IN THE SUPREME COURT OF OHIO

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

REPLY MEMORANDUM OF APPELLEE, RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, IN RESPONSE TO JUNE 6, 2008 ORDER REGARDING PUBLIC RECORDS ISSUES

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RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO, *et al.*,	:	**REPLY MEMORANDUM OF APPELLEE, RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO**
Appellees.	:	

The June 6, 2008 Order of this Court asks the parties to address specific issues involving discovery and the Public Records Act. It indicates that:

> It is ordered by the Court, sua sponte, that **merit briefing** pursuant to S.Ct. Prac.. R. VI **is hereby stayed** until further order of this Court.

(Emphasis added.) Accordingly, the Tax Commissioner confined his analysis to the two questions raised. In contrast, review of the memorandum filed by the Cleveland Clinic Foundation, Inc. and Fairview Hospital ("the Clinic") reveals that although it addressed the Court's two questions, it also ventured well beyond those questions into its merit argument, i.e. whether the Board of Tax Appeals ('BTA") erred by merely issuing a protective order rather than actually sealing the alleged trade secret documents at issue. Moreover the Clinic also appears to be requesting the Court to opine on matters beyond the discovery stage, i.e. treatment of exhibits during the actual hearing, a matter the BTA itself has not yet addressed as premature. In fact the Clinic's "Conclusion" requests this Court to declare de novo that the documents are actually trade secrets apparently without the benefit of the trial court having first ruled on the

issue, without an in-camera review, without the Clinic providing the other parties with a privilege log by which they could adequately address the alleged confidential nature of the records in question and without having fully addressed the two step analysis set out by the Court for trade secret issues. The Clinic instead requests the Court as follows:

> 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.

"Memorandum of Appellants" at 35.

The Tax Commissioner is clearly entitled to respond to this argument at the proper time presuming the matter has not been dismissed and merit arguments are re-opened. However, without waiving his right to file a responsive brief during merit briefing, the Tax Commissioner would like to address certain key points that should be taken into consideration by the Court if it elects to address the Clinic's merit issues.

One is the Clinic's argument that the existing protective order is insufficient to guard its interests during the discovery stage. The Clinic argues that the provision requiring the parties to return or destroy documents received in discovery at the end of the proceedings is insufficient because "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" (Clinic Memo at 22.) If the Clinic is concerned that the state would dishonor the spirit of a destruction order, it presumes too much. The state routinely deals with confidential material in administrative proceedings (the medical records of patients injured by physicians charged in Medical Board hearings being a prime example) without that confidentiality being betrayed. If the Clinic is now concerned about a disagreement

with the BTA on whether a given class of documents is confidential, it certainly didn't raise that issue in its Notice of Appeal.

The Clinic also argues that an express finding the records are trade secrets protects against inadvertent release by the public entity (Clinic Memo at 27), but offers no real reason why a protective order controlling dissemination of the same documents, regardless of whether trade secret or not, doesn't offer even greater protection. As to requests by the public under the Public Records Act, the protective order clearly provides a mechanism to allow the Clinic, with timely notice to the public agency, to assert trade secret status in a judicial proceeding before release to the public. Finally if the Clinic now is second-guessing itself on the terms of a confidentiality agreement that it entered into voluntarily, it not should not be using the Court as a vehicle to undo it own acts.

Two, the Clinic also asserts that the protective order does not protect its records once they have been filed with the BTA during the hearing stage of the exemption proceeding (Clinic Memo at 22.) The Clinic is correct because the order only covers the discovery stage, as the BTA properly pointed out in its order This, however, hardly constitutes substantial prejudice to the Clinic as the BTA merely deferred ruling on the issue of trade secret and an order to seal until the proper time – when the records are actually placed in the hands of the tribunal and a request for sealing is ripe.

Finally, with respect to the Clinic's request that the Court actually declare the records in question trade secrets and seal them, the relief would clearly be both premature and outside its jurisdiction. Initially the issue of whether particular information is a trade secret is a factual determination **for the trial court.** *Water Mgt., Inc. v. Stayanchi* (1984), 15 Ohio St. 3d 83;

State ex rel. Fisher v. PRD. Public Sector, Inc. (10th Dist. 1994), 99 Ohio App. 3d 387, 393. Here the trial court has yet to make that determination.

Next, as stated in *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance* (1997), 80 Ohio St. 3d 513, a two–step analysis must be performed by the trial court in the course of determining whether any record filed with a public agency can be withheld from a public records request because it contains alleged trade secrets:

> In determining whether information submitted to a public agency is exempt from disclosure pursuant to trade secret status under *R.C. 1333.51*, we have applied a two-step analysis. *See State ex rel. Allright Parking v. Cleveland, 63 Ohio St. 3d at 776, 591 N.E.2d at 711*. First, the court in which the action is brought must undertake an *in camera* review of the documents to determine if the documents contain trade secret information. If the documents do not contain trade secrets, full disclosure is required. However, if any of the documents do contain trade secrets, the court must determine whether the statutory requirements for submitting the documents explicitly places them in the public record. *See id.; State ex rel. Seballos v. School Emp. Retirement Sys., 70 Ohio St. 3d at 670, 640 N.E.2d at 832*. Where the statute requiring submission of the documents is silent as to the public record status of the submissions, information in the submitted documents that constitutes trade secrets pursuant to *R.C. 1333.51* is exempt from public disclosure. See *Seballos at 671, 640 N.E.2d at 832*.

The current record before the Court has open issues on both steps of this process. With respect to step one, the Court has made it clear that that a detailed examination of each record via an *in-camera* inspection is mandated. See also *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland* (1992), 63 Ohio St. 3d 772,776. The Clinic has yet to submit the documents for *in-camera* inspection, nor has it provided a privilege log to the other parties, as is the common practice, to allow the parties sufficient discovery to meaningfully respond to the trade secret assertion.

Moreover, the burden of establishing a trade secret is rigid. As stated in *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance, supra,* at 523-524, it requires a showing of:

> (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. *Pyromatics, Inc. v. Petruziello (1983), 7 Ohio App. 3d 131, 134-135, 7 Ohio B. Rep. 165, 169, 454 N.E.2d 588, 592*; see *Water Management, Inc. v. Stayanchi (1984), 15 Ohio St. 3d 83, 86, 15 Ohio B. Rep. 186, 188, 472 N.E.2d 715, 718.* A business or possessor of a potential trade secret must take some active steps to maintain its secrecy in order to enjoy presumptive trade secret status. *Water Management,* at 85-86, 15 Ohio B. Rep. at 472 N.E.2d at 718. A claimant asserting trade secret status has the burden to identify and demonstrate that the material is included in categories of protected information under the state. See *Amoco Production Co. v. Laird Ind. (1993), 622 N.E.2d 912.*

Broad conclusory statements by the party seeking the protection are insufficient. The claim must be supported by specific factual evidence establishing each point. *State ex rel Besser v. Ohio State University* (2000), 89 Ohio St. 3d 396, 2000 Ohio 207. At best the record in the instant case only includes generic testimony regarding the records in question.

Analysis of step two may be even more problematic. A record could include trade secrets and still be public because the statute under which ii is filed requires it to be so. *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland* (1992), 63 Ohio St. 3d 775-776, *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance, supra,* at 524; *State ex rel. Seballos v. School Emp. Retirement Sys.* (1884), 70 Ohio St. 3d 667, 671. In *Allright*, R.C. 1728.06, a statute governing applications for a tax abatement, provided that such applications "shall be a matter of public record upon receipt by the mayor." While concluding that the statute did not

address materials submitted with the application and therefore any trade secrets contained therein could still be withheld from the public, the Court concluded that the application itself had to be disclosed. Id. at 776.

By comparison, R.C. 5715.27(G), which governs applications for real property exemption, provides that:

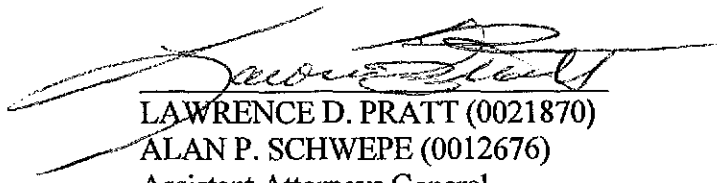
> Applications and complaints, **and documents of any kind related to applications** and complaints, filed with the tax commissioner under this section **are public records** within the meaning of section 149.43 of the Revised Code.

(Emphasis added.) Thus, under similar analysis, it is reasonably argued that the General Assembly intended that more than just the application be public and that the public should have access to any and all documents that would support a claimed charitable exemption such as the ones filed by the Clinic. The rationale would be that any claim to confidentiality would be waived with the decision to seek the public benefit of a real property exemption.

The question would then become whether, in cases such as this, the provision still applies to proceedings before the BTA where an applicant has chosen not to submit material documentation initially with its application but instead waits until the BTA hearing to produce it. It certainly would not seem to be a reasonable interpretation to allow such practice but in any event two observations are quickly apparent. One, it underscores why the trade secret determination can't be made until actual hearing since only then will it be clear whether or not the discovery is material to the application. The BTA has indicated similar thoughts. See *Cleveland Clinic Foundation v. Wilkins* (January 25, 2008), Case Nos. 2005-V-1726, 2006-V-99, 2006-H-117, 2008 Ohi0 Tax LEXIS 157, at 11, fn. 10, "The board emphasizes, however, that such finding applies solely to discovery and that it should not be construed to foreshadow or predetermine any ruling regarding a request to restrict public access to this board's hearing or

documents sought to be admitted into evidence. See *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland* (1992), 63 Ohio St. 3d 775-776, *State ex rel. The Plain Dealer v. Ohio Dept. of Insurance* (1997), 80 Ohio St. 3d 513, 523-524; R.C. 5715.27(G). Two, like other issues in this matter, this is a case of first impression.

Respectfully submitted,



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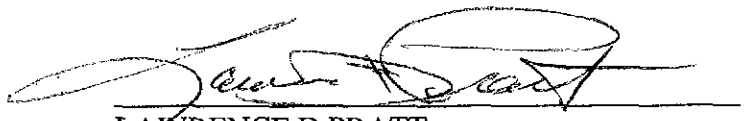
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Reply was sent by regular U.S. Mail this 7th day of July, 2008, to: Stephen G. Sozio. Esq., Tracy k. Stratford, and Robert J. Colacarro, Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114; and David H. Seed, Brinda McIntyre & Seed LLP, 1111Superior Avenue, Suite 1025, Cleveland, Ohio 44114



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