

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BOARD OF HEALTH OF CUYAHOGA)
COUNTY, OHIO)
)
Plaintiff,)
)
v.)
)
LIPSON O'SHEA LEGAL GROUP)
)
Defendant)
)

CASE NO. CV 12 784198
JUDGE PAMELA A. BARKER
OPINION AND JOURNAL ENTRY



This matter is before the Court on Plaintiff Board of Health of Cuyahoga County, Ohio's Motion For Summary Judgment Pursuant to O.R. Civ.R. 56 filed on December 24, 2012 ("Plaintiff's Motion"), Defendant Lipson O'Shea Legal Group's Brief In Opposition To Plaintiff's Motion For Summary Judgment filed on February 26, 2012 ("Plaintiff's Brief"), and the Reply Brief In Support Of Plaintiff's Motion For Summary Judgment filed on March 15, 2012 ("Plaintiff's Reply").

Plaintiff filed this action seeking a declaration by this Court construing and declaring its status, duty obligations and/or requirement to maintain the confidentiality of records sought by Defendant pursuant to Revised Code Sections 3701.17 and 149.43 and resolve any and all conflicts between them.¹ Plaintiff alleges in its Complaint and establishes through the Affidavit of Terry Allan, Health Commissioner, Cuyahoga County Board of Health, attached as Exhibit "A" to its Motion, that pursuant to an agreement entered into by and between it and the Director

¹ Plaintiff's Complaint, at WHEREFORE clause, page 3.



of Health² it is an agent for the Director of Health under Revised Code Chapter 3742 and is obligated to confidentially maintain "Protected Health Information" as defined by R.C. 3701.17.³ Plaintiff further alleges and Defendant does not dispute that on or about January 22, 2012, Defendant issued a public records request to Plaintiff pursuant to O.R.C. 149.43 seeking or requesting "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."⁴ Plaintiff alleges in its Complaint that it has conducted a diligent search for records meeting the description of Defendant's public record request and has located approximately 110 files of documents relevant to the request constituting in excess of approximately 5,000 pages of documents.⁵ However, it is Plaintiff's position that these documents include lead assessment reports which involve investigations into the homes or residences of children, child histories or health questionnaires, and letters and other documents some of which clearly contain health information and which collectively or individually, will lead to the "identity" of the "child" for whom R.C. 3701.17 is intended to keep the identity confidential.⁶ Therefore, according to Plaintiff, R.C. 3701.17 prohibits it from producing any of the records it has created and maintained unless presented with a properly executed authorization form or a court

² The "PERSONAL SERVICE CONTRACT By and Between THE OHIO DEPARTMENT OF HEALTH and CUYAHOGA COUNTY DISTRICT BOARD OF HEALTH" or agreement is attached to Plaintiff's Motion as Exhibit "B".

³ *Id.* at paragraph 8, page 2.

⁴ *Id.* at paragraph 9, page 2 and Exhibit "A" attached thereto; Defendant's Answer, at paragraph 4.

⁵ *Id.* at paragraph 10, page 2. In the Affidavit of Thomas P. O'Donnell, Administrative counsel for the Cuyahoga County Board of Health, attached to the Notice Of Filing Records Under Seal, Mr. O'Donnell testified that the record request actually "encompasses almost 200 files" and "could result in approximately 6,000 pages of documents." Affidavit, at paragraph 4.

⁶ *Id.* at paragraph 12, page 3.

order.⁷ Absent from Plaintiff's Complaint is any allegation that Defendant's request is improper as vague or overly broad.

In its Answer to Plaintiff's Complaint, Defendant set forth five affirmative defenses to include the defenses that Plaintiff's claims are barred by the doctrine of waiver and that Plaintiff has a statutory obligation to comply with R.C. 149.43, *et seq.*

Pursuant to an agreement of the parties and this Court, Plaintiff submitted a CD containing twelve (12) files of records pertaining to lead assessment investigations or a representative sample of records maintained by Plaintiff, under seal, for an *in camera* inspection by the Court.⁸ The Court conducted an *in camera* review of the records submitted and they consist of the following: Comprehensive Questionnaires of Parents/Guardians of Children with Elevated Lead Levels and Complete Child Reports/Child Data that include the names, dates of birth, residence addresses, schools attended, sibling information, and blood test results of children with elevated blood lead levels, and the names, addresses, telephone numbers and employment/work information of their parents or guardians; Lead Risk Assessment Reports that identify by name and address the owners of the property where the children with elevated blood lead levels reside and include the resident addresses of the children; Letters of Notice directed to the parents or guardians of the affected children at their resident addresses and to the property owners with the residences of the children identified by addresses; Lead Clearance Reports that identify the addresses of the affected properties or residences of the children; documents that identify the owners of the residences of the children

⁷ *Id.* at paragraph 13, page 3.

⁸ See Notice Of Filing Records Under Seal, filed on October 19, 2012 and the Affidavit of Thomas P. O'Donnell, attached thereto.

with elevated blood lead levels (e.g., deed(s), Cuyahoga County Fiscal Officer Real Property Information) and handwritten or typewritten documents titled "Chronology" that describe contacts and/or events surrounding the investigations that include the children's resident addresses. Each and every one of these documents includes the address of the property where a child with an elevated lead blood level resided at the time the blood test was performed. The information contained in the documents is not set forth in summary, statistical or aggregate form.

Essentially, Plaintiff's Motion and Reply set forth three arguments in support of its position that the records sought should not be released: 1.) the request is improper as vague and overbroad because it seeks "information", as distinguished from records, as well as a complete duplication of Plaintiff's lead related documentation for all homes in Cuyahoga County in 2008, 2009, 2010 and 2011 where a minor child was found to have elevated blood levels;⁹ 2.) the records sought are not "public records" under R.C. 149.43 to the extent that they include specific identifiable personal information and disclosure is warranted only if Defendant can show that they assist in monitoring Plaintiff's compliance with its statutory duties and only if the information is not otherwise excepted¹⁰; and 3.) an exception, specifically R.C. 149.43(A)(1)(v)¹¹, applies to preclude release of the records¹².

According to Plaintiff, the release of the records is prohibited by state law, specifically R.C. 3701.17, which provides in relevant part as follows:

(A) As used in this section:

⁹ Plaintiff's Motion, at page 9, and Plaintiff's Reply, at pages 1-2.

¹⁰ Plaintiff's Motion, at page 10, and Plaintiff's Reply, at pages 2-3.

¹¹ "(A) As used in [149.43] *** 'Public record' does not mean any of the following: *** (v) Records the release of which is prohibited by state or federal law;"

¹² Plaintiff's Motion, at pages 10-13, and Plaintiff's Reply, at pages 3-5..

(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.

(B) Protected health information reported to or obtained by the director of health, the department of health, or a board of health of a city or general health district is confidential and shall not be released without the written consent of the individual who is the subject of the information unless the information is released pursuant to division (C) of this section or one of the following applies:

(1) The release of the information is necessary to provide treatment to the individual and the information is released pursuant to a written agreement that requires the recipient of the information to comply with the confidentiality requirements established under this section.

(2) The release of the information is necessary to ensure the accuracy of the information and the information is released pursuant to a written agreement that requires the recipient of the information to comply with the confidentiality requirements established under this section.

(3) The information is released pursuant to a search warrant or subpoena issued by or at the request of a grand jury or prosecutor in connection with a criminal investigation or prosecution.

(4) The director determines the release of the information is necessary, based on an evaluation of relevant information, to avert or mitigate a clear threat to an individual or to the public

health. Information may be released pursuant to this division only to those persons or entities necessary to control, prevent, or mitigate disease.

- (C) 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.

- (D) Except for information released pursuant to division (B)(4) of this section, any disclosure pursuant to this section shall be in writing and accompanied by a written statement that includes the following or substantially similar language: "This information has been disclosed to you from confidential records protected from disclosure by state law. 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. A general authorization for the release of medical or other information is not sufficient for the release of information pursuant to this section."

In Defendant's Brief, Defendant relies on *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33 (2006) to argue that its request is not improper as vague or overbroad and assuming *arguendo* that it is, since Plaintiff had a duty imposed by R.C. 149.43(B)(2) to inform it that the request was improper and advise Defendant of the manner in which records are maintained so the request could be revised, but failed to do so, Plaintiff has waived any objection that it is vague or overbroad.¹³

¹³ Defendant's Brief, at pages 4-7.

Further, Defendant argues that the records sought are “public records” as that term is defined by R.C. 149.43(A)(1) and R.C. 149.011(G)¹⁴ and interpreted by the Ohio Supreme Court¹⁵ inasmuch as R.C. 3742.35 charges Plaintiff with conducting an investigation to determine the source of lead poisoning in an individual under the age of six and therefore, the records requested document the organization, functions, policies, decisions, procedure, operations, or other activities of Plaintiff.¹⁶

And, finally, Defendant argues that the records requested, to include lead inspection reports, lead hazard violation notices, correspondence to a property owner, remediation notices, compliance notices, etc. do not contain “Protected health information” as that term is defined in R.C. 3701.17(A)(2) and even if they do, the “Protected health information” can and should be redacted and the redacted records must be released.¹⁷

¹⁴ R.C. 149.43(A)(1) provides: “Public record’ means records kept by any public office, including, but not limited to, *** county [offices].” R.C. 149.011(G) defines “records” for purposes of the Public Records Act to include “any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, **which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.**” (Emphasis added.)

¹⁵ At page 8 of its Brief, Defendant correctly cites the Ohio Supreme Court’s decision in *State ex rel. O’Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, for its argument that “[i]n order to establish that documents are ‘records’ for purposes of R.C. 149.011(G) and 149.43, a party must establish that they are (1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of the government agency, (3) which serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” In that case, the Court held that because they helped the public monitor CMHA’s compliance with its statutory duty to provide safe housing, the residence addresses contained in lead-poisoning documents, specifically questionnaires and medical-release authorizations, qualified as “public records” and were obtainable under R.C. 149.43. However, the Court also held that personal identifying information in CMHA lead-poisoning documents, such as the names of parents and guardians, their Social Security and telephone numbers, their children’s names and dates of birth, the names, addresses, and telephone numbers of other caregivers, and the names of and places of employment of occupants of the dwelling unit, including the questionnaire and authorization, did not serve to document the organization, functions, policies, decisions, procedures, operations or other activities of the CMHA and were not obtainable under the Public Records Act.

¹⁶ Defendant’s Brief, at pages 7-9.

¹⁷ Defendant’s Brief, at pages 10-12.

For the reasons stated immediately below, and considering the propriety of Defendant's public-records request in the context of the circumstances surrounding it, this Court finds and declares that Defendant's request is not vague or overbroad, but is appropriate.

Plaintiff has not submitted any evidence to demonstrate that during either the approximate four and one-half months between the date of Defendant's request and the filing of its Complaint on June 4, 2012, or the eleven months between the date of Defendant's request and the filing of Plaintiff's Motion, it advised Defendant that its request was vague or overbroad, so as to provide Defendant with the opportunity to revise its request by informing Defendant of the manner in which the records are maintained and accessed in the ordinary course of Plaintiff's office, as required by R.C. 149.43(B)(2). By contrast, Defendant, through the Affidavit of one of its principals, Michael O'Shea, attached to Defendant's Brief, has submitted uncontroverted evidence that Plaintiff never so advised Defendant.

Thus, just as the Ohio Supreme Court in *State, ex rel. Dispatch Printing Co. et al., v. Wells*, (1985), 18 Ohio St.3d 382, 385, 481 N.E.2d 632, 634, considered the relators' contention that the request was vague and overbroad or that they did not understand exactly what information was sought to be "largely unpersuasive from a purely factual perspective," so, too, this Court finds Plaintiff's argument unpersuasive. And, although Plaintiff did not "sit on [its] hands and make a public records seeker file an action in mandamus but instead filed this lawsuit,"¹⁸ neither did it find it necessary to inquire or inquire of Defendant to help it understand the request, or allege that the request was vague or overbroad in its Complaint or at any time before it filed Plaintiff's Motion.¹⁹

¹⁸ Plaintiff's Reply, at page 2.

¹⁹ Compare *State ex rel. Davila v. City of Bellefontaine*, (Logan App. No. 8-11-01) 2011 Ohio 4890 (Sept. 26, 2011), discretionary appeal not allowed by 2012 Ohio 648, 2012 Ohio LEXIS 473 (Ohio. Feb. 22, 2012) (where the

Although the public records request at issue in *State ex rel. Morgan v. City of New Lexington, supra*, that requested “[a]ll records or documents” is distinguishable from that at issue in this case which requests “documentation or information”, the following remains. As was true of the request in *State ex rel. Morgan v. City of New Lexington, supra*, where the Court held that the request was sufficiently specific for purposes of invoking the Public Records Act, Defendant’s request is specific enough to have allowed Plaintiff to identify numerous responsive documents meeting the description of Defendant’s record request, specifically almost 200 files of documents consisting of approximately 6,000 pages; 2.) a review of the representative sampling of these documents, specifically 12 of the files, demonstrates to this Court that the documents included therein are responsive to the request; and 3.) Defendant’s request did not require Plaintiff to make a new record by compiling certain information from existing records. Each file represents a child or children in a single household found to have an elevated blood lead level and contained in each file are documents relative to the investigation associated with or specific to that child or children and the residence in which he and/or she live(s).

As the Ohio Supreme Court explained in *State ex rel. O’Shea & Assocs. Co., L.P.A. v. CMHA, supra*, 131 Ohio St.3d 149, p. 21, a court “must consider the propriety of a public-records request ‘in the context of the circumstances surrounding it,’” citing *State ex rel. Morgan v. New Lexington, supra*, paragraph 33. In the context of the circumstances surrounding

respondents responded to the relator’s letter/request within 8 days advising that they wanted to properly understand the letter/request and needed additional information, and noted what they understood the letter/request to mean and advised that they thought it was overly broad in a manner that left them unable to comply; when no response from the relator was forthcoming a second letter was mailed out 21 days later and contained basically the same information; and when the relator sent another letter respondents responded to that letter within 11 days).

Defendant's public records request, this Court declares and finds that Defendant's request is appropriate.

For the reasons stated immediately below, and with the exception of personal identifying information contained therein, this Court finds and declares that the records requested constitute "public records" and therefore, are obtainable under the Public Records Act unless an exception applies.

The Ohio Supreme Court's decision in *State ex rel. O'Shea & Assocs. v. Cuyahoga Metro. Hous. Auth.*, *supra*, dictates the conclusion that, with the exception of personal identifying information, including the names, dates of birth, addresses, school information, sibling information and blood test results of any child or children and the names, addresses, telephone numbers and employment or work information of the parent(s) and guardian(s), the records requested by Defendant constitute "public records" subject to disclosure, unless an exception applies. Thus, the remaining and dispositive issue is whether or not the non-personal identifying information contained in the records is exempted or excepted from disclosure under R.C. 143.01(A)(1)(v). Stated differently, is the release of the records prohibited by "state law", i.e., R.C. 3701.17?

For the reasons stated immediately below, this Court finds and declares that the release of the records is exempted or excepted from disclosure, specifically, such disclosure or release is prohibited by state law, specifically R.C. 3701.17.

R.C. 3701.17(A)(2) defines "Protected health information" to mean "information in any form...that describes an individual's past, present, or future physical...condition...if either...it reveals the identity of the individual who is the subject of the information [or] 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." R.C. 3701.17(B) provides that "Protected health information" is confidential and

shall not be released without the written consent of the individual who is the subject of the information unless: 1.) R.C. 3701.17(B)(1), (2), (3) or (4) applies - and none do in the instant matter; or 2.) it is released pursuant to R.C. 3701.17(C), which provides that “[i]nformation that does not identify an individual and is not protected health information may be released in summary, statistical, or aggregate form,” and that “[i]nformation 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.”

The parties have not directed this Court to, and this Court has not been able to locate, any case law interpreting R.C. 3701.17. Indeed, in Plaintiff’s Reply, Plaintiff correctly notes that “[t]his is an issue of first impression.”²⁰ Thus, the Court is left with applying the rules of statutory construction outlined at pages 3-5 of Plaintiff’s Reply that includes looking to the plain language of the statute and applying it according to its terms.

In the Court’s opinion, the records include descriptions of children’s physical condition, i.e., lead poisoning as diagnosed by test results included therein, and either reveal the identity of the individual child by name, address, and date of birth or include information that could be used to reveal the identity of the child and therefore constitute “protected health information”. The investigations that are the subject of the records are instituted for the very reason that children have been diagnosed as having elevated blood lead levels. Even if the personal information concerning these children and their parents was redacted so that their names, addresses, dates of birth, telephone numbers, test results, schools attended, sibling and/or employment information would not be revealed, the non-personal identifying information that

²⁰ Plaintiff’s Reply, at page 3.

remains, communications to the property owners that include their names and addresses and information about the properties at issue could be used with other information that is available to predictable recipients of the information, to reveal the identity of the individual child. Moreover, even if some portions of the information contained in the records do not constitute "Protected health information", the fact remains that the information is not in a summary, statistical, or aggregate form and therefore, under R.C. 3701.17(C) it may not be released.

Accordingly, and for the reasons set forth more fully above:

That portion of Plaintiff's Motion requesting this Court to declare that the request is improper because it is overly broad and/or vague is **DENIED**;

That portion of Plaintiff's Motion requesting this Court to declare that the records requested do not constitute "public records" is **GRANTED IN PART AND DENIED IN PART**, specifically the personal identifying information delineated above is not a "public record" but the non-personal identifying information is a "public record".

That portion of Plaintiff's Motion requesting this Court to declare that under R.C. 143.01(A)(1)(v) and R.C. 3701.17 the release of the requested records is prohibited is **GRANTED**.

Costs are assessed to Defendant.

IT IS SO ORDERED.

No Just Reason For Delay.

Pamela A. Barker 3-27-13
JUDGE PAMELA A. BARKER DATED

RECEIVED FOR FILING

MAR 27 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By *[Signature]* Deputy