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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.

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

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

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INTRODUCTION

Relator-appellee O'Shea and Associates ("O'Shea") begins its brief by alleging that the United States Department of Housing and Urban Development ("HUD") has made "false" and "misleading" arguments to this Court, and that HUD is participating in this case "only . . . to protect its proverbial pocketbook[.]" Realtor's Merit Brief ("O'Shea Br.") at 7. Offensive and untrue, O'Shea's table banging, ad hominem attack on HUD only underscores the lack of merit to O'Shea's legal arguments. See, e.g., Jonathan Wallace, The World of Lawyering: Why I Left the Law, 22 LEGAL. STUD. F. 789, 791 (1998) ("When you have neither the law nor the facts on your side, bang on the table and shout.").

O'Shea's unprovoked attack should not obscure from this Court what is actually at issue in this case: the potential

disclosure to the public of private citizens' personal information, including children's names and dates of birth; their addresses and telephone numbers; the names, addresses and telephone numbers of the children's daycare providers; and information about where the children like to play and to hide.¹ Only by ignoring entirely the nature of the information at issue can O'Shea attempt to distinguish this Court's decision in State ex rel. McCleary v. Roberts, 725 N.E.2d 1144 (Ohio 2000), and assert that the documents it seeks somehow "document the . . . functions, procedures [and] operations" of respondent-appellant Cuyahoga Metropolitan Housing Authority ("CMHA").

As the United States explained in its opening brief, this Court's precedent compels the conclusion that the personal information provided to CMHA by its residents does not serve to document the functions, procedures, operations, or other activities of CMHA, and therefore that the information at issue here is not subject to disclosure under the Ohio Public Records Act. Indeed, were the Court to adopt the contrary conclusion urged by O'Shea, it would call into question not only this Court's decision in McCleary, but also its decisions in State ex

¹With regard to O'Shea's assertion that there are "other lead poisoning documents" in CMHA's possession that should have been produced, see O'Shea Br. at 8-9, HUD has no knowledge about what potentially responsive documents are in CMHA's possession. The Court of Appeals' decision discussed only the Medical Releases and Resident Questionnaires; accordingly, HUD has addressed in its briefs only those documents.

rel. Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180 (2002), and State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274 (Ohio 2005). Because the court of appeals' decision cannot be reconciled with those cases, and is in fact directly contrary to McCleary, it should be reversed.

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. As the United States noted in its opening brief (at 10-11), 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, e.g., State ex rel. Fant v. Enright, 610 N.E.2d 997, 999 (Ohio 1993). Under § 149.011(G), a "record" includes only those documents that "serve[] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the [relevant public] office." To be subject to disclosure, a document thus must "create 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).

information, emergency contact information, and medical history information of children who used public recreational facilities were "clearly outside the scope of [Ohio Revised Code §] 149.43 and not subject to disclosure" under the Ohio Public Records Act. Id. at 1148 (emphasis added). The Court reached this conclusion because "personal information regarding children who participate in the [Recreation and Parks] Department's photo identification program . . . does nothing to document any aspect of the City's Recreation and Parks Department." Id. at 1147.

Here, as in McCleary, the documents at issue contain personal information about children, such as their names, home addresses and family information; their dates of birth and telephone numbers; the names and addresses of their daycare providers; and information about where the children like to play and to hide. And, as in that case, this information does nothing to document any aspect of CMHA and therefore its disclosure "would do nothing to further the purposes of the Act." Id. at 1148; 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 1148). 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.

2. Ignoring completely the nature of the information at issue, O'Shea argues that the completed Medical Releases and Resident Questionnaires are subject to disclosure because they document procedures, operations and functions that federal law requires CMHA to carry out. See O'Shea Br. at 21-23. According to O'Shea, because CMHA uses the Medical Release and Resident Questionnaire to comply with its duties under HUD's regulations, O'Shea is entitled to disclosure of those documents to evaluate CMHA's compliance. See id. at 23. Not only is this assertion unpersuasive on its face, but O'Shea's rationale was expressly rejected by this Court in State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274 (Ohio 2005).

Under O'Shea's reasoning, disclosure of children's personal information will allow it to verify whether CMHA has complied with its obligations under 24 C.F.R. § 35.1130, which requires CMHA, *inter alia*, to conduct risk assessments of dwellings in which children with elevated blood lead levels live and to obtain verification of a child's elevated blood lead level from his or her health care provider. See O'Shea Br. at 22. But the actual information O'Shea seeks--children's names, dates of birth, addresses and telephone numbers; the names and addresses of their daycare providers; and information about where the children like

to play and to hide--in no way reflects whether CMHA has conducted a risk assessment or obtained verification from a health care provider. Rather, it is documents such as the risk assessments and medical records² themselves that reflect CMHA's compliance with its legal duties.

Moreover, O'Shea's theory that information is subject to disclosure because it is used by a state agency was considered and rejected by this Court in State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274 (Ohio 2005). In Johnson, the Court accepted the premise that state employees' home addresses "are needed and used as part of [Ohio Department of Administrative Services] operations." Id. at 280. The court nevertheless concluded that the addresses themselves did not "'document the organization, functions, policies, decisions, procedures, operations, or other activities' of the state agencies within the meaning of R.C. 149.011(G)." Id. As the Court explained, "[c]ertainly, any state-agency policy requiring that its employees provide and update their home addresses would document a policy and procedure of a public office, but the home addresses themselves would not do so." Id.; see also McCleary, 725 N.E.2d at 1144, 1147 (recognizing that children's personal information is used as part of Recreation and Parks Department program, but

²Medical records are, of course, exempted from disclosure under the Ohio Public Records Act. See Ohio Rev. Code § 149.43(A)(1)(a).

concluding that the information "does nothing to document any aspect of the City's Recreation and Parks Department"); see generally Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991) ("Were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information[.]").

O'Shea's attempt to distinguish this Court's decision in McCleary highlights the flaws in its approach. According to O'Shea, McCleary is distinguishable because the program at issue in that case was not "created pursuant to any federal or state statute or local ordinance," and because the program was not "done for the purpose of or in response to the investigation of any accident, injury, or dangers to any children[.]" O'Shea Br. at 24. But whether information "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the [relevant public] office" does not depend on the existence of a statute or on the reason the information was gathered; information documenting a public office's compliance with its internal policies is no less subject to disclosure than information documenting a public office's compliance with its statutory duties. In both cases, however, the relevant focus is on the nature of the information at issue and whether that information reflects "the structure, duties, general

management principles, agency determinations, specific methods, processes, or other acts of the state agenc[y]." Johnson, 833 N.E.2d at 280.

Here, the information sought by O'Shea sheds no light on CMHA's operations or procedures; instead, it documents the private lives of CMHA resident families and their children. See Johnson, 833 N.E.2d at 280 ("As amici curiae city of Cleveland and the Cleveland Municipal Court cogently observe, home addresses generally document the places to which state employees return *after* they have performed the work comprising the 'organization, functions, policies, decisions, procedures, operations, or other activities' of their state agencies."). Accordingly, O'Shea's assertion that it is entitled to public disclosure of this information to verify CMHA's compliance with federal regulations is without merit.

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

1. While this case can and should be resolved based on this Court's controlling authority in McCleary, there is an alternative ground upon which to reverse the court of appeals: if the completed Medical Releases and Resident Questionnaires are subject to disclosure under the Ohio Public Records Act, the Act would conflict with federal law and thus be preempted.

As the United States explained in its opening brief (at 18-19), state laws are preempted when they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941), and when they "interfere[] 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).

Here, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992, 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). Pursuant to its authority under that statute and the Lead Based Paint Poisoning Prevention Act, 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. Among other things, public housing authorities are required to verify the child's elevated blood level with his or her health care provider, to complete a risk assessment of the dwelling unit in which the child lives, and to reduce the lead-based paint hazards identified in the risk assessment. See generally 24 C.F.R. §§ 35.1225, 35.1130. CMHA uses the Medical Release and Resident

Questionnaire as part of its compliance with those federal requirements.

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. Public housing authorities would then be frustrated in their attempts to comply with federal law. Accordingly, if the completed Medical Releases and Resident Questionnaires are subject to disclosure under the Ohio Public Records Act, the Act would be preempted to the degree it subjects the completed Medical Releases and Resident Questionnaires to public disclosure. Avoiding this outcome is another reason to conclude 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)).

2. O'Shea resists this conclusion, asserting that CMHA residents do not have a reasonable expectation of privacy in the information at issue, see O'Shea Br. at 37-38, and that any conflict between state and federal law is hypothetical given the

lack of record evidence that public housing residents would be less likely to cooperate with public housing authorities if their personal information was subject to public disclosure, id. at 39. Neither of these assertions has merit.

O'Shea's argument that CMHA's have no privacy interest in the information contained on the Medical Releases and Resident Questionnaires directly contradicts this Court's opinions in McCleary and State ex rel. Keller v. Cox, in which the Court found that individuals have a privacy interest in precisely the type of information at issue here. In McCleary, the Court held that documents containing the names, home addresses, family information, emergency contact information, and medical history information of children who used public recreational facilities are protected by the constitutional right to privacy. 725 N.E.2d at 1149. And in Keller, the Court held that documents containing the names of police officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, and the like are similarly protected. 707 N.E.2d 931, 934 (1999).

The federal courts, too, have recognized individuals' "privacy interests . . . in controlling dissemination of their names, addresses" and other personal information. Hopkins v. HUD, 929 F.2d 81, 88 (2d Cir. 1991); see, e.g., National Ass'n of Retired Federal Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) ("[T]he privacy interest of an individual in avoiding the

unlimited disclosure of his or her name and address is significant, as several other circuits have held."). As the United States Supreme Court explained, "[i]n this class of cases where the subject of the [requested] documents 'is a private citizen,' 'the privacy interest . . . is at its apex.'" National Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004) (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989)). "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 500 (1994); see also State ex rel. Dispatch Printing Co. v. Johnson, 833 N.E.2d 274, 283 (Ohio 2005) (same). Indeed, insofar as O'Shea intends to use the information it seeks to contact CMHA's residents at their homes, see O'Shea Br. at 39-40, that fact "dramatically increases the already significant threat to the [residents'] privacy interests that disclosure of this information would entail." Hopkins, 929 F.2d at 88.

The cases relied upon by O'Shea merely underscore the flaw in its argument. In each of those cases, the Court concluded that the constitutional right of privacy does not extend to information regarding public employees or information placed in the public domain. See State ex rel. The Plain Dealer Publ'g Co.

v. City of Cleveland, 661 N.E.2d 187, 190-91 (Ohio 1996)

(constitutional right to privacy does not apply to the resumes of applicants seeking public employment); State ex rel. Thomas v. Ohio State Univ., 643 N.E.2d 126, 129 (Ohio 1994) (same with respect to public employees' names and work addresses); Ohio Domestic Violence Network v. Public Utilities Comm'n, 638 N.E.2d 1012, 1018-19 (Ohio 1994) (same with respect to telephone numbers provided to telephone company). But CMHA's residents are not public employees and they did not place their personal information in the public domain by completing the Medical Releases and Resident Questionnaires.³ As the Court explained in McCleary, "there is a clear distinction between public employees and their public employment personnel files and files on private citizens created by government." 725 N.E.2d at 1148.

Equally without merit is O'Shea's claim that any conflict between state and federal law is hypothetical given the lack of evidence that public housing residents would be less likely to cooperate with public housing authorities if their personal information was subject to public disclosure. See O'Shea Br. at 39. The fact that public housing residents will be less likely to provide the information requested by the Medical Release and

³Indeed, the Resident Questionnaire assured respondents that "[a]ll information is confidential and will be maintained only at the CMHA Office of Environmental Affairs." Appellant's Supplement at 33.

Resident Questionnaire if those documents are subject to public disclosure simply reflects the commonsense notion that individuals will avoid, when possible, invasions of their privacy. Courts, including this one, have routinely accepted that proposition without relying on record evidence. 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").

Indeed, as this Court recognized in McCleary, even more is at stake here than an invasion to CMHA residents' privacy. If children's personal information is subject to disclosure under the Ohio Public Records Act, "it is not beyond the realm of possibility" that the information "might be posted on the Internet and transmitted to millions of people." McCleary, 725 N.E.2d at 1149; see generally 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."). Thus, "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 this "unacceptable risk" to their children, it cannot legitimately be disputed that, if the Medical Releases and Resident Questionnaires at issue here are subject to public disclosure, public housing residents will be less likely to cooperate with their public housing authority by completing those documents, thus frustrating the public housing authorities' attempts to comply with federal law. For this reason, too, the Court should conclude that the documents at issue are not subject to disclosure under the Ohio Public Records Act.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2011, I filed the foregoing Reply 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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