IN THE SUPREME COURT OF OHIO

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

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FILED
JUN 26 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE FACTS

A. Introduction

As part of a tax exemption proceeding consolidated for discovery purposes involving three Cleveland-area properties owned and operated by the Cleveland Clinic Foundation, the Board of Tax Appeals ("BTA") was asked to declare as trade secrets proprietary information held by the Clinic and requested by two school districts that were parties to the proceeding. The information at issue included compensation paid to the Clinic's doctors and key administrators, internal financial projections and analyses, and private contracts. The information was highly sensitive and confidential, and its disclosure could impair many of the Clinic's competitive advantages, including its ability to employ the best and brightest in their fields. In view of the sensitive nature of the requested information and the concern that producing such proprietary information to public school districts could result in the information being divulged to others—including competitors—by way of public records requests, the Clinic requested that the BTA declare this information trade secrets, pursuant to the Ohio Uniform Trade Secrets Act. After noting that the requested materials "may qualify as confidential commercial information," BTA Jan. 25, 2008 Order at 8 n.10, the BTA nevertheless failed to make a ruling on the trade secrets issue. Although it put in place a protective order, the BTA ordered that the documents be produced immediately to the school districts, with a trade secrets ruling to come at some future point, if ever, leaving the Clinic with little certainty regarding the future of its proprietary information.

The BTA's decision is flawed in multiple respects. First, ordering documents to be produced without first resolving the trade secrets issue contravenes both the letter and purpose of the Trade Secrets Act, which authorizes tribunals "to preserve the secrecy of an alleged trade secret" by, among other things, "ordering any person involved in the litigation not to disclose an

alleged trade secret." R.C. 1333.65. In competing with health care institutions in Ohio and throughout the world, the Cleveland Clinic relies on the proprietary information it has developed, yet the BTA, by failing to address whether that information constitutes trade secrets, puts the information at risk of disclosure to the Clinic's competitors. Second, the ruling leaves the Clinic in the untenable position of having to choose between protecting its trade secrets by foregoing its statutorily authorized right to seek tax-exempt status for its facilities, or producing the information to a public body with no assurance that the information would be protected from disclosure to competitors. The latter is more than a merely hypothetical concern. Indeed, these cases have already generated significant media attention, and the Clinic believes that media have already sought the Clinic's documents from the Boards of Education. *See* Appellants' Opposition to Motion to Dismiss for Lack of Jurisdiction, filed May 9, 2008, at 4 n.1 (collecting articles about the cases).

Recognizing the sensitive nature of the information at issue and the public nature of the BTA proceeding, the Court, during briefing on the merits of this appeal, ordered that the parties address two additional issues regarding the applicability of public records law to this proceeding. *See* Court's June 6, 2008 Order. First, the Court asked whether documents obtained by a public office as a litigant during discovery qualify as "trial preparation records," R.C. 149.43(A)(1)(g), "that are exempt from public disclosure." Second, the Court asked whether "a protective order issued by a tribunal in discovery" shields documents obtained during discovery from disclosure pursuant to the "catch-all" exemption in the public records law, R.C. 149.43(A)(1)(v).

In both instances highlighted by the Court, Ohio law provides limited protection for the Cleveland Clinic's proprietary information. Absent a trade secrets determination, that information is still at risk of disclosure to third parties. For instance, the Court, applying the

"trial preparation records" exemption to public records, has consistently protected from public disclosure those documents received by a public entity during discovery, as "the sole purpose of discovery is to assist trial preparation." *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271. That said, because the trial preparation records exemption leaves it to the public body's discretion whether to produce the documents at issue to a third party, and because the exemption at all events expires once a proceeding has come to an end, this public records exemption provides less protection to the Cleveland Clinic than would a trade secrets determination. Similarly, while a protective order covering the Clinic's proprietary information should place that information safely in the "catch-all" exemption in the Public Records Act, that exemption still would appear to fall short of providing full protection to the Clinic, as it is not clear how extensively the BTA's protective order applies in this case, nor would a protective order necessarily bind the BTA, itself a public body that ultimately will also receive the Clinic's confidential information during the merits hearing.

In other words, the Cleveland Clinic deserves the benefit of the comprehensive scope of Ohio's trade secrets laws. As is true for any successful organization, private or public, for-profit or non-profit, the Cleveland Clinic develops and maintains proprietary information and systems that provide it with economic and competitive advantages. Those advantages allow the Clinic to sustain its economic viability while fulfilling its charitable mission. For operations like the Clinic, which rely on the latest technology, practices and information to deliver their services, the "laws which define and protect that information are increasingly important." A. Tracey, The Contract in the Trade Secret Ballroom—A Forgotten Dance Partner? (2007), 16 Tex. Intell. Prop. L.J. 47, 49. Yet in the proceedings below, the BTA ordered the production of trade secret

information without putting in place adequate protection against the future dissemination of that information.

If the decision below is sustained, the tax appeal process will forever be slanted against the private entities involved. After all, the public entity in these proceedings need only request sensitive, proprietary information from its private opponent to put the private litigant in the position the Clinic finds itself here: produce the information at the risk of further dissemination or dismiss the proceeding. Because disputes should be decided on their merits, not due to an uneven procedural playing field, *see generally Int'l Periodical Distribs. v. Bizmart, Inc.*, 95 Ohio St.3d 452, 2002-Ohio-2488, at ¶ 7, and because the information at issue is "business" and/or "financial information" that "derives independent economic value . . . from not being generally known," R.C. 1333.61(D), it deserves the full protection of the trade secrets law.

B. The Cleveland Clinic Seeks Tax-Exempt Status For Three Healthcare Facilities.

Founded at the close of World War I with the goals of providing better care for the sick, investigating their problems, and educating medical professionals, the Cleveland Clinic is recognized today as one of the world's leading medical facilities. The Clinic's charitable mission is simple: provide compassionate health care of the highest integrity in a setting of education and research. Consistent with this mission, the Clinic, in addition to providing world-class patient care, also conducts cutting-edge research, operates a medical school, and hosts more than 800 residents and fellows annually. June 7, 2007 Hearing Transcript ("Tr.") at 39–40. In view of its charitable mission, the Clinic since its inception has been organized as a state and federal non-profit.

The Clinic's main campus, located just east of downtown Cleveland, includes a thousand-bed hospital, exam rooms for over 1,500 physicians, laboratories and technical service areas, and

administrative offices. Tr. at 46. The Clinic's reach extends throughout Northeast Ohio, with facilities in numerous Ohio communities. Included in the Clinic's network of facilities are the Taussig Cancer Center, (at issue in BTA Case No. 2006-H-117), the Beachwood Family Health and Surgery Center (at issue in BTA Case No. 2005-V-1726), and Fairview Hospital (at issue in BTA Case No. 2006-V-99). The Taussig Center, a cancer research and treatment facility, serves over 180,000 patients annually. The Beachwood Center, an extension of the main campus, utilizes Clinic-employed physicians in providing clinical services, research, and training. Fairview Hospital, a more than century-old acute care teaching hospital in the city of Cleveland, offers the West Side's only Pediatric Emergency Department.

In 2005 and 2006, the Cleveland Clinic instituted proceedings with the Tax Commissioner to have these three facilities declared as exempt from real property taxation in accordance with R.C. 5709.12 (exemption of property used for public or charitable purposes) and R.C. 5709.121 (exclusive charitable or public purposes defined). The Commissioner in turn granted exempt status for the Taussig and Fairview facilities, but denied the exemption for the Beachwood facility. *See* BTA Apr. 6, 2007 Order at 3. All three determinations were appealed to the BTA: the Taussig and Fairview exemption determinations were appealed by the Cleveland Municipal School District Board of Education, and the Beachwood denial, favorable to the Beachwood City School District Board of Education, was appealed by the Clinic (hereafter, the Cleveland and Beachwood Boards of Education are together referred to as the "Boards of Education").

C. During Proceedings Before The BTA, The Clinic Sought To Protect Its Proprietary Trade Secret Information From Disclosure To Third-Parties.

The Clinic's identity and success is largely attributable to its world-class personnel. Indeed, the Clinic's sustainability in the competitive health care industry is directly impacted by

its ability to attract and retain the best and brightest in their fields, to negotiate fair contracts, and to protect the competitive advantages it has developed. Because those efforts would be damaged by the disclosure of the Clinic's proprietary information to competitors, protecting that information is a high priority for the Clinic.

During the proceedings before the BTA, the Boards of Education served more than 250 interrogatories and document requests (including subparts) upon the Cleveland Clinic. Included in the discovery were requests for documents that contained proprietary information held by the Clinic, including: (1) physician and key administrators' compensation; (2) internal financial analyses/statements; (3) the chargemaster; (4) financial arrangements with third parties; (5) contractual terms with insurance companies; and (6) advertising and marketing information. *See* BTA Jan. 25, 2008 Order at 5, 8. The discovery requests were overbroad and burdensome, even extending to requests aimed at establishing that the Clinic is not a charitable institution under R.C. 5709.12, a fruitless endeavor in that the Clinic has been an Ohio non-profit corporation and federal 501(c)(3) organization for decades, and that the statute "conclusively presume[s]" that an organization like the Clinic is "a charitable" organization. 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, . . . 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). Nonetheless, in response to the Boards of Education's requests, the Clinic produced hundreds of documents. Further, it agreed

to produce other sensitive, proprietary information so long as the documents were declared trade secrets by the BTA and were appropriately protected from dissemination.

Unsatisfied with the Cleveland Clinic's proposal, the Boards of Education moved to compel the Clinic to divulge its proprietary information. Believing that this information likely constituted trade secret information and that its disclosure to public entities would subject those documents to further disclosure under public records laws, the Clinic opposed the motion and asked that the requested information be deemed trade secrets, protecting it from further disclosure pursuant to R.C. 1333.61 *et seq.* *See* BTA Apr. 6, 2007 Order at 2. In accordance with that request, the Clinic asked that the BTA "conduct an ex parte hearing to perform an in camera inspection of the documents responsive to the BOE's discovery requests" to resolve the trade secrets question. *Id.*

After recognizing its authority "to place restrictions upon discovery engaged in extra-judicially by the parties," *id.* at 5, the BTA nevertheless denied granting trade secret status to the requested documents at this stage. *Id.* at 7. Instead, the BTA ordered that a hearing be set to receive testimony and evidence to determine what relief should issue "to govern the exchange of discovery between the parties." *Id.*

D. The BTA Fails To Protect Adequately The Cleveland Clinic's Trade Secrets.

At the subsequent June 7, 2007 hearing, the Cleveland Clinic presented two witnesses, Robert Coulton, its Executive Director of Professional Staff Affairs, and Michael O'Boyle, its then Chief Operating Officer, to address the proprietary nature of the requested documents as well as the Clinic's efforts to keep the information confidential. Specifically, the Clinic's witnesses discussed how the requested information would have significant value to the Clinic's competitors should it be disseminated publicly and how that public dissemination would harm the Clinic by eroding the competitive advantages it has developed. *See, e.g.*, Tr. at 54–59, 61–

64, 65–72, 73–77, 77–81, 134–41. The witnesses also testified to the steps the Clinic takes to protect that information from dissemination. *See* Tr. at 58, 62–63, 67–68, 79–81, 135–37, 142. The Boards of Education called no witnesses at the hearing.

Also during the hearing, the Cleveland Clinic and the Boards of Education asked the BTA to approve a proposed stipulation and confidentiality order, which, if approved, would ensure some degree of protection for the Clinic's other confidential documents (beyond those documents covered by the six categories for which the Clinic sought a declaration as protected trade secrets). *See* BTA Jan. 25, 2008 Order at 2. The Tax Commissioner, however, declined to join this proposed stipulation and confidentiality order. *See id.* The confidentiality order, notably, included procedures designed to prohibit the parties from disclosing confidential documents to parties outside the proceedings and to limit dissemination within the Boards of Education to those individuals with a litigation reason to have access to the documents, and provided for the return or destruction of confidential documents after the proceedings. *See* Tax Commissioner's Motion to Dismiss for Lack of Jurisdiction at Appendix C. The order, however, made clear that it did not apply "to any document or information that is, or becomes, available publicly without violation of [the order]." *Id.* at Appendix C ¶ 1. It also provided that if a party receives a public records request for confidential documents, that party is required only to notify the party who designated it confidential, so that the designating party can then seek a separate determination that the documents are not public records. *Absent such a determination, the protective order permitted the parties to disclose confidential documents pursuant to a public records request. Id.* at Appendix C ¶ 12.

In its subsequent decision issued on January 25, 2008, the BTA, "as contemplated by Ohio Admin. Code 5717-1-11(D) and Civ. R. 26(C)(7)," found "that information regarding [the

Clinic'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." BTA Jan. 25, 2008 Order at 8 n.10. With alterations concerning the BTA's jurisdictional limitations, it approved the Boards of Education and the Cleveland Clinic's stipulation and confidentiality order. *See id.* at 9–10. Moreover, referring back to the Clinic's original motion to seal documents, which the BTA had construed as a motion for a protective order, *see id.* at 2 n.1, the BTA also issued a protective order "consistent with the terms of the [stipulation and confidentiality] agreements," noting that the those agreements "afford the same safeguards that a protective order would provide." *Id.* at 10. Notably, however, because the Tax Commissioner had not joined the stipulation and confidentiality agreements, the BTA explained that the Tax Commissioner is not subject to either the approved agreements or the protective order. *Id.* at 13. Instead, the BTA invited the Commissioner to "reconsider" the stipulation and confidentiality agreements. If the Commissioner chooses to join those agreements, the BTA concluded, he would be bound by the approved orders. *Id.* If, on the other hand, the Tax Commissioner chooses not to join, the BTA determined, the Commissioner would be allowed to observe copies of the documents at a Clinic office, but would not be permitted to copy them. *Id.* at 14.

Nevertheless, despite finding that the documents "may qualify as confidential commercial information" and approving these measures on that basis, the BTA ultimately refused to resolve whether the Clinic's proprietary information constituted trade secrets under R.C. 1333.61, holding that such a decision was "unnecessary." *Id.* at 11. In justifying that conclusion, the BTA observed that "[t]hese cases do not involve a competitor attempting to obtain [the Clinic's] proprietary information." *Id.* That analysis, however, failed to consider the

fact that the proprietary information, once disclosed to the public Boards of Education without a trade secrets declaration, would not be shielded from further disclosure through public records requests. The BTA's conclusion that "it is unnecessary to reach this issue for purposes of discovery," *id.*, also failed to consider the uncertainty the lack of a decision creates with respect to potential future disclosure. What is more, the BTA did not rule out the possibility of making the records public at the merits hearings on the three cases. In the end, the Clinic was left with a proverbial "Catch-22": either produce the documents at the risk they will be produced to third-parties via public records requests and/or at the merits hearings or, alternatively, withdraw its exemption applications. In view of the legal and practical flaws in the BTA's ruling, the Clinic sought this Court's review.

ARGUMENT

I. DOCUMENTS PRODUCED TO A PUBLIC AGENCY DURING DISCOVERY ARE "TRIAL PREPARATION MATERIALS," MAKING THEM EXEMPT FROM DISCLOSURE AS PUBLIC RECORDS.

A. The Cleveland Clinic's Documents Produced In Discovery In This Proceeding Constitute Trial Preparation Records.

Documents produced to the Boards of Education and the Tax Commissioner in discovery in the underlying BTA proceeding are exempt from disclosure as public records. Those documents, which were assembled by these public agencies as part of their effort to build a defense to the Cleveland Clinic's exemption claim, constitute "trial preparation records," which are specifically exempt from the definition of public records under the Ohio Public Records Act. R.C. 149.43(A)(1)(g).

The Public Records Act defines a trial preparation record as "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney." R.C. 149.43(A)(4). Under this broad definition, trial preparation records include any information compiled in anticipation of or in defense of a proceeding. For example, the Court has held that virtually all of a prosecutor's file in a criminal matter, which includes materials "complied in reasonable anticipation of" a legal action, are exempt from public records law under the "trial preparation records" exemption. *See State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 431–32 ("It is difficult to conceive of anything in a prosecutor's file, in a pending criminal matter, that would not be either material compiled in anticipation of a specific criminal proceeding or the personal trial preparation of the prosecutor."), *superseded by statute on other grounds as recognized in Banks v. Ohio Physical Med. & Rehab., Inc.*, 5th Dist. No. 07CA68, 2008-Ohio-2165, at ¶ 9.

The broad trial preparation records classification also includes documents received during discovery, as "the sole purpose of discovery is to assist trial preparation." *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271. In *Lowe*, the Court held that documents produced during discovery are not public records, as discovery, "whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation." *Id.* (quoting *United States v. Anderson* (11th Cir. 1986), 799 F.2d 1438, 1441). Indeed, because discovery is a private matter, it is the filing with the court (without sealing of the record), not production in discovery, that generally subjects a record to disclosure under the Public Records Act. *See, e.g.*, *Lowe*, 77 Ohio St.3d at 354 ("[D]ocuments collected during discovery are not 'judicial records.'") (citation and punctuation omitted); *State ex rel. Cincinnati Enquirer v. Dinkelacker* (1st Dist. 2001), 144 Ohio App.3d 725, 732 ("[W]hen pretrial discovery is submitted into court records, for whatever reason, the character of the pretrial discovery material changes, and it is no longer 'discovery' material [but instead a public record].").

Consistent with *Steckman* and *Lowe*, the discovery documents at issue here constitute records "specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding." Litigation before the BTA qualifies as a "proceeding," which the Court has broadly defined as the "regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." *Steckman*, 70 Ohio St.3d at 432 (quoting Black's Law Dictionary (6 Ed. Rev. 1990) 1204); *cf. Aero Trucking, Inc. v. Lindley* (B.T.A. Aug. 7, 1978), No. 78-D-150, 1978 Ohio Tax Lexis 211, at *4 ("This appeal before the Board of Tax Appeals upon an assessment against Appellant is certainly a proceeding."). The documents at issue, moreover, are being "compiled" by the Boards of

Education and the Tax Commissioner during discovery as part of those public bodies' defense in the proceeding. The discovery documents in this case, in sum, are exempt from disclosure under public records law by application of the trial preparation records exemption.

That *Steckman* and *Lowe* each involved criminal proceedings does not change their impact here. As *Lowe* noted, the legal and policy notions protecting discovery from public-record disclosure apply equally whether the discovery is "civil or criminal." 77 Ohio St.3d at 354; *see also id.* ("discovery should be encouraged and th[e] public disclosure would have a chilling effect on the parties' search for and exchange of information pursuant to the discovery rules"). Nor are the rules announced in *Steckman* and *Lowe* confined to proceedings between private parties, as opposed to proceedings involving public bodies. *Lowe* involved a public body as a party, namely a prosecutor, *id.* at 353, something the Court expressly recognized in holding that the discovery documents at issue were exempt from production under public records law. *See id.* at 355 (noting that while "the purpose of Ohio's Public Records Act . . . is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy, . . . *there are certain governmental activities that would be totally frustrated if conducted openly*") (citations and punctuation omitted, emphasis added).

Nor do the principles in *Steckman* and *Lowe* apply only to documents *actually prepared* by a public body, rather than, as in this case, documents prepared by a private opponent and later *collected* by the public body in discovery. The trial preparation record exemption, it bears repeating, includes all information "compiled"—not merely initially prepared—in anticipation of or defense of a proceeding. R.C. 149.43(A)(4). And when a public body seeks documents in discovery, it plainly is compiling that information. *See* Random House Webster's Unabridged

Dictionary (2d ed. 2001) at 417 (definition of "compile" includes "to put together (documents, selections, or other materials) in one book or work," and "to gather together").

Finally, unlike in *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, at ¶¶ 31, 38, where the Court held that the terms of the Public Records Act do not authorize a "judicially created exemption" from producing public records, *Lowe* was based entirely on the Court's reading of the "trial preparation records" exemption in the Public Records Act itself. To be sure, before *Dues* some lower courts had read *Lowe* to have announced a judicially-created exemption from public records disclosure.[1] In *Dues*, however, the Court, in holding that courts could not create their own extra-statutory exemptions to public records laws, rejected the suggestion by lower courts that *Lowe* had authorized such an exemption. As the Court made clear, *Lowe* "recognized that *exemptions for* work product and *trial preparation records* would not lose their exempt status because of the[ir] disclosure" during discovery. *Dues*, 2004-Ohio-1497, at ¶ 38 (emphasis added). In sum, *Dues* coupled with *Steckman* and *Lowe*, the latter of which held that "the sole purpose of discovery is to *assist trial preparation*," 77 Ohio St.3d at 354 (emphasis added), make it exceedingly clear that documents produced during discovery in litigation are exempt from disclosure as public records by operation of the trial preparation record exemption in R.C. 149.43(A)(1)(g).

B. The Trial Preparation Records Exemption Does Not Fully Protect From Disclosure The Cleveland Clinic's Confidential Proprietary Information.

Finding the documents in question to be trial preparation records would remove them from the definition of public records and provide an independent basis for both the Boards of

[1] *See, e.g.*, *Adams v. Metallica, Inc.* (1st Dist. 2001), 143 Ohio App.3d 482, 488 n.1, 489 (questioning why *Lowe* did not base its holding on the trial preparation record exemption, noting that "[t]he fact that the court in *Lowe* did not consider discovery trial preparation is somewhat odd considering that it quoted the court in *Anderson* that 'the sole purpose of discovery is to assist trial preparation'"); *Dinkelacker*, 144 Ohio App.3d at 731–32.

Education and the Tax Commissioner to withhold the documents if they received public records requests during the proceeding. Unlike a trade-secret determination, however, a trial-preparation determination, for at least three reasons, would stop short of fully protecting these documents from disclosure to third parties.

First, unlike the catch-all exemption in the Public Records Act applicable to trade secrets, *see* R.C. 149.43(A)(1)(v), which *prohibits* a public body from producing covered documents as public records, the trial preparation exemption is not mandatory in that it seemingly only *permits* a public body to withhold covered documents. Indeed, in the words of the Attorney General, documents covered by the trial preparation exemption are merely "discretionarily exempt":

> Other provisions of the Public Records Act [other than the catch-all provision] explicitly exempt certain kinds of records from the definition of "public records" that must be made available by a public office. This means that the public office does not have to disclose these records in response to a public records request. *However, it may, if it chooses to do so, without fear of punishment under the law*. Such records are referred to as being "discretionarily exempt."

Ohio Sunshine Laws 2008: An Open Government Resource Manual at 51 (emphasis added), *available at* http://www.ag.state.oh.us/legal/pubs/Ohio_Sunshine_Laws_2008.pdf. Assuming the Attorney General is correct in her description of the law, the Boards of Education and/or Tax Commissioner could produce documents received from the Cleveland Clinic during discovery and covered by the trial preparation record exemption. Leaving this discretionary decision in the hands of others is of little comfort to the Clinic, and constitutes far less protection than would a trade secrets determination.

To be sure, an agreement from the Boards of Education and the Tax Commissioner not to produce the documents would provide some additional protection to the Cleveland Clinic. To

that end, while a private body's confidentiality agreement cannot trump public records law, *see State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 403, 1997-Ohio-206, an agreement not to produce *trial-preparation records* would be permissible under public records law because it would be limited to keeping confidential those records that the public body has a right (if not a mandate) not to produce. That being said, to this point in the litigation, the Clinic has failed to receive any such assurances from the public body litigants. At most, the Boards of Education have agreed only to notify appellants if they receive a public records request. *See* Tax Commissioner's Motion to Dismiss for Lack of Jurisdiction at Appendix C ¶ 12. The Tax Commissioner, for his part, has not even agreed to provide notice to the Clinic, let alone not produce the documents. Likewise, the BTA has so far declined to bind itself to voluntary agreements between the parties. *See* Jan. 25, 2008 BTA Order at 9 ("[T]he 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."). Given the real possibility that the Tax Commissioner or the BTA could still produce the Clinic's confidential information *despite* a trial-preparation determination, this exemption offers the Clinic little solace.

Second, and equally important, the trial preparation exemption seemingly expires once the proceeding in question is fully complete. *See State ex rel. Cleveland Police Patrolmen's Assn. v. Cleveland*, 84 Ohio St.3d 310, 311, 1999-Ohio-352 (Trial preparation records "continue to be exempt until all criminal proceedings are completed. The purpose of the trial-preparation and work-product exemptions is not furthered by continuing these exemptions when the defendant no longer seeks a new criminal trial."); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 360, 1997-Ohio-273 (citing *Steckman*, supra, paragraph four of the syllabus); *see also State*

ex rel. Beacon Journal Publ. Co. v. Bodiker (10th Dist. 1999), 134 Ohio App.3d 415, 427–28 (finding documents likely not protected by trial preparation record exemption because proceeding in question had already finished). Because the purpose of the exemption is to ensure a fair trial and prevent unfair advantage for parties while proceedings are still pending or possible, *see Cleveland Police Patrolmen's Assn.*, 84 Ohio St.3d at 311, once the possibility of further proceedings ends, the Court has so far not found a basis for the documents to be withheld from public disclosure. *See id.*

The trade-secret exemption, in contrast, is unending. And for good reason. After all, as long as the information remains valuable and secret, the coming and going of any particular proceeding is no reason to terminate protection of a trade-secret owner's valuable proprietary information. All told, while the trial preparation record exemption may provide temporary protection, declaring the Cleveland Clinic's proprietary information as trade secrets is the only way to afford that information the long-lasting protection it deserves.

Third, it is not clear that the trial preparation exemption would preclude the BTA from producing the same documents if they are filed in court and the BTA in turn receives a public records request. Generally, when a party files a discovery document with a court, the document leaves the private realm of discovery and enters the public realm of the open courthouse. *See Dinkelacker*, 144 Ohio App.3d at 732 ("when pretrial discovery is submitted into court records, for whatever reason, the character of the pretrial discovery material changes, and it is no longer 'discovery' material [but instead a public record]"). While *Lowe* recognized that "exemptions for work product and trial preparation records would not lose their exempt status because of the[ir] disclosure" during discovery, *Dues*, 2004-Ohio-1497, at ¶ 38, *Lowe* did not answer whether the documents would retain their exempt status when introduced in court. Indeed, the

mechanism for preventing tribunals from producing protected documents in response to public records requests is not the application of the trial preparation records exemption but instead a request that the tribunal seal those records. *See, e.g.*, *Honda of Am. Mfg., Inc. v. Wilkins* (B.T.A. Sept. 12, 2005), No. 2005-A-529, 2005 Ohio Tax Lexis 1171, at *1–*2; *see also State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, at ¶ 6 (documents sealed pursuant to a court order are exempted from the definition of public records under the catch-all provision of R.C. 149.43(A)(1)(v)). That determination, it bears noting, is often based on whether the documents in question qualify as trade secrets. *See, e.g.*, *Honda of Am.*, 2005 Ohio Tax Lexis 1171, at *3–*4. A trade secrets determination would be the easiest and most logical way to protect the proprietary information at issue here as well.

II. A PROTECTIVE ORDER ISSUED BY A TRIBUNAL IN DISCOVERY CONSTITUTES AN EXEMPTION FROM MANDATORY DISCLOSURE OF THE DISCOVERED DOCUMENTS AS PUBLIC RECORDS PURSUANT TO THE "CATCH-ALL" EXEMPTION IN R.C. 149.43(A)(1)(v).

A. The BTA's Protective Order Is A State-Law Prohibition Against Disclosure That Itself Exempts Covered Documents From Public-Records Disclosure.

In addition to the trial preparation records exemption applicable here, a protective order would also afford the Cleveland Clinic some protection from disclosure of its confidential information. That is so because a protective order would serve as the "state law" that "prohibit[s]" disclosure of the records, triggering the public records exemption in R.C. 149.43(A)(1)(v).

R.C. 149.43(A)(1)(v), the "catch-all" exemption in the Public Records Act, exempts from the definition of public records those "records the release of which is prohibited by state or federal law." A protective order qualifies as an act of state law prohibiting the release of covered documents. To that end, Ohio Admin. Code 5717-1-11(D) authorizes the BTA, "[u]pon the motion of a party and for good cause shown," to "issue a protective order restricting

discovery of a trade secret or other confidential research, development or commercial information." Similarly, Rule 26(C)(7) of the Ohio Rules of Civil Procedure—which guides the BTA absent conflict with its own procedural rules, *see* Ohio Admin. Code 5717-1-11(A)—authorizes a court upon motion and for good cause to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." It follows that a protective order limiting disclosure of confidential information under either of these provisions is a state-law prohibition on disclosure that trigger's the Public Records Act's catch-all provision.

Indeed, this Court has already indicated as much. In *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, at ¶¶ 24–26, the Court addressed a public official's assertion that a proposed settlement agreement was exempt from production as a public record because the agreement was covered by a protective order issued in an earlier case involving one of the parties to the proposed agreement. On that record, the Court, after stating that "[u]nder R.C. 149.43(A)(1)(v), public records do not include '[r]ecords the release of which is prohibited by state or federal law,'" *id.* at ¶ 25, acknowledged that the protective order could be the basis for a public-records exemption. In ultimately holding that this particular proposed settlement agreement be disclosed, the Court did so only because one of the parties to the agreement was not a party in the litigation that produced the protective order, meaning that the protective order did not fully protect the proposed settlement agreement from disclosure. *Id.* at ¶ 26. But in a situation like this one, where all parties involved in compiling the documents in question are bound by a protective order, that order exempts the covered documents from public-records disclosure under the catch-all provision.

A protective order, moreover, shields documents from public records disclosure even "where the tribunal has not ruled that specific documents are confidential under specific provisions of law," for example, trade secrets law. Court's June 6, 2008 Order. The independent statutory authority and legal considerations underlying the issuance of a protective order by themselves trigger the catch-all exemption, without resort to other statutory grounds for exempting records from disclosure. Indeed, there are significant differences between the grounds for issuing a protective order under Ohio Admin. Code 5717-1-11 and Rule 26(C)(7) and the grounds underlying other statutory bases that trigger the catch-all exemption. For instance, while trade secrets also trigger the catch-all exemption, a protective order covers a broader range of information, not only "trade secrets" but also "other confidential research, development or commercial information." Ohio Admin. Code 5717-1-11(D); Civ.R. 26(C)(7) (same). The burdens associated with a protective order are unique as well. For example, in exchange for this extended coverage, the party seeking the protective order, unlike in the trade secrets context, must also show good cause before the order may issue. *See id.*

Although the Court has previously held that confidentiality agreements do not serve as a proper basis for withholding documents otherwise within the definition of public records, *see Dupuis*, 2002-Ohio-7041, at ¶ 27, a protective order is different than a confidentiality agreement entered into by a public litigant. To that end, a confidentiality agreement constitutes nothing more than a public body's *voluntary choice* to retain documents as confidential. Understandably, that voluntary choice could not serve as a basis for a public body's failure to comply with laws that *mandate* the body's disclosure of public records. A protective order, on the other hand, is not a voluntary agreement but instead a binding, statutorily authorized order issued by a tribunal, which has the force of law itself. *See id.* at ¶ 25.

Not only is a statutorily authorized protective order different than a voluntary confidentiality agreement, but it is also different than a court order sealing documents, what was at issue in *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497. In *Dues,* a probate court, citing no specific statutory authority, ordered sealed and exempt from public records requests certain records filed with the court pertaining to settlement of a wrongful death claim. *Id.* at ¶¶ 3–9. In subsequent mandamus proceedings, the Court rejected the probate court's conclusion that the sealed documents were exempt from public records laws, holding that courts cannot create their own non-statutory exemptions to public records disclosure. *Id.* at ¶¶ 30–39. In *Dues*, even the probate court was quick to concede that the documents at issue were public records and did not fall "within any of the statutory confidential [exemptions]" in the Public Records Act. *Id.* at ¶¶ 28–29. Here, by contrast, a protective order is based on the BTA's statutorily authorized powers under Ohio Admin. Code 5711-1-11 and Rule 26(C), which provide a codified state law basis for a protective order, leaving the BTA with no need to create its own non-statutory exemption from public records disclosure, as was the case in *Dues*.

Dues, moreover, involved a probate court, crafting a common law rule allowing courts to add their own judicially-created exemptions to public-records disclosure by weighing the interest in keeping a record private against the interest in public disclosure. *Id.* A protective order, by contrast, is a separate, free-standing, statutory-based act, far different than the legal policymaking at play in *Dues.* In other words, while after *Dues* courts cannot seal documents filed with them based on nothing more than their own devised exemptions to public records disclosure, a protective order is more grounded than that. In this case specifically, it is based on the BTA's statutory authority to issue protective orders to protect confidential information from

disclosure for good cause shown, a prohibition triggering the catch-all exemption in R.C. 149.43(A)(1)(v).

B. A Protective Order Does Not Provide The Same Level Of Protection To The Cleveland Clinic's Proprietary Information As Does A Trade Secrets Determination.

Like the trial preparation records exemption, the protective order exemption to the Public Records Act provides some measure of protection for the Cleveland Clinic's confidential proprietary information, but not the full range of protection afforded by the trade secrets laws. For example, if the protective order were the sole basis for the public-records exemption, the exemption would be limited to the provisions of the protective order itself. In this case, it bears noting, the order is limited in scope, covering only certain documents. And even then, the order is uncertain in duration in that it is based on the still undetermined possibility that these documents "may qualify as confidential commercial information." *See* Jan. 25, 2008 BTA Order at 8 n.10. Equally troubling, while the protective order requires the public bodies to return confidential material after these proceedings, *id.* at 10, it leaves open the possibility that those bodies may retain possession of bona fide trade secrets, including those in categories not covered by the protective order or those open to interpretation as to their confidential status.

What is more, as was also true for the trial preparation record exemption, the protective order seemingly does not cover documents submitted to the BTA as part of the exemption proceeding. This is particularly troubling here, as the BTA has stated that it, as another public body, is not inclined to be bound by the terms of the confidentiality agreement or protective order binding the parties. *See id.* at 9 ("[T]he 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."); *id.* at 8 n.10 ("The board emphasizes, however, that such finding [of possible confidential commercial information]

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.").

Accordingly, as with the trial preparation records exemption, the best way to afford the Cleveland Clinic's documents the full protection they deserve is for the BTA to determine that they qualify as trade secrets under the Trade Secrets Act. That would trigger, without the need for a protective order, the mandatory catch-all exemption from public records disclosure for as long as the documents retained the characteristics that currently render them trade secrets. That determination would also lend peace of mind to all involved in this proceeding, not only to the Clinic but also to the BTA, the Tax Commissioner, and the Board of Education, as each would have an established basis for withholding the documents from future public records requests.

III. A DECISION BY THE BTA DECLARING DOCUMENTS TRADE SECRETS MEANS THAT THE RELEASE OF THOSE DOCUMENTS "IS PROHIBITED BY STATE LAW" UNDER R.C. 149.43(A)(1), A DECISION THE BTA MUST MAKE WHEN THE ISSUE IS FIRST PRESENTED.

As demonstrated by the discussion above, absent a trade secrets determination, the Cleveland Clinic faces the likelihood of seeing its secret proprietary information divulged to third parties. In a setting like this one, where an entity is asked to produce proprietary documents to a public entity during discovery, the entity holding the trade secrets "ha[s] a legitimate concern that confidential business information that was not intended for public release will be conveyed to a competitor through a public records release." *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland* (1992), 63 Ohio St.3d 772, 775. The BTA's refusal to declare the Clinic's proprietary information to be trade secrets, in particular its failure to even address the issue once raised, violates both the letter and spirit of Ohio's trade secrets law, which aims to provide certainty regarding the protection of one's confidential proprietary information.

A. Like Nearly Every Other State, Ohio Protects Trade Secrets To Ensure A Stable Business Environment.

"Trade secret business information," all should agree, "is a valuable commodity," so much so that "[c]ompanies that fail to protect it and the intellectual capital that it represents quickly lose ground to the competition." A. Tracey, The Contract in the Trade Secret Ballroom—A Forgotten Dance Partner? (2007), 16 Tex. Intell. Prop. L.J. 47, 48. Due to the increasing significance of developing proprietary information to compete in the world marketplace, nearly every state has enacted a version of a trade secret act, "[u]sing the Uniform Trade Secret Act ("USTA") as "an impetus." *Id.* at 888. These jurisdictions recognize that trade secrets "are a valuable commodity which require laws to define, regulate, and protect them accordingly." *Id.* Among other things, protecting trade secrets from public disclosure leads to "subsidization of research and development" as well as "increased economic efficiency." *Kewanee Oil Co. v. Bicron Corp.* (1974), 416 U.S. 470, 482. Trade secrets laws also help ensure the stability of a State's business environment. "For example, a state willing to protect customer lists as a trade secret would be more attractive to companies with valuable customer contracts than a state not offering such protection." Neufeld, Mission Impossible, 7 Fordham Intell. Prop. Media & Ent. L.J. at 893.

Ohio law defines a "trade secret" as "information" that both "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D). A trade secret can constitute "scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing

of names, addresses, or telephone numbers . . . ." R.C. 1333.61(D). Not only does trade secret information take many forms, but it also may be held by many, from individuals to associations to corporations, both for-profit and non-profit. *See, e.g.*, *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 541, 2000-Ohio-475 (holding that Ohio State University, a tax-exempt institution, "can have its own trade secrets under R.C. 1333.61").

B. The BTA Is Authorized To Make Trade Secret Determinations, And Those Determinations Are Binding As To The Documents At Issue.

A host of statutes and regulations authorize the BTA to protect trade secrets from dissemination. For one, Ohio Admin. Code § 5717-1-11(D) permits the BTA, "[u]pon the motion of the party and for good cause shown, [to] issue a protective order restricting discovery of a trade secret or other confidential research, development or commercial information." For another, Civil Rule 26(C)(7), made applicable here by Ohio Admin. Code § 5717-1-11(A), authorizes tribunals to order during discovery "that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way." And for another, the Trade Secret Act itself, R.C. 1333.65, more generally gives Ohio tribunals considering trade secrets actions broad authority and responsibility to "preserve the secrecy of an alleged trade secret by reasonable means that may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."

Not only does the BTA have the power to make trade secret determinations, but that determination also shields those documents from disclosure as public records. Under the Pubic Records Act, the definition of public record does *not* include, and public bodies are prohibited from releasing, "[r]ecords the release of which is prohibited by state or federal law."

R.C. 149.43(A)(1)(v). This mandatory "catch-all" exemption applies to trade secrets as defined in R.C. 1333.61. *See State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, at ¶ 45 ("Trade secrets are exempt from disclosure under the exemption of R.C. 149.43(A)(1)(v) for disclosures prohibited by state or federal law."); *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 2000-Ohio-475.

The BTA's determination that a document constitutes a trade secret shields the document from disclosure through public records requests. Indeed, the BTA "has the authority to seal records which are demonstrably trade secrets, *and thus expressly excluded from the definition of a public record*." *Honda of Am.*, 2005 Ohio Tax Lexis 1171, at *3 (emphasis added); *see also Cincinnati Gas & Elec. Co. v. Clermont Cty.* (B.T.A. Oct. 27, 2000), Nos. 98-K-707; 98-K-708, 2000 Ohio Tax Lexis 1447, at *9, *18 (same); *Dayton Power & Light Co. v. Adams Cty. Bd. of Revision* (B.T.A. Feb. 20, 2002), No. 00-T-1402, 2002 Ohio Tax Lexis 170, at *2–*3, *14 (same). In these cases, the BTA resolved the "potential for conflict between the Public Records Act and the protections afforded by the Uniform Trade Secrets Act"—the purpose of which is "to maintain commercial ethics, encourage invention, and protect an employer's investments and proprietary information," *Honda of Am.*, 2005 Ohio Tax Lexis 1171, at *2–*3—by declaring at the outset that the documents were trade secrets, barring their subsequent production as public records. In the words of the BTA, a litigant "should not be deprived of the protections accorded by R.C. 1333.61, *et seq.*," simply because the "litigant concludes it is required to submit information constituting a trade secret to this Board in attempt to prevail in either its challenge to or defense of a taxing authority's decision." *Id.* at *3.

The BTA's trade-secret determination not only shields documents from a public records request issued to the BTA itself, but that determination, as the BTA has recognized, also shields

documents from public records requests issued to public bodies appearing before the BTA, including the Tax Commissioner. In *Honda of America*, for example, the documents at issue had been filed with the BTA itself *and* separately provided to the Tax Commissioner. 2005 Ohio Tax Lexis 1171, at *1. The Commissioner's possession of the documents did not prevent the BTA from acting, when requested, to declare the documents trade secrets as a way to prevent their public release.

That the BTA can declare documents trade secrets and bar their further dissemination by public bodies participating in BTA proceedings is consistent with the policy notions underlying the Trade Secrets Act as well fair notice principles embodied in our legal system. If the BTA declares them to be trade secrets, the parties can proceed knowing that they are shielded from such requests. If not, the party requesting the exemption can either proceed with the action, knowing that the documents may someday be revealed to the public, or dismiss the action. But if the parties and/or courts later faced with public-records mandamus actions, *see* R.C. 149.43(C)(1), could ignore the BTA's trade secrets determination, the BTA's authority over trade secrets is rendered meaningless. Accordingly, the BTA's trade-secret determination should be the final word (subject to appellate review) for all future public records requests or actions pertaining to the records at issue.

C. The BTA Must Determine Whether Documents Constitute Trade Secrets When The Issue Is First Raised.

For many of the same reasons that the BTA's trade-secret determination must be binding as to any future public-records request, the BTA must make its determination when the issue is raised. As already explained, a central purpose of trade secret law is to afford trade secrets reliable protection *before* the information is subjected to potential public disclosure. *See* Neufeld, Mission Impossible, 7 Fordham Intell. Prop. Media & Ent. L.J. at 926 ("trade secret law

maintains standards of commercial morality while encouraging innovation"). Indeed, "[o]nce clothed with the public records cloak, the records cannot be defrocked of their status." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1966), 75 Ohio St.3d 374, 378. With these realities in mind, the only way to give effect to the laws protecting trade secrets is to afford parties seeking trade-secret protection a clear answer before they are required to release the documents. Armed with that answer, the holder of the secrets can make an informed decision how to proceed, better knowing the risks that lie ahead.

The certainty afforded by a BTA ruling also benefits the public bodies receiving the trade secret information through discovery. After all, without a clear statement that documents are (or are not) trade secrets, public bodies run the risk of erroneously producing trade secrets as public records. *See, e.g.*, R.C. 149.43(B) ("[A]ll public records responsive to the request shall be promptly prepared and made available for inspection to any person."). Given the Public Records Act's requirement that public bodies quickly make available all public records, a public body may very well err in disclosing a trade secret it has received, potentially subjecting it to liability for misappropriation. *See* R.C. 1333.63 (damages recoverable). A trade secrets ruling by the BTA gives the public entities involved the guidance needed to respond properly to any subsequent public records request. Equally true, as noted earlier, should the party seeking the exemption choose not to pursue the exemption in the face of an unfriendly trade secrets ruling, the public entities would be spared further litigation.

Early consideration of trade secret issues, moreover, is nothing new to the BTA. At early stages in the proceedings, the BTA has repeatedly declared documents to be trade secrets, and protected those documents from public disclosure. *See, e.g., Gentile v. Hamilton Cty.* (B.T.A. Aug. 14, 1992), Nos. 90-K-1569–73, 1577, 1597–99, 1992 Ohio Tax Lexis 973 (before

documents produced in discovery, BTA issued protective order limiting disclosure of trade secrets or other confidential information); *Honda of Am. Mfg., Inc.*, 2005 Ohio Tax Lexis 1171 (declaring trade secret and sealing portion of the record when party filed a motion for such relief); *Dayton Power & Light Co.*, 2002 Ohio Tax. Lexis 170 (same); *Cincinnati Gas & Elec. Co.*, 2000 Ohio Tax Lexis 1447 (same). Making trade secret determinations at the outset is not only consistent with the BTA's past practice, but it is also consistent with the Uniform Trade Secrets Act, which plainly envisions active management by a tribunal to protect potential trade secrets from disclosure, a purpose that is thwarted in the absence of a preliminary ruling on the issue. *See, e.g.*, R.C. 1333.65.

In sum, not only does the BTA have the authority to make trade secret determinations—determinations that are binding on other public bodies or courts addressing public records requests for the documents at issue—but the BTA also has the responsibility to make such determinations when the issue is raised, so that the purposes of both trade secret and public records law can be given full effect.

D. The Cleveland Clinic's Proprietary Information Sought In Discovery Constitutes Trade Secret Information.

The documents at issue requested from the Cleveland Clinic during discovery constitute trade secret information. Building on the statutory definition of a trade secret, *see* R.C. 1333.61(D), the Court has adopted six factors to be considered in determining whether information constitutes a trade secret under the statute:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and

> (6) the amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. Plain Dealer v. Ohio Dep't of Ins., 80 Ohio St.3d 513, 524–25, 1997-Ohio-75 (citations omitted). Plainly, the proprietary information sought from the Clinic, which ranges from compensation information to internal financial data to the terms of third-party contracts, qualifies for trade secret protection.

1. Compensation information for physicians and key administrators.

Information relating to compensation for the Cleveland Clinic's physicians and key administrators qualifies as a trade secret. *See Kemper Mortgage, Inc. v. Russell* (S.D. Ohio May 4, 2006), No. 3:06-cv-042, 2006 U.S. Dist. Lexis 26323, at *14–*16 (holding that information relating to compensation structure constituted trade secret). For the Clinic to maintain its world class status, it needs to protect from disclosure its compensation system. *See* Tr. at 44. At the Clinic, compensation information is kept strictly confidential. *See* Tr. at 132–34, 135–37. With the exception of information revealed about the ten most highly-compensated employees required by federal Form 990s, no compensation information is publicly released, nor is it released internally. The Clinic, moreover, takes reasonable precautions to safeguard compensation information, making it available only to a limited number of employees and trustees.

Plainly, this information has value to the Clinic as well independent economic value. If the Clinic's compensation information were publicly disclosed, the Clinic's competitors could use it to recruit away the Clinic's physicians and administrators. *See* Tr. at 134. Not only would the Clinic suffer economic harm and competitive disadvantage as it result, but it would also be left to incur the significant costs associated with recruiting new employees, training them, and

rebuilding the referral network through which patients are referred to specialists and sub-specialists within the organization. *See* Tr. at 135.

2. Internal financial analyses and statements.

The Cleveland Clinic's internal financial analyses/statements for its health care centers also qualify as trade secrets. *See Kemper Mortgage*, 2006 U.S. Dist. Lexis 26323, at *14–*16, 19 (holding that information relating to budgeting and forecasting constituted trade secret under R.C. 1333.61). Because the Clinic's family health centers are not stand-alone facilities, their operations rely on the support of various centrally organized Clinic departments. Accordingly, the Clinic creates internal financial analyses/statements to evaluate the operating efficiency of each family health center. *See* Tr. at 65. Revenues and costs, both actual and allocated, are reflected in the internal financial analyses/statements. *See* Tr. at 65–66.

The Clinic's internal financial analyses and statements have value to the Clinic, as the processes driving the allocations and estimates in the analyses have been developed over "hundreds and hundreds of hours over many, many years." Tr. at 70. Unlike the Clinic's audited comprehensive financial statements, which are publicly released, the internal analyses/statements for specific facilities are kept confidential. *See* Tr. at 67–68. The underlying electronic data is password protected, accessible to a limited number of employees. *See* Tr. at 72. Public dissemination of this internal financial information would undercut the Clinic's ability to negotiate favorable agreements with its vendors, and it would also constitute a windfall of information to its competitors. *See* Tr. at 71.

3. The chargemaster.

The Cleveland Clinic's "chargemaster," a comprehensive list of the charges for individual physician and hospital-related services, Tr. 52, also qualifies as a trade secret. *See In re Vitamins Antitrust Litig.* (S.D. Ohio 2003), 267 F. Supp. 2d 738, 739–42 (quashing subpoena

requesting pricing on a "unit-by-unit basis" because information constituted trade secret); *Vanguard Trans. Sys., Inc. v. Edwards Transfer & Storage Co.* (10th Dist. 1996), 109 Ohio App.3d 786, 791–92 (holding that contract rates constituted trade secret). The chargemaster refers to 90,000 specific items, listing individual charges for every item for which a patient is billed, including, for example, operating room usage, nursing care, anesthesia, cotton packs, and aspirin. *See* Tr. at 52–53. The Clinic has expended "thousands of hours over many, many years" to develop and refine its chargemaster. *See* Tr. at 58. The Clinic maintains the chargemaster electronically and limits access to a small group of employees. *See* Tr. at 54. Electronic access is password protected, and access to paper data is also limited; the comprehensive list of *all* 90,000 charges, moreover, is never disclosed to any patient or insurer. *See* Tr. at 55, 57-58.

The chargemaster derives independent value from its confidentiality, as the Clinic's vendors and competitors could use the information, if known, to their advantage. *See id.* at 175. Public disclosure of the comprehensive chargemaster would disadvantage the Clinic in numerous ways. For one, the Clinic's vendors could use the information to increase the prices of the goods they provide to the Clinic. *See* Tr. at 55–56. For another, insurance providers could use the information to negotiate lower payment rates. *See Id.* Moreover, competing providers could use the chargemaster to analyze the Clinic's cost structures and negotiate more advantageous contracts with vendors and insurance providers. *See* Tr. at 59.

4. Information relating to financial arrangements between third parties and the Cleveland Clinic.

Information relating to financial arrangements between the Cleveland Clinic and outside parties also qualifies as trade secrets. *See In re Vitamins Antitrust Litig.*, 267 F. Supp. 2d at 739–42; *Vanguard Transportation Sys.*, 109 Ohio App.3d at 791–92. To that end, the Clinic enters into financial arrangements with a variety of entities, arrangements that include contract and

management services, licensing agreements, royalty agreements, leases, and investment contracts. *See* Tr. at 77–78. The specifics regarding financial arrangements with third parties are revealed only to those Clinic employees who have a need for that information. *See* Tr. at 79–80. Electronic data is password protected and paper data is maintained in secure areas. *See* Tr. at 80–81. The Clinic maintains the details as confidential to protect its position in negotiating future arrangements with third parties. *See* Tr. at 78–79.

5. Contractual terms with insurance companies.

Contracts that the Cleveland Clinic negotiates with health care insurance providers to pay for services rendered to their insured constitute trade secrets. *See Vanguard,* 109 Ohio App.3d at 791–92. The contracts are complex, unique to each insurance provider, and heavily negotiated. *See* Tr. at 61–62, 63. Because health care insurers typically dictate how the health care provider is paid and on what basis, the Clinic's ability to negotiate favorable contractual terms depends on its ability to keep the terms of each contract confidential. *See* Tr. at 62. After all, if insurers knew the terms to which the Clinic had agreed in other contracts, those insurers would demand the most favorable payment terms in their contracts as well. *See* Tr. at 62, 64. Accordingly, internal access to those agreements is closely guarded. *See* Tr. at 62–63.

6. Spending on individual advertising campaigns.

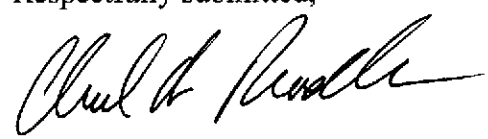
Spending on individual advertising campaigns also constitutes trade secret information. The Cleveland Clinic engages in advertising to promote its services and educate the community about health and well-being. *See* Tr. at 73. The amount of money the Clinic spends on individual advertising campaigns is not publicly disclosed or generally available to employees of the Clinic. *See* Tr. at 74–75, 76–77. That is so because disclosing this information would compromise the Clinic's ability to negotiate with the vendors that provide advertising services.

See Tr. at 76. Equally true, if such proprietary information were disclosed, other health care providers could use it to negotiate better advertising deals for themselves. *See id.*

CONCLUSION

The documents at issue in this case are exempt from public records disclosure as trial preparation records and as a result of the state-law prohibition on disclosure contained in the BTA's protective order. Nonetheless, the documents at issue are also trade secrets, and as such, deserve the full and lasting protection afforded to trade secrets, preventing their public disclosure by all parties and tribunals involved. Accordingly, the Court should hold that the documents at issue are trade secrets, should reverse the BTA's ruling that a trade-secret determination is not necessary at this point, and should remand the case for further proceedings with this trade-secret protection in place.

Respectfully submitted,



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