ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. **Motor Carrier Service, Inc.** Relator, v. **Mike Rankin, Ohio BMV and Thomas P. Charles, ODPS,** Respondents.	:	Case No. 2012-1394 Original Action in Mandamus
State ex rel. **Motor Carrier Service, Inc.** Appellant-Relator, v. **Carolyn Y. Williams, Ohio BMV and Thomas J. Stickrath, ODPS,** Appellees-Respondents.	:	Case No. 2012-1264 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 10AP-1178

RELATOR-APPELLANT MOTOR CARRIER SERVICE, INC.'S MERIT BRIEF

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Respondents-Appellee Mike Rankin, Ohio Bureau of Motor Vehicles and Thomas P. Charles, Ohio Department of Public Safety

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I. INTRODUCTION

This consolidated case[1] involves repeated violations of Ohio's public records law by Respondents-Appellees the Ohio Department of Public Safety ("ODPS") and the Ohio Bureau of Motor Vehicles ("BMV") (collectively, "Respondents"). On multiple occasions in response to multiple public records requests by Relator-Appellant Motor Carrier Service, Inc. ("MCS"),[2] Respondents have refused to provide MCS with unredacted copies of certain of its employee driving records, at cost, in violation of R.C. § 149.43, on the grounds that the federal and state Driver's Privacy Protection Acts, 18 U.S.C. § 2721 and R.C. § 4501.27 (collectively, the "DPPA") prohibit such disclosures to MCS under Ohio's public records law. Instead, Respondents have argued that Relator must pay the $5.00 certified abstract fee pursuant to R.C. § 4509.05 and O.A.C. § 4501:1-12-02 to obtain an unredacted copy of the record with no justification for this requirement and despite the fact that the DPPA expressly permits certain entities such as MCS to obtain personal information in connection with an individual's motor vehicle record for certain purposes.

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[1]Pursuant to Rule 10.7 of the Rules of Practice of the Supreme Court of Ohio, Respondents contemporaneously submit herewith a submission entitled Relator-Appellant Motor Carrier Service, Inc.'s Presentation of Evidence (hereinafter Relator's Presentation of Evidence) which contains copies of the evidence which Relator relies upon in the original action, Case No. 2012-1394 (which has been consolidated with the appeal from the Tenth District Court of Appeals, Case No. 2012-1264). It should be noted that the original affidavits (and their exhibits) have been previously submitted to this Court (either attached to the Complaint as required by Rule 10.4(B) of the Rules of Practice of the Supreme Court of Ohio or as a part of the record on appeal from the 10th District Court of Appeals).

[2]It should be noted that MCS has also been involved in an earlier challenge to the BMV's policy regarding public records requests. MCS, as a member of the Ohio Trucking Association, was involved in prior litigation in the Franklin County Court of Common Pleas styled *Ohio Trucking Ass'n v. Director Henry Guzman*, No. 09CVH-07-10813. In that case, the Ohio Insurance Institute (along with the Ohio Trucking Association and the Professional Insurance Agents Association of Ohio), on behalf of its member Grange Mutual Casualty Company, brought a declaratory judgment action against Respondents challenging its decision to refuse the production of unredacted records in response to public record requests from DPPA-authorized requesters. At the time that action was filed, the BMV had not yet enacted O.A.C. 4501:1-12-02. Its decision was based solely on an internal policy decision. On June 18, 2010, the trial court, without ever reaching the merits, entered judgment in favor of the BMV holding that the Ohio Insurance Institute's sole remedy was a mandamus action. The Tenth District Court of Appeals affirmed that decision on August 31, 2011. *See Ohio Trucking Ass'n v. Director Cathy-Collins Taylor*, No. 10APE-07-673.

Thus, Respondents position is not about privacy; it is about money. Respondents stand to lose a significant stream of revenue if this Court determines that Respondents cannot require MCS (and all other DPPA-authorized requesters) to pay the $5.00 certified abstract fee to obtain an unredacted copy but instead, in accordance with Ohio's public records laws, must provide unredacted, uncertified copies of driving records at cost – which according to the BMV's public records policy is $.05 per page for documents over 40 pages (and no charge for documents under 40 pages).

MCS is an entity permitted by the DPPA to receive personal information about an individual that Respondents have obtained in connection with a motor vehicle record. Specifically, the DPPA allows MCS to obtain an unredacted copy of employee driving records to verify information relating to the employee's commercial driver's license that is required under the Commercial Motor Vehicle Safety Act of 1986, 100 Stat. 3207-170, 49 U.S.C. § 2701, *et seq.* *See* 18 U.S.C. § 2721(b)(9) and R.C. § 4501.27(B)(j).

Citing a self-serving and unenforceable administrative rule, O.A.C. § 4501:1-12-02, Respondents argue that MCS cannot obtain an unredacted copy of a driving record in response to a public records request – period. Instead, Respondents contend that MCS may only obtain an unredacted copy of its employee's driving record by paying the $5.00 fee required by R.C. § 4509.05 for a ***certified*** copy of the driving record .[3] In other words, Respondents require MCS to pay for the act of certification[4] to obtain the same information contained in the public record,

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[3] It should be noted that litigation challenging the constitutionality of R.C. 4509.05 is currently pending before the Court in a case styled *Ohio Trucking Ass'n v. Thomas P. Charles*, No. 2011-1757. Oral argument was held on July 11, 2012.

[4] During the July 11, 2012 oral argument in *Ohio Trucking Ass'n v. Thomas P. Charles*, No. 2011-1757, counsel for Respondents admitted that the BMV's $5.00 driving record abstract fee is a fee for certification of the record:

> ***The fee here is for certification not for getting this information in and of itself***, because people can get this information in other forms at little or no cost at all. So, when someone is paying a certified abstract fee, they're choosing to seek this information in certified form with the BMV's assurance on the document

which, as a practical matter, requires MCS to pay significantly more than the actual cost of a copy – in violation of Ohio's public records statute[5] – and to purchase a product it does not want.

An analysis of the interplay between Ohio's public records law and the DPPA makes clear that Respondents' position, as promulgated in O.A.C. § 4501:1-12-02, violates Ohio's public records law:

- MCS is authorized to request unredacted copies of its employees driving records under the DPPA.
- MCS, a DPPA-authorized requester, has made proper public records requests for copies of its employee driving records under R.C. § 149.43.
- It is undisputed that the driving records are defined as public records under R.C. § 4501.34.
- Disclosure of the records to MCS, a DPPA-authorized requester, is not prohibited by federal or state law.
- Ohio's public records law mandates the production of these records to MCS at cost.

In other words, O.A.C. § 4501:1-12-02 – which prohibits MCS from ever receiving an unredacted copy of its employee's driving record in response to a public records request under R.C. § 149.43 – conflicts with Ohio's public records statute and, as a result, is an invalid regulation under Ohio law. In her dissent, Judge French correctly recognizes this conflict:

> ***BMV's rule goes too far***, however, in its requirement that a requester eligible under R.C. 4501.27(B)(2) or (B)(3) choose either a public records request to receive a redacted copy or the completion of form BMV 1173, request for a certified abstract, and payment of a $5 fee to get a full copy. Because BMV's records are public records, ***BMV must treat every request as a public records request under R.C. 149.43 and impose any limitations accordingly. BMV's current rule fails to do so.***

Decision, State ex rel. Motor Carrier Service, Inc. v. Carolyn Williams, No. 10AP-1178, at ¶ 30 (Jun. 12, 2012) (emphasis added).

> that this is a true and accurate record of one's accidents and motor vehicle violations in the past.

See Transcript of Oral Argument, July 11, 2012 (emphasis added), Relator's Presentation of Evidence, at Tab F.

[5] R.C. § 149.43(B) states, in pertinent part, that "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." (Emphasis added).

Perhaps more telling, however, is that Respondents have previously advanced MCS's position as their own. In *Roth v. Guzman*, 650 F.3d 603 (6th Cir. 2011), Respondents successfully argued that Ohio's public records laws ***required*** them to provide unredacted driving records to a DPPA-authorized requester seeking them pursuant to a proper public records request, and that Respondents ***were not*** required to confirm that the requester was actually authorized under the DPPA. Here, in stark contrast, Respondents take the opposite approach: they contend that MCS did not prove it was authorized under the DPPA to obtain the records, and that MCS can only obtain the information requested by paying for a certified abstract. Respondents' inconsistency is not surprising; in *Roth*, Respondents argued that Ohio's public records law mandates disclosure of driving record information to DPPA-authorized requesters in order to avoid civil and potential criminal sanctions under the DPPA. Respondents were seeking to protect their ability to provide records to requesters willing to pay a bulk rate for the public records. Yet here, when faced with the loss of revenue generated by the $5.00 per certified abstract fee set forth in R.C. § 4509.05, Respondents argue the opposite position – the argument made by the losers in *Roth*.

Respondents have thus adopted whichever legal argument is expedient at the time to protect its unlawful revenue stream. Such gamesmanship must not be permitted. Having adopted a position in prior litigation that is completely inconsistent with their position now, they should be estopped from pursuing their current position. As pointed out by Respondents in *Roth*, MCS, as a DPPA-authorized requester, is entitled to obtain unredacted, uncertified copies of its employee driving records at cost from Respondents.

Thus, MCS can demonstrate by clear and convincing evidence that it is entitled to the requested records, and any exceptions to disclosure must be strictly construed against

Respondents. As a result, in this consolidated action, MCS asks this Court to (1) issue a writ of mandamus compelling Respondents to produce the requested unredacted employee driving record pursuant to Ohio's public records law, (2) reverse the lower court's decision denying MCS a writ of mandamus compelling Respondents to produce similar unredacted employee driving records under Ohio's public records law, and (3) award MCS the court costs and reasonable attorneys fees which it has incurred in pursuing these mandamus actions.

II. STATEMENT OF FACTS

The BMV is a division of ODPS and subject to its policies and rules. ODPS's public records policy requires that the BMV provide responses of less than forty pages to public records requests gratis, while records containing more than forty pages are provided at five-cents per page. *See* ODPS Policy No. DPS-400.04, Administration of Public Records Requests, 12/16/2008. Stipulation of Evidence, Tab 5, *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin and Thomas Charles*, No. 10APD-12-1178 (10th Dist. Apr. 12, 2011), Relator's Presentation of Evidence at Tab D.

This policy notwithstanding, on three separate occasions, the BMV refused to provide MCS with an unredacted copy of employee driving records, at cost, in response to proper public records requests by MCS.

A. The First Public Records Request

On August 31, 2010, MCS submitted a public records request to the BMV requesting a copy of the complete driving record of one of its employees. Affidavit of Keith Tuttle, at ¶ 3, Exhibit 1, Relator Motor Carrier Service's Evidentiary Submission, *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin and Thomas Charles*, No. 10APD-12-1178 (10th Dist. May 20,

2011), Relator's Presentation of Evidence at Tab A.[6] MCS submitted this request in its capacity as an employer to verify information relating to its employee's commercial driver's license as required under the "Commercial Motor Vehicle Safety Act of 1986," 100 Stat. 3207-170, 49 U.S.C. § 2701, et. seq. *Id.* A true and accurate copy of MCS's August 31, 2010 public records request is attached to Mr. Tuttle's Affidavit as Exhibit 1. MCS is authorized to obtain unredacted driving records for its employees under the DPPA because it is an employer seeking to obtain or verify the information relating to a holder of a commercial driver's license that is required by law.

On September 20, 2010, the BMV refused to provide a complete unredacted driving record to MCS regarding its employee. Instead, in response to MCS's proper public records request, the BMV produced a redacted copy of the requested record. In a letter dated September 20, 2010, Anne Vitale, Associate Legal Counsel at ODPS, explained the redaction:

> The record(s) have been redacted pursuant to Ohio Revised Code section 149.43(A)(1)(v) and the federal and state Driver's Privacy Protection Acts, 18 U.S.C. 2721-2725 and R.C. 4501.27 (collectively, the "DPPA"), which prohibit the disclosure of any personal information about an individual that the Bureau of Motor Vehicles obtains in connection with a motor vehicle record, except to certain statutorily exempted requesters for certain statutorily defined purposes.

A true and accurate copy of the September 20, 2010 Letter from Ms. Vitale is attached to Mr. Tuttle's Affidavit as Exhibit 2, Relator's Presentation of Evidence, at Tab A.

[6] The Affidavit of Keith Tuttle was initially submitted with Relator Motor Carrier Service's Evidentiary Submission in a case styled *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin, No. 10APD-12-1178,* in the Tenth District Court of Appeals on May 20, 2011.

B. The Second Public Records Request

On February 1, 2012, MCS submitted a second public records request (which included BMV Form 1173)[7] to the BMV seeking an unredacted, non-certified copy of one of its employee's driving record. Affidavit of John Fritzius, at ¶ 4, *see* Complaint; Relator's Presentation of Evidence at Tab B. MCS submitted this request to verify information relating to its employee's commercial driver's license that is required under the "Commercial Motor Vehicle Safety Act of 1986," 100 Stat. 3207-170, 49 U.S.C. § 2701, *et. seq.* Fritzius Aff., at ¶ 5. A true and accurate copy of the February 1, 2012 Letter from Keith Tuttle to Mike Rankin is attached to Mr. Fritzius's Affidavit as Exhibit B-1, Relator's Presentation of Evidence, at Tab B.

On February 3, 2012, the BMV responded to MCS's February 1, 2012 public records request by refusing to provide MCS with an unredacted copy of the driving record on the grounds that such a disclosure of information is barred by the federal and state DPPAs and O.A.C. § 4501-1-12-02(A)(1). Fritzius Aff., at ¶ 6. A true and accurate copy of the February 3, 2012 Letter from Lora Manon to Keith Tuttle is attached to Mr. Fritzius' Affidavit as Exhibit B-2, Relator's Presentation of Evidence, at Tab B.

C. The Third Public Records Request

On June 29, 2012, MCS submitted a third public records request to the BMV seeking a copy of the complete driving record of one of its employees. Fritzius Aff., at ¶ 7. A true and accurate copy of the June 29, 2012 Request is attached to Mr. Fritzius's Affidavit as Exhibit B-3, Relator's Presentation of Evidence, at Tab B.

This request was supplemented by MCS on July 3, 2012, to include an unintentionally omitted signature from Part A of the OBMV Record Request, which completed the Record

[7] A copy of BMV Form 1173 is attached to Relator's Presentation of Evidence at Tab E. Respondents consented to its addition to the Stipulation of Evidence, *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin and Thomas Charles*, No. 10APD-12-1178 (10th Dist. Apr. 12, 2011), in footnote 5 of Brief of Respondents (May 26, 2011).

Request. *Id.* As a DPPA-authorized requester, MCS again submitted this request to verify information relating to this employee's commercial driver's license that is required under the "Commercial Motor Vehicle Safety Act of 1986," 100 Stat. 3207-170, 49 U.S.C. § 2701, et seq.

On July 3, 2012, the BMV once again refused to provide a complete unredacted driving record to MCS regarding its employee. Fritzius Aff., at ¶ 8. Instead, the BMV produced a redacted copy of the requested record to MCS in response to its public records request:

> The record for Mr. Norden provided in response to your public records request has been redacted pursuant to Ohio Revised Code section 149.43(A)(1)(v), and the federal and Ohio Driver's Privacy Protection Acts, found respectively at 18 U.S.C. 2721-2725 and Revised Code section 4501.27; and collectively referred to as the "DPPA."

Fritzius Aff., at ¶ 9. A true and accurate copy of the July 3, 2012 Letter is attached to Mr. Fritzius's Affidavit as ExhibitB-4, Relator's Presentation of Evidence, at Tab B.

D. <u>The BMV Has Consistently Failed to Provide an Unredacted Driving Record Unless the Requester Pays the $5.00 Fee for a Certified Driving Abstract</u>

Not only has the BMV consistently refused to provide unredacted driving records to MCS regarding its employees pursuant to MCS's proper public records requests, it has taken the position that it will only produce an unredacted driving record if MCS pays the $5.00 fee for a certified driving abstract required by R.C. § 4509.05 – which is different product than an un-certified record. MCS, simply, does not want or need these records to be certified and should not be forced to pay for a certification stamp.

On December 4, 2009, Robin Mathews, Associate Legal Counsel at ODPS, sent a letter to LaVawn Coleman at Grange Mutual Casualty Company ("Grange"), another DPPA-authorized requester, in which the BMV refused to produce an unredacted copy of an insured's driving record in response to Grange's November 17, 2009 public records request. Stipulation of Evidence, Tabs 3 and 4, *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin and Thomas*

Charles, No. 10APD-12-1178 (10th Dist. Apr. 12, 2011), Relator's Presentation of Evidence at Tab D. In this denial letter, Ms. Mathews advised Grange that in order to obtain an unredacted copy, Grange must request an abstract pursuant to R.C. § 4509.05:

> If you would like to receive an unredacted copy of the record, you may request an abstract pursuant to R.C. 4509.05, accompanied by the appropriate fee. In responding to requests for abstracts, the Department has established procedures to document the ability of requesters to receive personal information protected by the DPPA. I understand your company has an established electronic account with the BMV for this purpose.

A copy of the December 4, 2009 Letter from Robin Mathews is attached to the Stipulation of Evidence, Tab 3, *State ex rel. Motor Carrier Services, Inc. v. Mike Rankin and Thomas Charles*, No. 10APD-12-1178 (10th Dist. Apr. 12, 2011), Relator's Presentation of Evidence at Tab D. As a result, the earlier Companion Litigation was filed.[8]

Thus, using O.A.C. § 4501:1-12-02(D)(2) as justification, the BMV admittedly would have provided MCS with an unredacted copy of its employee's driving record if it had requested a certified driving abstract and paid the $5.00 fee required by R.C. 4509.05:

> The BMV cannot, by law, provide you with a complete record unless the required fee of five dollars ($5.00) is provided along with the BMV Form 1173.

See February 3, 2012 and July 3, 2012 Letters from Lora Manon, Fritzius Aff. at Exhibits B-2 and B-4, Relator's Presentation of Evidence at Tab B.

On January 25, 2012, MCS, through a courier, submitted another public records request and BMV Form 1173 to the BMV seeking an unredacted copy of an employee driving record. Fritzius Aff. at ¶ 10; Jarrett Aff. at ¶ 2, Relator's Presentation of Evidence at Tabs B and C. When submitting this public records request, the courier was told that he had to pay the $5.00 driving record abstract fee and the $3.50 BMV service fee along with his public records

[8] See footnote 1, *infra.*

submission and the submission of BMV Form 1173. Jarrett Aff. at ¶ 3. After paying the fees, the courier was given an unredacted, ***certified*** copy of MCS's employee's driving record. Jarrett Aff. at ¶ 4. The courier observed that after submitting Form 1173 and paying the requisite fee, the clerk at the BMV did nothing more than accept the form and the fee and have his supervisor initial the form before giving him a certified copy of the record. Jarrett Aff. at ¶ 5. Upon receipt of this request, the BMV did nothing to verify MCS's identity, did nothing to research whether MCS was in fact the employer of the employee, and did nothing to ensure that MCS was in fact requesting the record to verify its employee's driving record. Jarrett Aff. at ¶ 6. The BMV did not even ask the courier for identification or otherwise confirm that he was authorized to make the request on MCS's behalf. Jarrett Aff. at ¶ 7.

E. Procedural History

1. Appeal from Tenth District Court of Appeals' June 12, 2012 Decision

Seeking to remedy the first denied request, on December 21, 2010, MCS filed a mandamus action styled *State ex rel. Motor Carrier Service, Inc. v. Mike Rankin, et al.,* Case No. 1OAPD-12-1178, in the Tenth District Court of Appeals. MCS argued that Ohio's public records statute, R.C. § 149.43, permits it to obtain an unredacted, non-certified copy of driving records rather than pay a $5.00 fee for a certified abstract pursuant to R.C. § 4509.05. MCS further argued that O.A.C. § 4501:1-12-02 conflicts with R.C. § 149.43, and requested an order that the Ohio Administrative Code provision be rendered unenforceable.

On June 12, 2012, a 2-1 majority of the Franklin County Court of Appeals denied MCS's requested writ of mandamus. MCS appealed this decision to this Court on July 26, 2012, in Case No. 2012-1264.

2. Original Mandamus Action

On August 14, 2012 MCS filed a separate original action in this Court, captioned *State ex rel. Motor Carrier Service, Inc. v. Mike Rankin, et al.*, requesting (1) a writ of mandamus compelling Respondents to produce the driving records requested by MCS on February 3, 2012 and July 3, 2012; (2) an order that Respondents produce an unredacted, non-certified copy of a driving record in response to a public records request to any DPPA-authorized requester at cost; and (3) an order that O.A.C. § 4501:1-12-02, as it relates to public records, conflicts with R.C. § 149.43, and is therefore unenforceable.

3. Consolidation

By order of this Court, these two cases were consolidated on October 1, 2012.

III. ARGUMENT

A. Respondents' Refusal to Provide a Copy of an Unredacted Driver's Record in Response to a Public Records Request by an Authorized DPPA Requester Violates Ohio's Public Records Law.

In determining a public-records mandamus claim, this Court must construe R.C. § 149.43 liberally in favor of broad access, and resolve any doubt in favor of disclosure. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376 (1996). R.C. § 149.43(B)(1) provides that Respondents must provide public records pursuant to a proper request, ***unless*** the release is prohibited by state or federal law. *See* R.C. § 149.43(A)(1)(v). Because the documents requested are public records under R.C. § 149.43, and neither federal nor state law prohibits their disclosure, Respondents have violated Ohio's public records law, and must disclose the requested records pursuant to R.C. § 149.43.

1. All Documents in the Registrar's Possession Are Public Records

Ohio law is clear: "all documents in the registrar's possession are public records." R.C. § 4501.34. The term "public record" is defined by statute, along with certain statutory exceptions to the general definition – only one of which Respondents attempt to implicate here:

> "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.... "Public record" does not mean any of the following:
>
> ***
>
> (v) Records the release of which is prohibited by state or federal law.

R.C.§ 149.43(A)(1)(v). Thus, only if state or federal law operates to prohibit the disclosure of a complete driver's record, such record must be disclosed pursuant to a proper public records request. As explained below, there is no such prohibition, and the complete driver's record must be disclosed.

2. Neither Federal Nor State Law Operates to Prohibit Respondents' Disclosure of a Complete Driver's Record to an Authorized Requester

Exceptions to the disclosure of public records must be ***strictly construed*** against the custodian of public records, and the burden is upon the custodian to prove the exception they advance. *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 25; *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169 (1994). "A custodian does not meet this burden if it has not proven the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, ¶ 10. Respondents cannot meet this burden.

Neither the state nor federal DPPA removes a driver's record from what is considered a public record. Instead, each specifically allows for the disclosure of certain information to

persons with a permissible purpose, i.e., DPPA-authorized requesters. *See* 18 U.S.C. § 2721(b) (allowing the disclosure of a complete driver's record in connection with certain permissible uses); R.C. § 4501.27(B)(2) (same).[9] In her dissent, Judge French correctly concluded:

> BMV argues that state and federal law prohibit the release of individual driving records. I disagree. R.C. 4501.27(B)(2) states that BMV "may disclose personal information, other than sensitive personal information, about an individual" as long as the disclosure is for certain purposes, including for use in the normal course of business by a legitimate business and for a specific purpose. R.C. 4501.27(B)(2)(c). Therefore, while state and federal law certainly ***condition*** the release of personal information contained within a driving record, state and federal law do not ***prohibit*** the release of that information.

Decision, State ex rel. Motor Carrier Service, Inc. v. Carolyn Williams, No. 10AP-1178, at ¶ 28 (Jun. 12, 2012) (emphasis added).

Thus, short of prohibiting the release of a complete driver's record, these laws allow such release upon the simple showing that the use of the sought-after driver's record is permissible. *See* OBMV Record Request form, Relator's Presentation of Evidence, at Tab E.

Moreover, Ohio's public records laws ***do allow*** Respondents to ask the requester the purpose for which it seeks the record (which MCS voluntarily has provided) prior to releasing the record. Because the federal and state DPPAs limit who may obtain certain information, R.C. 149.43(B)(4) is implicated. That section provides as follows: "[u]nless specifically required or

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[9]In addition to MCS, an Ohio trucking company, (and the insurance and trucking entities who are parties to the companion litigation), numerous other entities could be negatively impacted by the BMV's current position prohibiting the disclosure of unredacted records to DPPA-authorized requesters. For instance, both DPPAs provide for the disclosure of personal information "[f]or use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals. 18 U.S.C. § 2721(b)(5) and R.C. § 4501.27(B)(2)(f). The BMV's current interpretation of its obligations under the Public Records laws as expressed in its December 4, 2009 response to Grange's public records request would render such permissible research activities relating to such important topics as motor vehicle and driver safety impossible as a practical matter. For instance, if a researcher, such as a University statistician, a daily newspaper or a lawmaker, attempts to research a licensure issue related to 5,000 truck drivers, the cost of such research under the BMV's current policy would most certainly be prohibitive. At $5.00 a record (the fee charged to obtain a certified record which is the only current method under BMV policy to obtain the information), the cost of such research would be $25,000.00. If the same researcher, however, could request the same 5,000 records from the BMV via a public records request, the cost would be only $250.00.

authorized by state or federal law . . . no public office or person responsible for public records may limit or condition the availability of public records by requiring the disclosure of the requester's identity or the intended use of the requested public record." R.C. § 149.43(B)(4). Under this section, because the federal and state DPPAs limit who may obtain certain information, Respondents are expressly allowed to ask for the identity and intended use prior to releasing this information.

Indeed, ODPS' public records policy explicitly requires that, upon receipt of a public records request, it "ask that the request be made in writing and include the following: the specific public records requested; the requester's identity; and the intended use of the information requested." *See* ODPS Policy No. DPS-400.04 Administration of Public Records Requests, 12/16/2008, at paragraph E2, Relator's Presentation of Evidence at Tab D. Thus, ODPS' own policy requires its employees to attempt to obtain the identity and intended use of the information requested notwithstanding the fact that a requester is not required to give it.

Furthermore, BMV employees regularly solicit and analyze information regarding the identity and intended use of driving record abstracts when processing requests for certified driving record abstracts under R.C. § 4509.05. Indeed, a comparison of Part C of the OBMV Record Request Form with the information contained in MCS' February 1, 2012 and July 3, 2012 public records requests, shows that MCS provided the identical information that the BMV requires from DPPA requesters seeking certified driving record abstracts. The only difference is the fee. Respondents do not want to provide an unredacted copy of a driving record abstract for $.05 per page when their self-serving regulation requires requestors to purchase a certified copy at $5.00 per abstract as set forth in R.C. § 4509.05.

Respondents' argument boils down to this: because federal and state law touch on the issue of which portion of a driver's record can be disclosed, and to whom, and because the BMV is not allowed to require the identity of a public records requester or the purpose of the request (even though its policy is to seek this information anyway), an unredacted driving record is outside the purview of Ohio's public records law. In short, the BMV prohibits a DPPA-authorized requester seeking a public record who voluntarily identifies herself and her purpose from obtaining an unredacted copy of a driver's record. This result is not ordained by Ohio or federal law. *See* 18 U.S.C. § 2721(b) (allowing the disclosure of a driver's record in connection with certain permissible uses); R.C. § 4501.27(B)(2) (same). Certainly short of prohibiting the release of a complete driver's record, these laws allow such release upon the simple showing that the use of the sought-after driver's record is permissible. *See* BMV Form 1173, Relator's Presentation of Evidence, at E.

Simply, neither federal nor state law prohibits the disclosure of an unredacted driver's record to a proper party with a proper purpose. Ohio's public records law thus does not exclude driver's records from what is considered a "public record." Accordingly, when a public records request is properly made for a driver's record, it must be provided pursuant to R.C. § 149.43 and the ODPS public records policy at $.05/page after forty pages — not at the $5.00 certified abstract fee.

B. O.A.C. § 4501:1-12-02 Conflicts With R.C. § 149.43, and Therefore, Is an Invalid Regulation

O.A.C. § 4501:1-12-02 is the administrative regulation enacted by the BMV on May 13, 2010 to codify the position that Respondents had taken in earlier litigation in the Franklin County Court of Common Pleas, entitled *Ohio Trucking Ass'n v. Ohio Dep't of Public Safety*, Case No. 09CVH-07-10813, *see, infra* fn. 1, in which the BMV had refused to provide an

unredacted copy of a driving record to Grange Mutual Casualty Company, another DPPA-authorized requester, who had made a public records request on November 17, 2009, seeking an unredacted copy of the driving record for one of its insureds. O.A.C. § 4501:1-12-02(D) purports to govern the BMV's disclosure of confidential information as follows:

> (D) A requester, including a data account holder with the BMV, may request release of a motor vehicle record pertaining to a specified person by either submitting a public records request ***or*** by completing form BMV1173 and submitting any required documentation.
>
> (1) Upon the receipt of a public records request, the BMV will promptly prepare and make available for inspection a motor vehicle record to any person at all reasonable times during regular business hours, or shall make copies of the motor vehicle record available at cost within a reasonable period of time.
>
> (a) The BMV will ***not*** provide personal information in response to a public records request for a motor vehicle record. The BMV will provide a redacted copy of the motor vehicle record.
>
> (b) A requester will be charged the appropriate fees authorized by law and the department of public safety's public records policy.
>
> (c) The BMV shall not limit or condition the availability of a motor vehicle record by requiring the disclosure of the requester's identity or the intended use of the requested public record. The BMV may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identify or intended use would benefit the requester by enhancing the ability of the BMV to identify, locate, or deliver the public records sought by the requester.
>
> (2) Upon receipt of a request for a specific motor vehicle record submitted on form BMV 1173, ***and accompanied by the fees statutorily authorized***

> ***in the Revised Code***,[10] the BMV will provide personal information to requesters authorized by law to receive such information.

O.A.C. § 4501:1-12-02(D) (Emphasis added). This regulation effectively prohibits a DPPA-authorized requester from ever obtaining an unredacted, uncertified copy of the record pursuant to Ohio's public records laws. Indeed, it forces the DPPA-authorized requester to pay a $5.00 fee for a certified copy – a product which is not being requested, nor wanted. Because the regulation conflicts with Ohio's public records statute, it is an invalid regulation.

Under O.A.C. § 4501:1-12-02(D)(1), despite the fact that "***all*** documents in the registrar's possession are public records," R.C. § 4501.34 (emphasis added), Respondents have, by rulemaking fiat, determined (contrary to Ohio's Public Records Act enacted by the Ohio General Assembly in R.C. § 149.43) that it will ***never*** provide an unredacted copy of a certain type of public record in response to a public records request made under R.C. § 149.43 – a driving record abstract containing personal information. In its correspondence to MCS denying its requests for an unredacted record, the BMV explained that the requested records had been redacted pursuant to R.C. § 149.43(A)(1)(v), the federal and state Driver's Privacy Protection Acts, 18 U.S.C. §§ 2721-2725 and R.C. § 4501.27, and O.A.C. § 4501:1-12-02. Letters from Lora Manon to Keith Tuttle (February 3, 2012 and July 3, 2012), Fritzius Aff., Exhibits B-2 and B-4, Relator's Presentation of Evidence, at Tab B.

As discussed above, this position is wholly inconsistent with the plain language of R.C. §§ 149.43 & 4501.34, and the federal and state DPPAs, which, when read together, mandate disclosure of the unredacted records to MCS. Moreover, as discussed above, Ohio's public records laws allow the BMV to ask MCS the purpose for which it seeks the record (which

[10] R.C. § 4509.05 establishes a $5.00 fee per certified abstract. BMV Form 1173 only reflects this $5.00 fee and nowhere indicates that its use is required for a public records request, ***or*** that its use is for anything other than payment for a ***certified*** abstract (as opposed to a non-certified copy of the record).

MCS voluntarily provided) prior to releasing the record. *See* R.C. 149.43§ (B)(4) and *infra* section III.A.2.

Simply, because neither federal nor state law prohibit the disclosure of an unredacted driver's record to a proper party with a proper purpose and because Ohio's public records law does not exclude a driver's records from what is considered a "public record," when a public records request is properly made by a DPPA-authorized requester for an unredacted driver's record, it must be provided pursuant to R.C. § 149.43 and ODPS's public records policy at $.05/page after forty pages. Respondents violate state public records law when requiring public records requestors pay the $5.00 certified abstract fee as provided in the BMV's invalid regulation.

O.A.C. § 4501:1-12-02(D) conflicts with R.C. § 149.43, and as a result, O.A.C. § 4501:1-12-02(D) is an invalid regulation. *See Dixon v. Brown*, 8th Dist. No. 66931, 1996 Ohio App. LEXIS 1999 (May 16, 1996) (citing *Ohio Council 8, Am. Fed. of State, Cty. & Mun. Emp., AFL-CIO v. Cincinnati*, 69 Ohio St.3d 677, 681 (1994) ("[t]hough administrative rules are permitted to facilitate an administrative agency's actions, the agency is not permitted to issue rules that are unreasonable or in clear conflict with statutory enactments that cover the same subject matter.")); *see also Chicago Pacific Corp. v. Limbach*, 65 Ohio St.3d 432, 435 (1992); *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St.3d 232, 234 (1988); *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125 (1948).

C. **Respondents are Estopped From Arguing that the Federal and/or State DPPA Prohibits Them From Producing An Unredacted Driving Record To MCS, a DPPA-authorized requester, under Ohio's public records statute, R.C. § 149.43**

On June 13, 2011, the Sixth Circuit Court of Appeals issued a decision in *Roth v. Guzman*, 650 F.3d 603 (6th Cir. 2011), in which Respondents prevailed by advancing the position they now challenge.

In *Roth*, plaintiffs brought an action on behalf of themselves and other similarly situated drivers licensed in Ohio, whose personal information as defined by the federal DPPA was disclosed, sold, or otherwise disseminated by agents of the ODPS and/or the BMV. 650 F.3d at 607. Specifically, the plaintiffs alleged that a Texas corporation, Shadowsoft, Inc. ("Shadowsoft"), which specializes in public records database distribution, unlawfully acquired a large database from the ODPS and/or BMV that contained personal information belonging to hundreds of thousands of drivers licensed in Ohio. *Id.* at 607–08. In response, defendants (the Respondents in the instant cases) admitted that the BMV disclosed personal information to Shadowsoft ***in response to a public records request***, but that its conduct did not violate plaintiff's rights under the DPPA since the disclosure was made for a purportedly permissible purpose under the DPPA – for use in the "normal course of business" – under 18 U.S.C. § 2721(b)(3). *Id.* at 608. Indeed, as discussed below, defendants argued that, once they received a public records request from someone purporting to be a DPPA authorized requester, ***they had no choice*** but to provide the sought-after documents pursuant to Ohio's public records law. The Sixth Circuit Court of Appeals agreed with ODPS and BMV, reversed the decision of the trial court, and remanded the case for entry of judgment in favor of defendants.

In *Roth*, the ODPS and BMV (making essentially the same argument that MCS makes here) argued that Ohio's public records law ***mandates*** the State's disclosure of the requested information:[11]

- When a legitimate business (or its agent, employee, or contractor) requests personal information for the use identified in § 2721(b)(3), Ohio public records law ***mandates*** the State's disclosure of the information. *See* Ohio Rev. Code § 149.43 (mandating disclosure of any information that may be legally disclosed). *Guzman Brief,* at 5 (emphasis added).

- *See* also *Guzman Reply,* at 4 ("Shadowsoft is a legitimate business, and requested information for a purpose authorized by the DPPA. Accordingly, the state officials were ***required*** to disclose the information under Ohio's Public Records Act. *See* R.C. § 149.43 (mandating public disclosure of information whenever disclosure is not otherwise prohibited by law).") (emphasis added).

- Defendants in *Roth* also argued, successfully, that the State is not required to verify a requester's stated use:

  > "But neither the DPPA's plain language nor any case interpreting the Act obligates state officials to verify a requesting entity's stated use for personal information." *Guzman Brief,* at 15.

- *See* also *id.* at 19 ("Legislative history further confirms that the DPPA does not obligate States to verify a requesting entity's intended use for personal information. In fact, it suggests that the DPPA does not even require States to ask *why* requesters are seeking the requested information under § 2721(b)(3)." (Emphasis in original).

- *Guzman Reply,* at 1 ("The DPPA's minimal requirements do not oblige state officials to confirm the legitimacy of a business requesting information or of a request before disclosing personal information under the business-use exception.").

In *Roth,* the Sixth Circuit agreed with the defendants' position, holding that the BMV was not required to complete any investigation before providing information to the requester: "Whether or not it would have been prudent for the BMV to investigate Shadowsoft before

[11]A copy of the Decision, Brief of Defendants-Appellants Henry Guzman, et al., and Reply Brief of Defendants-Appellants Henry Guzman is attached to Relator's Appendix as Exhibits J, K and L.

making any disclosures, this is neither an obligation imposed by the terms of the DPPA, nor one that has been 'clearly established' under the governing case law."[12] *Roth,* 650 F.3d at 613–14. Importantly, the Sixth Circuit also found "that defendants maintain that the Ohio law directs that ***disclosures must be made whenever permissible under the DPPA***." *Id.* at 6, n.5 (emphasis added).

Because the Sixth Circuit Court of Appeals has ruled on this issue in Respondents' favor, Respondents are judicially and/or collaterally estopped from now arguing that the DPPA prohibits such disclosure.

1. Judicial Estoppel

In *Green-Burger v. Temesi*, this Court held that:

> The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. ***Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship***, achieving success on one position, then arguing the opposing to suit an exigency of the moment. The doctrine only applies when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court.

116 Ohio St.3d 324, 330 (2007) (emphasis added).

In this case, Respondents attempt to argue the opposite position of what they successfully argued in *Roth*: that the federal (and Ohio's) DPPA prohibits the BMV from disclosing unredacted driving records in response to a public records request by a DPPA-authorized requester. Since Respondents took a contrary position in *Roth*, and the position was accepted by the Sixth Circuit Court of Appeals in its order reversing the trial court's decision in favor of that

[12] Nevertheless, this very information was submitted by MCS to the BMV in its February 1, 2012 and July 3, 2012 public records requests. Indeed, MCS provided more information evidencing its status as a DPPA authorized requester in its public records requests than Shadowsoft provided to the BMV using BMV Form 1173.

case's plaintiffs, Respondents are now judicially estopped from espousing the opposite position here.

It is wholly inconsistent that Respondents would argue to the United States Court of Appeals that Ohio's public records law mandates disclosure of driving record information to DPPA-qualified requesters when facing civil and potential criminal sanctions under the DPPA, yet argue the ***exact opposite*** position when faced with a loss of revenue generated by the $5.00 certified abstract fee contained in R.C. § 4509.05 if trucking companies, insurance companies, and other DPPA-authorized requesters could obtain such records for $.05 per page under Ohio's public records laws. Indeed, this is the precise type of "cynical gamesmanship" – achieving success on one position, then arguing the opposing to suit an exigency of the moment – which this Court has tried to eliminate from the judicial process.

2. Collateral Estoppel

Similarly, in *State v. Williams*, this Court held that:

> The doctrine of collateral estoppel, or, more correctly, issue preclusion, precludes further action on an identical issue that has been actually litigated and determined by a valid final judgment as part of a prior action among the same parties or those in privity with those parties. *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 74 (1977), 777; *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193 (1983), paragraph one of the syllabus.

76 Ohio St.3d 290, 294 (1996); *Bauer v. Huntington Nat'l Bank*, 10th Dist. No. 99 AP-347, 2000 WL 145080 at *10–11, *13–14 (Feb. 10, 2000). To be successful in asserting a claim of collateral estoppel, a party must prove the following four elements:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue, (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment, and (4) the issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher Indus., Inc., 21 Ohio App.3d 179, 180-81 (1st Dist. 1984).

Here, Respondents, the very same parties in the *Roth* case, seek to re-litigate the identical issue which was litigated in *Roth*: whether the federal DPPA prohibits the disclosure of unredacted driving record information (which includes personal identifying information) in response to a public records request by a DPPA-authorized requester. 650 F.3d 603 (6th Cir. 2011). The doctrine of collateral estoppel precludes such re-litigation. First, Respondents were parties in the prior action. Second, there was a final judgment by the Sixth Circuit Court of Appeals in *Roth* after Respondents had a full and fair opportunity to litigate the issue. Third, the issue was actually adjudicated by the Sixth Circuit Court of Appeals and is necessary to the final judgment in *Roth.* Fourth, the issue here is identical to the dispositive issue in *Roth.*

Indeed, the doctrine of collateral estoppel protects parties like MCS from having to vigorously litigate issues that have already been determined by courts of competent jurisdiction,[13] ensures that judicial resources will not be squandered, and safeguards the finality of judgments. Because the issue presented in this case is identical to the issue determined in *Roth*, the doctrine of collateral estoppel applies, and Respondents' arguments against MCS's mandamus relief are barred.

D. MCS Should Be Awarded The Court Costs and Attorneys Fees Which It Has Expended in Obtaining A Writ of Mandamus Under R.C. § 149.43(C)

MCS has spent the last two years litigating its right to an unredacted copy of its employee's driving records in both the Tenth District Court of Appeals and this Court. As a

[13] This court should honor the comity of decisions made by competent federal courts. The Sixth Circuit Court of Appeals was presented with the same issue. To hold now that the DPPA precludes the disclosure of BMV records containing personal information to DPPA authorized requesters in response to a public records request is to find that the Sixth Circuit's decision on this exact issue (as informed by ODPS and BMV's argument that they had no choice but to produce unredacted drivers records in response to a public records request) is incorrect.

result, significant court costs and attorneys fees have been expended. R.C. § 149.43(C) allows this Court to award MCS costs and attorneys fees as follows:

> (C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with Division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, ***the person aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorneys fees to the person that instituted the mandamus action,*** and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section.

R.C. § 149.43(C) (emphasis added). *See also State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 145 (1995); *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.*, 39 Ohio St.3d 108, paragraph two of the syllabus (1998). Decisions of this Court have awarded attorney fees if the relator demonstrates a sufficient public benefit, and the Court may also consider the reasonableness of respondent's refusal to comply and whether the respondent acted in good faith. *State ex. rel. Multimedia, Inc.*, 72 Ohio St.3d at 145; *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 626 (1994); *State ex rel. Mazzaro v. Ferguson*, 40 Ohio St.3d 37, 41 (1990). This Court has awarded attorney fees when the respondent failed to comply with the records request based on reasons found to have been meritless. *See generally State ex rel. Multimedia, Inc.*, 72 Ohio St.3d 141.

Here, if MCS prevails, the benefit to the public is immeasurable. Certainly, all DPPA-authorized requestors will benefit from a ruling that the BMV cannot require them to pay a $5.00 certification fee to obtain a copy of the record that they are entitled to at cost. Perhaps more importantly, a decision in MCS's favor, will highlight the importance of Ohio's public records

statutes and reinforce that Ohio's public agencies cannot simply ignore their duties under Ohio's public records law or pass self-serving regulations to side-step such obligations.

Further, the position that Respondents have taken here is neither reasonable nor taken in good faith. Indeed, Respondents have stonewalled MCS (and Grange before it) at every turn in this case while espousing a position that is completely opposite to the very position it prevailed upon in *Roth:*

- Respondents, just weeks before Judge Frye's June 8, 2010 decision on the merits, enacted O.A.C. § 4501:1-12-02 in an effort to create a state law which would enable them to argue that the disclosure of the records was prohibited by state law under R.C. § 149.43(A)(1)(v).

- Respondents successfully espoused a position in *Roth* which is identical to the position that MCS asserts here. Thus, Respondents position, while wrong on the merits, is barred by the doctrines of judicial estoppels and collateral estoppel.

- Respondents waited until the January 4, 2012 oral argument before Magistrate Brooks to argue that MCS' public records request was invalid because MCS failed to complete BMV Form 1173. Yet, nowhere on BMV Form 1173, the BMV website or on any other BMV communication does it indicate to a public records requestor that BMV Form 1173 is required to successfully complete such a request.

- Respondents have played hide the ball throughout this entire process. Ohio's public records law has been enacted to give members of the general public access to public records. The burden should not be on the requestor to figure out the agency's process and procedure to obtain the requested public records.

Accordingly, MCS respectfully requests that this Court award it court costs and reasonable attorneys fees which MCS expended in litigating this mandamus action.

V. CONCLUSION

For the foregoing reasons, MCS can demonstrate by clear and convincing evidence that it is entitled to the requested records, and any exceptions to the disclosure of public records must be strictly construed against Respondents. Therefore, this Court should (1) reverse the lower

court's denial of MCS's requested writ of mandamus, (2) issue a writ of mandamus directing Respondents to provide the complete and unredacted driving records sought by MCS, and (3) award MCS its court costs and reasonable attorneys fees which it has incurred in pursuing these consolidated mandamus actions. Additionally, this Court should make clear that the BMV cannot continue to deny access to unredacted driving records when sought via proper public records requests by DPPA-authorized requesters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator-Appellant Motor Carrier Service, Inc.'s Merit Brief was served upon Hilary R. Damaser and William J. Cole, Assistant Attorneys General, Executive Agencies Section, 30 East Broad Street, 26th Floor, Columbus, OH 43215-3428, by ordinary U.S. Mail, postage prepaid, this 20th day of November, 2012.

Lisa Pierce Reisz