

IN THE SUPREME COURT OF OHIO

THE CLEVELAND CLINIC FOUNDATION)	Case No. 08-0411
AND FAIRVIEW HOSPITAL,)	
)	
Appellants,)	
)	
v.)	Appeal from the
)	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.)	

APPELLANTS' RESPONSE TO MEMORANDA OF THE TAX COMMISSIONER
AND BOARDS OF EDUCATION

Lawrence D. Pratt (0021870)
Alan P. Schwepe (0012676)
Assistant Attorneys General
Taxation Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Tel. No. 614-466-5967

Counsel for Appellee Richard A. Levin, Tax
Commissioner of Ohio

David H. Seed (0066033)
Daniel McIntyre (0051220)
Brindza McIntyre & Seed LLP
1111 Superior Avenue, Suite 1025
Cleveland, Ohio 44114
Tel. No. 216-621-5900

Counsel for Appellee Cleveland Municipal and
Beachwood City School District Boards of
Education

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

Chad A. Readler (0068394)
JONES DAY
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
Tel. No. 614-469-3939
Fax No. 614-461-4198
careadler@jonesday.com

Counsel for Appellants The Cleveland Clinic
Foundation and Fairview Hospital

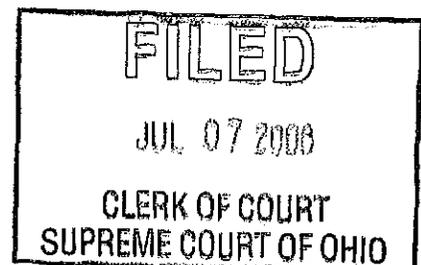


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INTRODUCTION

The parties' opening memoranda share much common ground. *First*, all parties seem to agree that a trade secret determination would best protect the Cleveland Clinic's confidential proprietary information from public disclosure. To that end, all agree that a trade secret determination is the most appropriate threshold analysis to apply to the information at issue here. As the Clinic explained in its opening brief, a determination by the BTA on the trade secrets issue affords the Clinic the benefit of knowing whether its proprietary information is protected from public records disclosure, in accordance with the preservation principles underlying Ohio's trade secret law. *See* Clinic Br. at 27. On this point, the Tax Commissioner and the Boards of Education (collectively, "appellees") agree, with the Commissioner, for example, suggesting that the BTA, rather than merely issuing a protective order, as it did here, should instead "first apply[] the more specific test to ascertain whether the [documents] are actually trade secrets under the privilege." Comm'r Br. at 26. That is so because a trade secrets determination, as the Boards of Education aptly observe, would "bar disclosure during and after litigation if a court did not determine that the documents were trial preparation records" Boards Br. at 9.

Nor does any party dispute the fact that such a determination is a more recognized basis for protecting a party's proprietary information from disclosure. All parties agree that trade secrets satisfy the catch-all exception to the Public Records Act. *See* Comm'r Br. at 18 (catch-all exemption has been applied to exclude trade secrets under R.C. 1333.61(D)); Boards Br. at 1 (same). Appellees, moreover, agree that protecting this information via the alternatives identified in the Court's briefing letter—namely, trial preparation and a protective order—has less solid legal grounding than does a trade secret determination. *See* Comm'r Br. at 12 ("[T]he specific issue of whether discovery received by a state agency falls within [the definition of trial preparation record] has not yet been addressed by the Court, [and] case law . . . [is] not definitive

in reaching a resolution.”); *id.* at 26 (“[I]t is a case of first impression and the answer is not definitively laid out in either the language of the Act or the case law interpreting it.”); Boards Br. at 6 (“Ohio courts have narrowly construed the trial preparation record exception”); *id.* at 13 (“a protective order issued by a tribunal, such as the BTA, does not constitute an exception from the mandatory disclosure of discovered documents pursuant to the ‘catch all’ exception”).

Second, while all agree that a trade secrets determination would best protect the Clinic’s proprietary information, all also agree that the information would nevertheless likely receive at least some protection from disclosure by way of the trial preparation exemption and/or a protective order. As noted by both the Clinic and the Commissioner, *see* Comm’r Br. at 11–17, the trial preparation records exemption, R.C. 149.43(A)(1)(g), applies here because the documents at issue will be “compiled” by public body litigants specifically with regard to the Clinic’s tax exemption claim. While the Boards of Education offer the most narrow reading of the exemption, *see* Boards Br. at 5–7, even the limits the Boards’ cases purport to put on the exemption would not exclude from it documents produced in discovery. That said, because the trial preparation exemption is not a mandatory prohibition on disclosure, expires at the close of the proceeding, and does not appear to bind the BTA, itself a public body, the exemption does not fully protect the Clinic’s trade secrets. *See* Clinic Br. at 14–18.

Likewise, with respect to the interplay between a protective order and the Public Records Act, because a protective order is grounded in codified rules governing the BTA’s ability to control discovery and pre-trial procedures, the order qualifies as the kind of state law prohibiting disclosure of records that the catch-all exemption contemplates. *See* Clinic Br. at 18–22. The Boards’ contrary view relies on a reading of *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, that extends that decision far past its intended reach. The Commissioner,

for his part, finds some common ground with the Clinic, but in the end suggests that a protective order may have such exclusionary force only when it is based on a preliminary finding that records are trade secrets. *See* Comm'r Br. at 26. While the Clinic agrees that a preliminary determination on trade secrets is both necessary and appropriate here, the fact remains that both the Court's precedent and the language of R.C. 149.43(A)(1)(v) lead to the conclusion that *any* Rule 26(C)(7) limitation on disclosure triggers the catch-all exemption, regardless whether the order is based on a finding of trade secrets. Here again, however, all also seem to agree that the protective order, to the extent it does protect documents from disclosure, offers only limited protection, less than that offered by a trade secrets determination. *See* Clinic Br. at 22–23.

Third, the disagreement among appellees themselves regarding when information may be exempt from public records disclosure coupled with the parties' collective agreement that a trade secret determination provides broader protection proves that the issues presented in this appeal—whether the documents are trade secrets and whether a tribunal should make a trade secrets determination at the outset—are appropriate for review at this stage. In previously moving to dismiss this appeal, the Tax Commissioner argued that there was no “danger of being unable to unring the proverbial bell” because the BTA's Jan. 25, 2008 protective order offered the protection necessary to prevent disclosure of trade secrets before the merits hearing, Comm'r Mot. to Dismiss (Mar. 6, 2008) at 7–9, making this appeal unnecessary. Today, however, appellees express varying levels of doubt as to whether that protective order would indeed shield documents from public records disclosure. Indeed, the Commissioner himself states that the question is unsettled and “will come down to the Court's own construction and balancing of the interests involved,” Comm'r Br. at 26, and the Boards of Education and are even more pessimistic, asserting that a protective order issued by the BTA “does not constitute an exception

from the mandatory disclosure of discovered documents pursuant to the ‘catch all’ exception” Boards Br. at 13. As appellees’ words now demonstrate, there is considerable risk that the Clinic “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), as a decision at that time may be too late to protect the Clinic’s proprietary information from disclosure. The uncertainty and inherent limits surrounding these alternative avenues of protection make an appeal of the trade secrets issue timely and necessary. *See State v. Muncie*, 91 Ohio St.3d 440, 451–52, 2001-Ohio-93 (finding that order compelling the administration of medication did not afford meaningful or effective remedy after final judgment because of the “potential” for side effects).

ARGUMENT

I. THE DOCUMENTS ARE TRIAL PREPARATION RECORDS.

As the Clinic established in its opening brief (at 11–14), the documents in question are trial preparation records, exempt from disclosure under R.C. 149.43(A)(1)(g), because they are “compiled” by the appellees “in defense of[] a civil . . . proceeding.” *See also State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271 (“the sole purpose of discovery is to assist trial preparation”). The Tax Commissioner generally agrees. *See Comm’r Br.* at 11–17. In the words of the Commissioner, “[d]iscovery appears to be excluded from public records disclosure as a ‘trial preparation record’ pursuant to R.C. 149.43(A)(1)(g) and R.C. 149.43(A)(4).” *Id.* at 11.

The Boards of Education, for their part, appear to take a more narrow view of the exemption, citing cases in which the Court denied the exemption. *See Boards Br.* at 6. But none of the Boards’ cases preclude application of the exemption here. Rather, all three of their cases found the exemption inapplicable because the information at issue was compiled for other

reasons, in advance of actual litigation, and thus not specifically “in anticipation of, or in defense of” an action or proceeding, as the provision requires. *See Franklin Cty. Sheriff’s Dep’t v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 502–03 (records compiled by State Employment Relations Board during probable cause investigation of allegation of unfair labor practice are not compiled “in anticipation of litigation,” as Board will only issue complaint if probable cause is found and at that point will begin “on a blank slate”); *Barton v. Shupe* (1988), 37 Ohio St.3d 308, 309 (city investigation into allegations of police chief wrongdoing was for the purpose of assessing the accuracy of the allegations, and not specifically in anticipation of litigation); *State ex rel. Beacon Journal Publishing Co. v. Univ. of Akron* (1980), 64 Ohio St.2d 392, 397 (university police reports regarding criminal incidents were not prepared specifically in anticipation of litigation). Here, by contrast, the documents have been requested *in discovery in an ongoing litigation proceeding*.

Likewise, in suggesting that *Lowe* does not render discovery documents exempt under the trial preparation records exemption, *see* Boards Br. at 7–10, the Boards of Education misread *Lowe* as relying upon a judicially-created exception for discovery documents rather than the trial preparation exemption itself. To be sure, *Dues* makes clear that no such judicially-created exemption is permissible. *See State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, at ¶ 31, 38. But *Dues* makes equally clear that *Lowe* “recognized that *exemptions for work product and trial preparation records* would not lose their exempt status because of the[ir] disclosure” during discovery. *Id.* at ¶ 38 (emphasis added). In other words, *Lowe* is clear guidance that discovery documents are exempt under the trial preparation records exemption. *See* Clinic Br. at 14.

That exemption, however, is limited, in particular because the decision to assert it is left in the hands of the public body holding the trade secret information, not the creator of that information, and because the exemption expires at the proceeding's end. *See* Clinic Br. at 14–18. That is why, as all seem to agree, a trade secret determination here is the superior method for protecting from public disclosure the Cleveland Clinic's confidential proprietary information. *Cf.* Boards Br. at 9 (“[R]ecords produced in discovery could enter the public domain if filed with the trial court or at the conclusion of litigation.”).

II. THE PROTECTIVE ORDER IN THIS CASE TRIGGERS THE CATCH-ALL EXEMPTION.

Likewise, as the Cleveland Clinic and the Tax Commissioner recognize, the BTA's protective order triggers the catch-all exemption, offering some protection from public records disclosure. Consistent with the Court's precedent, a protective order can be the state-law prohibition on disclosure that triggers the catch-all exemption. *See State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, at ¶¶ 24–26; *see also* Clinic Br. at 19. The “state law prohibition” that triggers the catch-all exemption “may include procedural rules,” including procedural rules governing discovery. Comm'r Br. at 23 (quoting *State ex rel. Clark v. Toledo* (1990), 54 Ohio St.3d 55, 56–57, *overruled on other grounds*, *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 437). In this case, the protective order is authorized by specific state law provisions and procedural rules, including Rule 26(C)(7) and Ohio Admin. Code 5717-1-11(D). Those provisions, codified pursuant to well-established processes, empower the BTA to issue protective orders limiting disclosure of “trade secrets or other confidential research, development or commercial information.” Clinic Br. at 20; *see also* Ohio Const. art. IV, § 5(B) (authorizing the Supreme Court to prescribe procedural rules, pursuant to the General Assembly's approval, and making laws in conflict with those rules ineffective). In

that way, this case is different than *Dues*, where the probate court based its order sealing a settlement agreement on its own judicially-created rationale, admitting along the way that the document in question was a public record and not covered by any statutory exemption. *Dues*, 2004-Ohio-1497, at ¶¶ 28–29; Clinic Br. at 21. Indeed, as the Tax Commissioner aptly notes, “*Dues* does not appear to be controlling on the question posited by the Court,” in large part because “the codification of the inherent right of courts to control discovery distinguishes protective orders issued under this rule from the trial court’s uncodified inherent right to seal settlement agreements in *Dues*.” *Id.* at 22.

Perhaps envisioning a broad rule allowing *any* discovery order pursuant to Rule 26 to trigger the catch-all exemption, the Tax Commissioner in the end equivocates, concluding that the issue is one of first impression and “will come down to the Court’s own construction and balancing of the interests involved.” *Id.* at 26. But to decide today’s case, the Court need not consider whether *any* Rule 26 discovery order triggers the catch-all exemption. Here, the Court is faced with a protective order under Rule 26(C)(7) that specifically *prohibits or limits disclosure* of confidential documents, in other words, a “state . . . law” “prohibit[ing]” the “disclosure” of records, R.C. 149.43(A)(1)(v). The other types of protective orders envisioned by the Commissioner, for example, a Rule 26 order that merely sets discovery deadlines—what was at issue in *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108—may or may not be the “prohibition” on “disclosure” of records contemplated by the catch-all exemption.¹ But with respect to the type of order that exists in this case—*i.e.*, a Rule 26(C)(7) order prohibiting certain disclosure of confidential documents—the Court’s precedent confirms that this order is

¹ See Comm’r Br. at 25 (“The *Gilbert* case, of course, addresses a situation where a party did not actually seek to obtain access to discovery but instead tried to supplement discovery through an alternative means.”); *id.* (“Thus the Court has not previously addressed the situation where a member of the public actually makes a public records request or exchanged discovery during ongoing litigation and that discovery is the subject of a protective order.”).

the type of a “state-law” that triggers the catch-all exemption. It is not necessary here to reach the broader issues pondered by the Tax Commissioner.

Nor should one accept the Commissioner’s suggestion that for a Rule 26(C)(7) protective order to trigger the catch-all exemption, there must first be a preliminary determination that the documents covered by the protective order are in fact trade secrets. *See Comm’r Br.* at 26. While the Cleveland Clinic agrees that a preliminary determination on trade secrets is the prudent approach here, that determination is not a prerequisite for a protective order to serve as an exception to the Public Records Act. To that end, the Commissioner errs in asserting that Rule 26(C)(7) “target[s] this type of confidential material [i.e., trade secrets] already protected by a specific statutory provision, i.e., R.C. 1333.61(D).” That reading of Rule 26 fails to consider the Rule’s full scope and text. Indeed, both Rule 26(C)(7) and Ohio Admin Code 5717-1-11(D) extend to “trade secrets or other confidential research, development, or commercial information,” and both are based on standards different from those that apply to trade secrets determinations, including a consideration for good cause. *See Clinic Br.* at 20. The Commissioner’s interpretation of Rule 26 would read out of the Rule the phrase “or other confidential research, development, or commercial information,” in violation of the cardinal rule of interpretation that all words be given effect. *See D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶ 26 (“Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. . . . [T]he court should avoid that construction which renders a provision meaningless or inoperative.”) (citation and punctuation omitted). In sum, so long as a protective order limiting disclosure of confidential information is properly grounded in the standards of Rule 26(C)(7), a separate or preliminary determination on whether the documents qualify as trade secrets is unnecessary to trigger the catch-all exemption.

The Boards' lonely assertion that *Dues* precludes *any* protective order from triggering the catch-all exemption extends *Dues* too far. *See* Boards Br. at 13. The flaw in *Dues* was that the probate court did not base its sealing order on any codified law whatsoever. Here, by contrast, the protective order is based on the BTA's codified power to prohibit or limit disclosure of trade secrets or other confidential information. *See* Clinic Br. at 21.

The Boards' related assertion that public bodies, once they have possession of the documents, themselves can determine which documents are protected as trial preparation materials, is equally flawed. *See* Boards Br. at 13. For one thing, the Boards' rule creates an unmanageable and unpredictable regime in which public records determinations are left to the whims of the individual public body attorney handling a respective matter, as opposed to a tribunal (in this case, the BTA). *See id.* (suggesting that "the public entity in using the documents can determine which documents are trial preparation materials, useful to the litigation, or irrelevant to the matter."). For another thing, such a regime creates unending uncertainty for the body seeking to protect its trade secrets, as it denies that body a ruling, before production, that the documents are in fact legally exempted from public records disclosure, leaving the decision for another day and in the hands of the body's adversary in litigation.

III. THE DOCUMENTS MAY ULTIMATELY PROVE NOT TO BE "RECORDS" AT ALL, BUT SUCH A CUMBERSOME DETERMINATION WOULD COME TOO LATE TO AFFORD LEGITIMATE PROTECTION IN THIS CASE.

Lastly, the Tax Commissioner and the Boards of Education make the separate point that not all of the documents at issue are necessarily public "records" to begin with, because the public bodies may not "use" all of them in the course of their duties. While this proposition has some theoretical appeal, ultimately any protection against disclosure via this route would only come after a cumbersome item-by-item analysis after the proceedings have ended. This would

be too little and too late for meaningful protection of the Clinic's trade secrets, and would also lend even more uncertainty to an already uncertain terrain.

For the purposes of public records law, a "record" is limited to information that documents the activities of a public office, or information that a public agency actually used or relied on in carrying out its activities. See Comm'r Br. at 9–11; Boards Br. at 2–5; *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384; *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117; *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180. In the Commissioner's view, "it is only when discovery is filed with the court in support of motions or utilized at trial that there is any certainty that it is being utilized or relied upon in advancing the activities of the agency." Comm'r Br. at 11.

Given the exceedingly large number of discovery requests propounded upon the Cleveland Clinic in this case, it is more than fair to think that not every document produced by the Clinic will be used or relied upon by the public bodies involved in this proceeding. While those "unused" documents seemingly would not qualify as public records to begin with, resolving today's case on this basis is fraught with peril. First, here again the determination of whether a document needs to be produced in the face of a public records request would come down to a public body's subjective belief as to whether it used or relied upon the document. Second, that determination would come only after a cumbersome "item by item analysis" of the documents. Comm'r Br. at 10. Third, that determination would not be made until *after* the proceedings end, as it is only then when one can ascertain how a document was used (if at all), meaning that entities like the Clinic that are asked to produce proprietary information will have no certainty regarding the protection (if any) that will ultimately be afforded to their confidential

information. In sum, the “records” question is no substitute for an early trade secret determination. Here again, the most appropriate legal analysis and workable approach is for the tribunal to determine, at the outset, whether requested information constitutes trade secrets, a determination that benefits all involved.

CONCLUSION

The Cleveland Clinic is seeking tax exemptions to allow it to continue to provide accessible and superior health care services at the Taussig Cancer Center, the Beachwood Family Health and Surgery Center, and Fairview Hospital—venerable institutions with charitable missions. In response to appellees’ extensive and seemingly unprecedented discovery, which reaches to some of the Clinic’s most valuable trade secrets, the Clinic seeks a determination at the outset that the documents are trade secrets, protecting them from future public records disclosure. Doing so, moreover, is consistent with the State’s statutory trade secret regime, which was enacted to ensure a vibrant and stable business environment. *See* Clinic Br. at 24. While alternative mechanisms may provide some degree of limited protection for the Clinic’s proprietary information, none does so sufficiently to lessen the need for a trade secret determination.

For the reasons stated herein and in the Cleveland Clinic’s opening memorandum, 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,



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

Chad A. Readler (0068394)
JONES DAY
325 John H. McConnell Boulevard, Suite
600
Columbus, Ohio 43215
Tel. No. 614-469-3939
Fax No. 614-461-4198
careadler@jonesday.com

Counsel for Appellants The Cleveland
Clinic Foundation and Fairview Hospital

CERTIFICATE OF SERVICE

I certify that on July 7, 2008, a copy of this Response of Appellants was sent by UPS overnight delivery to counsel of record for appellees:

Lawrence D. Pratt (0021870)
Alan P. Schwepe (0012676)
Assistant Attorneys General
Taxation Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Tel. No. 614-466-5967

Counsel for Appellee Richard A. Levin,
Tax Commissioner of Ohio

David H. Seed (0066033)
Daniel McIntyre (0051220)
Brindza McIntyre & Seed LLP
1111 Superior Avenue, Suite 1025
Cleveland, Ohio 44114
Tel. No. 216-621-5900

Counsel for Appellee Cleveland Municipal and
Beachwood City School District Boards of Education



Chad A. Readler
Counsel for Appellants