In the
Supreme Court of Ohio

Rosanna L. Miller,	:	Case No. 2022-0319
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
Ohio Department of Health,	:	
	:	Court of Appeals
Appellee.	:	Case No. 21AP-267

MEMORANDUM OF APPELLEE,
OHIO DEPARTMENT OF HEALTH,
OPPOSING JURISDICTION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS.....3

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 6

ARGUMENT 9

Appellee's Proposition of Law:

Absent consent or a statutory exception, the Ohio Department of Health is prohibited by R.C. 3701.17(B) from releasing "protected health information," which includes information that identifies or could be used to identify decedents along with their causes of death. 9

CONCLUSION.....15

CERTIFICATE OF SERVICE

INTRODUCTION

Ohioans enjoy certain privacy rights, including a right of privacy relating to their health information—which encompasses any information about "an individual's past, present, or future physical or mental health status or condition." If such information reveals, or could be used to reveal, the individual's identity, it is "protected health information" ("PHI"). *See* R.C. 3701.17(A)(2). The Ohio Department of Health ("ODH") may not—without the consent of the individual or his representative—release PHI absent an exception. *See* R.C. 3701.17(B). This implicates the Public Records Act, R.C. 149.43, because the release of PHI absent consent or an exception is "prohibited by state…law" and, therefore, a record containing such PHI is not a "public record" under the Act. *See* R.C. 149.43(A)(1)(v).

Although Ms. Miller argues that PHI includes information about living individuals only, the General Assembly did not specify any such restriction. Therefore, like a similarly-worded federal definition of "protected health information," this privacy right applies to deceased individuals, giving protection to a decedent's legacy, estate, and family and other survivors. PHI necessarily includes a person's cause of death, as certified by a medical professional, because it reflects a physical or health condition just before, or at, death. So ODH cannot, absent consent or an exception, disclose individually-identifiable cause-of-death information.

Ms. Miller wrongly insists that, because cause-of-death information is included on death certificates, its release is not prohibited by law and it can therefore always be part of a "public record." The availability of individual death certificates under a specific statutory process (by providing identifying details about the decedent in a signed application and paying a fee, *see* R.C. 3705.23(A)(1)) is an exception to the general prohibition against the release of PHI, as the lower court held. This exception does not turn a decedent's cause-of-death information into a potential public record (assuming that the information appears in a "record" at all—otherwise

ODH would not have to release it regardless, *see* R.C. 149.011(G) (a "record" is a "document, device, or item" that "document[s]…the activities of the [public] office.")).

Ms. Miller argues that members of the public must be allowed to obtain, through public-records requests, causes of death and other data concerning individuals who died in Ohio because it will enable them to "fact-check the government" by studying the data "to evaluate [whether] they reveal the lethality of Covid-19, relationships between specific governmental measures and improved outcomes, [and] which responses to the pandemic (or any other potential calamity) were justified and which, if any, were heavy-handed." *See* Miller's JurMemo at 2, 12. "Accessing the data and…and…correlations helps electors, researchers, taxpayers, and the public gauge which officials took valid policy stances, who was irresponsible, and what future measures ought to be considered." *Id*. at 2. The public, Ms. Miller argues, should have access to the same information that state officials track and use to make public policy. *Id*. at 2-3.

But that kind of information is already publicly accessible. The Ohio Department of Health maintains on its website a "COVID-19 Dashboard" as well as the "Ohio Public Health Information Warehouse." These allow users to select and sort for desired de-identified variables, obtain information, and create charts and reports that can be downloaded. Information can be tailored by county and—in the case of some kinds of COVID-19 information—by zip-code.

Ms. Miller asked ODH to create a report containing selected categories of information pulled from the "EDRS" database. This is the same database that supplies the aggregate, de-identified data to the publicly-accessible Ohio Public Health Information Warehouse. Nowhere does Ms. Miller explain why the public would need individually-identifiable information about COVID-related deaths in order to "gauge which officials took valid policy stances, who was irresponsible, and what future measures ought to be considered" or to provide the kind of

information that state officials track and use when making public-policy decisions. Regardless, ODH was prohibited from releasing that information because it is PHI.

But even a ruling in Ms. Miller's favor on the PHI issue would not be dispositive here. Ms. Miller requested the creation of a brand-new report. The Public Records Act does not require an agency to create a new record. *See*, *e.g.*, *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26 (per curiam). The trial court realized that Ms. Miller had requested a new record, but it ordered production anyway because ODH was—in that Court's view—capable of producing the report without much difficulty. That conflicts with the Public Records Act.

For these reasons, the Court should decline jurisdiction.

STATEMENT OF THE CASE AND FACTS

In April 2020, Ms. Miller made a public-records request to ODH seeking information about people who had died from COVID-19. *See Miller v. Ohio Dept. of Health*, 10th Dist. Franklin No. 21AP-267, 2022-Ohio-357 ("App. Op."), ¶ 2. She asked ODH to create a report, based on the Electronic Death Registration System ("EDRS"), listing each decedent's name, age, and date and county of death. *Id*. *See also* Special Master's Report & Recomm., *Miller v. Ohio Dept. of Health, Vital Statistics*, Ohio Court of Claims No. 2020-00618PQ, 2021-Ohio-996 ("R&R"), ¶ 3 (adopted by the Court of Claims, *see Miller v. Ohio Dept. of Health, Vital Statistics*, Ohio Court of Claims No. 2020-00618PQ, 2021-Ohio-1901 ("Ct. of Claims"), ¶ 10).

ODH uses EDRS to receive and maintain death records. Resp. to 1/22/21 Order, Sorrell Affid. at ¶ 2. It contains death-event data reported by funeral home directors, coroners, and local health departments. Its sole function is to create and print death certificates. Resp. to 1/22/2021 Order, Narrative Resp. at ¶ 2. In addition to EDRS, ODH maintains another database, the

EnterpriseDataWarehouseSecure, which is the backend database for the Ohio Public Health Information Warehouse. *Id.* Data from EDRS is pulled into EnterpriseDataWarehouseSecure. *Id.* Through the Ohio Public Health Information Data Warehouse, the public has online access to aggregate EDRS death data without the individual-identifying information. *Id.*

EnterpriseDataWarehouseSecure was created to provide state agencies access to death data so that the agencies can perform their functions. Resp. to 1/22/2021 Order, Narrative Resp. at ¶ 2. EnterpriseDataWarehouseSecure securely stores death data in two modules: the Secure Mortality Module and the Secure Death Roster Module. *Id.* The Secure Mortality Module contains virtually all variables that are collected from EDRS and used by individuals and specific agencies with statutorily mandated broad access (e.g., the Ohio Department of Medicaid). *Id.*

The Death Roster Module contains death data that helps agencies maintain current records and identify deceased and former military members. Resp. to 1/22/2021 Order, Narrative Resp. at ¶ 2. There is identifying demographic information in the module; however, no cause-of-death information is included. *Id.* The downloadable files provide two choices: the Deceased Ohioans Report (created monthly) and the Deceased Veterans Report (created quarterly). *Id.* Access to the module is limited to certain government agencies and other entities. *Id.* Non-governmental entities and members of the public do not have access to it, but they can obtain copies of the Deceased Ohioans reports free of charge by requesting them. *Id.*

As mentioned above, a vast amount of aggregate, de-identified information was (and is) available to the public, including Ms. Miller. She could have used the Ohio Public Health Information Warehouse to generate reports and charts based on selections of data fields, and those reports and charts could have shown, for example, how many individuals were coded in EDRS as having died from COVID-19 during a selected period, along with the areas in which

they lived, their ages, and many types of other information—just not information that could have been used to identify the ***specific*** individuals involved. *See* https://publicapps.odh.ohio.gov/EDW/DataCatalog (last visited 4/21/2022). ODH also maintains the publicly-accessible "COVID-19 Dashboard," which provides COVID-19-specific information (including, e.g., mortality rates) organized by county and even some information sortable by zip code. *See* https://coronavirus.ohio.gov/dashboards (last visited 4/21/2022).

Neither EDRS nor the EnterpriseDataWarehouseSecure was programmed to compile information with the specifications requested by Ms. Miller. In the ordinary course of its business, ODH does not group this information in the manner she requested. Resp. to 1/22/21 Order, Narrative Resp. at ¶ 4. True, ODH is ***capable*** of extracting that information from the Secure Mortality Module and creating the report that Ms. Miller requested—but such a report does not already exist. *Id.* Complying with Ms. Miller's request would have required ODH to extract a unique subset of information and organize it into a unique, new report.

ODH denied Ms. Miller's request, and she sued. *See* Ct. of Claims, ¶ 2. ODH argued that Ms. Miller had requested the creation of a new report, not the production of an existing record. *See id*., ¶¶ 7-8; R&R, ¶¶ 6-7. ODH also argued that the requested report would have contained PHI, as defined by R.C. 3701.17(A)(2), because it identified decedents and their causes of death. *See* Ct. of Claims, ¶ 9; R&R, ¶ 7. ODH pointed out that, because ODH was prohibited by R.C. 3701.17(B) from releasing PHI, the report requested by Ms. Miller could not be a "public record" for purposes of the Public Records Act, pursuant to R.C. 149.43(A)(1)(v). *See* R&R, ¶¶ 7, 23, 31, 32. *See also* Dept.'s 11/20/2020 MTD, pp. 4-6.

The Court of Claims Special Master issued a Report and Recommendation, which the Court of Claims adopted after objections and responses were filed. *See* Ct. of Claims, ¶¶ 4, 10.

That Court ruled that, because ODH ***could*** create the requested report, it was required to do so. *See* Ct. of Claims ¶ 8, 10; R&R ¶¶ 17, 18, 21, 32. That Court also held that the requested report would not have contained PHI because the information at issue is available on death certificates. *See* Ct. of Claims ¶10; R&R ¶¶ 29-33.

The Tenth District Court of Appeals reversed, agreeing with ODH that the requested report would have contained PHI and was therefore excluded from the definition of "public record" because the PHI's release was prohibited by state law. *See* App. Op. ¶¶ 5-7, citing *Walsh v. Ohio Dept. of Health*, 10th Dist. Franklin No. 21AP-109, 2022-Ohio-272. The Tenth District rejected Ms. Miller's argument that ODH's prior release of similar information required it to continue that practice. *Id*. at 21, citing *State ex rel. Dispatch Printing* Co. *v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 38. And that Court deemed moot ODH's argument that Ms. Miller had improperly requested the creation of a new record. *See id*. ¶¶ 8-10.

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Ms. Miller asks the Court to declare that ODH is not prohibited from releasing, under the Public Records Act, information about an identified decedent's cause of death, either because the prohibition does not extend to decedents' information or because that information would be included on a death certificate. The Court should decline jurisdiction for at least four reasons.

First, Ms. Miller's proposition is incorrect. As mentioned above, Ohioans have a right to privacy concerning their health information. If information about "an individual's past, present, or future physical or mental health status or condition" reveals, or could be used to reveal, the individual's identity, it is PHI. *See* R.C. 3701.17(A)(2). ODH may not, absent consent or an exception, release PHI. *See* R.C. 3701.17(B). The General Assembly did not confine the definition of PHI to living individuals. Therefore, because PHI includes information about

decedents, it includes cause-of-death information, which—as certified by a medical professional—reflects a physical or health condition just before, or at the moment of, death. Because ODH cannot disclose PHI without consent or an exception, the Public Records Act (R.C. 149.343) is implicated because the release of such PHI is prohibited by state law—and therefore a record containing it is not a "public record" under the Act. *See* R.C. 149.43(A)(1)(v).

Ms. Miller asks the Court to insert the word "living" before "individual's" in the definition of PHI. She also argues that, because cause-of-death information is included on death certificates, that information is not prohibited from release by state law. She is wrong on both counts. The General Assembly easily could have added the word "living" but did not. A similar federal definition ***does*** apply to deceased individuals. *See*, *e.g.*, 45 C.F.R. 164.508(c)(1)(vi); 45 C.F.R. 164.502(g)(4); 45 C.F.R. 164.502(f); 45 C.F.R. 160.103. Nothing in the Revised Code indicates that the General Assembly intended the statute to apply only to living individuals. Multiple reasons exist to protect the privacy of a decedent's health information, including the fact that some causes of death could reveal hereditary or infectious conditions that could publicly reveal health information of the decedent's relatives and close associates—people who are still living. Also, some causes of death might—rightly or wrongly—bring stigmatization, religious condemnation, or unwanted public attention to a decedent's survivors.

Contrary to Ms. Miller's arguments, the fact that individual death certificates can be obtained under a specific statutory procedure (namely, by providing identifying details about the decedent in a signed application and paying a fee, *see* R.C. 3705.23(A)(1)) reflects an exception to—rather than a negation of—the general prohibition against the release of PHI. This narrow exception does not turn a decedent's cause-of-death information into information that ODH can release in response to a public-records request. "'An individual's interest in controlling the

dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.'" *See Johnson*, *supra*. Therefore, as the lower court ruled (on the authority of its recent decision, *Walsh v. Ohio Dept. of Health*, 10th Dist. Franklin No. 21AP-109, 2022-Ohio-272), ODH properly denied Ms. Miller's request because the report would have contained PHI without consent or an exception, meaning it would not have been a "public record" under R.C. 149.43(A)(1)(v). *See* App. Op. ¶¶ 6-7.

Second, as explained above, Ms. Miller's desire to obtain information about the "lethality of Covid-19" and evaluate governmental responses to it can be accomplished with publicly-accessible aggregate (that is, de-identified) cause-of-death data pulled from the very same database from which she asked ODH to create a report using identified cause-of-death data. She could also access aggregate COVID-19-specific information through the COVID-19 Dashboard. She has not stated what great public or great general interest could exist in accessing individual-identifying information. This is another reason to decline this case.

Third, even if the Court accepted jurisdiction and agreed with Ms. Miller's proposition, the outcome would not change. Ms. Miller asked ODH to create a brand-new document. It had never existed and was not necessary for ODH to perform its duties. The Public Records Act requires the production only of records that already exist, provided that they qualify as "public records" under R.C. 149.43 and no exemption applies. The Act does not require an agency to create a new record or new compilation of records. *See*, *e.g.*, *McCaffrey, supra*; *State ex rel. White v. Goldsberry*, 85 Ohio St. 3d 153, 155, 707 N.E.2d 496 (1999) (per curiam); *State ex rel. Carr. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 22 (per curiam); *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 274, 695 N.E.2d 256 (1998) (per curiam).

The trial court recognized that the report Ms. Miller was requesting did not already exist, but it ordered production anyway based on ODH's ***ability*** to create it. *See* Ct. of Claims ¶¶ 8, 10; R&R ¶¶ 17, 18, 21, 32. That is plainly wrong. The purpose of the Public Records Act is to "expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 264, 1997-Ohio-319, 685 N.E.2d 1223 (1997). Ordering the creation of a new record does nothing to further that purpose, which is why it is not required by the Act. *See McCaffrey*, *supra*.

Fourth, the Court should wait for a better vehicle if wishes to address the PHI issue. In 2018, Ms. Miller was placed on this Court's "Vexatious Litigators" list and was prohibited from suing in the Court of Claims and other courts without permission from the placing court. *See* R.C. 2323.52. *See also* https://www.supremecourt.ohio.gov/Clerk/vexatious/millerR_081618.pdf (& link to placing order). Nothing in the record suggests that Ms. Miller received that permission, so the Court of Claims lacked jurisdiction. *See State ex rel. Sapp v. Franklin County Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶¶ 28-31 (per curiam). A reversal here would reinstate the Court of Claims' judgment, which is arguably void. *See id.*

ARGUMENT

If the Court accepts jurisdiction, it should affirm. The Tenth District correctly held that Ms. Miller requested information that was not a "public record" under R.C. 149.43.

Appellee's Proposition of Law:

> *Absent consent or a statutory exception, the Ohio Department of Health is prohibited by R.C. 3701.17(B) from releasing "protected health information," which includes information that identifies or could be used to identify decedents along with their causes of death.*

Ohio's "Public Records Act," R.C. 149.43, makes certain governmental records available to any member of the public upon request. The purpose of the Act is to "expose government

activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *Petro*, *supra*. "Public records" are "records kept by any public office…." R.C. 149.43(A)(1). A "record" for purposes of the Act is

> 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.

R.C. 149.011(G).

Many types of records are excluded from the definition of "public records" under the Act. *See* R.C. 149.43(A)(1)(a) – (oo). For example, "[r]ecords the release of which is prohibited by state or federal law" are excluded by R.C. 149.43(A)(1)(v). Therefore, an agency need not produce, in response to a public-records request, any record that the agency is forbidden by law to release. *See id*.

PHI that has been "reported to or obtained by" ODH, its director, or a local board of health or health district is one type of information that ODH may not—absent an exception—release "without the written consent of the [subject] individual[.]" *See* R.C. 3701.17(B). PHI is "confidential," *id*., and consists of "information …that describes an individual's past, present, or future physical or mental health status or condition…" if the information "reveals the identity of the [subject] individual" or "could be used to reveal the [subject individual's] identity, either by using the information alone or with other information that is available to predictable recipients[.]" R.C. 3701.17(A)(2). *See also Cuyahoga Cnty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 11 (applying R.C. 3701.17(A)(2) and deeming a request problematic because it sought records of identifiable minor children's past "physical status or condition."). Because—absent consent or an exception—a

record containing PHI is a record "the release of which is prohibited by state or federal law," it is not a "public record." *See* R.C. 149.43(A)(1) & (A)(1)(v).

PHI includes cause-of-death information that reveals (or could be used to reveal) the decedent's identity, because a cause of death—e.g., infection, poisoning, cancer, stroke, COVID-19—describes an individual's past "physical status or condition." *See* R.C. 3701.17(A)(2); *Lipson O'Shea*, *supra*. As the lower court pointed out in *Walsh*, a medical certificate of death in Ohio is to be "completed and signed by the physician who attended the decedent or by the coroner or medical examiner, as appropriate…." *Walsh* at ¶ 15 (quoting R.C. 3705.16(C)). "Medical certification" is the "completion of the medical certification portion of the certificate of death…as to the cause of death…." *Id*., quoting R.C. 3705.01(I). "A physician's cause of death determination reflected on a death certificate is an expert opinion on a medical question." *Id*., citing *Vargo v. Travelers Ins. Co.*, 34 Ohio St.3d 27, 30, 516 N.E.2d 226 (1987). As the lower court in *Walsh* concluded, "a decedent's cause of death indicated on the death certificate, as determined by the certifying physician, is information that identifies that individual's past physical status or condition because it identifies the injury, disease, or condition that led to the decedent's death." *Id*.

Ms. Miller incorrectly argues that PHI applies only to living individuals and that therefore individually-identifiable cause-of-death information is not PHI. *See* Miller's JurMemo at 13-14. She attempts to cast death-related information—including a decedent's cause of death—as the polar opposite of "health" information, *see* Miller's JurMemo at 13, even though one's cause of death is a description of one's physical or health condition just before, or at the moment of, death. And, according to her, the fact that R.C. 3701.17(B) requires consent of the

subject "individual" before PHI can be released shows that PHI refers only to information about living individuals, because deceased individuals cannot give written consent. *See id.*

She is wrong. As the Tenth District noted when rejecting that argument in *Walsh* (and, by extension, in this case), accepting that position would require the improper insertion of the word "living" into the statute. *See Walsh* at ¶ 14; App. Op. at ¶ 7. The Tenth District also pointed out that a decedent's personal representative (e.g., administrator or executor) stands in the decedent's shoes and can provide written consent to release PHI. *See Walsh* at ¶ 14. Ms. Miller argues that the Tenth District's reasoning on this point requires the insertion of words into the statute. But she fails to recognize the implications of her argument for a number of living individuals, including minors, incompetent persons, and people with certain physical disabilities. They cannot provide written consent themselves, either. It is unfathomable that "individuals" for purposes of R.C. 3701.17 excludes everyone who can give written consent only through a representative.

Certain federal HIPAA[1] provisions are instructive. They protect similarly-defined "protected health information" (a.k.a. "individually identifiable health information"). *See*, *e.g.*, 45 C.F.R. 160.103. Like R.C. 3701.17, they do not include the word "living" or any similar word in the definition, and they likewise require the subject "individual" to give written authorization for any (non-exempt) release. *See id*. (defining "protected health information" as "individually identifiable health information," with listed exceptions, and defining "individually identifiable health information" as information that, among other things, includes certain information "relat[ing] to the past, present, or future physical or mental health or condition of an individual…[that] identifies the individual [or] with respect to which there is a reasonable basis

[1] Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d, et seq.

to believe that the information can be used to identify the individual"); 42 U.S.C. 1320d(6) (similarly defining "individually identifiable health information"); 45 C.F.R. 154.502(a)(1)(i) (referencing disclosures "[t]o the individual"); 45 C.F.R. 164.508 (stating when authorization by the subject "individual" is required and how it is be treated).

Yet the regulations recognize that someone other than the "individual" can sign on behalf of the individual for release-authorization purposes—including someone authorized to act on behalf of a decedent. *See* 45 C.F.R. 164.508(c)(1)(vi); 45 C.F.R. 164.502(g)(4). And the regulations provide that "protected health information" must be kept confidential—subject to certain exceptions—for at least 50 years after the individual's death. *See* 45 C.F.R. 164.502(f); 45 C.F.R. 160.103. So even without an express qualifier in its definition of "protected health information," the federal government extends these privacy rights to decedents. The Court should therefore reject Ms. Miller's suggestion that it would be irrational to conclude that the definition of PHI in R.C. 3701.17 applies to information about decedents.

Ms. Miller also argues that, regardless, a record reflecting a known individual's cause of death is not, on that basis, excluded as a public record because the information would also be listed on a death certificate—a certified copy of which anyone can obtain by submitting a signed application and paying the statutory fee. *See* Miller's JurMemo at 13. *See also* R.C. 3705.23(A)(1). Because a death certificate identifies a decedent's cause of death, she argues, the release of records containing that information is not prohibited by law and therefore such records are not excluded as "public records" under R.C. 149.43(A)(1)(v). *See* Miller's JurMemo at 13.

But Ms. Miller is again incorrect. That this information can be obtained under the ***specific*** procedure under R.C. 3705.23 to obtain a certified copy of a death certificate does not erase the ***general*** prohibition in R.C. 3701.17(B) against the release of that information. Rather, the ability

to obtain a death certificate by providing details about the individual decedent and paying a specified fee is an exception to the general prohibition in R.C. 3701.17(B). And this narrow exception is for the actual certified copies of death certificates. It does not render all the various bits of information found on death certificates available in other forms under the Public Records Act. *See Johnson*, *supra*. And a specific statutory exception allowing information to be obtained only in a particular manner controls over the more general Public Records Act. *See State ex rel. Motor Carrier Serv. v. Rankin*, 135 Ohio St.3d 395, 2013-Ohio-1505, 987 N.E.2d 670, ¶¶ 20-30 (per curiam).

Furthermore, the General Assembly expressly provides that the Social Security numbers obtained through the death-data reporting process are public records under the Public Records Act. *See* R.C. 3705.16(D). If, as Ms. Miller believes, the General Assembly intended for all information that could be printed on a death certificate to be "public records" (and thus necessarily excluded from the protection offered by R.C. 3701.17(B)), there would have been no reason to specify that Social Security numbers on death certificates are public records. Ms. Miller's argument would require an entire statutory provision to be treated as meaningless.

One can imagine valid reasons for the General Assembly to restrict the amassing by (potentially) anonymous[2] requesters of large amounts of personal information about strangers while allowing a specific exception for someone who may need a copy of a particular death certificate regarding a decedent whom the requester can identify, in a signed application, by providing specific details (e.g., name, date of birth, place of birth/death, date of death, father's name, mother's name). *See* Ohio Adm.Code 3701-5-02(A)(20). The potential implications are significant. Large-scale identity theft or other kinds of fraud are not likely to be significantly

[2] *See* R.C. 149.43(B)(4).

aided by the ability to obtain individual death certificates using the process required by R.C. 3705.23. As this Court has acknowledged, modern technology has made it possible for vast amounts of information to be collected and transmitted online to millions of people, which creates a serious risk that personal information—even if initially provided to a well-intentioned requester—will fall into the wrong hands. *See State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 371, 725 N.E.2d 1144 (2000). And the fact that a cause of death might—rightly or wrongly—be a socially-stigmatized, religiously-condemned, or otherwise sensitive topic for a decedent's family, such as self-inflicted harm, drug overdose, hereditary condition, or AIDS,[3] is another reason the General Assembly may have accorded significant weight to privacy concerns in deciding whether and when to allow access to PHI. Such a choice cannot be characterized as an irrational balancing of the competing interests.

In short, the statutory definition of PHI includes individually-identifiable cause-of-death information. *See* R.C. 3701.17(A)(1). Unless an exception applies, ODH may not release PHI without consent. *See* R.C. 3701.17(B). Therefore, absent an exception or consent, ODH is not required to produce—in response to a public-records request—records containing PHI, because records "the release of which is prohibited by state or federal law" are not "public records." *See* R.C. 149.43(A)(1)(v).

CONCLUSION

For the foregoing reasons, the Court should decline to accept jurisdiction.

[3] Ms. Miller accuses ODH of "stigmatiz[ing]" people with AIDS. *See* Miller's JurMemo at 13, n.11. But ODH merely cited R.C. 3701.243(A)(3), which restricts the identification of those with AIDS-related conditions, and noted that Ms. Miller's theory would—despite that law—permit requesters to obtain the names of persons who died of AIDS. *See* ODH's 6/22/2021 Brief at 27.

Respectfully submitted,

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Ohio Department of Health

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of Appellee Opposing Jurisdiction was sent this 21st day of April 2022 to Andrew R. Mayle, Counsel for Appellant, via electronic mail to amayle@maylelaw.com.

/s *Rebecca L. Thomas*
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Assistant Attorney General