

**IN THE SUPREME COURT OF OHIO**

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

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**REPLY BRIEF OF APPELLANT, BOARD OF HEALTH OF CUYAHOGA COUNTY**

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## INTRODUCTION

Appellee, Lipson O’Shea Legal Group (hereafter “Lipson”) is not entitled to information or records which could be used to determine a sick Ohioan’s identity by simply requesting such sensitive information from the Board of Health (“BOH”). The Ohio General Assembly recognized as much when it enacted R.C. 3701.17. At a time when governmental agencies are faced with combating an increasing number of controversial diseases, it is vitally important to safeguard information about Ohio residents’ medical ailments in the BOH’s custody. Despite Lipson’s previous success in this Court<sup>1</sup> about similar lead-paint requests directed to a public housing agency, this case is about a different statute never before addressed by any court. Under Ohio law, a special statutory confidentiality applies to information in the custody of its Boards of Health and the Ohio Department of Health.

Lipson’s entire argument boils down to this: “what we requested is not ‘protected health information’ under Ohio law.” As demonstrated in the BOH’s Merit Brief and herein, that is simply not the case. Notwithstanding Lipson’s pleas to “liberally construe” public records law or “uphold the intent” of R.C. 149.43, the information Lipson demanded is prohibited from release under another statute, namely R.C. 3701.17. In the proceedings below, the trial court correctly applied the plain language of this statutory text which, on appeal, was discounted and ultimately ignored. Accordingly, the BOH respectfully requests that this Court reverse the judgment of the Eighth District Court of Appeals.

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<sup>1</sup> See, *State ex rel. O’Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297.

**The Board of Health’s Proposition of Law: 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.**

Ohio law plainly relieves a BOH from producing documents pursuant to a public records request which contain protected health information (hereinafter, “PHI”). Section 3701.17(A)(2), Revised Code, defines this as follows:

‘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.

(Emphasis added).

There is no question that Lipson’s request sought PHI under R.C. 3701.17(A)(2). Lipson demanded the following, “**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/dl.” (Bold and italics added). All Cuyahoga County homes where a minor with elevated blood-lead level resides is, by its very definition “information [which] could be used to reveal the identity of the [minor] who is the subject of the information...” As PHI, these Records are not public records pursuant to R.C. 149.43(A)(1)(v) . The Records are not subject to disclosure, with or without redaction, under Ohio’s Public Records Act. Based on the law and evidence before the Court, which includes an affidavit from the BOH’s director, the trial court’s methodical

analysis and approach in determining all responsive Records were properly withheld should be adopted. The Court of Appeals decision should therefore be reversed.

**A) Lipson’s Public Record Request Plainly Asked For PHI Under R.C. 3701.17.**

In a misguided effort to escape the statutory definition of PHI, Lipson claims “there are a number of documents which do not contain any medical or health related information whatsoever.” Merit Brief at 16. Not so. The Records demanded by Lipson – by their very nature contain information that “could be” directly used to identify a child who is the subject of the information. (i.e. Cuyahoga County children with elevated blood-lead levels). An elevated blood-lead level “describes an individual's past, present, or future physical\*\*\*status or condition,” specifically: lead poisoning. Thus, pursuant to the plain language of R.C. 3701.17(A)(2) and R.C. 149.43(A)(1)(v), the Records in their entirety – not just the child or family names in them – are not “public.” Accordingly, they are not subject to release.

**B) The BOH Never Had Any Duty to Redact Records Deemed Confidential.**

Notwithstanding the above provisions, the Eighth District Court of Appeals found that Lipson should receive redacted records. Ap. Op. at ¶¶ 31-32. “Redaction” means obscuring or deleting any exempt information from an item that otherwise meets R.C. 149.011’s definition of a “record.” R.C. 149.43(A)(11). Here, the redaction obligation never arose and in any event would not apply to the facts herein. R.C. 149.43(A)(1)(v) defines “[r]ecords the release of which is prohibited by state or federal law” as “not a public record.” Redaction only applies to documents that are public. “If a record does not meet the definition of a public record, or falls within one of the exceptions to the law, the records custodian has no obligation to disclose the document.” *State ex rel. Plunderbund Media v. Born*, \_\_ Ohio St.3d \_\_, 2014-Ohio-3679, \_\_ N.E.3d \_\_, ¶ 18. (Underscore added). Just like in *Plunderbund*, the BOH has no duty to “consider each document

to determine if the record contains ‘protected health information,’ and redact the document accordingly.” Ap. Op. ¶ 31.

In any event, the BOH *did* consider each document and asserted confidentiality under R.C. 3701.17(B) by commencing this litigation. The BOH submitted representative samples of the requested records under seal asked the trial court declare the rights and obligations of the parties. See, *Compl.* at ¶¶ 10 -13. The trial court found that *all* of the requested records constituted PHI. See, *BOH’s Merit Brief*, Appx. 30-31. Because **it is all PHI**, there is no redaction requirement. Moreover, by releasing what the Eighth District believed appropriate, namely, “Letters of Notice to the landlord property owner,” and the like, this special confidentiality bestowed upon BOH records will have been effectively destroyed. Lipson will be able to “reverse-engineer” from the Landlord’s name and residential addresses to determine lead-poisoned children’s identities. Recognizing this problem, the legislature broadly defined PHI as “information, in any form...”<sup>2</sup> and exempted it from disclosure in its entirety “unless: 1) R.C. 3701.17(B)(1), (2), (3), or (4) applies – and none do in the instant matter[.]” Tr. Ct. Op. at Appx. 31.

Lipson attempts to escape this broad statutory definition by substituting the word “document” in place of what the legislature actually used in R.C. 3701.17(A)(2): “information.” *Lipson’s Merit Brief* at p. 12-13. “Information” is defined as ‘1: the communication or reception of knowledge or intelligence 2a (1): knowledge obtained from investigation, study, or instruction \* \* \*.’” *Svoboda v. Clear Channel Communications, Inc.* 156 Ohio App.3d 307, 805 N.E.2d 559, ¶ 40 quoting Merriam-Webster's Collegiate Dictionary (1996) at 599. Accord, *State ex rel. Commt. for Charter Amendment for an Elected Law Director v. Bay Village*, 115 Ohio St.3d 400, 875

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<sup>2</sup> For instance, *information* that a particular Cuyahoga County landlord was issued a lead-paint citation or that a child residing at a certain home has an elevated blood-lead level.

N.E.2d 574, ¶ 17 (Lundberg-Stratton, dissenting); *Malcor Group, Inc. v. Application Link, Inc.*, 10<sup>th</sup> Dist. No. 99AP-776, 2000 WL 868572 at \*3. In considering statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441, (1988) at para. 3 of the syllabus). The term “information” is broader than Lipson’s re-written substitute, “document.” Lipson wants “knowledge obtained from investigation\*\*\*” so that it may ascertain lead-poisoned children’s identities in order to solicit business without appropriate authorization. Lipson’s public records request to the BOH was properly denied under these circumstances because the requested information is confidential and it is undisputed none of the four exceptions found in R.C. 3701.17(B)(1)-(4) apply.

**C) Public policy considerations are inappropriate when confronted with clear statutory language.**

At bottom, this case involves merely applying statutory terms as defined by the legislature. Only when a statute is subject to varying interpretations, it is ambiguous and must be construed in a manner which carries out the intent of the General Assembly. *Harris v. Van Hoose*, 49 Ohio St.3d 24, 26, 550 N.E.2d 461, 462 (1990); *Cochrel v. Robinson*, 113 Ohio St. 526, 149 N.E. 871 (1925), paragraph four of the syllabus. Thus, the Court of Appeals erred by ordering release of certain BOH records to “uphold the intent of the Public Records Act”<sup>3</sup> because: (1) the relevant statutes are clear and unambiguous; (2) neither party argued otherwise at any point in the underlying proceedings; and (3) the Eighth District failed to identify which statutes, if any, were ambiguous. Therefore, the Eighth District’s decision to liberally construe Ohio’s Public Records Act to the detriment of R.C. 3701.17’s confidentiality provisions should be reversed. Lipson

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<sup>3</sup> Ap. Op. at ¶ 31.



**CERTIFICATE OF SERVICE**

Pursuant to S.Ct.Prac.R. 3.11 (B)(1) and 3.11(C)(1)(a), a copy of the foregoing Reply Brief of the Appellant, Board of Health of Cuyahoga County was served via e-mail this 25<sup>th</sup> Day of November upon the following counsel:

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