ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. O'SHEA & ASSOCIATES CO., L.P.A. Relator, -v- **CUYAHOGA METROPOLITAN HOUSING AUTHORITY** Respondent,	Case No.: 2010 -1536

On Appeal from the Court of Appeals,
Eighth Appellate District
Cuyahoga County, Ohio
Case No.: 93275

RELATOR'S MERIT BRIEF

Michael J. O'Shea, Esq. (0039330)

O'SHEA & ASSOCIATES CO., L.P.A.
19300 Detroit Road
Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 – fax

Counsel for Relator

Shawn Maestle, Esq. (0063779)

Hilary Taylor, Esq. (0017496)
Weston Hurd LLP
The Tower at Erieview
1301 East Ninth Street – Suite 1900
Cleveland, Ohio 44114
Fax: (216) 621-8369

Counsel for Respondent

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INTRODUCTION

This is a disturbing appeal to this Court. This is a difficult thing to assert and is not asserted without some thought. Here's why this appeal is so disturbing.

First, the pursuance of this appeal to this Court by CMHA and HUD is an attempt by both CMHA and HUD to cover-up serious and ongoing cases lead poisoning of resident families at CMHA - purportedly the very people CMHA is duty bound to protect.[1] As will be argued in this brief, CMHA and/or HUD have important and unambiguous statutory and legal obligations to prevent lead poisoning at public housing properties – and the documents sought by Relator memorialize and/or track those obligations. What this Court has not been told by CMHA and HUD is that CMHA does not currently have any liability insurance for lead poisoning injuries (even though lead poisoning is somewhat rampant in its housing stock),[2] and HUD (as a functual self insurer) is essentially "on the hook" for any monetary compensation that has to be paid to compensate the families for lead poisoning injuries. It is the good faith belief of the undersigned that the ***only*** reason HUD now appears here in this action is to protect its proverbial pocketbook – rather than its clear statutory duty to protect the families who live in public housing. The undersigned hopes this Court finds this hypocrisy as disturbing as the undersigned does.

Second, CMHA's brief misrepresents the records and the proceedings at the Cuyahoga County Court of Appeals (essentially, for purposes of this appeal to this Court, the trial court). CMHA (and for that matter HUD) makes the misleading argument that CHMA made its "federal/HUD" arguments (i.e. the arguments asserted in "Proposition of Law No. III") in the initial summary judgment proceedings at the Cuyahoga County Court of Appeals.

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[1] See page 11 of CMHA's Brief wherein CMHA asserts that is "goals and overall function" is "to provide low income and impoverished individuals with safe housing."

[2] The insurance documents produced by CMHA pursuant to item number 1 of the Relator's March 26, 2009 public record request verifies this.

However, that is not true. Only ***after*** the May 25, 2010 opinion was issued by the Court of Appeals was issued did CMHA, for the ***very first time*** in connection with a motion for reconsideration, make any federal/HUD arguments. All of the documents and affidavits advanced in the federal/HUD arguments were attached to the motion for reconsideration – and not to the summary judgment briefs. Even now, in the briefs presented to this Court, CMHA and/or HUD attempt to insert still ***even more*** testimony and documents to advance the federal/HUD arguments. In that regard, just as a court of appeals would be barred from considering documents that were not part of a trial court record, this Court must deem such additional testimony and documents as an improper attempt to insert items that are not properly part of the record.

Third, CMHA and/or HUD make the false argument that ***all*** Relator is looking to obtain in the March 26, 2009 public record request is "confidential, personal and medical information which lists the names and addresses of children or other tenants who have been diagnosed with lead poisoning." In fact, however, the specific records sought by Relator were "[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.[3]" Thus, assuming for the sake of argument (and only for the sake of argument) that there was any legal legitimacy to the spurious medical/confidential arguments advanced by CMHA, it appears that CMHA can offer ***no*** explanation as to why all of the ***other non-medical documents*** sought in the request (including, but certainly not limited to, lead citation reports, lead inspection reports, lead abatement reports, reports to HUD about lead issues and abatement, the location of residences that have lead problems, correspondence from CMHA management about lead issues, etc) were ***never*** produced and (obviously) never given the "redaction" review required

[3] See the March 26, 2009 letter attached to the Writ filed at the Court of Appeals – and see page one of CMHA's brief.

by Ohio law. In fact, none of the "questionnaire and releases" type of documents which CMHA seeks to hide were ever given a redaction review – and never presented to the Court of Appeals for redaction review. It appears without question that the medical/confidential arguments are being used to bar Relator, or anyone in the general public, from a look inside any of CMHA's (or HUD's) compliance with state and federal requirements for the protection of tenants of public housing. It also appears without question that CMHA and HUD has tacitly abandoned any arguments that other lead poisoning documents are excepted from production and thus this Court can easily order the un-redacted production of those documents and assess attorney fees for that failed response alone.

If this Court gives any credence to the arguments advanced by CMHA and/or HUD, then this Court will essentially place a barrier to the general public from having any knowledge about the past and current CMHA and/or federal government's public housing operations here in the State of Ohio. Such a barrier would render the Ohio Public Records Act essentially meaningless.

STATEMENT OF THE FACTS

On March 26, 2009, the Relator served its public records request upon Respondent (the "Public Records Request").[4] The Public Record Request sought the following public records:

1. Copies of all liability insurance contracts which cover any and all premises liability issues for the last 20 years and for any and all buildings owned or operated by CMHA;

2. Copies of all minutes of all meetings (for the last 10 years) wherein liability insurance and/or the process, methods and sources of paying legal claims for personal injury claims against CMHA are with discussed or decided: and

3. Copies 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.

On April 10, 2009, Respondent, through outside private counsel attorney Hilary Taylor (the "4/10/09 Taylor Letter"), provided the first official written response to the Public Record Response.[5] As it relates to item number 3 of the Public Records Response (which is relevant to this case), the 4/10/09 Taylor Letter indicated that Respondent was refusing to produce a single document.[6] The 4/10/09 Taylor Letter claimed that the request for the Lead Poisoning Documents was not proper because they "are not public records."[7] Specifically, page 3 of the 4/10/09 Taylor Letter stated that the Lead Poisoning Documents were not public records because:

1. They are medical records per RC 149.43(A)(1)(a) and RC 149.43(A)(3);
2. They are "information pertaining to the recreational activities of a person under the age of eighteen" per RC 149.43(A)(1)(r) and RC 149.43(A)(8).
3. They are documents subject to the Ohio Privacy Act (RC 1347.01(E));

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[4] A copy of the Public Records Request was attached to the Relator's Verified Petition for Writ of Mandamus (the "Petition") filed in this action.
[5] See April 10, 2009 letter attached to the Petition from Respondent to Relator.
[6] Id.
[7] Id.

4. They are documents which involved a Family Educational Rights and Privacy Act ("FERPA") violation; and

5. They are records covered by the federal Health Insurance Portability and Accountability Act ("HIPPA").

By email correspondence dated April 10, 2009 (the 4/10/09 O'Shea Letter"), Relator made the following points as related to the Public Records Request and specifically the Lead Poisoning Documents:

> ***I do appreciate the fact that CMHA concedes that it is a governmental entity which has a duty to comply with the Ohio Public Records Act. Further, as you know, in Ohio, the Ohio Supreme Court has consistently held that records of a public office belong *to the people*, not to the government officials holding them. Accordingly, the public records law must be *liberally interpreted* in favor of disclosure, and any doubt whether to disclose a record should be resolved by its disclosure. See *White v. Clinton Cty. Bd. Of Cmsrs.*, 76 Ohio St. 3d 416, 667 N.E.2d 1223 (1996); *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St. 2d 107, 109, 341 N.E.2d 576 (1976) (quoting *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 171 N.E.2d 508 (1960); and 325 *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177 (1994).
>
> ***
>
> [A]s it relates to item number 3, let me try to be more specific. I am not limiting the request to medical records (although I do want some records of who the poisoned persons were - as I will discuss below). As you are surely aware, as a HUD contracted governmental entity, CMHA is required by federal law to keep records of all instances of lead problem properties and repairs, as well as records of all instances where a child was poisoned. In that regard, my public record request is not limited to records concerning medical injuries specific to a minor child.
>
> ***RC 149.43(A)(1)-(3) requires that any document which a governmental entity claims as "medical record" exempt from release under the Ohio Public Records Act be both (i) pertain to a patient's medical history, diagnosis, prognosis, or medical condition and (ii) generated and maintained in the process of medical treatment. Although I will assume that records as to the adult tenant's name, location of the specific unit/building and occurrence dates would be in the possession of CMHA, I cannot imagine that CMHA would ever have a copy of any child's medical records. So nothing in RC 149.43(A)(1)-(3) could apply to this request. Further still, it is the affirmative obligation of CMHA to promptly identify the existence and location of all documents which it claims are exempt, and then carry the burden of proving that the documents are exempt. The governmental entity cannot just say that "certain of the documents" are exempt without identifying the existence and location of those documents. Further still, the fact that any tenant was admitted or discharged from a hospital or other medical provider is not a "medical record." See RC 149.43(A)(1)-

(3). Moreover, a public office is permitted to disclose this information notwithstanding the federal HIPPA (i.e. it is not PHI). See 45 C.F.R. Parts 160 and 164. The HIPPA regulations, including the Privacy Rule, apply only to "covered entities," of which there are only three: (1) healthcare providers; (2) a health plan; or (3) a healthcare clearinghouse. Lastly, even a "covered entity" (which CMHA is not) may release "directory information" about a patient without running afoul of HIPPA. A "covered entity" (which CMHA is not) may in fact disclose a patient's name, the patient's past or present location at a medical facility, and a description of the patient's general condition so long as it does not communicate specific medical information. Further still, none of the records sought involve information concerning the children of public officials, child support/parentage/adoption issues, child abuse/neglect issues or juvenile court proceedings.

Lastly, regardless of specific information that might be discovered in a particular document that is unquestionably exempt, the record, with the proper redaction of the exempt information, must be produced. See RC §149.43(B)(1).

Accordingly, I hereby respectfully take issue with your April 10, 2009 letter, and respectfully demand that CMHA properly produce what are now overdue records without further delay. In order to provide a clear reasonable deadline for production, I will indicate that if all of the proper records are not produced by April 17, 2009 (at the "actual cost"), I will file the appropriate mandamus action and seek all legally appropriate statutory damages (per document) and attorney fees.[8]

On April 17, 2009, Respondent, again through outside private counsel attorney Hilary Taylor (the "4/17/09 Taylor Letter"), provided its response to the 4/10/09 O'Shea Letter.[9] As it relates to item number 3 of the Public Record Response (i.e. the Lead Poisoning Documents), the 4/17/09 Taylor Letter stated that Mr. Taylor affirmed that "he and/or the Respondent would review all of the Lead Poisoning Records and work on "redacting" any protected/non-public record information and make all of the remaining records "available for your inspection."[10]

By letter dated April 20, 2009 (the 4/20/09 O'Shea Letter"), Relator responded to the 4/17/09 Taylor Letter.[11] In the 4/20/09 O'Shea Letter, Relator made it clear that if Respondent is in possession of documents, it has to produce those documents (i.e. it cannot

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[8] See April 10, 2009 email attached to the Petition from Relator to Respondent.
[9] See April 17, 2009 letter attached to the Petition from Respondent to Relator.
[10] Id.
[11] See April 20, 2009 email attached to the Petition from Relator to Respondent.

simply make the generic statement that it will make the public records "available for inspection"):

> [I]f CMHA is in possession of the documents (at whatever office or location), they must produce the documents. In State ex rel. Bertolini v. Smith, 1988 Ohio App. LEXIS 2994, 3-4 (Ohio Ct. App., Franklin County July 26, 1988), the Court held:
>
> ..[T]he duty to make copies of the requested records is that of the governmental agency having charge of the records and not the person making the request. To conclude otherwise would require governmental agencies to give up custody and control of their records to any person to be taken any place for copying. The fact that numerous documents are requested and duplicating them might be a burdensome chore, or a time consuming task, is not listed as an exception or reason for failing to provide the records as set forth in R.C. 149.43(A). The governmental agency is required to make copies available at cost and, if the number of documents requested makes the cost prohibitive to the individual making the request, the decision to withdraw or narrow the request for public records becomes his, not the agency's.
>
> The fact that CMHA has decided not to direct "staff" to comply with the request (regardless of whether that decision is based upon their conclusion that they do not have enough staff) is a direct violation of the Public Records Act ("PRA"). I am not asking that CMHA "create" records that do not exist, and thus the cases of *Norris* and *Jones* do not apply here. I want copies of the records that already exist. I do not want to "inspect" the documents at CMHA or your office. The second sentence of RC 149.43(B) specifically requires CMHA to make the copies if I ask for copies.[12]

Further, as it related to the redaction issue, the 4/20/09 O'Shea Letter again reminded Respondent that:

> It is the affirmative duty of CMHA to review the records, identify what they believe to be excepted information, and then promptly produce a redacted version. See the third sentence of RC 149.43(B).[13]

Lastly, the 4/20/09 O'Shea Letter requested that in order to stave off the filing of a mandamus action, the following would have to occur prior to April 27, 2009:

A. Produce at the actual cost all of the documents I have requested which do not contain any data which CMHA claims is excepted;

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[12] Id.

[13] Id.

B. Produce all documents at actual cost which contain alleged exempt data, with the exempted data redacted; and
C. Produce a specific log of all data for each document which CMHA claims is specifically exempt from public disclosure, along with a specific reference for non-disclosure.[14]

On April 24, 2009, Respondent, again through outside private counsel attorney Hilary Taylor (the "4/24/09 Taylor Letter"), provided its response to the 4/20/09 O'Shea Letter.[15] The 4/24/09 Taylor Letter provided a CD of documents which included some documents responsive to items 1 and 2 of the Public Records Request. However, the 4/24/09 Taylor withdrew Respondent's earlier affirmation to engage in the proper redaction process as it relates to the Lead Poisoning Documents, and just claimed in a blanket fashion that none of the Lead Poisoning Documents were "public records."[16] Thus, despite the affirmations made in the 4/17/09 Taylor Letter which conceded the legal responsibilities with respect to redaction and logging, the Respondent refused to turn over any of the Lead Poisoning Documents in either partial (i.e. redacted) format or any format.

The Relator filed its mandamus action on May 11, 2009 - 15 days after the April 27, 2009 deadline set by Relator in the 4/20/09 O'Shea Letter.[17] Since the filing of the mandamus action and this appeal, Respondent has ***still*** refused to produce ***any*** shred of paper concerning the requested Lead Poisoning Documents and has refused to engage in ***any*** mandatory redactions activities.[18]

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[14] Id.
[15] See April 24, 2009 letter attached to the Petition from Respondent to Relator.
[16] Id.
[17] See Petition for Mandamus generally.
[18] See the affidavit of Michael O'Shea attached to the Petition.

LAW AND ARGUMENT

A. PROPOSITION OF LAW NO.1: A PUBLIC RECORDS REQUEST WHICH SEEKS INFORMATION, NOT SPECIFIC RECORDS, IS NOT A PROPER RECORDS REQUEST, R.C.§149.43 ET SEQ.

1. General public policy concerning public records requests

The fundamental policy of R.C. 149.43 is to promote open government, not restrict it. State ex rel. Besser v. Ohio State Univ. (2000), 89 Ohio St. 3d 396, 2000 Ohio 207, 732 N.E.2d 373. To that extent, this Court has consistently held that records of a public office belong *to the people*, not to the government officials holding them. Accordingly, the Ohio Public Records Act (the "Act") must be *liberally interpreted* in favor of disclosure, and any doubt whether to disclose a record should be resolved by its disclosure. See White v. Clinton Cty. Bd. Of Cmsrs. (1996), 76 Ohio St. 3d 416, 667 N.E.2d 1223; Dayton Newspapers, Inc. v. Dayton (1976), 45 Ohio St. 2d 107, 109, 341 N.E.2d 576 (quoting *State ex rel. Patterson v. Ayers*[1960], 171 Ohio St. 369, 171 N.E.2d 508 (1960); State ex rel. Strothers v. Wertheim (1997), 80 Ohio St. 3d 155; State ex rel. Warren Newspapers, Inc. v. Hutson (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174. State ex rel. The Miami Student v. Miami Univ. (1997), 79 Ohio St. 3d 168, 171, 1997 Ohio 386, 680 N.E.2d 956; State ex rel. Gannett Satellite Info. Network, Inc. v. Petro (1997), 80 Ohio St. 3d 261, 264, 1997 Ohio 319, 685 N.E.2d 1223; and State ex rel. Cincinnati Enquirer v. Hamilton Cty. (1996), 75 Ohio St. 3d 374, 376, 1996 Ohio 214, 662 N.E.2d 334.

Further, any reading of the Act is to be done with an expansive (vs. narrow) view on what type of documents are public records. See Kish v. City of Akron (2006), 109 Ohio St. 3d. 162, wherein the Court stated:

> We previously have held that the General Assembly's use of "includes" in *R.C. 149.011(G)* as a preface to the definition of "records" is an indication of ***expansion*** rather than constriction, restriction, or limitation and that the statute's use of the phrase "any document" is one encompassing all documents that fit within the statute's definition, regardless of "form or characteristic." *State ex rel. Cincinnati Post v. Schweikert (1988), 38 Ohio St.3d 170, 172-173, 527 N.E.2d 1230.* There can be no dispute that there is ***great breadth in the definition of "records" for purposes here.*** Unless otherwise exempted or excepted, almost all documents memorializing the activities of a public office can satisfy the definition of "record." *State ex rel. Beacon Journal Publishing Co. v. Bond, 98 Ohio St.3d 146, 2002 Ohio 7117, 781 N.E.2d 180, P13.* Indeed, ***any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record.*** See *State ex rel. Mothers Against Drunk Drivers v. Gosser (1985), 20 Ohio St.3d 30, 33, 20 OBR 279, 485 N.E.2d 706.* So can any material upon which a public office *could* rely in such determinations. *State ex rel. Mazzaro v. Ferguson (1990), 49 Ohio St.3d 37, 40, 550 N.E.2d 464.* The document need not be in final form to meet the statutory definition of "record." *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis, 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163, P20.* See, also, *State ex rel. Calvary v. Upper Arlington (2000), 89 Ohio St.3d 229, 232, 2000 Ohio 142, 729 N.E.2d 1182.*
> (emphasis supplied).

Thus, any argument which claims that the Act is to be read as limiting the definition of public records and access to those public records has to be summarily dismissed unless there is an extremely clear exemption from disclosure.

2. Respondent's claim that Relator's request is for "Information" v. Specific Records.

As to the issue of Relator's records request being overbroad or seeking "information" as opposed to "records", Relator relies on State ex rel. Morgan v. City of New Lexington, 112 Ohio St. 3d 33, 38 (2006). In that case this Court upheld a records request, which was challenged as overbroad and seeking "information" not "records". Specifically, the request for records was worded as follows, "[a]ll records or documents which show or purport to show that prior to February 22, 2005, [Plaintiff/Appellant] misappropriated any funds."

In its opinion, the Morgan court went on to hold that:

> "We have never held that in order to constitute a viable request, the requester must specify the author and date of the records requested. Although this may be helpful in identifying the requested records, the failure to do so does not automatically result in an improper request for public records, particularly where, as here, it is evident that the public office was aware of the specific records requested. ***We do not require perfection in public-records requests.*** Citing, State ex rel. Cater v. N. Olmsted (1994), 69 Ohio St.3d 315, 320, 1994 Ohio 488, 631 N.E.2d 1048."

As alleged[19] in the Amicus Brief of the United States, "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")[20] The United States goes on at length describing these two documents and does not mention or describe any other documents related to lead that may be responsive to the request. Respondent similarly argues in its Merit Brief against the production of these same two documents and makes no reference to any other documents which may be responsive. (Relator does not concede that these are the only two types of responsive records) Interestingly, Respondent argues in the same breath that it would have to "comb through thousands of its records over the last 15 years to look for some document which somewhere therein may refer to "instances of lead poisoning."[21] Certainly, the representations to this Court by the United States, as to what documents are responsive to the request, are in stark contrast to the representations of Respondent. This conflict and inconsistency flies in the face of Respondent's argument that they need to search through thousands of records, when they claim to already know which two types records they need to look for and produce. See State ex rel. Morgan v. City of New Lexington, supra.

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[19] As set forth in the introduction, this allegation that there are only two types of records sought by Relator is false.

[20] See Amicus Brief of the United States at p6.

[21] See Respondents Merit Brief at p. 7.

3. Public Office's statutory duty to inform requesting party of a vague or overbroad request.

R.C. 149.43(B)(2) provides:

> "If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, **the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or the person's duties**." See State ex rel. Morgan v. Strickland, 121 Ohio St. 3d 600, 603-604 (Ohio 2009).

Based on the undisputed record in this case, the Respondent has never stated or argued that the Relator's request was vague, overbroad, or a request for "information" until after the filing of the mandamus action. Instead, Respondent's counsel claimed in his April 10, 2009 letter to Relator that he could not produce any records responsive to Realtor's third request because the records sought were not "public records" and cited the following:

a. They are medical records per RC 149.43(A)(1)(a) and RC 149.43(A)(3);

b. They are "information pertaining to the recreational activities of a person under the age of eighteen" per RC 149.43(A)(1)(r) and RC 149.43(A)(8).

c. They are documents subject to the Ohio Privacy Act (RC 1347.01(E));

d. They are documents which involved a Family Educational Rights and Privacy Act ("FERPA") violation; and

e. They are records covered by the federal Health Insurance Portability and Accountability Act ("HIPPA").

In Respondent's Counsel's April 17, 2009 letter to Relator, he reversed course and stated that, "he and/or the Respondent would review all of the Lead Poisoning Records and

work on "redacting" any protected/non-public record information and make all of the remaining records "available for your inspection." Finally, in the last communication before the filing of the mandamus action, Respondent's Counsel's reversed course again in his April 24, 2009 letter to Relator and withdrew his earlier affirmation to engage in the proper redaction process as it relates to the Lead Poisoning Documents, and just claimed in a blanket fashion that none of the Lead Poisoning Documents were "public records."

Clearly, based on this record of communication, not only did the Respondent fail to argue that Relator's request was vague, overbroad, or a request for "information," as a basis for refusing to produce the records but they flat out failed to perform their statutory duties under R.C. 149.43(B)(2) to inform Relator that his request was ambiguous or overly broad and advise him as to the manner in which the records are maintained so the request could be properly revised.

A similar attempt to make an "eleventh hour" or "after the fact" argument that a records request was vague and overbroad was made in State ex rel. Dispatch Printing Co. v. Wells, 18 Ohio St. 3d 382, 385 (Ohio 1985). In that case, respondents contended that relators' requests to view the "civil service personnel files of James E. Thompson" were vague and overbroad. This Court concluded that this argument was largely unpersuasive from a purely factual perspective on the grounds that not once during relators' ten-month effort to gain access to the civil service files did respondents advise relators that such request was vague or that respondents did not understand exactly what information was sought.

As stated the case in State ex rel. Dispatch Printing Co, this Court should reject Respondent's assertion that Relator's request was vague, overbroad, or for "information" on the grounds that these arguments were never made at any time before the filing of the mandamus action, and further, even if Respondent objected to the request on these grounds,

they completely failed to perform their statutory duties under R.C. 149.43(B)(2) and thus never provided Relator with an opportunity to narrow its request.

B. PROPOSITION OF LAW NO. 2: ANY DOCUMENT CONTAINING REFERENCES TO CHILDREN IS NOT A RECORD DISCLOSABLE UNDER THE PUBLIC RECORDS ACT, R.C. § 149.43 ET SEQ.

1. The purpose of the Ohio Public Records Act (R.C.§ 149.43)

The Ohio Public Records Act mandates the release of state agency records in order to shed light on the state government's performance, thereby enabling Ohio citizens to understand better the operations of their government. See State ex rel. Strothers v. Wertheim, 80 Ohio St. 3d 155, 684 N.E.2d 1239, 1997 WL 621509, *3 (Ohio 1997) Therefore, inherent in Ohio's Public Records Law is the public's right to monitor the conduct of government. State ex rel. McCleary v. Roberts, 88 Ohio St. 3d 365, 369 (Ohio 2000). Like our state courts, the federal courts have taken a similar position in Kallstrom v. City of Columbus, 136 F.3d 1055, 1064-1065 (6th Cir. Ohio 1998) by stating:

> "One of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed"); cf. United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 495-97, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994) (stating that the purpose of the federal Freedom of Information Act, 5 U.S.C. § 552, is to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to" (quotation omitted) (alteration in original)). In the judicial setting, courts have long recognized the importance of permitting public access to judicial records so that citizens may understand and exercise oversight over the judicial system. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978); Video Software Dealers Ass'n v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 26 (2d Cir. 1994); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988). There is no reason why public access to government agency records should be considered any less important.

2. **The purpose of the federal Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. §4851a(6)) and the Lead Based Paint Poisoning Reduction Act (42 USCS § 4822 (A)(1)).**

The one of the main purposes of the federal Residential Lead-Based Paint Hazard Reduction Act of 1992, 106 Stat. 3672, is "to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government." 42 U.S.C. §4851a(6). In conjunction with said Act, the mandates of the federal Lead Based Paint Poisoning Reduction Act require the Secretary of Housing and Urban Development to:

> "establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning with respect to 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. 42 USCS § 4822 (A)(1).

Those procedures are provided in 24 CFR 35.1130, which require a public housing authority to, inter alia, conduct a risk assessment of the dwelling unit of child found to have elevated lead levels, verify the levels of lead in the child's blood from his/her medical provider, and perform lead hazard reduction of all lead hazards found in the risk assessment.

3. **24 CFR 35.1130 (a),(b)(c) require a housing authority to carry our certain "procedures," "operations" and "functions" as contemplated by R.C. 149.011 (G), and the Medical Authorization and Resident Questionnaire are records which document these "procedures," "operations" and "functions."**

R.C. 149.011 provides:

> As used in this chapter, except as otherwise provided: (G) 'Records' includes any document, device, or item, regardless of physical form or characteristic, 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."

So long as a document constitutes a "record," it becomes a "public" record pursuant to R.C. 149.43(A)(1) if it is kept by any public office. State ex rel. McCleary v. Roberts, 1998 Ohio App. LEXIS 6370 (Ohio Ct. App.,1998)

In this case the Medical Release and Resident Questionnaire, which are provided by CMHA and filled out by the CMHA risk assessor and parent, are records which are ***required*** by federal regulation to be prepared in the event a child tenant is found to have been exposed to lead. As indicated in the purpose clause of the Resident Questionnaire it states, "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." The purpose clause describes the requirements of 24 CFR 35.1130 (a) which states in relevant part:

> (a) Within 15 days after being notified by a public health department or other medical health care provider that a child of less than 6 years of age living in a public housing development has been identified as having an environmental intervention blood lead level, the PHA shall 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, the provisions of § 35.1115(b) notwithstanding...

Similarly, and with respect to the Medical Authorization, 24 CFR 35.1130 (b) states in relevant part:

> (b) Verification. 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 PHA shall immediately verify the information with the public health department or other medical health care provider.

Clearly 24 CFR 35.1130 (a) & (b)mandate that a housing authority carry out certain **"procedures," "operations" and "functions"** as contemplated by R.C. 149.011 (G) by conducting a risk assessment and obtaining medical verification of lead poisoning. And the Medical Release and Resident Questionnaire are, according to Respondent and the United States, the only two documents generated by a housing authority in compliance with these

statutory mandates.[22] At a minimum, the Medical Release and Resident Questionnaire document whether or not a housing authority has in fact complied with 24 CFR 35.1130 (a) & (b). Additionally, and perhaps more importantly, Medical Release and Resident Questionnaire also are necessary before a housing authority can comply with its statutory mandate to perform a lead hazard reduction, which is required under 24 CFR 35.1130 (c) and states in relevant part:

> (c) Hazard reduction. Within 30 days after receiving the report of the risk assessment conducted pursuant to paragraph (a) of this section or the evaluation from the public health department, the PHA shall complete the reduction of lead-based paint hazards identified in the risk assessment in accordance with § 35.1325 or § 35.1330.

The production of the Medical Release and Resident Questionnaire pursuant to R.C. 149.43 will allow the requesting party to verify not only that all of the functions of 24 CFR 35.1130 have been complied with, but will also identify the number of children who have been poisoned by lead at the housing authority properties. Verifying both of these issues are part of the public's right to monitor the conduct of government and shed light on the state government's (housing authority's) performance. See Strothers, supra, McCleary, 88 Ohio St. 3d 365.

4. McCleary v. Roberts and this case are factually and legally distinguishable.

The case of McCleary v. Roberts involved a mandamus action to compel the Columbus Department of Recreation and Parks to produce records related to photographic identification cards ("ID card") for children which were required to use the city's swimming pool. Id. McCleary sought access to the database in an attempt to recruit urban youngsters for the Boy Scouts. See dissenting opinion in State ex rel. McCleary v. Roberts, 88 Ohio St. 3d 365, 372 (Ohio 2000). In order to obtain a card a child's parent or guardian must complete

[22] As set forth in the introduction, this allegation that there are only two types of records sought by Relator is false and Relator believes there to be several other types of documents generated as a result of a housing authority's compliance with 24 CFR 35.1130.

an application which seeks information pertaining to the child such as the child's name, address, emergency medical and family contact information. McCleary, 1998 Ohio App. LEXIS at 6370. According to Wayne Roberts, Assistant Director of Recreation and Parks for respondent he explained,

> "that the photographic identification program was started as a security measure in order to allow respondent to better provide a safe recreational environment for the children of the community. One of the core goals of the program was to eliminate rowdy and frequently violent behavior exhibited at respondent's facilities. Accordingly, the program was designed to provide an effective means by which to monitor and control access to respondent's pools and other facilities. In addition, the program allows respondent to provide a more informed response to health emergencies, and has demonstrably increased the job satisfaction and retention of its staff." See Id.

There is nothing in the factual record of McCleary v. Roberts which states that the identification cards program was created pursuant to any federal or state statute or local ordinance. And there is nothing in the factual record to indicate that the information collected in the ID card applications was done for the purpose of or in response to the investigation of any accident, injury, or dangers to any children at the pool.

In Respondent's Merit Brief and the United States' Amicus Brief, they both argue from the position that the Resident Questionnaire and Medical Release at issue here are similar to the ID card application in McCleary in the types of information contained therein. And because the Court in McCleary found that ID card application was not a "record" pursuant to 149.011 (G) (because it revealed "little or nothing about the agency's own conduct", and "would do nothing to further the purposes of the Act" (Public Records Act)) that this Court should find that these documents are also not "records."

The problem with this overly simplistic comparison is that both the Respondent and the United States have completely failed to perform any analysis and comparison as to the

purpose of the ID card application in McCleary vs. the statutorily mandated purposes of the Resident Questionnaire and Medical Release at issue here. As previously stated the ID card program was a decision by the city recreation department designed to eliminate rowdy and violent behavior by patrons of the pool. This program and the records generated as a result did not serve to document any incidents of injuries, crimes, violations of pool rules, exc. The records were simply compilations of identifying information so the city could create ID cards and determine who was eligible to use the pool and who was not.

In this case, the Resident Questionnaire and Medical Release are documents which are required to be completed by statutory mandate (24 CFR 35.1130) and have specific purposes (ie: to determine the likely sources of lead exposure and to assist the Lead Risk Assessor in determining where environmental sampling should be conducted, and to medically verify whether a child has been poisoned by lead. On that basis the Resident Questionnaire and Medical Release are clearly not completed simply as means to identify public housing tenants as the ID cards were in McCleary. The Resident Questionnaire and Medical Release are some of the more important documents generated which indicate whether the mandates of 24 CFR 35.1130 (which can only be defined as statutory **"procedures," "operations" and "functions")** have been followed and competently completed by the housing authority. Even though these documents in McCleary and at issue here contain similar identifying information, they serve completely different purposes. When viewed in terms of the purpose of the records, the Resident Questionnaire and Medical Release are more related to State ex rel. Cincinnati Enquirer v. Daniels, 844 N.E. 2d 1181 (Ohio 2006) in that, like the lead assessment reports at issue in that case, the Resident Questionnaire and Medical Release serve to document the statutory **"procedures," "operations" and "functions"** of the housing authority in assessing lead risks and hazards on their properties and to their tenants and eliminating those risks.

Therefore this Court should find that in light of the statutory purposes of 24 CFR 35.1130 and the Resident Questionnaire and Medical Release generated pursuant to that statute, that these records document the **"procedures," "operations" and "functions"** of the housing authority as contemplated in 149.011 (G). This Court should further find that the production of these records would advance the purposes of the Ohio Public Records Act by shedding light on whether Respondent has complied with 24 CFR 35.1130 and inform the public (and specifically other current and prospective housing authority tenants) as to the extent of the lead poisoning problem and the relative risks that may pose to them.

5. The Respondent as records custodian has the burden of proving the requested records fall within an exception to production.

Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. State ex rel. Carr v. Akron, 112 Ohio St.3d 351, 2006 Ohio 6714, 859 N.E.2d 948, P 30; State ex rel. Beacon Journal Publishing Co. v. Akron, 104 Ohio St. 3d 399, 2004 Ohio 6557, 819 N.E.2d 1087, P23. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception. State ex rel. Cincinnati Enquirer v. Jones-Kelley, 118 Ohio St. 3d 81, 84 (Ohio 2008).

In this case, Respondent has only argued that it has two types of records responsive to Relator's request for records pertaining to lead, the Resident Questionnaire and the Medical Authorization. As stated throughout this brief, Relator believes Respondent's and the United States' assertion that these are the only two responsive documents is false and that Respondent is in possession of other several other documents that are responsive, which it is

now concealing to Relator and this Court.[23] Never the less, Relator's argues, as outlined in subsections one through five of Proposition of Law No. 2, that Respondent has failed to prove that either the Resident Questionnaire or the Medical Authorization fall within any exception to R.C. 149.43.

Further, since Respondent has argued that it has only two types of records responsive to Relator's request for records pertaining to lead, Respondent has failed to make any argument or offer any evidence that any other type of document its has which may be responsive is entitled to any exception. Therefore, to the extent Respondent has any lead citation reports, lead inspection reports, lead abatement reports, reports to HUD about lead issues and abatement, records containing the location of residences that have lead problems, correspondence from CMHA management about lead issues, etc., they have failed to prove these records are excepted and must produce them.

C. PROPOSITION OF LAW NO. 3: PUBLIC HOUSING TENANT DOCUMENTS ARE EXEMPT FROM DISCLOSURE UNDER THE FEDERAL PRIVACY ACT, 5 U.S.C. §552(a) AS WELL AS THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S REGULATIONS

1. CMHA is not an "agency" as defined by 5 USC §552(e) and thus the Federal Privacy Act cannot apply.

The [Federal] Privacy Act (5 USC §552) applies only to "agencies" as that term is defined under 5 U.S.C. § 551(1) and 5 U.S.C. § 552(e).[24] Under these definitions, "agency"

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[23] Relator believes Respondent has in its possession responsive records such as lead citation reports, lead inspection reports, lead abatement reports, reports to HUD about lead issues and abatement, records containing the location of residences that have lead problems, correspondence from CMHA management about lead issues, etc

24 provides that:

"For purposes of this section, the term "agency" as defined in of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the

does not encompass ***state agencies or bodies***. St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373 (9th Cir. Cal. 1981). Federal funding reaches a countless number of activities of local and state governments. To assure that the federal funds are spent for the purposes for which they were intended, extensive federal regulations are promulgated and must be complied with. However, those regulations (such as the U.S. Housing Act of 1937 42 USC §1401) do not convert acts of local and state governmental bodies into federal governmental acts. Id citing, United States v. Orleans, 425 U.S. 807, 816, 96 S. Ct. 1971, 1976, 48 L. Ed. 2d 390 (1976); Forsham v. Harris, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980). "Extensive, detailed and virtually day-to-day supervision" by the federal government is needed before "agency" status could be said to attach., Id at 304; United States v. Orleans; see, Housing Authority of City of Seattle v. State of Washington, 629 F.2d 1307 (9th Cir. 1980).

It is undisputed that CMHA is a state agency, created under the authority of R.C. 3735.27. In deed, metropolitan housing authorities have requested and secured sovereign immunity status form this Court because they are an Ohio state agency. See Moore v. Lorain Metro. Hous. Auth. (2009), 121 Ohio St. 3d 455. There is absolutely no evidence in the record which establishes that the Federal Government exercises any type of extensive, detailed or virtually day-to-day supervision of the activities of CMHA and CMHA has not argued that this type of supervision exists. All that has been argued is that CMHA receives federal monies pursuant to an annual contributions contract which allegedly mandates that CMHA abide by the U.S. Housing Act of 1937 and unspecified HUD regulations and requirements.

Government (including the Executive Office of the President), or any independent regulatory agency."

Clearly, there is neither the legal basis nor the evidence to support a finding that CMHA is an "agency" as defined by 5 USC §552(e) and the cited cases interpreting that provision. Therefore, since CMHA is not an "agency," the requirements of the Federal Privacy Act cannot apply here.

2. Respondent has waived any argument concerning HUD regulations as this argument and supporting evidence were not presented to the trial court prior to the court's summary judgment decision on the issue of production of lead documents.

A cursory review of Respondent's Brief in Opposition to Relator's Summary Judgment motion will reveal that Respondent failed to make any argument or attach and supporting evidence that HUD regulations prohibited the disclosure of certain records.[25] All that was attached to Respondent's brief on opposition were an affidavit from Audrey Davis, the Resident Questionnaire, and the Medical Release and Respondent made no mention of any HUD regulations.[26] The Court of Appeals (as the Trial Court) then rendered its decision on Relator's summary judgment motion on May 25, 2010. What Respondent then attempted to do is sneak this new HUD regulation argument and its HUD Notice PIH 2010-15(HA) ("Notice") and a new affidavit from Audrey Davis into the Trial Court's record by attaching them to its Motion for Reconsideration and making ***for the first time*** the argument that mandates in the Notice prohibit CMHA from releasing tenant information.[27] The Court of Appeals denied Respondent's Motion on July 20, 2010.[28]

It is well-accepted that issues not raised by the parties are waived for appellate purposes. S&G Invs., LLC v. United Cos., LLC, 2010 Ohio 3691, P25 (Ohio Ct. App., Clermont County Aug. 9, 2010) citing State v. Awan (1986), 22 Ohio St.3d 120, 22 Ohio B.

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[25] See Respondent's Brief in Opposition to Lead Paint Summary Judgment Motion
[26] Id.
[27] See Respondent's Motion for Reconsideration, see also Respondent's Merit Brief Supplement at 39-46.
[28] See Court of Appeals' Judgment Entry of July 20, 2010.

199, 489 N.E.2d 277, syllabus. Further, exhibits attached to a brief are not part of the record and cannot be considered on appeal. State v. Klempa, 7th Dist. No. 01 BA 63, 2003 Ohio 3482, P11; Nationwide Ins. v. Phelps, 7th Dist. No. 2002 CO 27, 2003 Ohio 497, P24; D'Amico v. D'Amico (July 17, 1998), 7th Dist. No. 94-CA-218, 1998 Ohio App. LEXIS 3661.

Relator argues that because Respondent failed to argue and present evidence to the Trial Court on the issue of contractual mandates in the Notice prohibit CMHA from releasing tenant information, **before the Trial Court issued its May 25, 2010 decision,** that this argument is waived for the purposes of this appeal and the newly presented exhibits should be striken from the record and the Merit Brief of Respondent.

3. Respondent has presented no legal authority that provisions of it's Annual Contributions Contract with the United States or the HUD Notice PIH 2010-15(HA) can nullify R.C. 149.43.

Respondent argues in its Merit Brief that the Annual Contributions Contract ("ACC") (which is not part of the record in this case) between the United States and CMHA and the HUD Notice PIH 2010-15(HA) ("Notice") mandate that Respondent is prohibited from releasing certain tenant information.[29] In support of this position, Respondent fails to cite to any authority which could lead this Court to conclude that either the ACC or the Notice have the legal effect of trumping R.C. 149.43.

With respect to this issue Relator relies on State, ex rel. Dispatch Printing Co., v. Wells (1985), 18 Ohio St. 3d 382, 18 OBR 437, 481 N.E. 2d 632. In State, ex rel. Dispatch Printing Co. this Court held that a collective bargaining agreement cannot supplant state law by requiring that records be kept confidential contrary to the Public Records Act. This

[29] See Respondent's Merit Brief at page 2-3, 14-18.

holding embodies the fundamental legal principle that parties to a private contract cannot nullify state law, and that any contractual provision purporting to do so is a legal nullity. Id.

Therefore, based on this authority, Respondent cannot claim that either the provisions of its ACC or the Notice have the legal effect of prohibiting Respondent from producing records required by R.C. 149.43.

D. PROPOSITION OF LAW NO. 4: A PUBLIC HOUSING TENANT'S MEDICAL RECORDS ARE EXEMPT FROM DISCLOSURE

Some documents are not defined as "public records." Included in that limited list of excluded documents are documents that the Act defines as "medical records." See RC 149.43(A)(1)(a).[30] RC 149.43(A)(3) of the Act then defines "medical records" as follows:

> (3) "Medical record" means any document or combination of documents, *except* births, deaths, and the fact of admission to or discharge from a hospital, that pertains to ***the medical history, diagnosis, prognosis, or medical condition*** of a patient ***and*** that is ***generated and maintained in the process of medical treatment***. (emphasis supplied).

Thus, in order for any document to meet the definition of "medical record" for purposes of the Act, the document in question must meet a mandatory 2-part test. That document must (a) pertain to the medical history, diagnosis, prognosis or medical condition of a patient **and** (b) be generated and maintained in the process of medical treatment. Further, even if the

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[30] As it relates to the "medical records" exception, RC 149.43(A)(1)(a) of the Act provides:

> (A) As used in this section:
> (1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code. "Public record" does not mean any of the following:
> (a) Medical records;

document in question meets that 2-part test, it is still not a "medical record" if it concerns "admission or discharge from a hospital."

This Court has rejected any attempt by a public office to assert that the "medical records" exception exists under the Act just because medical or injury issues might be discussed. In Strothers v. Worthheim, *supra*, this Court, in reversing a decision by the Cuyahoga County Court of Appeals, rejected an attempt by the Cuyahoga County Ombudsman's Office to claim (as the Respondent claims here) that records associated with alleged reports of child abuse at the Cuyahoga County Juvenile Court were "medical records" exempt from production under the Act. The Court stated:

> In order to fit within the "medical record" exception to the public records law, "a record must pertain to a medical diagnosis ***and*** be generated and maintained in the process of medical treatment." (Emphasis *sic.*) State, ex rel. Toledo Blade Co. v. Telb (C.P.1990), 50 Ohio Misc. 2d 1, 10, 552 N.E.2d 243, 251. In *Telb*, the court held that to be excepted from disclosure, the records sought must meet the conjunctive requirements of the statute.

Further, one Ohio Court held (in a lead poisoning record case) that even if some of the records sought under the Act may arguably constitute "medical records," if the requesting party asks for a redaction process to sift out any medical information, the public office has to review all of the requested records and redact out what it claims is medical information and produce the un-redacted portions of the records (and then produce the claimed exempt records to the relevant Court for an in-camera review). See State ex rel. Cincinnati Enquirer v. Adcock, 2004 Ohio 7130; and see the decision from this Court in State ex rel. Strothers v. Rish, 2003 Ohio 2955 wherein this Court mandated that the public office (the Maple Heights Board of Education) go through all of the requested records and specifically identify the records which it claimed were exempt medical records and produce all of those claimed exempt records to this Court for an in-camera review. The *Rish* Court cited to the decisions of State ex rel. Master v. Cleveland (1996), 75 Ohio St. 3d 23, 31, 1996 Ohio 228, 661

N.E.2d 180; and State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland (1988), 38 Ohio St.3d 79, 526 N.E.2d 786. In State ex rel. Master v. Cleveland, *supra*, the Supreme Court of Ohio stated:

> "When a government body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individual scrutiny of the records in question. If the court finds that these records contain excepted information, ***this information must be redacted and any remaining information must be released***."

First, the Lead Poisoning Records in the possession of Respondent cannot be "medical records." To meet the definition, Respondent would have to be in possession of records which meet the mandatory 2-part test: (a) pertain to the medical history, diagnosis, prognosis or medical condition of the child **and** (b) be generated and maintained in the process of medical treatment. There is no conceivable way that Respondent would be in possession of the private medical records of any of the children poisoned by lead at the premises owned and/or operated by the Respondent. Respondent is not a medical facility and does not render any type of medical services. Further, even if the document in question meets that 2-part test, it is still not a "medical record" if it concerns "admission or discharge from a hospital."[31]

Even if there was the slightest good faith basis for raising the "medical records" exemption under the Act (which there is not), Respondent was still under an affirmative duty to review all of the requested records and redact what it claimed was information which met the definition of medical record and then produce the un-redacted portions. As of the date of this brief, not a single document, either redacted or not, has been produced.

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[31] It is conceivable that Respondent may have in its records the fact that a child was poisoned by lead and thereafter treated medically for that poisoning. However, RC 149.43(A)(3) makes it clear that, for purposes of the Act, "medical record" does not include references to "the fact of admission to or discharge from a hospital."

E. PROPOSITION OF LAW NO. 5: DOCUMENTS GENERATED FOR THE PURPOSES OF LITIGATION ARE CONFIDENTIAL AND EXEMPT FROM DISCLOSURE

F. PROPOSITION OF LAW NO. 6: DOCUMENTS OBTAINED THROUGH A GOVERNMENTAL ENTITIES' INVESTIGATORY WORK PRODUCT ARE LIKEWISE CONFIDENTIAL AND EXEMPT FROM DISCLOSURE

The statutory exception for "trial preparation records" is contained in R.C. 149.43. (A)(1) & (4) which states:

> (A) As used in this section:
>
> (1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code. "Public record" does not mean any of the following:
>
> (4) "Trial preparation record" means 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.

This exemption was discussed in State ex rel. Natl. Broadcasting Co. v. Cleveland (1988) 38 Ohio St. 3d 79, 84-85, 526 N.E.2d 786 and State ex rel. Zuern v. Leis (1990), 56 Ohio St. 3d 20, 21, 564 N.E.2d 81. In both of those cases this Court held that material cannot be excepted from disclosure simply by an agency's broad assertion that it constitutes trial preparation records (as is the case here). For the trial preparation exception to apply, the records must have been **"specifically compiled in reasonable anticipation of litigation."** R.C. 149.43(A)(4). When an investigation has multiple purposes, the records of that investigation cannot be said to be trial preparation records. State, ex rel. Coleman, v.Cincinnati (1991), 57 Ohio St.3d 83, 566 N.E.2d 151.

In this case, the Resident Questionnaire explicitly states that "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." Additionally, the United States in its Amicus Brief states that "the Resident Questionnaire is used by CMHA to comply with federal regulations." See Amicus Brief p. 7. And more importantly, Respondents admit in their Merit Brief that the documents (medical authorization and resident questionnaire) are used for the dual purpose of complying with federal regulations and are used by their legal affairs office to "maintain, investigate, and follow claim[s]"

Therefore based on the admitted dual purpose of the documents by Respondent, the express language in the resident questionnaire stating several additional purposes, it is clear that these documents are obviously not **"specifically compiled in reasonable anticipation or in defense of, a civil or criminal action or proceeding,"** and are thus not within the R.C. 149.43. (A)(4) exemption for "Trial preparation records."

G. PROPOSITION OF LAW NO. 7: ATTORNEYS' FEES MAY NOT BE AWARDED WHERE THE RESPONDENT'S ACTIONS WERE REASONABLE.

In granting or denying attorney fees, the court should consider the reasonableness of the government's failure to comply with the public records request and the degree to which the public will benefit from release of the records in question. State ex rel. Olander v. French, 79 Ohio St. 3d 176, 179 (Ohio 1997) citing State ex rel. Warren Newspapers, Inc. v. Hutson (1994), 70 Ohio St. 3d 619, 626, 640 N.E.2d 174, 180.

In Respondent's Merit Brief, they claim that this Court should overturn the award of attorney's fees in this case on the grounds that they reasonably withheld production of the documents because they were personal, private, and confidential records of their tenants and

in light of the decisions in McCleary v. Roberts and State ex rel. Cincinnati Enquirer v. Daniels. The problem with this disingenuous argument is two fold, first, at the time Respondent was refusing to produce the records (between March 26, 2009 and May 11, 2009) it had argued that the basis for its refusal to either produce or redact the records was because the records were medical records per RC 149.43(A)(1)(a) and RC 149.43(A)(3); were "information pertaining to the recreational activities of a person under the age of eighteen" per RC 149.43(A)(1)(r) and RC 149.43(A)(8); were documents subject to the Ohio Privacy Act (RC 1347.01(E)); were documents which involved a Family Educational Rights and Privacy Act ("FERPA") violation; were records covered by the federal Health Insurance Portability and Accountability Act ("HIPPA"). It is these arguments that this Court should consider when deciding the reasonableness of Respondent's failure to produce the records, not the arguments the made in the mandamus action or this appeal both of which occurred long after the fact.

Secondly, the case law is clear that "even if a public record contains some material that is excepted from disclosure, the governmental body is still obligated to disclose the nonexcepted material, after redacting the excepted material." State, ex rel. Natl. Broadcasting Co., v. Cleveland, supra, citing State, ex rel. Dispatch Printing Co., v. Wells (1985), supra. Therefore, even if Respondent had a good faith and/or reasonable belief that the records contained exempted information, they still had a duty to redact that information and produce the documents. As the record is undisputed in this case, Respondent has to this day failed to produce a single document, either redacted or not, which is responsive Relator's requests regarding lead poisoning documents.[32]

[32] This includes not only the Resident Questionnaire and Medical release, but any other records Respondent has which are responsive to Relator's request.

As to the issue of the degree to which the public will benefit should the requested records be released to Relator, Respondent has made no argument. Perhaps that is because this case involves the potential release of records hundreds of cases of children who have been exposed to lead paint at Respondent's rental properties. It is no secret to Respondent and the United States (as HUD is responsible for funding CMHA and any legal liabilities it incurs) that Relator is a law firm which is heavily engaged in prosecuting litigation against landlords who have permitted their tenants to become exposed to lead. It is also no secret that Relator is attempting to expose a significant public health risk which involves many children. It should almost go without saying that the public in general (and especially those injured) will inherit a great benefit by the production of the requested records.

H. 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 United States is attempting to make a preemption argument based on a highly speculative and completely unsupported claim that CMHA tenants would be less likely to fill out the Medical Release and Resident Questionnaire if the records were public. In support of this bald assertion, the United States argues that the release of these documents would be an invasion of privacy and create a risk of victimization to the child tenants Certainly, the United States has not cited any factual evidence supporting this assertion because the record here is completely void of any.

As to the issue of privacy, CMHA tenants should not have a reasonable expectation of privacy concerning these documents in light of several cases authorizing the release of the

same type of information contained therein. Generally speaking the right to privacy encompasses only personal information and information not readily available to the public. Cox Broadcasting Corp. v. Cohn (1975), 420 U.S. 469, 494-495. Consequently, the Ohio Supreme Court has stated that individuals do not have a legitimate expectation of privacy in their telephone numbers, their names and work addresses, and their resumes. State ex rel. Plain Dealer Publishing Co. v. Cleveland, 75 Ohio St.3d 31, 34, 1996 Ohio 379, 661 N.E.2d 187; State ex rel. Thomas v. Ohio State Univ., 71 Ohio St.3d 245, 248; Ohio Domestic Violence Network v. Pub. Util. Comm., 70 Ohio St.3d 311, 318-319. Courts have also upheld the sale of the names and addresses of motor-vehicle registrants to direct-mail advertisers. Shibley v. Time, Inc. (1975), 45 Ohio App.2d 69, 72-73, 341 N.E.2d 337; Lamont v. Commr. of Motor Vehicles (S.D.N.Y.1967), 269 F. Supp. 880, 883-884. Certainly, the disclosure of individuals' names and addresses does not rise to the level of the disclosure of their social-security numbers or copies of their tax returns. State ex rel. Fisher v. Cleveland, 109 Ohio St.3d 33, 2006 Ohio 1827, 845 N.E.2d 500, P27-32; Plain Dealer Publishing Co., supra, at 34-35. And specific to this case, tenants generally do not have a reasonable expectation of privacy in the location of their residences. Mariemont Apt. Ass'n v. Vill. of Mariemont, 2007 Ohio 173, P19 (Ohio Ct. App. 2007).

As to the issue of preemption, there are two prongs to conflict preemption analysis: impossibility and obstacle. Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). When a state law makes it impossible to comply with a federal law, there is a clear conflict between the two and the state law is preempted. Id. The other branch of conflict preemption involves ***state laws*** that "prevent or frustrate the accomplishment of a federal objective." Geier v. Am. Honda Motor Co., 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Federal law thus preempts state law that "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objective of

Congress." Id. (citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).Gonzalez v. Drew Indus., 2007 U.S. Dist. LEXIS 35952, 7-8 (C.D. Cal. May 10, 2007).

The party claiming preemption has the burden of proof. Love v. Foster, 100 F.3d 413, 414 (5th Cir. La. 1996) citing 2 Rotunda & Nowak, Treatise on Constitutional Law § 12.4 at 90 (2d ed. 1992). See also Stucky v. City of San Antonio, 1998 U.S. Dist. LEXIS 22202 (W.D. Tex. Aug. 25, 1998). As stated in Rocky Mt. Farmers Union v. Goldstene, 719 F. Supp. 2d 1170, 1187 (E.D. Cal. 2010),

> "Tension between federal and state law is not enough to establish conflict preemption." Incalza v. Fendi North America, Inc., 479 F.3d 1005, 1010 (9th Cir. 2007). A court finds preemption only in "those situations where conflicts will necessarily arise." Goldstein v. California, 412 U.S. 546, 554, 93 S.Ct. 2303, 37 L. Ed. 2d 163 (1973). **A "hypothetical conflict is not a sufficient basis for preemption."** Total TV v. Palmer Communications, Inc., 69 F.3d 298, 304 (9th Cir. 1995)

Similarly, the Court in Kent v. DaimlerChrysler Corp., 200 F. Supp. 2d 1208, 1217 (N.D. Cal. 2002) stated that "the **"prospect"** of conflict, however, is not sufficient to give rise to preemption based on frustration of purpose." The state law at issue must conflict with the intent of Congress in a specific and **concrete** way. Id. Clearly courts should not lightly infer preemption. International Paper v. Ouellette, 479 U.S. 481, 491 (1987).

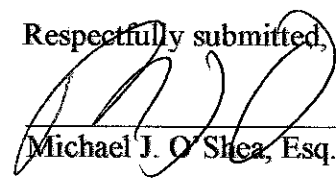
As stated above, there has been no actual evidence presented in this case which would support a finding that the Ohio Public Records Act would frustrate the purposes of any federal laws. All that has been presented is the speculative assertion that CMHA residents will be less likely to provide information to CMHA if the records are subject to public release. As the case law states above speculation, hypothetical, or prospective conflicts with federal are insufficient to prove preemption. Further, on the contrary, this Court should consider the opposite assertion, that CMHA tenants will benefit from the release of this

information which will assist and put other tenants and citizens of the State on notice as to the dangers of lead paint at CMHA properties and further, that release of this information will assist them in finding attorneys and other persons who have the means to hold CMHA responsible for its tortuous conduct.

CONCLUSION

Based on the foregoing arguments and law, Relator respectfully requests this Court uphold the Eighth District Court of Appeals decision, affirm the writ of mandamus, and direct Respondent to produce all records responsive to Relator's requests.

Respectfully submitted,



Michael J. O'Shea, Esq. (0039330)

O'SHEA & ASSOCIATES CO., L.P.A.
19300 Detroit Road
Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 - fax

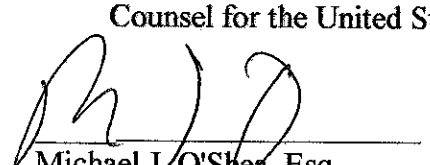
Counsel for Relator

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via U.S. mail, postage prepaid to the following party, this 21 day of March, 2011.

Shawn Maestle, Esq.
Hilary Taylor, Esq.
Weston Hurd LLP
The Tower at Erieview
1301 East Ninth Street – Suite 1900
Cleveland, Ohio 44114
Fax: (216) 621-8369

Daniel J. Lenerz
Civil Division, Room 7242
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for the United States



Michael J. O'Shea, Esq.