[Cite as *Heisig v. MetroHealth Sys.*, 2018-Ohio-4925.]

ERIC J. HEISIG Requester v. THE METROHEALTH SYSTEM Respondent	Case No. 2016-00806-PQ Special Master Jeffery W. Clark REPORT AND RECOMMENDATION

{¶1} On December 31, 2014, respondent, MetroHealth System, entered into a general release and separation agreement ("Agreement") with former employee Dr. Edward Hills. Response, Exhibit B. On August 22, 2016, requester, Eric Heisig, a federal courts reporter for cleveland.com, sent an e-mail to MetroHealth making the following request: "I would also like a copy of the separation agreement MetroHealth entered into with Dr. Hills." On September 26, 2016, MetroHealth Associate General Counsel Laura C. McBride denied the request, stating that "a court's seal protects the sealed documents from disclosure. Court rules are recognized as state law, which would then fall under the exemption of RC 149.43(A)(1)(v). See State ex rel. Beacon Journal Publishing Co. v. Waters, 67 Ohio St.3d 321 (1993)." Complaint, Attachments, page 1.

{¶2} On October 31, 2016, Heisig filed a complaint with this Court under R.C. 2743.75 alleging denial of access to a public record in violation of R.C. 149.43(B), attaching copies of the original records request and related correspondence with MetroHealth. Mediation was then conducted with Heisig and a representative of MetroHealth. On December 21, 2016, the Court was notified that the case was not

resolved and that mediation was terminated. On January 6, 2017,[1] MetroHealth filed its response to the complaint ("response"). MetroHealth attached copies of documents on file in Cuyahoga County Court of Common Pleas Case No. CV-15-855255, including the case docket, plaintiffs Hills' December 8, 2015 Motion to File Documents Under Seal ("Motion"), and a December 8, 2015 Journal Entry ("Journal Entry") granting the Motion.

{¶3} As amended by 2015 Sub. S.B. No. 321, R.C.149.43(C) provides that a person allegedly aggrieved by a violation of division (B) of that section may either commence a mandamus action (a remedy that predates the amendment) or file a complaint under R.C. 2743.75 (a remedy created by the amendment). In mandamus actions alleging violations of R.C. 149.43(B), case law provides that relators must establish by "clear and convincing evidence" that they are entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol,* 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14. As for actions under R.C. 2743.75 alleging violations of R.C. 149.43(B), neither party has suggested that another standard should apply, nor is another standard prescribed by statute. R.C. 2743.75(F)(1) states that such claims are to be determined through "the ordinary application of statutory law and case law * * *." Accordingly, the merits of this claim shall be determined under a standard of clear and convincing evidence.

{¶4} In order to obtain relief in this action, Heisig must demonstrate that he is a person aggrieved by denial of access to public records in violation of division (B) of section 149.43 of the Revised Code. R.C. 2743.75(C) and R.C. 2743.75(F)(3). R.C. 149.43(B)(1) provides, "Upon request * * *, all public records responsive to the request shall be promptly prepared and made available for inspection to any person * * *." MetroHealth affirms that Heisig made public records requests for the Agreement. MetroHealth does not dispute that the Agreement was an official record in its keeping at the time of the request. *State ex rel. Dispatch Printing Co. v. Columbus,* 90 Ohio St.3d

[1] The Court received transmission of MetroHealth's electronic filing at 5:30 P.M. on January 5, 2017. C.C.O. *Administrative Rules Regarding Electronic Filing*, R. VIII. B. provides that "[d]ocuments filed later than 4:59 p.m. Eastern Standard Time shall be deemed to have been filed the following business day."

39, 41, 734 N.E.2d 797 (2000). Heisig therefore meets his initial burden of showing a proper public records request, and a denial of that request by MetroHealth.

{¶5} A public office refusing to release public records has the burden of proving the records are excepted from disclosure by R.C. 149.43. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6; *Natl. Broadcasting Co., Inc. v. Cleveland,* 38 Ohio St.3d 79, 526 N.E.2d 786 (1988), paragraph two of the syllabus. The public office must prove that the requested records fall squarely within the exception, and exceptions will be strictly construed against the public records custodian. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 84, 2008-Ohio-1770, ¶ 10. The Ohio Supreme Court recognizes an additional burden regarding initially public records that are subsequently obtained by another office, or repurposed: "Once clothed with the public records cloak, the records cannot be defrocked of their status." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 378, 662 N.E.2d 334, 338 (1996); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 316, 750 N.E.2d 156 (2001) (requester was entitled to records kept at a city public works department, despite the fact that they subsequently became relevant to criminal litigation).[2] MetroHealth claims no exception for the Agreement prior to the Journal Entry of December 8, 2016, nor could the non-disclosure clause allegedly contained in the Agreement serve as an exception under R.C. 149.43(B). *State ex rel. Findlay Publ. Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 137 (1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records."); *State ex rel. Sun Newspapers v. Westlake Bd. of Edn.*, 76 Ohio App.3d 170, 173, 601 N.E.2d 173, 175 (8th Dist.1991). A contractual promise of confidentiality with respect to an otherwise public record is void *ab initio*. *Teodecki v. Litchfield Twp.*, 9th Dist. Medina No. 14CA0085-M, 2015-Ohio-

[2] Despite this holding, properly worded exceptions can protect copies of existing public, as received by another public office, *e.g.*, R.C. 109.57(D)(1)(a) (otherwise public arrest and disposition records received by BCI&I pursuant to R.C. 109.57(A)(2) and 109.60 "are not public records"); or even seal existing public records in every public office, *e.g.*, R.C. 2953.31 *et seq*. (sealing of certain convictions and arrests).

2309, ¶ 23-25. The Agreement was thus "clothed with the public records cloak" from December 31, 2014 forward.

{¶6} MetroHealth states that it is "not authorized" to release a public record that is subject to a court order allowing the record to be filed "under seal." However, since Heisig directed his records request to MetroHealth, and not to the court, MetroHealth's burden is to prove that the Journal Entry affirmatively "sealed" the Agreement at the location from where it was requested – the employee files of MetroHealth. MetroHealth relies on two documents in support: First, the Journal Entry granting "plaintiff's motion to file documents under seal," without further elaboration, and second, the Motion stating that: "Plaintiffs * * * request that this Honorable Court issue an Order permitting Plaintiffs to file under seal the [eight] documents described herein * * *.[3]" Significantly, the Motion did not ask the court to issue a "gag order" limiting the parties' disclosure of information,[4] or to order cleveland.com (a non-party) to remove from its public web site the three articles described in the Motion. The language of the Motion and Journal Entry did not expressly purport to restrict the documents outside of the court's walls, or even imply extrajudicial restriction. The scope of a claimed exception must be interpreted against the public office, with any doubt resolved in favor of disclosure, *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996). A non-exempt public record may not be withheld just because a public office believes it would be bad policy for it to release such records:

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[3] "File" means to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and dockets the document. Sup.R. 44(E).

[4] *See State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 401, 2015-Ohio-974, ¶ 32 (a writ of mandamus compelling the release of a public record is sufficient to invalidate a contrary protective order). *Compare*, *State ex rel. Cincinnati Enquirer v. Bronson*, 191 Ohio App.3d 160, 168, 2010-Ohio-5315, ¶¶ 5-6, 20 (12th Dist.) (Even where a criminal "gag order" had been issued, the issuing court must find that covered personnel records requested from township director of human resources were exempt from disclosure under one of the exceptions specified in R.C. 149.43(A)(1)(a) through (aa)).

> "'[T]he General Assembly is the ultimate arbiter of public policy.' Cf. *State ex rel. Cincinnati Enquirer*, 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163, P21. 'Respondents cannot withhold public records simply because they disagree with the policies behind the law permitting the release of these records.' *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn.*, 97 Ohio St. 3d 58, 2002 Ohio 5311, ¶ 54." *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 413, 2004-Ohio-1497, ¶ 37.

The Journal Entry, limited by its own terms to permission *to file* documents under seal, does not "prohibit" the release of the same records elsewhere. R.C. 149.43(A)(1)(v). Therefore, MetroHealth fails to meet its burden to prove that the Agreement kept in MetroHealth's files fell squarely within the wording of the Journal Entry alleged to be the exception to release. This failure is independently sufficient to determine that Heisig's public records request was denied in violation of R.C. 149.43(B).

{¶7} However, even had MetroHealth's original of the Agreement fallen within the four corners of the Journal Entry, MetroHealth has not identified a particular state law authorizing the order as an exception. While rules of practice and procedure, established under the authority of Article IV of the Ohio Constitution, are "state law" that *may* create exceptions to public records release, courts must still determine, in each case, whether the rule *does* expressly create an exception. *State ex rel. Beacon Journal Publishing Co. v. Waters,* 67 Ohio St.3d 321, 324, 617 N.E.2d 1110 (1993*)*. The *Waters* court identified wording in Crim.R. 6(E) that expressly protected the "deliberations of the grand jury," "the vote of any grand juror," and "other matters occurring before the grand jury." *Id*. However, the Supreme Court has also ruled that the prohibitions of Crim.R. 6(E) do not cover the same documents in public office records outside of the rule's express terms. *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 266-267, 685 N.E.2d 1223 (1997) (grand jury subpoena records kept by auditor of state were not secret, because he was not a person named in the rule). State laws may be worded to except records only where maintained for a particular purpose. In *State ex rel. Strothers v. Rish*, 8th Dist. Cuyahoga No. 81862,

2003-Ohio-2955, ¶ 24-32, R.C. 149.43(A)(1)(a) and (3) were found, by their terms, to permit withholding of "medical records" only where "maintained in the process of medical treatment." The respondent was ordered to reanalyze requested records maintained in a personnel file, and apply the express terms of the exception. Here, MetroHealth fails even to meet the threshold of citing any specific rule of practice or procedure as the "state law" that *may* create an exception in this case. To the contrary, MetroHealth concedes that there is no specific rule of civil procedure regarding seals. Response, page 3. I conclude that MetroHealth has not proven legal authority to withhold the requested record under a specific exception to R.C. 149.43(B).

{¶8} Finally, MetroHealth argues generally that:

> civil courts have wide authority and latitude in hearing motions and issuing orders in the cases pending before them. *See, e.g*., Ohio R. Civ. P. 7. A seal also falls within the procedure of the court and is dependent on neither the passage of time nor the status of the parties. Thus, MetroHealth has not identified any authority that would invalidate the Cuyahoga Court's order.

Id. MetroHealth's general reference to courts' "wide authority and latitude" falls well short of the requirement for a specific state law that "expressly" provides for the secrecy of the requested record. *Waters*. Civ.R. 7 contains no express language regarding confidentiality of records. While a court has general supervisory power over its own records, no local court rule or practice prevails over R.C. 149.43. *State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 372, 2004-Ohio-4952, ¶ 11; *Dream Fields, L.L.C. v. Bogart*, 175 Ohio App.3d 165, 2008-Ohio-152, ¶¶ 2, 6 (1st Dist.) ("Just because the parties have agreed that they want the records sealed is not enough to justify the sealing. If it were, the public could be barred from examining most court records."); *In re Estate of Vasko*, 10th Dist. Franklin No. 13AP-175, 2013-Ohio-4060, ¶ 2. The general appeal to the courts' authority to hear motions and issue orders fails to satisfy MetroHealth's burden to prove that the Agreement was subject to prohibition from release under "state law."

{¶9} Although MetroHealth does not argue that the Agreement in its hands is a "court record," I note that public access to court records is governed by Sup.R. 44-47. *Cleveland Constr., Inc. v. Villanueva*, 186 Ohio App.3d 258, 262, 2010-Ohio-444, ¶ 17 (8th Dist.2010). "Court records are presumed open to public access." Sup.R. 45(A); *City of Mayfield Heights v. M.T.S*., 8th Dist. Cuyahoga No. 100842, 2014-Ohio-4088, ¶ 8, fn. 1; *Highlander at* ¶ 10. On motion or upon its own order a court may restrict public access to a case document under Sup.R. 45(E). "Case document" means a document submitted to a court or filed with a clerk of court in a judicial action or proceeding. Sup.R. 44(C)(1). Local rules cannot be inconsistent with these rules. Sup.R. 5(A). If Heisig had requested the Agreement from the common pleas court as a court record, rather than as he did from MetroHealth as an employee record, the remedy for denial would have been an action in mandamus pursuant to Sup.R. 47(B). *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328.

{¶10} Finally, R.C. 149.43(B)(1) provides that "[i]f 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." MetroHealth may therefore redact any specific information within the Agreement that is a non-record, such as the home address of an employee, or that is specifically excepted, such as Social Security numbers. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005 Ohio-4384, ¶ 25; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188 (1993); Sup.R. 44(C)(2)(b) and (H). Any such redaction would be subject to further judicial review.

{¶11} Upon consideration of the pleadings and attachments, I find that Heisig has established by clear and convincing evidence that the release and separation agreement of December 31, 2014 between MetroHealth and Hills was a public record pursuant to R.C. 149.43(A). I further conclude that the failure of MetroHealth to provide

the Agreement in response to Heisig's requests, in the absence of a valid exception to release, denied Heisig access to a public record in violation of division (B) of section 149.43 of the Revised Code. Accordingly, I recommend that the court issue an order GRANTING Heisig's claim, and which 1) directs MetroHealth to provide Heisig with a copy of the Agreement, and 2) provides that Heisig is entitled to recover from MetroHealth the costs associated with this action, including the twenty-five dollar filing fee. R.C. 2743.75(F)(3)(b).

{¶12} *Pursuant to R.C. 2743.75(F)(2), within seven business days after receiving this report and recommendation, either party may file a written objection with the clerk of the Court of Claims of Ohio. Any objection to the report and recommendation shall be specific and state with particularity all grounds for the objection.*

JEFFERY W. CLARK
Special Master

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Sent to S.C. Reporter 12/10/18