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IN THE SUPREME COURT OF OHIO

BOARD OF HEALTH OF CUYAHOGA COUNTY	:	Case No. 2014-0223
Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
LISPON O'SHEA LEGAL GROUP	:	Court of Appeals Case No. 99832
Appellee.	:	

BRIEF IN OPPOSITION TO MEMORANDUM IN SUPPORT OF JURISDICTION

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WHY THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST

This case presents yet another governmental entity's (this time it's the Board of Health of Cuyahoga County - "BOH") rejection of some of the general long standing principals behind the Ohio Public Records Act (RC 149.43 et seq):

A. Public records are not records owned by the government, but are in fact owned by the public; and

B. Attempts by governmental entities to bar disclosure of records should be strictly construed against the governmental entity.

See the numerous pronouncements of this Court in 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.

This Court has made it clear that the fundamental policy of RC

§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. 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 this 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).

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, *supra*. 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 (2000), 88 Ohio St. 3d 365, 369.

Even if a governmental agency claims that some parts of a document or documents contain information subject to an exception to production, that agency must produce "redacted" portions of those documents. See State ex rel. Master v. City of Cleveland, 76 Ohio St. 3d 340 (Ohio 1996) where this Court 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.***"
> (Emphasis supplied)

Further, RC §149.43 (B) (1) specifically describes the redaction duties required of public entities as follows;

> Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. ***If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.*** When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a

> request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.
> (Emphasis supplied).

Many public entities such as the BOH attempt to shield production of ***any*** records or documents whatsoever under what can only be called the "some/none" tactic. With this tactic, if there is a claim that ***some*** of the information in the records ***might*** contain protected/excepted information, ***none*** of the documents need be produced. This tactic, however, has been soundly rejected by this Court again and again. See State ex rel. O'Shea & Associates Co., L.P.A. v. Cuyahoga Metro Hous. Auth. (2012), 131 Ohio St.3d 149, 2012-Ohio-115. This tactic was also rejected by the Cuyahoga Court of Appeals in this case. See ¶31 and ¶32 of that opinion.

In this case, the Court of Appeals went to very great detailed lengths to identify what records must be produced in their redacted format. See ¶s 33, 34, and 35. The Court of Appeals made it very clear that none of the records to be produced in their redacted format revealed a child's protected medical information, and therefore production of those documents would not violate RC 3701.17. The Memorandum in Support of Jurisdiction attempts to essentially affright this Court into believing that the Court of Appeals recklessly ordered the BOH to release ***all*** of the documents even though those documents contained some protected information. However, as a simple reading of the Court of Appeals opinion

indicates, that is just not true.

CONCLUSION

The Court of Appeals, in following this Court's clear guideposts, held, given the specific objections to production being advanced by the BOH, that some records were protected (e.g child data forms) - and some were not (e.g. lead violation notices to landlords, lead inspection reports, health correspondence to landlords, and abatement notices). Like this Court, the Court of Appeals outright rejected the "some/none" tactic being advanced by the BOH.[1]

There is nothing new with the issues being advanced by the BOH. The issues in this case have long been settled by this Court's previous well reasoned and unambiguous opinions. In that regard, there is no great public or general interest for this Court to address. For all of the foregoing reasons, this Court should decline jurisdiction in this case.

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[1] The Court of Appeals referred to the "some/none" tactic as a "blanket exemption," and called that asserted exemption as "not appropriate."

Respectfully submitted;

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this 4th day of March, 2014 by regular U.S.mail, email and/or fax transmission.

Michael J. O'Shea