

ORIGINAL

OSheaBOH5000

IN THE SUPREME COURT OF OHIO

BOARD OF HEALTH OF CUYAHOGA COUNTY

Appellant,

LISPON O'SHEA LEGAL GROUP

Appellee.

: Case No. 2014-0223  
:  
:  
: On Appeal from the  
: Cuyahoga County Court of  
: Appeals, Eighth Appellate  
: District Court of Appeals  
:  
: Case No. 99832  
:  
:

APPELLEE'S MERIT BRIEF

COUNSEL FOR DEFENDANT-APPELLEE  
**LIPSON O'SHEA LEGAL GROUP**  
MICHAEL J. O'SHEA, 0039330  
RONALD A. ANNOTICO (0083114)  
Michael@moshea.com  
Beachcliff Market Square  
19300 Detroit Road - Suite 202  
Rocky River, Ohio 44116  
(440) 356-2700 - phone  
(440) 331-5401 - fax

COUNSEL FOR PLAINTIFF-APPELLANT  
**BOARD OF HEALTH OF CUYAHOGA COUNTY**  
Brian R. Gutkoski, Esq. 0076411  
bgutkoski@prosecutor.cuyahogacounty.us  
1200 Ontario Street - Eighth Floor  
Cleveland, Ohio 44113  
(216) 443-7860  
(216) 443-7602 - fax

RECEIVED  
NOV 05 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
NOV 05 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
ASSIGNMENTS OF ERROR.....	5
FACTUAL SUMMARY.....	5
ARGUMENT.....	7
CONCLUSION.....	21
PROOF OF SERVICE.....	22

TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Clarrington v. Althar</u> (1930), 122 Ohio St. 608 .....	20
<u>Dayton Newspapers, Inc. v. Dayton</u> (1976), 45 Ohio St. 2d 107, 109, 341 N.E.2d 576 .....	7
<u>Kallstrom v. City of Columbus</u> , 136 F.3d 1055, 1064-1065 (6th Cir. Ohio 1998) .....	9
<u>Kish v. City of Akron</u> (2006), 109 Ohio St. 3d. 162 .....	8
<u>Littlejohn v. BIC Corp.</u> , 851 F.2d 673, 678 (3d Cir. 1988). ....	10
<u>Nixon v. Warner Communications, Inc.</u> , 435 U.S. 589, 597-98, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978); .....	10
<u>State ex rel. Mothers Against Drunk Drivers v. Gosser</u> (1985), 20 Ohio St.3d 30, 33, 20 OBR 279, 485 N.E.2d 706 .....	8
<u>Sizemore v. Smith</u> , 6 Ohio St.3d 330, 333, 6 Ohio B. 387, 453 N.E.2d 632 (1983) .....	21
<u>State ex rel. Asti v. Ohio Dept. of Youth Servs.</u> 107 Ohio St. 3d. 262 (2005) ( .....	16
<u>State ex rel. Cincinnati Enquirer v. Daniels</u> , 108 Ohio St. 3d 518 (Ohio 2006) .....	17
<u>State ex rel. Master v. City of Cleveland</u> , 76 Ohio St. 3d 340 (Ohio 1996) .....	11
<u>State ex rel. Beacon Journal Publishing Co. v. Bond</u> , 98 Ohio St.3d 146, 2002 Ohio 7117, 781 N.E.2d 180, P13 .....	8
<u>State ex rel. Besser v. Ohio State Univ.</u> (2000), 89 Ohio St. 3d 396, 2000 Ohio 207, 732 N.E.2d 373 .....	7
<u>State ex rel. Calvary v. Upper Arlington</u> (2000), 89 Ohio St.3d 229, 232, 2000 Ohio 142, 729 N.E.2d 1182 .....	9
<u>State ex rel. Cincinnati Enquirer v. Hamilton Cty.</u> (1996), 75 Ohio St. 3d 374, 376, 1996 Ohio 214, 662 N.E.2d 334 .....	8
<u>State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis</u> , 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163, P20 .....	9
<u>State ex rel. Cincinnati Post v. Schweikert</u> (1988), 38 Ohio St.3d 170, 172-173, 527 N.E.2d 1230 .....	8
<u>State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Edn.</u> , 97 Ohio St.3d 58, (2002) .....	10
<u>State ex rel. Fant v. Enright</u> (1993), 66 Ohio St.3d 186 .....	10
<u>State ex rel. Gannett Satellite Info. Network, Inc. v. Petro</u> (1997), 80 Ohio St. 3d 261, 264, 1997 Ohio 319, 685 N.E.2d 1223 .....	8
<u>State ex rel. Mazzaro v. Ferguson</u> (1990), 49 Ohio St.3d 37, 40, 550 N.E.2d 464 .....	9
<u>State ex rel. McCleary v. Roberts</u> , 88 Ohio St. 3d 365, 369 (Ohio 2000	

.....	9, 18
<u>State ex rel. Patterson v. Ayers</u> [1960], 171 Ohio St. 369, 171 N.E.2d 508 (1960).....	7
<u>State ex rel. Strothers v. Wertheim</u> (1997), 80 Ohio St.....	9
<u>State ex rel. The Miami Student v. Miami Univ.</u> (1997), 79 Ohio St. 3d 168, 171, 1997 Ohio 386, 680 N.E.2d 956;.....	8
<u>State ex rel. Warren Newspapers, Inc. v. Hutson</u> (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174.....	8
<u>State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.</u> (1998), 82 Ohio St.3d 37, 40.....	10
<u>State v. Awan</u> , 22 Ohio St. 3d 120, 123 (Ohio 1986): .....	20, 21
<u>State v. Bodyke</u> , 126 Ohio St.3d 266, 933 N.E.2d 753, ¶ 78 .....	21
<u>State v. Childs</u> (1968), 14 Ohio St. 2d 56 [43 O.O.2d 119], .....	20
<u>State v. Glaros</u> (1960), 170 Ohio St. 471 [11 O.O.2d 215], .....	20
<u>State v. Lancaster</u> (1971), 25 Ohio St. 2d 83 [54 O.O.2d 222], .....	20
<u>State v. Quarterman</u> , 2014-Ohio-4034, P19 (Ohio Sept. 23, 2014)	21
<u>State v. Williams</u> (1977), 51 Ohio St. 2d 112, 117. ....	20
<u>State v. Woodards</u> (1966), 6 Ohio St. 2d 14 .....	20
<u>State, ex rel. Specht, v. Bd. of Edn.</u> (1981), 66 Ohio St. 2d 178, 182 [20 O.O.3d 191].....	20
<u>Toledo v. Gfell</u> (1958), 107 Ohio App. 93, 95 [7 O.O.2d 437]. ..	20
<u>United States Dep't of Defense v. Federal Labor Relations Auth.</u> , 510 U.S. 487, 495-97, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994) ..	9
<u>Video Software Dealers Ass'n v. Orion Pictures Corp.</u> (In re Orion Pictures Corp.), 21 F.3d 24, 26 (2d Cir. 1994).....	10
<u>White v. Clinton Cty. Bd. Of Cmsrs.</u> (1996), 76 Ohio St. 3d 416, 667 N.E.2d 1223.....	7

**Statutes**

5 U.S.C. § 552 .....	9
R.C. §149.43 .....	7, 10, 16, 17
R.C. §3701.17 .....	13, 14, 15, 16
R.C. §3701.17 (A) (2) .....	17
R.C. §3701.17 (A) (2) (a) .....	12, 14
R.C. §3701.17 (C) .....	14, 15
R.C. §3701.17 (D) .....	15
R.C. §3701.17(A) (2) .....	12
R.C. 3701.17 (A) (2) .....	19

### ASSIGNMENTS OF ERROR

INFORMATION IN THE CUSTODY OF A BOARD OF HEALTH OR THE OHIO DEPARTMENT OF HEALTH THAT EITHER IDENTIFIES AN INDIVIDUAL OR COULD BE USED TO ASCERTAIN THAT INDIVIDUAL'S IDENTITY IS EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT ABSENT THE INDIVIDUAL'S CONSENT.

### FACTUAL SUMMARY

The Defendant/Appellant BOARD OF HEALTH OF CUYAHOGA COUNTY, OHIO ("Appellant") brought a declaratory judgment action against Plaintiff/Appellant LIPSON O'SHEA LEGAL GROUP ("Appellee") in response to Appellee's R.C. §149.43 public records request for "documentation or information of all homes in 2008, 2009, 2010, and 2011 in Cuyahoga County where a minor child was found to have elevated blood lead levels in excess of 10 mg/dcl." Prior to providing any records to Appellee, Appellant sought a legal determination of its obligation to produce the records sought. During the case, Appellant continued to refuse to provide any of the requested documents to Appellee, but did file a representative sample of the requested documents under seal with the Trial Court for its review.

On December 24, 2012 Appellant filed a motion for summary judgment alleging that the requested records should not be produced

because Appellee's records request was; (1) patently overbroad, (2) the documents sought were not public records under R.C. 149.43, and (3) the documents were exempt from disclosure pursuant to R.C. 149.43(A)(1)(v) and R.C. 3701.17. Appellee filed an opposition to Appellant's summary judgment motion and the Trial Court issued its decision on March 27, 2013.

Within that decision, the Trial Court rejected Appellant's first and second arguments, but granted summary judgment for Appellant on the grounds that the all of the requested documents were exempt from disclosure pursuant to R.C. §3701.17.

Appellee appealed this ruling to the Eight District Court of Appeals, who reversed the Trial Court's decision on December 26, 2013, holding;

After a de novo review of the sample documents, we note that some of the documents, such as Letters of Notice to the landlord property owner, do not on their face contain "protected health information" because they do not describe a child's past, present, or future physical or mental health status or condition, receipt of treatment or care.

We agree with the BOH that the child data forms that include a child's medical information are not subject to disclosure, even after redaction, because those forms, in and of themselves, are "protected health information." But we do not agree that the disclosure of (1) the property owner's name and address, if the property owner is not the parent/guardian of the affected child, and (2) the address of the property, are sufficient to trigger the provision in R.C. 3701.17(A)(2)(b) that prohibits disclosure if the information could be used to reveal the affected child's identity "if used with other information that is available

to predictable recipients of the information."

Therefore, the landlord property owner's name and address and the property's address are subject to disclosure. But any personal identifying information, including, but not limited to, the affected child's and parent/guardian's name, caregiver information, social security numbers, addresses, dates of birth, telephone numbers, test results, schools attended, sibling, and/or parent/guardian employment information must be redacted.

### ARGUMENT

#### ASSIGNMENTS OF ERROR NO. 1

**INFORMATION IN THE CUSTODY OF A BOARD OF HEALTH OR THE OHIO DEPARTMENT OF HEALTH THAT EITHER IDENTIFIES AN INDIVIDUAL OR COULD BE USED TO ASCERTAIN THAT INDIVIDUAL'S IDENTITY IS EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT ABSENT THE INDIVIDUAL'S CONSENT.**

#### **A. 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, 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 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).

**B. 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.

Further, a person may inspect and copy a 'public record,' as defined in R.C. 149.43 [A], irrespective of his or her purpose for doing so. State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept. (1998), 82 Ohio St.3d 37, 40, see also, State ex rel. Fant v. Enright (1993), 66 Ohio St.3d 186. The purpose behind a records request under the Act is irrelevant. State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Edn., 97 Ohio St.3d 58, (2002).

**C. GOVERNMENT AGENCIES HAVE A STATUTORY DUTY TO REDACT PROTECTED INFORMATION AND THEN PRODUCE THE REDACTED RECORDS TO THE REQUESTING PARTY.**

In the event that documents requested under R.C. §149.43 contain protected or exempt information, government agencies still have a statutory duty to redact the protected information and then produce the redacted records. This obligation is clearly set forth in 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."

Further, R.C. 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.

Therefore, pursuant to State ex rel. v. City of Cleveland and R.C. 149.43 (B) (1), government agencies have a duty to redact any exempt or confidential information from its records and then produce the redacted versions to the requesting party.

**D. APPELLANT MISINTERPRETS AND MISAPPLIES R.C. §3701.17, AS MANY OF THE DOCUMENTS SOUGHT BY APPELLEE DO NOT CONTAIN "PROTECTED HEALTH INFORMATION", THUS NO EXEMPTIONS TO PRODUCTION APPLY.**

Appellant has erred in its determination and argument that all of the records sought contain "Protected Health Information" as defined by R.C. 3701.17 (A) (2), and thus are exempt from production. Appellant's argument commits further error in conducting an irrelevant analysis and application of R.C. §3701.17 (A) (2) (a) & (b) and further attempting to apply R.C. 3701.17 (B) & (C) to records which do not contain "Protected Health Information" in the first place.

Appellee asserts that when conducting the legal analysis on this issue, the first step begins with R.C. 149.43(A)(1)(v), which provides as follows:

(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 of the Revised Code. "Public record" does not mean any of the following...:

(v) Records the release of which is prohibited by state or federal law;

Next, the R.C. 149.43(A)(1)(v) exception leads generally to R.C. §3701.17, and specifically, R.C. §3701.17(A)(2), which defines

"Protected Health Information" for the purposes of that section.

R.C. 3701.17 (A) (2) states:

(2) "Protected health information" means information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products, if either of the following applies:

(a) The information reveals the identity of the individual who is the subject of the information.

(b) The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information.

Based on a plain and unambiguous language of R.C. §3701.17 (A) (2), it appears that the statutory scheme sets forth a two part test to determine whether a requested document contains "protected health information." First, it must be determined whether the content of the documents "describe an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products." If so, then the second inquiry becomes whether;

(a) "The information reveals the identity of the individual who is the subject of the information"

OR

(b) "The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other

information that is available to predictable recipients of the information."

If the information in the documents contain both "protected health information" under R.C. 3701.17 (A)(2) and either R.C. §3701.17 (A)(2)(a) or (b) also apply, then and only then, does R.C. 3701.17 (B) (the four express exceptions) and R.C. 3701.17 (C) apply to govern the release of that "protected health information." If the requested documents do not contain "protected health information", Appellee contends that R.C. §3701.17 is not applicable to exempt the records from production.

Additionally, Appellant, like the Trial Court, confuses the applicability of R.C. §3701.17 (C) to documents subject to redaction or documents which do not contain any "protected health information."

R.C. 3701.17 (C) states;

"Information that does not identify an individual is not protected health information and may be released in summary, statistical, or aggregate form. Information that is in a summary, statistical, or aggregate form and that does not identify an individual is a public record under section 149.43 of the Revised Code and, upon request, shall be released by the director."

Appellee interprets this statute, in the context of R.C. §3701.17 as a whole, to mean that if a document contains "past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products", but

does not specifically identify the associated individual, then that specific health information for an unknown individual(s) "may" be released in summary, statistical, or aggregate form. The basis for this interpretation, is Appellee's argument that in order to even come within the purview of R.C. §3701.17, a document must first contain "protected health information." Appellants believe that the state legislature did not intend for this statute to limit, nor does it say, that any and all record requests upon the Health Dept. are to be released only in "summary, statistical, or aggregate form." Appellee's interpretation is further supported by the language in R.C. §3701.17 (C), which states "may be released" (as opposed to "shall" or "must"), and R.C. §3701.17 (D), which states;

**...If this information has been released to you in other than a summary, statistical, or aggregate form, you shall make no further disclosure of this information without the specific, written, and informed release of the individual to whom it pertains, or as otherwise permitted by state law...**

Based on what is expressly contained in R.C. §3701.17 (C) & (D), the legislature has already acknowledged that at least some documents can and will be released in their original form, and it is not expressly required to be only in "summary, statistical, or aggregate form." To interpret this statute as Appellant suggests would mean that the Health Dept. would be limited to releasing any type of document or information, whether they contain protected health

information or not, only in summary, statistical, or aggregate form. Appellee argues that Appellant's interpretation and blanket limitation is contrary to the express language of the statutory scheme, directly contradicts and renders R.C. §3701.17 (D) superfluous, and would be lead to an absurd and unreasonable result which severely limits the spirit and policy objectives of R.C. §149.43. See State ex rel. Asti v. Ohio Dept. of Youth Servs. 107 Ohio St. 3d. 262 (2005) (Courts must construe statutes to avoid unreasonable or absurd results).

Appellee maintains that if a document does not contain "protected health information", then R.C. 3701.17 becomes wholly irrelevant and inapplicable to exempt the record from production under R.C. 149.43.

**E. THE DOCUMENTS AND INFORMATION REQUESTED BY APPELLEE DO NOT CONTAIN PROTECTED HEALTH INFORMATION.**

Addressing the specific documents at issue in this case, within the representative sample of documents submitted by Appellant under seal to the Trial Court, there are a number of documents which do not contain any medical or health related information whatsoever. Among those documents are the lead hazard violation notices,

risk-assessment reports, Health Dept. correspondence with landlords, and lead abatement certifications. In fact, these specific documents only describe conditions concerning the real property, such as whether it contains lead paint hazards or not. Most importantly, these documents say nothing of the health status of any individual, nor do they identify anyone but the landlord.

Referring back to the statutory two part test of R.C. §3701.17 (A) (2), the first task is to determine whether a particular document contains "protected health information." In doing so, State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518 (Ohio 2006) offers considerable guidance with a similar "health information" analysis of the exact same documents at issue here. In this case, the Court analyzed a similar statute (Federal HIPAA law) defining "health information" and determined that certain health department documents did not contain protected information and thus had to be produced pursuant to R.C. §149.43.

State ex rel. Cincinnati held as follows:

Section 160.103, Title 45, C.F.R. defines "health information" to include information created by a public health authority that relates to the past, present, or future physical condition of an individual.

Further, the lead-citation notices issued by the health department reveal that they are intended to advise the owners of real estate about results of department investigations and to apprise them of violations relating to lead hazards; the report identifies existing and potential lead hazards on the exterior and interior of the

property, details the tests performed on the property and the results of those tests, explains the abatement measures required, provides advice about options to correct the problem, and mandates reporting of abatement measures, including the name of the abatement contractor, the abatement method, and the date of expected abatement completion. Nothing contained in these reports identifies by name, age, birth date, social security number, telephone number, family information, photograph, or other identifier any specific individual or details any specific medical examination, assessment, diagnosis, or treatment of any medical condition. There is a mere nondescript reference to "a" child with "an" elevated lead level.

Thus, the facts here are in sharp contrast with those in our decision in State ex rel. McCleary v. Roberts (2000), 88 Ohio St.3d 365, 2000 Ohio 345, 725 N.E.2d 1144, for example, where the city database at issue contained specific identifiable information, including names, addresses, phone numbers, family information, photographs, and medical information of children, that we determined was exempt from public disclosure; we held there that the information did not constitute a public record because it did not document the operation of an office. Here, while we concern ourselves with the question of whether the lead citations contain "protected health information," and therefore face a different issue from that confronted in McCleary, we nonetheless recognize that none of the specific identifiable information referred to in McCleary is part of the information contained in the lead-citation notices or risk-assessment reports prepared by the health department and requested by the Enquirer in this case.

The prohibition against disclosure contained in the HIPAA privacy rule refers to the release of otherwise protected health information. It provides: "A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter." Section 164.502(a), Title 45, C.F.R. After careful review of the record, we have concluded that the lead-risk-assessment reports and the lead citations do not contain protected health information and therefore are

subject to release, as they are not protected by the HIPAA privacy rule.

In this case, the R.C. 3701.17 (A) (2) definition of "protected health information" is very similar to the Section 160.103, Title 45, C.F.R. definition of "health information" in the Federal HIPAA law. Further, the same documents sought in State ex rel. Cincinnati were sought by Appellee in this case. Based on this precedent, and the Appellate Court's own de novo analysis of the contents of the lead hazard violation notices, risk-assessment reports, Health Dept. correspondence with landlords, and lead abatement certifications, it should be clear that these documents do not contain any information "that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products." R.C. 3701.17 (A) (2), supra.

Therefore, if any documents which are found not to contain any "protected health information", then no further analysis under R.C. 3701.17 (A), (B), or (C) is required and the documents are not exempt from production under R.C. 3701.17 (B) and R.C. 149.43(A) (1) (v).

**F. APPELLANT'S BRIEF UNTIMELY RAISES NEW ARGUMENTS NOT MADE TO EITHER THE TRIAL COURT OR APPELLATE COURT, THUS THEY SHOULD BE STRICKEN FROM CONSIDERATION HERE.**

Appellant has argued, for the very first time in its brief to this Court, that production of the requested records would violate

constitutional privacy rights of children. As the record indicates, Appellant has not raised any issues or arguments concerning rights to privacy or rights to personal security under the Fourteenth Amendment to the United States Constitution to either the Trial Court or the Court of Appeals, thus these arguments have been waived and should not be considered for the first time here.

As explained in State v. Awan, 22 Ohio St. 3d 120, 123 (Ohio 1986):

The general rule is that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Childs (1968), 14 Ohio St. 2d 56 [43 O.O.2d 119], paragraph three of the syllabus; State v. Glaros (1960), 170 Ohio St. 471 [11 O.O.2d 215], paragraph one of the syllabus; State v. Lancaster (1971), 25 Ohio St. 2d 83 [54 O.O.2d 222], paragraph one of the syllabus; State v. Williams (1977), 51 Ohio St. 2d 112, 117 [5 O.O.3d 98]. Likewise, "[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time." State v. Childs, supra, at 62, citing State v. Davis (1964), 1 Ohio St. 2d 28 [30 O.O.2d 16]; State, ex rel. Specht, v. Bd. of Edn. (1981), 66 Ohio St. 2d 178, 182 [20 O.O.3d 191], citing Clarrington v. Althar (1930), 122 Ohio St. 608, and Toledo v. Gfell (1958), 107 Ohio App. 93, 95 [7 O.O.2d 437]. Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See State v. Woodards (1966), 6 Ohio St. 2d 14 [35 O.O.2d 8]. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally vague. Both claims were apparent but yet not made at the trial court level.

Appellate courts are not obligated to search the record or formulate legal arguments on behalf of the parties, because "appellate courts do not sit as self-directed boards of legal inquiry and research, but [preside] essentially as arbiters of legal questions presented and argued by the parties before them.'" State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 78. Justice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination. Sizemore v. Smith, 6 Ohio St.3d 330, 333, 6 Ohio B. 387, 453 N.E.2d 632 (1983).

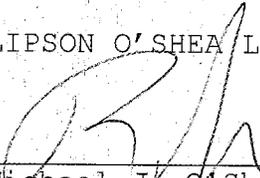
Recently this Court in State v. Quarterman, 2014-Ohio-4034, P19 (Ohio Sept. 23, 2014) applied the principles described above and declined to entertain constitutional arguments made on appeal which were not raised at the trial court level. As the Appellant has not made any constitutional arguments, either at the trial court or the appellate level, these arguments should be rejected as waived pursuant to the principles of appellate consideration stated in State v. Awan and State v. Quarterman, supra.

#### **CONCLUSION**

For the foregoing reasons, Appellee argues that this Court should uphold the Court of Appeals' ruling in its entirety.

Respectfully submitted;

LIPSON O'SHEA LEGAL GROUP



---

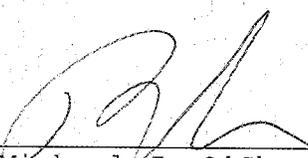
Michael J. O'Shea, Esq. (0039330)  
RONALD A. ANNOTICO (0083114)  
michael@lipsonoshea.com  
Beachcliff Market Square  
19300 Detroit Road - Suite 202  
Rocky River, Ohio 4116  
(440) 356-2700  
(440) 331-5401 - fax  
**Attorney for Appellee**  
**Lipson O'Shea Legal Group**

**SERVICE**

I hereby certify that a copy of the foregoing was served upon:

Brian R. Gutkoski, Esq.  
[bgutkoski@prosecutor.cuyahogacounty.us](mailto:bgutkoski@prosecutor.cuyahogacounty.us)  
1200 Ontario Street - Eighth Floor  
Cleveland, Ohio 44113  
(216) 443-7602 - fax  
COUNSEL FOR PLAINTIFF-APPELLANT

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



---

Michael J. O'Shea