

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO.: 2010-1536

O'SHEA & ASSOCIATES CO., LPA

RELATOR

v.

**CUYAHOGA METROPOLITAN
HOUSING AUTHORITY**

RESPONDENT

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

RESPONDENT'S REPLY BRIEF

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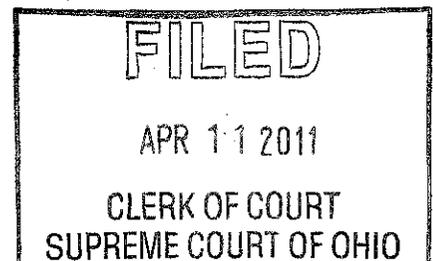


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LAW AND ARGUMENT

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

- 1. O'Shea attempts to rewrite his public records request nearly two years after his ambiguous and overbroad original request which resulted in this litigation.**

Two years ago, on March 26, 2009, O'Shea requested that CMHA produce documents "which document any and all instances of lead poisoning in the last 15 years * * *." *Merit Brief supplement at 7.* CMHA believed that the request was ambiguous, improper, as well as greatly overbroad in breadth. Accordingly, CMHA at its first opportunity requested legal protection. CMHA immediately moved to dismiss O'Shea's Mandamus action because O'Shea's request was vague, ambiguous and overbroad. *See Respondent's Motion to Dismiss, July 9 2009.*

In response to CMHA's request that the action be dismissed, O'Shea never attempted to clarify or ever state exactly what documents he was seeking. Instead, two years later, and for the first time in his brief to this Court, O'Shea identifies a laundry list of documents which he meant to request. *See O'Shea's relator's brief, page 8, and 27, respectively.* Indeed, O'Shea asserts that his request seeking documents documenting lead poisoning includes non-medical documents "including, but not 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." *O'Shea's Brief at page 8, 27 and footnote 23*. Frankly, if these were the documents O'Shea intended to request, O'Shea must explain why he never requested such documents.

More importantly, O'Shea's own words explain why his initial request sought information and not specific documents as the Public Records Act requires. This Court has maintained that the Act requires particular clarity as to what public records are sought. *State ex rel Dillery v. Isman*, 92 Ohio St.3d 312, 2001-Ohio-193. Overbroad or nebulous records requests are legally deficient because neither the act nor Ohio law requires a public entity to scrutinize, seek out or retrieve records with specific information that is of interest to the requestor:

Thomas is seeking a writ of mandamus to compel respondents to comply with R.C. 149.43 by making available to him unredacted copies of all requested records. **We issued an entry denying Thomas' request for a writ of mandamus to the extent that his request broadly sought respondents to search for records containing selected information.** *State ex rel. Fant v. Tober* (Apr. 28, 1993), Cuyahoga App. No. 63737, unreported, 1993 WL 173743, affirmed in *State ex rel. Fant v. Tober* (1993), 68 Ohio St.3d 117, 623 N.E.2d 1202.

State ex rel Thomas v. Ohio State University (1994), 71 Ohio St.3d 245, 1994-Ohio-261 (prior history noted therein)(Emphasis added); *State ex rel. Fant v. Tober*, 1993 Ohio App. LEXIS 2591, 8th Dist. No. 63737 (May 20, 1993), affirmed (1993), 68 Ohio St.3d 117.

Put simply, O'Shea's own brief establishes that his request regarding documents involving lead poisoning was ambiguous, overbroad and failed to meet the clarity a public

records request must, under Ohio law. Permitting O'Shea to amend that request and provide the clarity two years thereafter would be improper.

Additionally, it is clear that O'Shea was merely requesting information and not records. Ohio Law has consistently rejected the use of the Act in such manner. *State ex rel. Frank Recker & Assoc Co LPA v. Montgomery* (1997), 79 Ohio St.3d 1502; *Capers v. White*, 2002 Ohio App. LEXIS 1962, 8th Dist. No. 80713 (April 7, 2002); *State Ex Rel. Fant v. Tober*, 1993 Ohio App. LEXIS 2591, 8th Dist. No. 63737 (May 20, 1993), affirmed (1993), 68 Ohio St.3d 117; *State Ex Rel. Thomas v. Ohio State University* (1994), 71 Ohio St.3d 245, 1994-Ohio-261.

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

It is interesting how O'Shea claims to be an advocate to protect children from lead poisoning. However, O'Shea in his Brief has exposed his true interests. O'Shea is simply an attorney who seeks to solicit families to file lawsuits against low-income housing programs like CMHA. O'Shea is not a government "watchdog" or non-profit advocacy group who wishes to see improvement in low-income housing. Rather, O'Shea is a law firm who wishes to profit from the government.

CMHA understands that Relator's true financial motive is not a determining factor. However, one should consider same when reviewing a public record's request

which seeks the disclosure of children's personal information in order to have those children and their families solicited for litigation.

Ohio law and the Public Records Act must be interpreted to protect children. CMHA respectfully asserts that O'Shea has missed that point as well as this Court's attempt to protect children's personal and private information from dissemination in *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365. Contrary to O'Shea's statements, *McCleary* is neither factually nor legally distinguishable from the instant matter. In *McCleary*, this Court reminded governmental entities that public record's requests are not proper unless they "shed light on an agency's performance of its statutory duties * **." See *McCleary*, 88 Ohio St.3d at 368. A request which desires information of private citizens, does not meet that requirement. Indeed, a private citizen's personal and private information is protected from the public records laws particularly where those individuals do not have any particularized knowledge as to the inner workings. See *State ex rel. Keller v. Cox* (1999), 85 Ohio St.3d 279, 282.

This Court reaffirmed these salient points by restating that personal information regarding private citizens does not further the purpose of public records laws:

The subjects of appellee's public records requests are not employees of the government entity having custody of the information. They are children-private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on those citizens. It seems to us that there is a clear distinction between public employees and their public employment personnel files and files on private citizens created by the government. To that extent, the personal

information requested by Appellee is clearly outside the scope of R.C. 149.43 and not subject to disclosure.

McCleary, *supra* at 369-370, citing *State ex rel. Dispatch Printing Co v. Wells* (1985), 18 Ohio St.3d 382, 385.

This Court's statements in *McCleary* were further clarified in *State ex rel Beacon Journal Publishing Co v. Bond*, 98 Ohio St.3d 146; 2002-Ohio-7117. In *Beacon*, this Court adopted its rationale from *McCleary* and denied the disclosure of a juror's personal information. This Court explained:

We recently addressed whether personal information held by a public office falls within the statutory definition of a "record" in *State ex rel. McCleary v. Roberts* (2000), 88 Ohio ST.3d 365, 2000 Ohio 345, 725 N.E.2d 1144. In *McCleary*, the city of Columbus implemented a photo identification program requiring parents of children who used Columbus pools to provide the Recreation and Parks Department with personal information regarding their children. Holding that such information was not subject to disclosure, we observed that "standing alone, that information, *i.e.*, names of children, home addresses, names of parents and guardians, and medical information, does nothing to document any aspect of the City's Recreation and Parks Development." *Id.* at 368, 725 N.E.2d 1144.

* * *

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." 88 Ohio St.3d at 368 and 369, 725 N.E.2d 1144, quoting *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press* (1989), 489 U.S. 749, 780, 109 S.Ct. 1468, 103 L.Ed.2d 774.

Beacon, *supra* at ¶¶10-11; *see also*, *State ex rel Dispatch Printing Co v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384.

In sum, information of private citizens, particularly children, must be protected as a matter of public policy. CMHA, as well as the Department of Housing & Urban Development, believe that a tenant provides confidential, medical and personal information to CMHA with the promise and understanding that CMHA will keep it confidential. *Merit Brief Supplement at 33*. Without such promise of protections, a tenant, on their behalf or that of their children, with serious medical issues may be unwilling to come forward with any concerns if CMHA and the HUD cannot guaranty their privacy. No true advocate of public housing would desire such an unfortunate result.

C. PROPOSITION OF LAW NO. III: 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. In This Mandamus Action, Which Originated In The Court Of Appeals, CMHA Properly Asserted That The Federal Law Exemption Set Forth In R.C. §149.43(A)(1)(v) Exempted Disclosure Of The Any Record Which Documents An Incident Of Lead Poisoning.**

O'Shea argues continuously that CMHA did not assert that the requested records documenting lead poisoning were exempt from disclosure under the Federal Law exemption set forth in Ohio's Public Records Act. Put simply, O'Shea is wrong. In the trial court, the appellate court in this mandamus action, CMHA asserted in its Motion for Summary Judgment that the documents regarding lead poisoning were exempt from disclosure under Federal Law. The Appellate Court rejected CMHA's position in an interlocutory order. Thereafter, as is permitted under Ohio law, CMHA sought

reconsideration of the Appellate Court's interlocutory order. *Pitts v. Ohio Dep't of Transp.*(1981), 67 Ohio St.2d 378, 379 at fn. 1; *Schmidt v. Bankers Title & Escrow Agency, Inc.*, 2007-Ohio-3924 (8th Dist.) at ¶7-8, citing *Goldman v. Transportation Leasing Inc.*, 1981 Ohio App. LEXIS 10481, 8th Dist. no. 42480 (February 19, 1981); *Olson v. Watson*, 22 Ohio Law Abs. 118 (2nd Dist. 1936); *Wayne Cty. Natl. Bank v. Predmore-Henry Motor Co.*, 7 Ohio Law Abs. 425 (9th Dist. 1928); *MDM Realty Ltd., v. Progress Properties Partnership*, 2007-Ohio-3668 (8th Dist.); *Brown v. First Energy Corp.*, 159 Ohio App.3d 696, 2005-Ohio-712 (9th Dist. 2005).

In that reconsideration motion, CMHA explained that the interim summary judgment ruling was incorrect and that Federal Law prohibited disclosure of the requested information. The Appellate Court disagreed and now CMHA as well as the United States of America, Department of Housing & Urban Development, has requested this Court review the Act's federal exemption and determine whether the Appellate Court erred in its analysis. Simply, because CMHA presented the matter in the trial court, the issue is preserved for appellate review by this Court and O'Shea's arguments to the contrary are in error and must be rejected.

Moreover, this Court has stated that the Act's exemptions are always applicable and are not capable of being waived. *State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St.3d 379, 383 citing *State ex rel. Plain Dealer Publishing Co. Cleveland* (1996), 75 Ohio St.3d 31, 33-34.

2. Federal Law and Federal Regulations Exempt The Requested Document From disclosure.

R.C. §149.43(A)(1)(v) specifically exempts from disclosure any documents whose release is prohibited by federal law. CMHA detailed in its initial Merit Brief how exactly federal law and federal regulations prohibit CMHA from disseminating tenant information including the type of information O'Shea requests. O'Shea responds by stating that CMHA is not a federal agency and therefore federal privacy protections do not apply. O'Shea, like the Appellate Court, fails to fully consider the Public Record's federal law exemption, R.C. §149.43(A)(1)(v), and the application of HUD's federal regulations to CMHA.

As set forth in the initial appellate proceedings, CMHA's Federal Funding is tied directly to their obligation to abide by HUD's regulations. *Merit Brief Supplement at 39-40*. While O'Shea contends that there is no evidence of that fact, O'Shea is mistaken. CMHA submitted the affidavit of its Chief Legal Officer whom averred, without contradiction, that HUD's low income housing program requires its participating entities, like CMHA, to comply with HUD's regulations. *Id* In those regulations, HUD advises its participating Public Housing Authorities that the tenant's personally identifiable information is not to be disseminated to anyone pursuant to, the Federal Privacy Act, 5 U.S.C. §552(a), Section 6 of the Housing Act of 1937 and Section 208 of The E-Government Act. *Merit Brief Supplement at 41-46*. 5 U.S.C. §552a(m) provides the requisite authority for HUD to so direct CMHA:

(m) Government contractors

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

CMHA receives funds from HUD to assist in HUD's governmental function to provide low-income housing. As part of that relationship, HUD directs CMHA to obtain and assemble personal information from its tenants. Because of this mandate, the Federal Privacy Act, subsection (m) requires that HUD obligate CMHA to protect that assembled information from dissemination as the Privacy Act provides. *Id*

In sum, contrary to O'Shea's statements, federal law specifically directs HUD to require CMHA to protect the tenant's personal and private information. Accordingly, pursuant to Ohio Public Records Act, those records are exempt from disclosure. R.C. §149.43(A)(1)(v).

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

Medical records are exempt under the Act. R.C. §149.43(A)(1)(a) and R.C. §149.3(A)(3). A medical record is defined as "any document or combination of documents * * * 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." O'Shea maintains that this Court's decision in *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155 only protects medical records for those entities which both generate and maintain the medical records. CMHA respectfully asserts that such a reading is nonsensical.

If the exemption is read in this matter, the exemption would never apply except for government operated medical facilities. Certainly, the Legislature could not have intended that **only** medical records contained within the brick walls of such government medical facilities be the only places the public's medical records would be kept private and confidential. Medical records which are released to an authorized governmental entity by the private citizen should not become the public's records simply because of such limited specific release. Indeed, other than a public hospital or clinic what type of public office would maintain medical records "in the process of medical treatment"?

Additionally, such a proposition would also mean that the medical records of public employees would be subject to disclosure. CMHA asserts that the phrase "generated and maintained in the process of medical treatment" goes to the origination of the record., not simply where the record may be upon an authorized release.

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

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

O'Shea's sole argument that CMHA is not entitled to the Act's exemption for the litigation/ work product, is that CMHA arguably uses these documents for more than one purpose. O'Shea cites *State ex rel. Coleman v. Cincinnati* (1991), 57 Ohio St.3d 83 for support of his theory that documents created for a dual purpose do not meet these exemptions. See *O'Shea's Merit Brief at page 34-35*. However, a subsequent review of this Court's decision in *Coleman, supra* reveals that this Court overruled that decision in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 430-434.

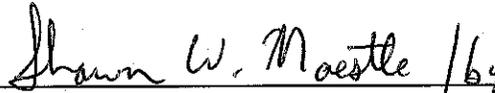
In *Steckman*, as well as other decisions, this Court has prohibited the release of all records created or compiled in anticipation of litigation including notes and independent thought processes. See, e.g. *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St.3d 185; *State ex rel. National Broadcasting Co v. Cleveland* (1991), 57 Ohio St.3d 77; *State ex rel. Renfro v. Cuyahoga County Dep.'t of Human Services* (1990), 54 Ohio St.3d 25; *State ex rel. Nix v. City of Cleveland* (1998), 83 Ohio St.3d 379. Simply because CMHA uses the documents for other purposes as well should not vitiate the Act's stated litigation exemptions.

CONCLUSION

Tenant's simply do not expect that their private personal information or medical records, and those of their children, will be disseminated to the Public **because** they obtain government housing. These individuals have the same expectation of privacy as all other. *State ex rel Beacon Journal Publishing Co v. City of Akron* (1994), 70 Ohio St.3d 605.

For these reasons, Respondent, CMHA respectfully requests that this Court reverse the Eighth District Court of Appeals decision to issue of writ of mandamus compelling CMHA to disclose the private, confidential, personal and medical information of its tenants and their children

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing true and correct copies thereof, in sealed envelopes, postage fully prepaid and by depositing same in the U.S. mail on this 11th day of April, 2011, to the following:

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