any Confidential Material, the party wishing to file the Confidential Material shall notify in writing both the Board of Tax Appeals and the other parties of its intention to file that material. The other parties shall have seven (7) business days from the notice of intent to file Confidential Material within which to file a motion with the Board of Tax Appeals to seal that Confidential Material.

10. At the conclusion of this litigation, and at least sixty days after this matter has been finally terminated, a producing party may request the destruction or return of documents subject to this Order that were not filed with the Board of Tax Appeals, except for work product of counsel, which work product shall remain confidential and subject to this Order for so long as such work product exists. If a request for destruction or return of documents is made in writing, the recipient of such a request shall have sixty days in which to (1) return the documents, (2) destroy the documents and certify to the other party that the documents have been destroyed, or (3) file a motion with the Board of Tax Appeals seeking an order upon good cause shown that documents should not be destroyed or returned.

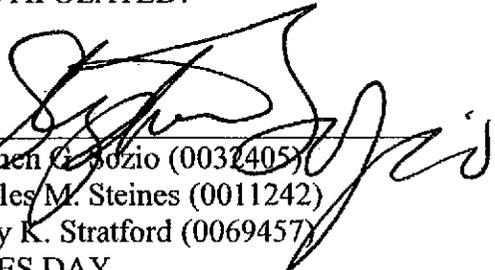
11. Nothing in this Confidentiality Order shall limit any producing party's use of its own documents or shall prevent any producing party from disclosing its own confidential information to any person. Such disclosures shall not affect the confidential treatment of a document pursuant to the terms of this Order so long as the disclosure is made in a manner which is reasonably calculated to maintain the confidentiality of the information.

12. In the event that any party receives a public records request under applicable state and/or federal law to disclose documents or information previously designated as confidential under this Order, the party will notify the party who produced and/or designated the requested document or information as confidential within two business days of receiving the request. The party receiving the request will have no obligation to undertake any opposition to the public records request, but the party receiving the request agrees to keep the party who produced and/or designated the requested document or information as confidential apprised of any developments relating to the request for public records. If the party who produced and/or designated the requested document or information as confidential believes that the requested document or information is not a public record, it shall seek a determination that the requested document or information is not a public record in a court of law within three business days of written notification by the party receiving the request; otherwise the requested document or information shall be disclosed by the party receiving the request. In the event that the party who produced and/or designated the requested document or information as confidential seeks such a determination, the party receiving the request may deposit under seal the requested document or information with the court of law, provided that a mechanism exists for filing the document or information under seal. In the event of a determination by a court of law that any document or other information designated as confidential under this Order is a public record and therefore subject to disclosure, and after all appeals of that determination have been exhausted or the time for appeal has expired, the parties shall have no obligation to maintain the confidentiality of any such document or information or otherwise comply with this Order as to such documents or information that are the subject of the court's determination.

13. The Board of Tax Appeals retains jurisdiction to make such amendments, modifications and additions to this Confidentiality Order as it may from time to time deem appropriate.

14. Counsel of record in this case may make use of "confidential" documents in other cases in which the tax exempt status of real property owned by CCF is at issue before or on appeal from the Ohio Board of Tax Appeals, provided that counsel of record and CCF execute a Confidentiality Order similar to this Order. Nothing in this Order shall be construed as a waiver of any party's objections to the admissibility or relevance of any document. Nothing in this paragraph shall be construed to eliminate or otherwise mitigate the obligation to return or destroy documents in paragraph 10.

SO STIPULATED:

  
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Charles M. Steines (0011242)

Tracy K. Stratford (0069457)

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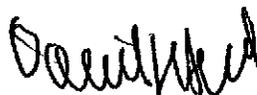
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Tax Commissioner of Ohio

IT IS SO ORDERED.

\_\_\_\_\_  
Matthew Chafin, Hearing Examiner

AGREEMENT TO BE BOUND BY CONFIDENTIALITY ORDER

I, \_\_\_\_\_, certify that I have been provided a copy of the confidentiality order regarding confidential information entered in the appeal captioned *The Cleveland Clinic Foundation v. William W. Wilkins, Tax Commissioner of Ohio, et al.*, Case No. 2005-V-1726 (Board of Tax Appeals for the State of Ohio) (the "Beachwood Appeal"). I have read the confidentiality order, and I agree to be bound by its provisions as a condition of receiving certain confidential information, which has been identified to me. I promise not to make use of this confidential information for any purpose other than my role in the Beachwood Appeal. I consent to being subject to the continuing jurisdiction of the Board of Tax Appeals for the State of Ohio for any proceedings relative to the enforcement of the confidentiality order.

DATED: \_\_\_\_\_

SIGNED: \_\_\_\_\_

PRINTED NAME: \_\_\_\_\_