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No. 2010-1536

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. O'SHEA AND ASSOCIATES CO., L.P.A.,

Relator-Appellee,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY,

Respondent-Appellant.

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ON APPEAL FROM THE OHIO COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
(CASE NO. 93275)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT-APPELLANT

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BRIEF FOR THE UNITED STATES OF AMERICA
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INTEREST OF THE UNITED STATES

Pursuant to Rule of Practice of the Ohio Supreme Court 6.6(A), the United States respectfully submits this brief as *amicus curiae*. The United States Department of Housing and Urban Development ("HUD") administers the federal public housing program to provide decent, safe and sanitary housing to eligible families. HUD achieves this goal, in part, by providing funds to local public housing authorities such as the respondent-appellant Cuyahoga Metropolitan Housing Authority ("CMHA").

When they accept federal funds, public housing authorities become subject to numerous contractual and regulatory requirements developed by HUD. The documents at issue in this case are used by CMHA to comply with HUD regulations promulgated for the Congressionally mandated purpose of eliminating the

threat of childhood lead poisoning in public housing assisted by the federal government. If those documents are subject to public disclosure, it will interfere with CMHA's ability to comply with the applicable regulations and therefore with HUD's ability to reduce the threat of childhood lead poisoning in federally assisted public housing.

SUMMARY OF ARGUMENT

The relator-appellee in this action, O'Shea and Associates Co., L.P.A., seeks documents from the Cuyahoga Metropolitan Housing Authority recording instances of lead poisoning in dwellings owned or operated by CMHA. The documents at issue are collected by CMHA both at the direction of the United States Department of Housing and Urban Development and for the purpose of complying with HUD regulations aimed at eliminating poisoning from lead-based paint in federally assisted housing. As discussed below, these documents are not subject to disclosure under the Ohio Public Records Act because they are not "records" as defined by Ohio law. Moreover, were the Act to require disclosure of the documents, it would conflict with federal law and therefore be preempted.

STATEMENT OF THE FACTS

I. STATUTORY FRAMEWORK

A. The Ohio Public Records Act

The Ohio Public Records Act requires that, "upon request . . . all public records responsive to the request shall be promptly prepared and made available for inspection to any person[.]" Ohio Rev. Code § 149.43(B)(1). For purposes of the Act, "public record" "means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units[.]" § 149.43(A)(1).

Whether a document constitutes a "public record" is limited by the definition of the term "record," which provides that a record "includes any document, device, or item . . . created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." § 149.011(G). To establish that a document meets this definition, a party seeking disclosure must show that the document "create[s] a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the state agencies." State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274, 280 (Ohio 2005). As this Court has explained, "[t]o the extent that

an[] item . . . is not a 'record,' *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed." Ohio ex rel. Fant v. Enright, 610 N.E.2d 997, 999 (Ohio 1993).

B. The Residential Lead-Based Paint Hazard Reduction Act

In 1973, the United States Congress amended the Lead Based Paint Poisoning Prevention Act to require the Secretary of Housing and Urban Development to "establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning" in "any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary[.]" 42 U.S.C. § 4822(a)(1); see Pub. L. 93-151, 87 Stat. 565.

In 1992, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act, Pub. L. 102-550, 106 Stat. 3672, among other reasons, "to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government[.]" 42 U.S.C. § 4851a(6). To further that goal, Congress expanded the scope of the Lead Based Paint Poisoning Prevention Act to set forth more specific requirements for lead-based paint risk assessments and abatement based on type of housing. See 106 Stat. 3672, 3904. CMHA receives housing assistance payments from HUD and thus CMHA housing is covered by

the Lead Based Paint Poisoning Prevention Act, the Residential Lead-Based Paint Hazard Reduction Act, and their implementing regulations.

Pursuant to Congress' directive, HUD promulgated regulations requiring public housing authorities who receive federal assistance to take certain measures after being notified that a child younger than six years old living in a public housing development has been identified as having an elevated blood-lead level. See 24 C.F.R. § 35.1130 (applying to conventional public housing); 24 C.F.R. § 35.1225 (applying to Section 8 housing). Among other things, if the public housing authority learns of the child's elevated blood-lead level from a person who is not a medical health care provider, it is required to "immediately verify the information with the public health department or other medical health care provider." § 35.1130(b); § 35.1225(b). The regulations also require the public housing authority to "complete a risk assessment of the dwelling unit in which the child lived," § 35.1130(a), § 35.1225(a), and to "complete the reduction of lead-based paint hazards identified in the risk assessment," § 35.1130(c).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

O'Shea and Associates Co., L.P.A. ("O'Shea"), made a written records request to CMHA under the Ohio Public Records Act.

(Appellant's Supplement ("Supp.") at 7). As relevant here, O'Shea sought "[c]opies of all documents which document any and all instances of lead poisoning in the last 15 years in any dwelling owned or operated by CMHA." (Id.) CMHA has two types of documents in its possession responsive to O'Shea's request that it declined to produce: the "Authorization for Release of Medical Information" ("Medical Release") and the "CMHA EBL Resident Questionnaire" ("Resident Questionnaire"). (See Supp. at 33-38). Blank examples of these documents are reproduced in the attached Addendum.

The Medical Release authorizes the disclosure of a minor child's medical records to CMHA. (Addendum at A-1; Supp. at 38). This document is completed by residents of CMHA housing whose children have been identified as having elevated blood lead levels; it requests the child's name, date of birth, and address. (Id.) An older version of the Medical Release also requests the resident's social security number. (Addendum at A-2; Supp. at 38). CMHA uses the Medical Release to comply with HUD regulations requiring it to verify "with the public health department or other medical health care provider" information it receives that a child of less than six years of age living in housing owned or operated CMHA has an elevated blood lead level. See generally 24 C.F.R. § 35.1130(b) ("After receiving information from a person who is not a medical health care

provider that a child of less than 6 years of age living in a public housing development may have an environmental intervention blood lead level, the [Public Housing Authority] shall immediately verify the information with the public health department or other medical health care provider."); § 35.1225(b) (same).

The Resident Questionnaire also contains information provided by CMHA residents with a child who has an elevated blood lead level. (Addendum at A-3 to A-7; Supp. at 33-37). Among other things, the Resident Questionnaire requests the resident's name, address and telephone number; the names and dates of birth of the resident's children; the name, addresses and phone numbers of the affected child's daycare providers; information about where the affected child likes to play and to hide, both inside and outside the home; and information regarding the unit occupants' employment. (Id.) The Resident Questionnaire promises respondents that "[a]ll information is confidential and will be maintained only at the CMHA Office of Environmental Affairs." (Addendum at A-3; Supp. at 33).

Like the Medical Release, the Resident Questionnaire is used by CMHA to comply with federal regulations. Those regulations require a public housing authority, within 15 days of being notified of a child less than six years of age with an elevated blood lead level, to "complete a risk assessment of the dwelling

unit in which the child lived at the time the blood was last sampled and of common areas servicing the dwelling unit[.]" 24 C.F.R. § 35.1130(a). HUD guidelines direct that public housing authorities should use a resident questionnaire when learning of a child with an elevated blood lead level. See Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995) at 16-8, available at www.hud.gov/offices/lead/lbp/hudguidelines/index.cfm ("The parents or guardians should be questioned regarding all possible lead sources and risk factors. (Use the questionnaire in Table 16.2.)"). The sample questionnaire provided by HUD is substantially similar to the Resident Questionnaire used by CMHA. See id. at Table 16.2 (16-11 to 16-18).

B. Procedural Background

After CMHA declined to provide O'Shea with documents responsive to its public records request, O'Shea filed a petition for a writ of mandamus in the Ohio Court of Appeals. (Supp. at 1-5). CMHA responded by seeking dismissal of O'Shea's mandamus petition, arguing that O'Shea's records request seeks "information" rather than "documents." In a January 11, 2010 opinion, the court of appeals held "that the language of O'Shea's request . . . is not on its face a request for information, [but] the record in this action is not sufficiently developed for this court to determine whether to grant or deny relief[.]" State ex

rel. O'Shea & Assoc. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth., 2010 Ohio 3416, at P14 (Ohio Ct. App. 2010). Accordingly, the court granted O'Shea leave to file a dispositive motion. Id. at P21.

O'Shea then filed a motion for summary judgment, which the court of appeals granted. The court first stated that it would not revisit CMHA's argument that O'Shea's request was for "information" rather than "documents." Id. at P27. It next rejected CMHA's argument that the documents sought by O'Shea are not "public records" under Ohio Revised Code § 149.43. The court asserted that the medical release and resident questionnaire "do not contain the comprehensive personal, family and medical information described in the records at issue in [State ex rel. McCleary v. Roberts, 725 N.E.2d 1144 (Ohio 2000)]." Id. at P31. The court concluded instead that the documents "merely identify individuals suspected to have been exposed to lead" and therefore that the circumstances of this case more closely resemble those in Ohio ex rel. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181 (Ohio 2006). Id. at P31-32.

In reaching this conclusion, the court focused on the fact that "the bulk of the Questionnaire is devoted to identifying where children routinely are" and that "[t]he Release merely authorizes the release of medical records"; on this basis, it concluded that "[t]he record in this action does not provide a

basis for distinguishing the records" at issue here from those at issue in Daniels. Id. at P34. The court thus held "that the more applicable, controlling authority in this action is Daniels and Daniels requires that CMHA release all disputed records to O'Shea." Id.

Finally, the court of appeals rejected CMHA's argument that the documents are exempt from disclosure under the Privacy Act, 5 U.S.C. § 552(a). The court explained that the Privacy Act applies to federal agencies, and that CMHA had not provided the court with any authority that it should be considered a federal agency. Id. at P35.

CMHA appeals to this Court as of right. See Ohio S.Ct. Prac. R 2.1(A)(1).

ARGUMENT

The United States' Proposition of Law No.I:

THE DOCUMENTS AT ISSUE IN THIS LITIGATION ARE NOT SUBJECT TO DISCLOSURE UNDER THE OHIO PUBLIC RECORDS ACT BECAUSE THEY ARE NOT "RECORDS" FOR PURPOSES OF OHIO REVISED CODE § 149.011(G)

1. a. This Court has repeatedly made clear that, for a document to constitute a "public record" subject to disclosure under the Ohio Public Records Act, it must satisfy the definition of "record" contained in Ohio Revised Code § 149.011(G). See State ex rel. McCleary v. Roberts, 725 N.E.2d 1144, 1148 (Ohio 2000) ("Because the information sought herein is not a 'record,'

as defined by R.C. 149.011(G), it follows that it cannot be a 'public record' as that term is contemplated by R.C. 149.43(A)(1)."); State ex rel. Fant v. Enright, 610 N.E.2d 997, 999 (Ohio 1993) ("To the extent that an[] item . . . is not a 'record,' *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed."). Section 149.011(G) limits "records" to those documents that "serve[] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the [relevant public] office." A document meets this definition only if it "create[s] a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the state agenc[y]." State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274, 280 (Ohio 2005).

It cannot be disputed that blank copies of the Medical Releases and Resident Questionnaires sought by O'Shea in its public records request are subject to disclosure under the Ohio Public Records Act. Insofar as those forms and the questions they contain are written or approved by CMHA, the forms document the activities of a public office and therefore satisfy the definition of "record" contained in § 149.011(G). See State ex rel. Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 187 (Ohio 2002) (holding that questions written or approved by court "serve

to document the activities of a public office and thereby satisfy the statutory definition of a 'record' under R.C. 149.011(G)").

The completed Medical Releases and Resident Questionnaires are not subject to disclosure, however, because the personal information provided by CMHA residents does not "serve[] to document the organization, functions, policies, decisions, procedures, operations, or other activities" of CMHA. See id. (holding that juror responses are not "records" and therefore are not subject to disclosure). The Medical Release is a one-page document that authorizes the release of a minor's medical records to CMHA, see Addendum at A-1; nothing about the information provided by CMHA residents when completing that document discloses anything about CMHA's organization, functions, policies, etc.

Similarly, the completed Resident Questionnaire contains information provided by public housing residents about themselves and their children, such as the resident's name, address and telephone number; the children's names and dates of birth; the name, addresses and phone numbers of the children's daycare providers; and information about where the children like to play and to hide, both inside and outside the home. See Addendum at A-3 to A-7. This document, which CMHA assures its residents "is confidential and will be maintained only at the CMHA Office of Environmental Affairs," id. at A-3, provides a great deal of

information about CMHA's residents, but it contains nothing about CMHA's "organization, functions, policies, decisions, procedures, operations, or other activities[.]"

Stated differently, the information provided by CMHA residents on the completed Medical Releases and Resident Questionnaires does not "create a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of [CMHA]." Johnson, 833 N.E.2d at 280 (holding that state employees' home addresses are not records under § 149.011(G)). Accordingly, the completed Medical Releases and Resident Questionnaires are not subject to disclosure under the Ohio Public Records Act.

This conclusion is compelled by this Court's opinion in State ex rel. McCleary v. Roberts, 725 N.E.2d 1144 (Ohio 2000). In that case, Cornell McCleary made a request under the Ohio Public Records Act for documents containing the "names, home addresses, family information, emergency contact information, and medical history information" of children who used public recreational facilities. Id. at 1145. The Court concluded that the documents were not subject to disclosure because "the information requested by [McCleary] is not a 'record' as that term is contemplated by Ohio's Public Records Act." Id. at 1146. The Court explained that "personal information regarding children

who participate in the [Recreation and Parks] Department's photo identification program . . . i.e., names of children, home addresses, names of parents and guardians, and medical information, does nothing to document any aspect of the City's Recreation and Parks Department." Id. at 1147. While the government had, "as a matter of public policy, determined that it is necessary to compile private information on these citizens," the court held that this "personal information . . . is clearly outside the scope of [Ohio Revised Code §] 149.43 and not subject to disclosure." Id. at 1148.

The documents at issue in this litigation are not meaningfully distinguishable from those at issue in McCleary. The documents in McCleary contained the names, home addresses, family information, emergency contact information, and medical history information of children who used public recreational facilities. McCleary, 725 N.E.2d at 1145. The completed Medical Releases and Resident Questionnaires at issue here similarly contain children's names, home addresses and family information; they also contain children's dates of birth and telephone numbers; the names and addresses of their daycare providers; information about where the children like to play and to hide; and information regarding public housing residents' employment. Indeed, if anything, the documents sought by O'Shea contain more private information than those in McCleary.

As in McCleary, the subjects of O'Shea's public records request "are children--private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on these citizens." McCleary, 725 N.E.2d at 1148. And, as in that case, this private information does nothing "to document the organization, functions, policies, decisions, procedures, operations, or other activities of the [public] office." Ohio Rev. Code § 149.011(G); see also Bond, 781 N.E.2d at 186 ("As we noted in McCleary, disclosure of information about private citizens is not required when such information 'reveals little or nothing about an agency's own conduct' and 'would do nothing to further the purposes of the Act.'") (quoting McCleary, 725 N.E.2d at 1147). Accordingly, the completed Medical Releases and Resident Questionnaires that are the targets of O'Shea's records request are not subject to disclosure under the Ohio Public Records Act.

b. In holding that the completed Medical Releases and Resident Questionnaires are subject to disclosure under the Ohio Public Records Act, the court of appeals determined that State ex rel. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181 (Ohio 2006), rather than McCleary, is the appropriate controlling precedent. See O'Shea, 2010 Ohio at P31-32, P34. This was error.

In Daniels, the Cincinnati Enquirer sought lead-contamination notices issued by the Cincinnati Health

Department to owners of units in which children with elevated blood lead levels resided. 844 N.E.2d at 1183. In the course of addressing whether those documents were protected under the Health Insurance Portability and Accountability Act, and therefore exempt from disclosure under Ohio law, the court noted that "[n]othing contained in these reports identifies by name, age, birth date, social security number, telephone number, family information, photograph, or other identifier any specific individual or details any specific medical examination, assessment, diagnosis, or treatment of any medical condition." Id. at 1185. Instead, the documents contained "a mere nondescript reference to 'a' child with 'an' elevated lead level." Id. On this basis, the court recognized "that none of the specific identifiable information referred to in McCleary is part of the information contained in the lead-citation notices or risk-assessment reports prepared by the health department and requested by the Enquirer in this case." Id. at 1186.

Daniels, of course, unlike McCleary, did not address whether the documents at issue were "records" as defined by Ohio law. Moreover, even if Daniels were relevant to that question, a comparison of the documents at issue in McCleary with those in Daniels makes clear that the Medical Release and Resident Questionnaire are much closer to, if not indistinguishable from, the documents in McCleary.

As in McCleary, the completed Medical Releases and Resident Questionnaires identify minor children by name, date of birth, address, telephone number, and family information; the completed Resident Questionnaires also contain the addresses and phone numbers of the children's daycare providers and information about where the children like to play. See Addendum at A-1 to A-7. The documents in Daniels, by comparison, contained no such information. See State ex rel. Cincinnati Enquirer v. Jones-Kelly, 886 N.E.2d 206, 215 (Ohio 2008) ("[L]ike the lead-citation notices at issue in [Daniels], and unlike the city database at issue in McCleary, the requested information in this case does not include specific identifiable information about children."). Except for the facial similarity that Daniels involved children with elevated blood lead levels, this case (which involves documents containing detailed personal information about minor children) bears no resemblance whatsoever to Daniels (which involved documents describing the results of lead-assessment investigations of dwellings). See generally Daniels, 844 N.E.2d at 1185 (explaining that each lead-citation notice "identifies existing and potential lead hazards on the exterior and interior of the property, details the tests performed on the property and the results of those tests, explains the abatement measures required, provides advice about options to correct the problem, and mandates reporting of abatement measures"). The court of

appeals' conclusion to the contrary was incorrect, and its holding that the completed Medical Releases and Resident Questionnaires are subject to disclosure under the Ohio Public Records Act warrants reversal.

The United States' Proposition of Law No.II:

IF THE DOCUMENTS AT ISSUE ARE SUBJECT TO DISCLOSURE UNDER THE OHIO PUBLIC RECORDS ACT, THAT LAW WOULD CONFLICT WITH FEDERAL LAW AND THUS BE PREEMPTED

The Court should also conclude that the documents at issue in this litigation are not subject to disclosure under the Ohio Public Records Act because, if the documents were subject to disclosure, the Act would conflict with federal law and thus be preempted. See generally State ex rel. Dispatch Printing Co. v. City of Columbus, 734 N.E.2d 797, 800 (Ohio 2000) ("'[I]t is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.") (quoting State ex rel. Dispatch Printing Co. v. Wells, 481 N.E.2d 632, 634 (Ohio 1985)).

1. a. The Supremacy Clause of the United States Constitution provides that federal law is "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As the United States Supreme Court has explained, under this Clause, "state law is nullified to the extent that it actually conflicts with federal law." Fidelity Fed. Sav. & Loan Assoc. v. De la

Cuesta, 458 U.S. 141, 153 (1982). "Such a conflict arises . . . when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); see generally Talik v. Federal Marine Terminals, Inc., 885 N.E.2d 204, 212 (Ohio 2008) (holding Ohio law preempted because it "would be inconsistent with the central purpose underlying" federal law).

Additionally, a state law "is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal." International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); see also Perez v. Campbell, 402 U.S. 637, 652 (1971) ("[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."). Federal regulations "have no less pre-emptive effect than federal statutes." Fidelity Fed., 458 U.S. at 153; see also Louisiana Pub. Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.").

b. The United States Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992, 106 Stat. 3672, among other reasons, "to reduce the threat of childhood lead

poisoning in housing owned, assisted, or transferred by the Federal Government[.]" 42 U.S.C. § 4851a(6). To further that goal, Congress expanded the scope of the Lead Based Paint Poisoning Prevention Act to set forth more specific requirements for lead-based paint risk assessments and abatement based on type of housing. See 106 Stat. 3672, 3904. Those requirements include procedures established by the Secretary of Housing and Urban Development "to eliminate as far as practicable the hazards of lead based paint poisoning" in "any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary or otherwise receives more than $5,000 in project-based assistance under a Federal housing program." § 4822(a)(1).

Pursuant to this directive, HUD promulgated regulations requiring public housing authorities who receive assistance from HUD to take certain measures after being notified that a child less than six years old living in a public housing development has been identified as having an elevated blood lead level. See 24 C.F.R. § 35.1130 (conventional public housing); 24 C.F.R. § 35.1225 (Section 8 housing). Among other things, if the public housing authority learns of the child's elevated blood-lead level from someone who is not a medical health care provider, it is required to "immediately verify the information with the public

health department or other medical health care provider." § 35.1130(b); § 35.1225(b). The regulations also require the public housing authority to "complete a risk assessment of the dwelling unit in which the child lived," § 35.1130(a), § 35.1225(a), and to "complete the reduction of lead-based paint hazards identified in the risk assessment[.]" § 35.1130(c).

c. As an entity receiving housing assistance payments from HUD, CMHA is covered by the Lead Based Paint Poisoning Prevention Act, the Residential Lead-Based Paint Hazard Reduction Act of 1992, and their implementing regulations. CMHA uses the Medical Release and Resident Questionnaire to comply with those federal requirements. The Medical Release allows CMHA to verify a child's elevated blood lead level with health care providers by authorizing those health care providers to provide the child's medical records to CMHA. Cf. 24 C.F.R. § 35.1130(b), § 35.1225(b) (requiring a public housing authority, when it learns of a resident child with an elevated blood lead level from someone who is not a medical provider, to "immediately verify the information with the public health department or other medical health care provider"). And the Resident Questionnaire is used by CMHA as part of the risk assessment process. Cf. § 35.1130(a), § 35.1225(a) (requiring public housing authorities, when faced with a resident child with an elevated blood lead level, to "complete a risk assessment of the dwelling unit in

which the child lived"). Indeed, use of the Questionnaire is prescribed by HUD for precisely that purpose. See Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995) at 16-8, available at www.hud.gov/offices/lead/lbp/hudguidelines/index.cfm ("The parents or guardians should be questioned regarding all possible lead sources and risk factors. (Use the questionnaire in Table 16.2.)").

If the completed Medical Releases and Resident Questionnaires are available to the public under the Ohio Public Records Act, residents whose children have elevated blood lead levels will be less likely to cooperate with their public housing authority by completing those documents, whose confidentiality the housing authority could no longer guarantee. See generally id. ("Confidential information about the child or household should not be revealed to any other individual or agency."); Addendum at A-3 ("All information is confidential and will be maintained only at the CMHA Office of Environmental Affairs.").

Both this Court and the United States Supreme Court have recognized that release of public records to a third party is equivalent to release to the general public and carries the same potential risks. See National Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) ("It must be remembered that once there is disclosure [under the Freedom of Information Act], the information belongs to the general public."); McCleary, 725

N.E.2d at 1149 (recognizing that "it is not beyond the realm of possibility that the information at issue herein might be posted on the Internet and transmitted to millions of people"). As such, O'Shea's "request for . . . information about a private citizen can reasonably be expected to invade that citizen's privacy[.]" DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); see also McCleary, 725 N.E.2d at 1147 (quoting Reporters Comm. with approval); see generally NASA v. Nelson, No. 09-530, __ U.S. __, 2011 WL 148254, at *12 (Jan. 19, 2011) (explaining that government's duty to avoid unwarranted disclosure to the public allays potential threat to privacy posed by government accumulation of personal information). Additionally, "[b]ecause of the inherent vulnerability of children, release of personal information of this nature creates an unacceptable risk that a child could be victimized." McCleary, 725 N.E.2d at 1150.

Given the potential invasion of their privacy and the risk to their children, it is apparent that many residents would not provide to their public housing authorities the personal information required by the Medical Release and Resident Questionnaire if that information may be disclosed to the public under the Ohio Public Records Act. See, e.g., Baldrige v. Shapiro, 455 U.S. 345, 361 (1982) (explaining that Congress required raw census data to be kept confidential "to encourage

public participation and maintain public confidence that information given to the Census Bureau would not be disclosed"); Henneman v. Toledo, 520 N.E.2d 207, 211 (Ohio 1988) (noting that disclosure of information compiled in the course of police internal investigations "may work to undermine investigatory processes by discouraging persons with knowledge from coming forward"); Church of Scientology v. IRS, 792 F.2d 153, 158-59 (D.C. Cir. 1986) (stating that "heightened [privacy] protection was intended with regard to tax information, in order to encourage the full, voluntary self-assessment of taxes upon which our internal revenue system largely depends"). Public housing authorities would then be frustrated in their attempts to comply with federal law requiring that information to be collected and acted upon.

Accordingly, if the completed Medical Releases and Resident Questionnaires are subject to disclosure under the Ohio Public Records Act, that Act will "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" Fidelity Fed., 458 U.S. at 153, specifically, Congress' objective "to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government," 42 U.S.C. § 4851a(6). Similarly, the Act would "interfere[] with the methods by which the federal statute was designed to reach [its] goal," International Paper, 479 U.S.

at 494, by interfering with public housing authorities' ability to comply with HUD's implementing regulations. The Ohio Public Records Act would thus be preempted to the degree it subjects the completed Medical Releases and Resident Questionnaires to public disclosure. Avoiding such a conflict with federal law is another reason to interpret Ohio law such that the documents at issue in this litigation are not subject to disclosure under the Ohio Public Records Act. See State ex rel. Dispatch Printing Co. v. City of Columbus, 734 N.E.2d 797, 800 (Ohio 2000) ("'[I]t is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.") (quoting State ex rel. Dispatch Printing Co. v. Wells, 481 N.E.2d 632, 634 (Ohio 1985)).

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals.

Respectfully submitted,

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JANUARY 2011

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CMHA
CUYAHOGA METROPOLITAN
HOUSING AUTHORITY

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I, (Parent/Guardian)_____ authorize, consent and agree to the release of any and all medical records at The City of Cleveland, Department of Public Health, Childhood Lead Poisoning Prevention Program concerning (Minor Child)_____ Date of Birth _____,

Address_____

City _____State _____Zip code_____

To the

CUYAHOGA METROPOLITAN HOUSING AUTHORITY
1441 West 25th Street
Cleveland, OH 44113
Attn; Jennette Raum
Lead Risk Assessor

_____ _____
Date **Parent Signature**

_____
Witness

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I, (Parent/Guardian)_____ Authorize, consent and agree to the release of any and all medical records at The Cuyahoga County Board of Health concerning (Minor Child) _____

Date of Birth _____, Address _____

City _____State _OH_ Zip code _____

To the

CUYAHOGA METROPOLITAN HOUSING AUTHORITY
1441 West 25th Street
Cleveland, OH 44113
Attn.: Mr. Bruce P. Haber
Environmental Affairs Supervisor

_____ _____
Date **Parent Signature**

_____
SSN#

_____ _____
Date **Witness**

CMHA

CUYAHOGA METROPOLITAN HOUSING AUTHORITY

Office of Legal Affairs
1441 West 25th Street
Cleveland, Ohio 44113-3101
tel 216.348.5056
fax 216.348.1379

CMHA EBL Resident Questionnaire

The purpose of this questionnaire is to determine the likely sources of lead exposure and to assist the Lead Risk Assessor in determining where environmental sampling should be conducted.

All information is confidential and will be maintained only at the CMHA Office of Environmental Affairs.

RESIDENT INFORMATION

Name_____
Address_____
Unit No._____
Telephone_____

Children(s) Name(s) _____ _____ _____

DOB _____ _____ _____

GENERAL INFORMATION

1. Where do you think the child is exposed to lead_____
_____

2.When did you/your family move into this home?_____

Complete the following for all addresses where the child/children have lived in the past 12 months.

Dates of Residency	Address (include city and state)	Approximate age of dwelling	General condition of the dwelling: any remodeling, renovation or deteriorating paint

3. Is the child cared for away from home? (This would include preschool, day-care center, day-care home, or care provided by a relative or friend.)

If yes, complete the following:

Type of care	Location of care (name of contact, address and phone number)	Approximate number of hours per week at this location	General condition of the structure: any remodeling, renovation or deteriorating paint

Type of care	Location of care (name of contact, address and phone number)	Approximate number of hours per week at this location	General condition of the structure: any remodeling, renovation or deteriorating paint

LEAD-BASED PAINT AND LEAD CONTAMINATED DUST HAZARDS

1. Where does the child like to play or frequent? (Include rooms, closets, porches, outbuildings, etc.)
2. Where does the child like to hide? (Include rooms, closets, porches, outbuildings, etc.)

Areas where child likes to play or hide	Paint condition (intact, fair, poor or not present *)	Location of painted component with visible bite marks

* Note location and extent of any visible chips and/or dust in window wells, on window sills, or on the floor directly beneath windows. Do you see peeling, chipping, chalking, flaking, or deteriorating paint? If yes, note locations and extent of deterioration.

WATER LEAD HAZARDS

1. What faucets do you obtain drinking water? _____
2. Do you use the water immediately or do you let the water run for awhile first?_____
3. Is tap water used to prepare infant formula, powdered milk, or juices for the children? If yes do you use the hot or cold water. If no, from what source do you obtain water for the children? _____

LEAD IN SOIL HAZARDS

1. Where does the child like to play or hide outside?_____
2. Are there busy roadways near the property?_____
3. Is there deteriorated paint on outside structures such as fences, garages, play structures? Note where._____
4. Is there bare soil areas near the structure or where the child plays outside?_____

Assessment: (check)
_____Probable soil lead hazard.

Actions: (check)
_____Test soil
_____Advise family to obtain washable doormats for entrances.

_____Counsel family to keep child away from bare soil areas thought to be at risk.

OCCUPATIONAL/ HOBBY LEAD HAZARDS

Enter family or other unit occupants names and employment history (Discuss possible employment exposures including construction, renovation, paint removal, demolition, electrical, plumbing, manufacturing of metal products and automotive repair.)

Name	Place of employment	Occupation or job title	Probable lead exposure (Yes/No)

Does any family member refinish furniture, repair electronics, make pottery, work with stained glass or artists paints as a hobby?_____

Assessment: (check)
_____Probable occupational-related lead exposure.
_____Probable hobby-related lead exposure
Actions: (check)
_____Counsel family (specify)
_____Refer to (specify)_____

CHILD BEHAVIOR RISK FACTORS

1. Does the child suck his/her fingers? Yes / no

2. Does the child put painted objects into the mouth yes / no
   If yes, specify_____

3. Does the child chew on painted surfaces, such as old painted cribs, window sills, furniture edges, railings door molding, or broom handles?_____
   If yes, specify_____

4. Does the child chew on putty around windows?_____

5. Does the child put soft metal objects in the mouth? These might include lead and pewter toys and toy soldiers, jewelry, gunshot, bullets, beads, fishing sinkers, or any items containing solder (electronics)._____

6. Does the child chew or eat paint chips or pick at painted surfaces? Is the paint intact in the child's play areas?_____

7. Does the child put foreign, printed material (news papers, magazines) in the mouth?_____

8. Does the child put matches in the mouth?_____

9. Does the child play with cosmetics, hair preparations, or talcum powder or put them into the mouth? Are any of these foreign made?_____

10. Does the child have a favorite cup? A favorite eating utensil? If yes, are they hand made or ceramic?_____

11. Does the child have a dog, cat or other pet that could track in contaminated sol or dust from the outside. Where does the pet sleep?_____
_____

12. Where does the child obtain drinking water?_____

13. **If the child is present, note the extent of hand to mouth activity**

Assessment:(check)
_____Child is at risk due to hand to mouth behavior.
_____Child is at risk for mouthing probable lead-containing substance (specify):_____
_____Child is at risk for other (specify)_____

Actions: (check)
_____Counsel family to limit access or use of (specify):_____
_____Other (specify):_____

OTHER HOUSEHOLD RISK FACTORS

1. Are imported cosmetics such as Kohl, Surma, or Ceruse used in the home?_____

2. Does the family ever use home remedies or herbal treatments? (If yes, what types) _____
_____

3. Are any liquids stored in metal, pewter or crystal containers?_____
_____

4. What containers are used to prepare, serve, and store the child's food? Are any of them metal, soldered, or glazed. Does the family cook with a ceramic bean pot?_____

5. Does the family use imported canned items regularly? _____
_____

6. Does the child play in or have access to any of the following materials are kept: shellacs, lacquers, driers, coloring pigments, epoxy resins, pipe sealants, putty, dyes, industrial crayons or markers, gasoline, paints pesticides, fungicides gear oil, detergents, old batteries, battery casings, fishing sinkers, lead pellets, solder, or drapery weights?_____
_____

7. Does the child take baths in an old bathtub with deteriorated on nonexistent glazing?_____
_____
_____

Assessment: (check)
_____Increased risk of lead exposure due to _____
_____

Actions: (check)
_____Counsel family to limit access or use (specify)_____
_____

ASSESSMENT FOR LIKELY SUCCESS OF HAZARD CONTROL MEASURES

1. What cleaning equipment does the family have in the dwelling? (Circle)
broom, mop and bucket, vacuum (does it work), sponges and rags

2. How often does the family:
Sweep the floors?_____
Wet mop the floors?_____
Vacuum the floors?_____
Wash the window sills?_____
Wash the window troughs?_____

3. Are floor coverings smooth and cleanable?_____
_____

4. What type of floor coverings are found in the dwelling? (Circle all that apply)
vinyl/linoleum, carpeting Wood other (specify):_____

This questionnaire has been completed by the Risk Assessor with the answers provided by the resident listed at the top of the questionnaire. All information is believed to be accurate as of the time of the interview. The Resident has reviewed the information and has received a copy of this Questionnaire.

_____ _____
Risk Assessor Resident Interviewed

_____
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2011, I filed the foregoing Brief of the United States of America as Amicus Curiae in Support of Respondent Appellant with the Clerk of the Supreme Court of Ohio. The following participants in the case were served by overnight delivery:

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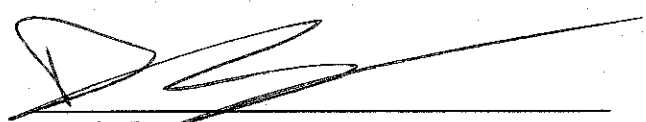

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