

IN THE SUPREME COURT OF OHIO

THE CLEVELAND CLINIC FOUNDATION	)	Case No. 08-0411
AND FAIRVIEW HOSPITAL,	)	
	)	
Appellants,	)	
	)	
v.	)	Board of Tax Appeals
	)	Case Nos.:
RICHARD A. LEVIN, TAX COMMISSIONER	)	2005-V-1726
OF OHIO, et al.,	)	2006-V-99
	)	2006-H-117
Appellees.	)	

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APPELLANTS THE CLEVELAND CLINIC FOUNDATION AND FAIRVIEW  
HOSPITAL'S OPPOSITION TO MOTION TO DISMISS FOR LACK OF  
JURISDICTION BY APPELLEE RICHARD A. LEVIN, TAX COMMISSIONER OF  
OHIO

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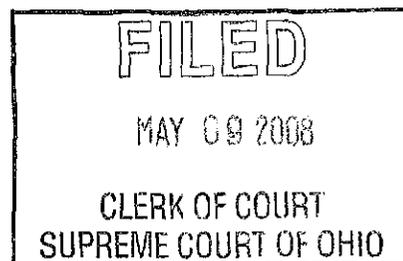
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## I. INTRODUCTION

In moving to dismiss The Cleveland Clinic Foundation's appeal as premature, the Tax Commissioner asserts that any injury caused by the Cleveland Clinic producing proprietary trade secrets today can be remedied months or years from now as part of a post-judgment appeal. The Tax Commissioner, however, overlooks the fact that it is a public entity subject to Ohio's broad Public Records Act, R.C. 149.43. In other words, even though the Board of Tax Appeals ("BTA") took steps to protect the Cleveland Clinic's trade secrets through a confidentiality order, the Attorney General cannot shield those records from public records requests. An appeal on this issue years from now, after the proprietary information at issue has been publicly disseminated, would be no recourse for the Cleveland Clinic. For that reason, today's appeal regards a provisional remedy that is subject to immediate review.

By way of background, the Appellants here sought protection for their trade secrets, asking the BTA to review the documents at issue, consider evidence, and issue an order finding the documents to be trade secrets. Instead, following an evidentiary hearing, the BTA acknowledged that the documents were proprietary business documents that may qualify as trade secrets and ordered the Appellants to produce the documents to government entities. The only protection the BTA offered to the Appellants for their trade secrets is an agreed confidentiality order. Disregarding the possibility of public records requests, the BTA's order contemplated a process where the Appellants would produce their trade secrets in discovery without trade secret protection. During the merits hearing, the BTA would consider whether documents offered into evidence should be "sealed" as trade secrets or made public. That process provides the Appellants with no meaningful protection for their trade secrets, and, without this appeal, no meaningful review of the BTA's order. This Court's decision in *State ex rel. The Plain Dealer v. Ohio Department of Insurance*, (1997) 80 Ohio St. 3d 513, 527, 687 N.E.2d 661, makes clear

that an agreed confidentiality order will not shield the trade secrets from public records requests: a party “cannot meet the statutory trade secret definition by stating that documents for which trade secret status is claimed are protected merely by reference to them in an agreement of confidentiality.”

Producing trade secrets to government entities, even subject to an agreed confidentiality order, does not protect them from public records requests. Moreover, if the BTA admits trade secrets into evidence without sealing them, they become public. There is no mechanism for retrieving them from the public domain. That is the very reason the Appellants sought to protect their trade secrets before producing them and now appeal the BTA’s denial of that request for trade secret protection.

## **II. BACKGROUND**

This appeal arises out of three applications for exemption from real estate taxation on property owned and used by Ohio non-profit corporations to provide medical treatment to patients, conduct scientific research, and train medical professionals. Two of the applications were filed by The Cleveland Clinic Foundation, a world-renowned academic medical institution located in Cleveland, Ohio. Those two applications relate to the Taussig Cancer Center, at which the Clinic treats and studies various forms of cancer, and the Beachwood Family Health Center, a property located in a Cleveland suburb at which Cleveland Clinic doctors treat patients, perform surgery, train doctors, and conduct research. The third application relates to Fairview Hospital, a non-profit regional hospital located on Cleveland’s westside, which is part of The Cleveland Clinic Health System. It is owned and operated by the non-profit Cleveland Clinic Health System-Western Region (“CCHSWR”). Both Fairview Hospital and CCHSWR are 501(c)(3) organizations exempt from federal income tax.

The Cleveland Clinic was founded as an Ohio non-profit corporation in 1921, dedicated

to a tri-partite mission of caring for the sick, researching their problems, and educating medical professionals. The United States government also recognized the Clinic as a 501(c)(3) organization, exempt from federal income tax. Over the last century, the Clinic has grown in size and reputation, but it continues to adhere to its original tri-partite charitable mission. As an Ohio non-profit corporation that operates not for profit but to fulfill its charitable mission, the Clinic is exempt from Ohio real estate tax under R.C. 5709.12 and 5709.121. Accordingly, and as directed by statute, the Clinic and Fairview Hospital filed the applications described above.

The Tax Commissioner granted the applications for real estate tax exemption relating to Fairview Hospital and the Taussig Cancer Center but denied the application relating to the Beachwood Family Health Center. Those three final determinations were appealed to the BTA, which consolidated the cases for purposes of discovery. For simplicity, references to the Cleveland Clinic hereinafter refer to both the Clinic and Fairview Hospital.

The Cleveland and Beachwood Boards of Education, represented by the same counsel, propounded extensive discovery on the Clinic in the BTA proceedings. In each case, more than 250 interrogatories and document requests were served, seeking broad and unprecedented disclosure of, among other things, financial analyses and projections, fee schedules, physician and administrative compensation, and confidential price terms contained in contractual arrangements with insurers, vendors, and other service providers. Although the Clinic has been an Ohio non-profit corporation and qualified as a 501(c)(3) organization for decades, much of the discovery was aimed at establishing that the Clinic is not a charitable institution under R.C. 5709.12. The discovery requests were not just overwhelming in their breadth, they were inconsistent with the conclusive presumption created by the statute, which on its face applies to the Clinic. *See* R.C. 5709.12(D)(1) (“A private corporation established as a nonprofit

corporation under the laws of a state, that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C.A. 1, as amended, and has as its principal purpose one of more of the foregoing objects, [encouraging the advancement of science generally, or of a particular branch of science, the promotion of scientific research, the improvement of the qualifications and usefulness of scientists, or the increase and diffusion of scientific knowledge] also is *conclusively presumed* to be a charitable or educational institution.” (emphasis added)). The Clinic objected to these requests as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence but agreed to provide certain more narrowly tailored categories of information, subject to adequate protection of the Clinic’s confidential documents and, more importantly, its trade secrets.

Protection of trade secrets was paramount in this case because the Cleveland Clinic would be producing its documents to public entities—the Cleveland and Beachwood Boards of Education and the Attorney General’s office on behalf of the Tax Commissioner—that are subject to Ohio’s Public Records Act. *See* R.C. 149.43(A)(1). A standard protective order would be inadequate to protect the Clinic’s documents in the event that a request were made under the Act.<sup>1</sup> *See Plain Dealer*, 80 Ohio St. 3d 513.

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<sup>1</sup> The Clinic believes that the media has already requested the Clinic’s documents from the Boards of Education, but the Clinic has produced only non-confidential documents to this point. Indeed, these cases have already generated significant media attention. *See, e.g., Nonprofit Hospitals, Once For the Poor, Strike It Rich—With Tax Breaks*, *The Wall Street Journal*, April 4, 2008, at A1; Douglas J. Guth, *Beachwood to Look at Clinic’s Books*, *The Cleveland Jewish News*, Feb. 8, 2008, at 12; Joan Mazzolini, *Records Must Be Given To Beachwood Schools*, *The Plain Dealer*, Jan. 26, 2008, at B3; Sarah Jane Tribble, *Hospitals’ Charity Care Draws Scrutiny*, *Lawmakers Question Tax-Exempt Status*, *The Plain Dealer*, Dec. 9, 2007, at A1; Douglas J. Guth, *Out with the Old . . . or Keep Experience*, *The Cleveland Jewish News*, Nov. 2, 2007, at 10; Gregg Blesch, *Not So Taxing After All*, *Modern Healthcare*, Oct. 29, 2007, at 28; *Next in the City*, *The Cleveland Jewish News*, Oct. 19, 2007, at 3; Joan Mazzolini, *Clinic Battles Beachwood Schools over Taxes, ‘Trade Secrets,’* *The Plain Dealer*, Oct. 15, 2007, at B1; *The Big Issue*, *Crain’s Cleveland Business*, May 15, 2006, at 11; *Beachwood Case Will Help Define Charity*, *The Plain Dealer*, April 9, 2006, at A6; Jeni Bell, *Telling the Story of Community Benefit*, *Healthcare Financial Management*, Jan. 1, 2006, at 58; Thomas J. Sheeran, *Education Leader Says Cleveland Clinic Tax Case Will Help Schools*, *The Associated Press*, Nov. 4, 2005; Cheryl Powell, *Hospitals’ Tax Breaks Criticized*, *Akron Beacon Journal*, June 16, 2005, at B1; Joan Mazzolini, *Clinic Loses Another Tax Ruling*, *The Plain Dealer*, Oct. 30, 2004, at B1.

The Clinic thus filed a motion to “seal” those documents that constituted trade secrets, which it offered to produce for in camera inspection to the BTA and provide testimony or argument relating to the trade secrets in an ex parte hearing. *See* The Cleveland Clinic Foundation’s Mot. To Seal Certain Records Requested In Discovery (filed Nov. 14, 2006). Shortly thereafter, the Boards of Education moved to compel responses to certain interrogatories and document requests. *See* Appellee Beachwood City Sch. Dist. Bd. of Educ.’s Mot. For Order To Compel Discovery (filed Nov. 25, 2006).<sup>2</sup> The Tax Commissioner, through his counsel, remained a bystander throughout these disputes, which related to discovery propounded by the Boards of Education.

The BTA issued an order on April 6, 2007. In that order, the BTA declined to review the documents in camera, it declined to hold an ex parte hearing, but it agreed to hold an evidentiary hearing at which the Cleveland Clinic would have the opportunity to establish that its documents qualified as trade secrets. The BTA specifically said that it would consider the Clinic’s motion to seal as a motion for a protective order. Under Rule of Civil Procedure 26(C)(7), the BTA’s protective order could have declared that certain of the Clinic’s records were trade secrets and that those documents were not to be disclosed by the Boards of Education or the Attorney General’s office. An order declaring records as trade secrets would have protected those documents from disclosure through public records requests to the Boards of Education and Attorney General’s office. The BTA also announced in the April 6 Order that it would not rule on the motions to compel until after it had considered the Clinic’s request for a protective order.

Consistent with the April 6 Order, the Clinic proffered testimony (which was largely uncontroverted) from its then Chief Operating Officer, Michael O’Boyle, and the director of

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<sup>2</sup> Similar motions were filed in the Fairview and Taussig cases.

Professional Staff Affairs, Robert Coulton. The post-hearing briefs proffered by the Clinic, the Boards of Education, and the Tax Commissioner made clear that the parties all understood that the purpose of the hearing was to proffer evidence so that the BTA could determine whether the records at issue constituted trade secrets. *See* the Tax Comm'r's Br. In Response To Cleveland Clinic's Post-Hearing Br. In Support Of Its Mot. To Seal Records Requested In Discovery at 1-2 (filed Aug. 14, 2007) ("T.C. Post Hearing Br.") (arguing that documents should not be sealed because they are not trade secrets); Bd. of Educ. For The Beachwood City Sch. Dist. & The Cleveland Board Of Educ.'s Post Hearing Br. In Opp. To The Cleveland Clinic Foundation's Mot. (sic) To Seal Certain Documents at 7 (filed Aug. 10, 2007) (same).

On January 25, 2008, the BTA issued the order currently under review. That order granted the motions to compel in part, compelled the Cleveland Clinic to produce certain documents, acknowledged that certain of the documents at issue were confidential, proprietary business records, entered a protective order that precluded the parties from disclosing confidential documents, but reserved the issue of whether any of the documents were trade secrets for later determination at the merits hearings on the tax exempt status of the three properties at issue.

The Cleveland Clinic filed a timely notice of appeal from the January 25 Order.

### **III. ARGUMENT**

By reserving the trade secrets issue for the merits hearings, the BTA has effectively declined to protect the Cleveland Clinic's trade secrets from public records requests. The harm to the Clinic will occur immediately upon production of its trade secrets to the Boards of Education and Tax Commissioner. An appeal following final judgment is no remedy for the immediate harm that will befall the Clinic from producing its trade secrets to government entities. Under Ohio law, the January 25 Order is thus a final appealable order over which this

Court has appellate jurisdiction.

**A. THE JANUARY 25 ORDER AND AGREED PROTECTIVE ORDER WILL NOT ADEQUATELY PROTECT TRADE SECRETS FROM REQUESTS UNDER THE OHIO PUBLIC RECORDS ACT.**

The Ohio Public Records Act, R.C. 149.43, allows any person to inspect and copy public records kept by any public office in the state. Public office includes school district units, the Attorney General's office, and the Ohio Tax Commissioner's office. *See* R.C. 149.43(A)(1); *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384, 833 N.E.2d 274, at ¶ 17 (Department of Taxation subject to public records requests); *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, 776 N.E.2d 82, at ¶ 40 (school districts subject to public records requests). Public records are any records kept by a public office. R.C. 149.43(A)(1). Among the exceptions to the definition of "public records" are "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). This Court has held that trade secrets are exempt from public records requests under R.C. 149.43(A)(1)(v). *State ex rel. Carr v. City of Akron*, 112 Ohio St. 3d 351, 2006-Ohio-6714, 859 N.E.2d 948, at ¶ 45. This Court has also held that a public office's promises of confidentiality do "not alter the public nature" of documents or exempt them from disclosure under the Ohio Public Records Act. *State ex rel. Gannett Satellite Info. Network v. Shirey*, (1997) 78 Ohio St. 3d 400, 403, 678 N.E.2d 557. Anything short of a determination that the Clinic's documents are trade secrets thus fails to protect those documents from disclosure under the Ohio Public Records Act, once produced to government entities.

**B. AN INTERLOCUTORY ORDER GRANTING A PROVISIONAL REMEDY IS REVIEWABLE IF IT MEETS THE REQUIREMENTS OF R.C. 2505.02(B)(4).**

For an appellate court to have jurisdiction over an appeal, Section 3(B)(2), Article IV of the Ohio Constitution requires that the decision under review be a judgment or a final order.

*Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St. 3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, at ¶ 9.

R.C. 2505.02 identifies those orders that constitute final appealable orders. Applicable here is the description of orders granting or denying provisional remedies:

(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 in the action.

R.C. 2505.02(B)(4).

The statute thus sets forth a three-part test to determine whether an order granting or denying a provisional remedy is final and appealable. First, “the order must grant or deny a provisional remedy.” *Sinnott*, 2007-Ohio-5584, at ¶ 16. Second, the order “must also determine the action and prevent a judgment in favor of the appealing party regarding the provisional remedy.” *Id.* Third, “the appealing party cannot have a meaningful or effective appellate remedy following final judgment.” *Id.*

1. **The April 6, 2007 Order Was Not A Final Order Under R.C. 2505.02.**

Although the Tax Commissioner argues that the Cleveland Clinic should have appealed from the April 6 Order, he avoids analyzing whether that Order was appealable. In a footnote the Tax Commissioner actually concedes that the April 6 Order was “not appealable.” T.C. Mem. at 5 n.2. The Clinic agrees. The April 6 Order was not appealable. And because it was not appealable, the Tax Commissioner’s first argument fails. The Clinic was not required to file a notice of appeal within 30 days of an order that was not appealable.

The April 6 Order was not appealable because it did not “determine[] the action with respect to the provisional remedy and prevent[] a judgment in the action in favor of the appealing party with respect to the provisional remedy.” R.C. 2505.02(B)(4)(a). When the April 6 Order was issued, the BTA was faced with two sets of pending motions—the Boards of Education’s motions to compel and the Clinic’s motions to seal records as trade secrets. The April 6 Order set a date for an evidentiary hearing at which the Clinic could present evidence that its documents constituted trade secrets that would be identified and protected in discovery through a protective order issued under Ohio Rule Civ. P. 26(C)(7). For reasons not articulated in the April 6 Order, the BTA declined to rule on the pending motions to compel until after the motions for protective order were decided.

The April 6 Order determined nothing: it did not determine the protections (if any) that would be afforded documents during discovery, it did not determine the protections (if any) that would be afforded documents introduced into evidence at the merits hearing, and it did not determine whether any of the documents at issue were even discoverable. There was no decision from which to appeal in the April 6 Order—it simply explained the process the BTA would follow to make a decision in the future. *Compare In re Special Docket No. 73958*, 115 Ohio St. 3d 425, 2007-Ohio-5268, 875 N.E.2d 596, at ¶ 29 (action was determined with respect to provisional remedy because “there existed nothing further for the trial court to decide with regard to the provisional remedy”) *with In re Adams*, 115 Ohio St. 3d 86, 2007-Ohio-4840, 873 N.E.2d 886, at ¶ 36 (no determination of action under 2505.02(B)(1) where order was temporary and anticipated a future, permanent decision). The future decision contemplated by the April 6 Order was eventually issued in the January 25 Order, from which the Clinic has timely appealed. *See Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 2007-Ohio-309, 869 N.E.2d 39, at ¶¶ 15-16

(distinguishing between order providing guidance as to process and order making determination and finding that only the order making determination was a final appealable order).

Because the Tax Commissioner and the Clinic agree that the April 6 Order was not a final order from which an appeal could be taken, and the April 6 Order did not determine the action with regard to any provisional remedy, the Tax Commissioner's argument that the Clinic's notice of appeal should have been filed within 30 days of the April 6 Order is specious.

**2. The January 25, 2008 Order Is A Final Order Under R.C. 2505.02(B)(4).**

The January 25 Order is a final order under R.C. 2505.02(B)(4) because it fulfills each of the three requirements articulated in the statute.

**(a) The January 25 Order Denies A Provisional Remedy.**

The first prong of R.C. 2505.02(B)(4)'s three-part test is that the order grant or deny a "provisional remedy." R.C. 2505.02(A)(3) defines provision remedy as "a proceeding ancillary to an action, including, but not limited to, . . . discovery of privileged matter . . ." "It is well-established that, in addition to encompassing the discovery of privileged matter, the term 'provisional remedy' also encompasses confidential information such as trade secrets." *Armstrong v. Marusic*, Lake App. No. 2001-L-232, 2004-Ohio-2594, at ¶ 12. Thus, an order compelling production of trade secrets without adequate protection denies a provisional remedy.

**(b) The January 25 Order Determines The Action With Respect To The Provisional Remedy.**

The January 25 Order meets the second prong of R.C. 2505.02(B)(4)'s test because it determines the action with respect to the provisional remedy and prevents a judgment in the Clinic's favor with respect to that provisional remedy. In the January 25 Order, the BTA compelled the production of the trade secrets but declined to identify them (and thus protect them) as trade secrets. No further BTA action is required—as of the January 25 Order, the

Cleveland Clinic is required to produce its trade secrets and there is nothing left for the BTA to do that can protect those trade secrets during the discovery phase of these proceedings. A determination that the documents are trade secrets during the merits hearing is inadequate because requests for the documents can be made long before the merits hearing takes place.

*State v. Muncie*, (2001) 91 Ohio St. 3d 440, 746 N.E.2d 1092, is instructive. In *Muncie*, the Court noted that the question as to whether an order determined the action with respect to a provisional remedy was “easily answered” when a trial court issued a forced medication order. *Id.* at 450. The Court reasoned that the trial court’s order “definitively provided that the physicians . . . could administer medication.” *Id.* at 450-51. The Court further noted that the “order also prevented a judgment in favor of Muncie with respect to the proceeding for forced medication, as it contained no provision permitting Muncie to contest” the medication. *Id.* at 451. Here, too, the question of whether the order determines the action with respect to the provisional remedy is easily answered. The January 25 Order forces production of trade secrets, without protection from public records requests, and without a mechanism in the BTA proceedings to seek protection throughout discovery. Accordingly, the January 25 Order determined the action with respect to the provisional remedy and the second prong of R.C. 2505.02(B)(4) is satisfied.

**(c) The Cleveland Clinic Would Not Be Afforded A Meaningful And Effective Remedy On Appeal Following Final Judgment.**

The final requirement under R.C. 2505.02(B)(4) is that “[t]he 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 in the action.” R.C. 2505.02(B)(4)(b). This section of the statute recognizes that “occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment. In some instances, the proverbial bell cannot be unrung and an appeal after final

judgment on the merits will not rectify the damage suffered by the appealing party.” *Muncie*, 91 Ohio St. 3d at 451 (internal quotation marks omitted).

An order compelling production of trade secrets is a final order because “the party resisting disclosure of those documents would have had no ability after final judgment to restore the cloak of secrecy lifted by the trial court’s order compelling production.” *Id.* (discussing *Gibson-Myers & Assocs. v. Pearce*, (Oct. 27, 1999) Summit App. No. 19358, unreported, 1999 Ohio App. LEXIS 5010 (Summit Cty. Oct. 27, 1999) with approval). *Accord The Dispatch Printing Co. v. Recovery Ltd. P’ship*, 166 Ohio App. 3d 118, 2006-Ohio-1347, 849 N.E.2d 297, at ¶ 8 (“This court has previously held that an order compelling discovery of privileged matters, which are potentially protected, constitutes a final appealable order . . . . [T]his court followed the reasoning of the Ninth District Court of Appeals which held that an order compelling the discovery of trade secrets was a final appealable order.”); *Armstrong*, 2004-Ohio-2594, at ¶ 15 (confidentiality order that was alleged to be adequate protection for trade secrets was appealable order because appeal at final judgment was not effective remedy for disclosure of trade secrets).

The Cleveland Clinic will be left with no “meaningful or effective remedy” after final judgment to undo the damage caused by the BTA’s decision to compel production of trade secrets without adequate protection. Once trade secrets are in the public realm they lose their protected status. Indeed, this Court has rejected the proposition that “public records may later be removed from the public domain: ‘Once clothed with the public records cloak, the records cannot be defrocked of their status.’” *Plain Dealer*, 80 Ohio St. 3d at 521, quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, (1996) 75 Ohio St. 3d 374, 378, 662 N.E.2d 334. Thus, documents produced in discovery without trade secret protection are unprotected, as are unsealed documents admitted into evidence at a merits hearing. An appeal following the merits hearing

cannot retrieve the documents from the public domain. Accordingly, the Cleveland Clinic's only meaningful remedy is this immediate appeal.

The fact that the Cleveland Clinic may have the opportunity to object to requests for its trade secrets under the Ohio Public Records Act does not make a post-judgment appeal an effective remedy. Even if the Clinic has the ability to appear in proceedings to protect its trade secrets, those proceedings will force the Clinic into ancillary litigation in multiple courtrooms across the state. It is likely that records requests will be made by multiple local and national media outlets, forcing all of the parties to the BTA proceedings to appear and litigate every time a request is made. Not only will that process consume the valuable resources of this state's courts, the Boards of Education, the Attorney General's office, the Tax Commissioner, and two non-profit institutions, the process sets up the possibility of inconsistent outcomes. There is no better forum to litigate whether those documents are trade secrets than the BTA—it is the forum that has ordered the Clinic to produce the documents and it already has the evidentiary record before it. It provides a single forum in which a determination can be made and consistently applied as public records requests are made to these government entities.

Finally, R.C. 2505.02(B)(4) simply inquires whether appeal following all proceedings would provide an effective remedy. It does not inquire whether ancillary litigation among different parties could possibly afford some relief.

An appeal in the BTA proceedings following the merits hearings will not provide the Cleveland Clinic with an effective remedy for disclosure of its trade secrets. Even if an agreed confidentiality order were sufficient to protect the Clinic's trade secrets from public records requests. The BTA's January 25 Order contemplates that it will rule on the trade secret status of documents after they are entered into evidence at the merits hearings. Trade secrets will be

sealed and documents that the BTA does not believe constitute trade secrets will become part of the public record. At that point, the Clinic has no remedy—it cannot adjourn the hearing to appeal the BTA’s ruling or otherwise shield the documents until an appeal can be taken. Once part of the public record, an appeal cannot undo the damage.

Under R.C. 2505.02(B)(4), the January 25 Order is a final appealable order over which this Court has jurisdiction. The Tax Commissioner’s motion should be denied.

**C. SUBJECT MATTER WAIVER IS NOT A JURISDICTIONAL ISSUE AND MISCONSTRUES THE RELIEF REQUESTED**

The only proper jurisdictional issues raised in the Tax Commissioner’s Motion to Dismiss involve whether or not the BTA’s January 25 Order is a final appealable order. Arguments that address the merits of the Cleveland Clinic’s appeal are not jurisdictional in nature. None of the cases on which the Tax Commissioner relies suggest that the Court can or should consider the merits of an appeal when addressing its jurisdiction to hear the appeal. Indeed, the appellate courts of this state have carefully avoided the merits when considering their jurisdiction. *See, e.g., Southside Community Development Corp. v. Levin*, 116 Ohio St. 3d 1209, 2007-Ohio-6665, 878 N.E.2d 1048, at ¶ 9. Because the Tax Commissioner’s “subject matter” waiver argument goes to the merits of the appeal, this Court should disregard that argument.

The Tax Commissioner’s subject matter waiver argument fails on its merits in any event. The subject matter waiver doctrine prohibits a party from instituting legal proceedings and then claiming privilege to shield from discovery documents that the party put at issue in the first place. *See, e.g., Covington v. The MetroHealth Sys.*, 150 Ohio App. 3d 558, 2002-Ohio-6629, 782 N.E.2d 661, at ¶ 28. But the Clinic has never argued that its trade secrets should be shielded from discovery altogether. It has simply sought the protection of trade secret status to which those documents are entitled under Ohio law. *See, e.g., The Cleveland Clinic Foundation’s*

Reply In Supp. Of Post-Hearing Br. In Supp. Of Its Mot. To Seal Certain Documents at 11 (filed Aug. 27, 2007) (“If this Board concludes that some or all of this information is relevant to these proceedings, the Tax Commissioner and the Boards of Education are not prejudiced or harmed in any way by the trade secret protection sought by The Cleveland Clinic—those parties will still have access to the information for use in these proceedings.”). The subject matter waiver doctrine has no relevance here whatsoever.

#### IV. CONCLUSION

The Tax Commissioner’s Motion to Dismiss Appeal for Lack of Jurisdiction should be denied. The Cleveland Clinic filed a timely Notice of Appeal to appeal the BTA’s January 25 Order. That order is a final order under R.C. 2505.02(B)(4), and, thus, this Court has jurisdiction over the appeal.

Respectfully submitted,



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