

Appendix

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Randy Ludlow, :
Requester-Appellee, :
v. : No. 21AP-369
(Ct. of Cl. No. 2021-00040PQ)
Ohio Department of Health, : (REGULAR CALENDAR)
Respondent-Appellant. :

D E C I S I O N

Rendered on September 27, 2022

On brief: *Graydon Head & Ritchey LLP, John C. Greiner, Darren W. Ford, and Kellie Ann Kulka*, for appellee.
Argued: *John C. Greiner*.

On brief: *Dave Yost*, Attorney General, *Rebecca L. Thomas*, and *Theresa R. Dirisamer*, for appellant.
Argued: *Rebecca L. Thomas*.

APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶ 1} Respondent-appellant, the Ohio Department of Health ("ODH"), appeals a judgment of the Court of Claims of Ohio ordering ODH to provide requester-appellee, Randy Ludlow, with the public record he requested. For the following reasons, we reverse that judgment.

{¶ 2} On April 20, 2020, Columbus Dispatch reporter Ludlow began seeking a digital spreadsheet copy of the Electronic Death Reporting System, the data system ODH uses to maintain death records. ODH initially denied Ludlow's requests. However, in October 2020, ODH provided Ludlow with a digital spreadsheet that contained almost all

of the information Ludlow requested. For deaths occurring during the selected period in 2020, ODH provided information that included the sex, age, race, birth date, and marital status of each recorded decedent; the date, time, and place of death; and the manner and cause of death. Although Ludlow wanted ODH to also disclose the names and addresses of each decedent, ODH refused to do so on the grounds that such information constituted "protected health information" under R.C. 3701.17.

{¶ 3} On January 26, 2021, Ludlow requested that ODH "provide a copy of the Electronic Death Reporting System database – in digital spreadsheet form – of all death certificates delivered to the department from March 1,, 2020 [sic] to Jan. 26, 2021 by all local health departments in the state." (Compl. at attachment.) In conjunction with this request, Ludlow acknowledged his receipt of the October 2020 digital spreadsheet, which contained much of the information he sought in the January request. Ludlow explained that he filed the January request to seek an update of the October spreadsheet and to again ask for the names and addresses of each decedent. According to Ludlow, ODH once more refused his request for names and addresses.

{¶ 4} On January 28, 2021, Ludlow filed a public-records-access complaint against ODH in the Court of Claims pursuant to R.C. 2743.75. In accordance with R.C. 2743.75(D)(2), the trial court assigned a special master to examine the complaint. The special master issued a report and recommendation to the trial court. In that report, the special master considered whether the record Ludlow sought in the January request was excepted from disclosure under R.C. 3701.17(B), which prohibits the release of "protected health information" absent consent or the application of a statutory exception. The special master concluded that the requested information did not fall squarely within the public-records exception contained in R.C. 3701.17. Consequently, the special master recommended that the trial court order ODH to comply with Ludlow's public-record request.

{¶ 5} ODH objected to the special master's report and recommendation. In a decision and entry dated July 1, 2021, the trial court overruled ODH's objections and adopted the special master's report and recommendation.

{¶ 6} ODH now appeals from the July 1, 2021 decision and entry, and it assigns the following errors:

1. The lower court erred when it ordered the Department to create a new spreadsheet from the death certificate database in response to a public records request.
2. The lower court erred when it ordered the Department to produce Protected Health Information, as defined by R.C. 3701.17.

{¶ 7} We will begin by addressing ODH's second assignment of error. In that assignment of error, ODH argues that the trial court erred by ordering it to provide the record Ludlow requested because it contains protected health information, which is exempted from disclosure under the Public Records Act pursuant to R.C. 3701.17. We agree.

{¶ 8} Ohio's Public Records Act requires a public office to promptly make copies of public records available to any person upon request. R.C. 149.43(B)(1). Courts construe the Public Records Act liberally in favor of broad access to public records and resolve any doubt in favor of disclosure. *State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 2020-Ohio-5149, ¶ 8. Conversely, courts construe exceptions to disclosure strictly against the public office. *Id.* The public office carries the burden to establish the applicability of an exemption to disclosure. *Id.* To meet its burden, the public office must prove facts establishing that the requested records fall squarely within the exemption. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, ¶ 35.

{¶ 9} Whether a particular record is exempt from disclosure presents a question of law, although the application of the statutory exemption will necessarily depend on the application of facts to the record at issue. *Id.* at ¶ 37. When a party appeals a mixed question of law and fact, an appellate court will review the legal question de novo but will defer to the trial court's underlying factual findings, reviewing them only for clear error. *Id.*

{¶ 10} The dispute in this case centers on the applicability of R.C. 149.43(A)(1)(v), which exempts from disclosure "[r]ecords the release of which is prohibited from state or federal law." ODH argues that R.C. 3701.17(B), which prohibits the release of protected health information, prevents it from disclosing to Ludlow a decedent's name or address in conjunction with that decedent's cause of death.

{¶ 11} Pursuant to R.C. 3701.17(B), "[p]rotected health information reported to or obtained by the director of health, the department of health, or a board of health of a city or general health district is confidential and shall not be released without the written consent of the individual who is the subject of the information unless the information is released pursuant to division (C) of this section" or a statutory exception applies. The statute defines "protected health information" as:

information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products, if either of the following applies:

(a) The information reveals the identity of the individual who is the subject of the information.

(b) The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information.

R.C. 3701.17(A)(2). "Information that is in a summary, statistical, or aggregate form and that does not identify an individual is a public record under section 149.43 of the Revised Code and, upon request, shall be released by the director." R.C. 3701.17(C).

{¶ 12} We recently considered the meaning and application of R.C. 3701.17 in *Walsh v. Ohio Dept. of Health*, 10th Dist. No. 21AP-109, 2022-Ohio-272. *Accord WCPO-TV v. Ohio Dept. of Health*, 10th Dist. No. 21AP-277, 2022-Ohio-1864, ¶ 19-22 (following and applying *Walsh*); *Miller v. Ohio Dept. of Health*, 10th Dist. No. 21AP-267, 2022-Ohio-357, ¶ 7 (same). In *Walsh*, a requester submitted a public-records request asking ODH to provide, for all deaths in Ohio during the first eight months of 2020, all decedents' names, addresses, dates of birth and death, partial social security numbers, genders, occupations, and causes of death. ODH denied that request. The requester then filed a writ of mandamus to compel ODH to comply with his public-records request. The trial court, however, dismissed the writ, finding that ODH could not disclose the requested record because it contained protected health information, and R.C. 3701.17(B) prohibited ODH from releasing that information.

{¶ 13} On appeal, the requester argued that the R.C. 3701.17 did not exempt the requested record from disclosure. We determined that the applicability of R.C. 3701.17(B) to the requested record depended on whether that record contained information describing an " 'individual's past, present, or future physical or mental status or condition, receipt of treatment or care, or purchase of health products.' " *Walsh* at ¶ 14, quoting R.C. 3701.17(A)(2).

{¶ 14} The requester first argued the record requested did not contain such information because that record described *deceased* individuals' "physical or mental status or condition, receipt of treatment or care, or purchase of health products." In other words, according to the requester, R.C. 3701.17(B) protected only information describing *living* individuals' "physical or mental status or condition, receipt of treatment or care, or purchase of health products." We, however, rejected that interpretation of R.C. 3701.17 because it required the insertion of a word—i.e., "living"—that did not appear in the text. *Walsh* at ¶ 14. Because R.C. 3701.17 uses the word "individual" without modification, the protections of R.C. 3701.17(B) apply equally to both living and dead persons.

{¶ 15} Next, we determined that a decedent's cause of death necessarily indicates that person's "past * * * physical * * * status or condition." R.C. 3701.17(A)(2). Consequently, under R.C. 3701.17(B), ODH could not disclose an identified or identifiable individual's cause of death absent written consent or the applicability of one of the statutory exceptions. *Walsh* at ¶ 15.

{¶ 16} Finally, we concluded that, even though R.C. 3705.23 permits members of the public to obtain certified death certificates that state an individual's cause of death, that information remains protected health information under R.C. 3701.17(B). We reasoned that release of cause of death information on a death certificate is restricted under R.C. Chapter 3705 because issuance of a death certificate is contingent upon an applicant complying with the statutorily mandated procedure and the copy being duly certified. We thus concluded that "[t]he fact that a decedent's cause of death, which qualifies as protected health information under R.C. 3701.17, may be disclosed to the public by the issuance of a certified copy of a death certificate pursuant to R.C. 3705.23, does not mean that information is not otherwise prohibited from release for the purpose of R.C. 149.43." *Walsh* at ¶ 20. After examining the relevant statutes, we found "no indication of General Assembly

intent to exclude a decedent's cause of death information from the confidentiality protection of R.C. 3701.17, except as necessary or required under that statute, or to the extent that information is obtainable pursuant to R.C. 3705.23." *Walsh* at ¶ 21.

{¶ 17} On appeal, Ludlow attacks *Walsh* because it failed to take into consideration R.C. 3705.231. Pursuant to that statute, "[a] local registrar shall allow an individual to photograph or otherwise copy a birth or death record." Consequently, contrary to what we indicated in *Walsh*, applying for a certified death certificate is not the only method provided in R.C. Chapter 3705 to obtain cause of death information on a death certificate. However, R.C. 3705.231 imposes its own restrictions to access: an individual must go to a local registrar and request to photograph or copy the relevant death record. R.C. 3705.231 does not require local registrars to issue uncertified copies of death certificates in response to requests. Given the limitations to access inherent in R.C. 3705.231, the reasoning of *Walsh* remains sound.

{¶ 18} *Walsh* resolves the two arguments Ludlow raises on appeal in ODH's favor: (1) R.C. 3701.17(B) applies to deceased individuals and (2) the disclosure of cause of death on a death certificate does not disqualify cause of death as protected health information subject to R.C. 3701.17(B). Thus, we need only address an additional point Ludlow raises in relation to the latter point, i.e., information regarding a specified individual's cause of death qualifies as protected health information under R.C. 3701.17, even if it might be disclosed elsewhere.

{¶ 19} Ludlow points to a statutory provision not considered in *Walsh*, R.C. 313.10(A)(1), which provides that, absent an applicable exception, "the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations * * * made personally by the coroner or by anyone acting under the coroner's direction [] are public records." Ludlow argues that because an autopsy report discloses the named decedent's cause of death and autopsy reports may be released pursuant to a public-records request, a named decedent's cause of death cannot constitute personal health information under R.C. 3701.17.

{¶ 20} We apply the logic of *Walsh* to this argument. True, R.C. 313.10(A)(1) may permit an individual to discover an identified decedent's cause of death through a public-records request of an autopsy report from a coroner's office. The fact that a particular

decedent's cause of death may be disclosed that way, however, does not mean that that information is not otherwise prohibited from release when a request like Ludlow's is made of ODH because of the limitations imposed by R.C. 3701.17. *See Walsh*, 10th Dist. No. 21AP-109, 2022-Ohio-272, at ¶ 20. We, therefore, decline to depart from the holding in *Walsh*.

{¶ 21} Ludlow does not contest that disclosure of a decedent's name and address, along with the cause of the decedent's death, would reveal the decedent's past physical health status or condition, as well as the identity of the individual. Consequently, the record Ludlow sought in his request contained protected health information, which ODH properly withheld pursuant to R.C. 3701.17(B). We thus conclude that the trial court erred in ordering ODH to produce the requested record, and we sustain the second assignment of error.

{¶ 22} By ODH's first assignment of error, it argues that the trial court erred in ordering it to create a new spreadsheet in order to respond to Ludlow's public-record request. Our resolution of the second assignment of error renders the first assignment of error moot, so we do not address it.

{¶ 23} For the foregoing reasons, we sustain the second assignment of error, which renders the first assignment of error moot. We reverse the judgment of the Court of Claims of Ohio.

Judgment reversed.

BEATTY BLUNT and MENTEL, JJ., concur.

IN THE COURT OF CLAIMS OF OHIO

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OF OHIO
2021 JUL -1 AM 9:00

RANDY LUDLOW

Requester

v.

OHIO DEPARTMENT OF HEALTH

Respondent

Case No. 2021-00040PQ

Judge Patrick E. Sheeran

DECISION AND ENTRY

Respondent Ohio Department of Health (ODH) objects to a Special Master's Report and Recommendation of June 8, 2021. Requester Randy Ludlow opposes ODH's objections. The Court overrules ODH's objections for reasons set forth below.

I. Background

On January 28, 2021, Ludlow, who at that time was a reporter for *The Columbus Dispatch*, filed a complaint wherein he claimed that he had been denied access to public records in violation of R.C. 149.43(B). Ludlow alleged:

On April 8, 2020, he filed a public-records request seeking a digital spreadsheet copy of the Electronic Death Reporting System;

On May 6, 2020, ODH's press secretary informed him that ODH "could not provide the requested record because it did not exist and that the data it contains is not a record that documents the functions or operations of the agency;"

On June 2, 2020, ODH's senior counsel "wrote that retrieving the database would require reprogramming [ODH's] computers and software to create the requested records, a duty not incumbent on the agency under ORC 149.43;"

On October 5, 2020, ODH's press secretary informed Ludlow that ODH would provide a copy of the death certificate database;

On October 19, 2020, ODH's press secretary "provided requested portions of the death certificate database, which did not include names, addresses, and dates of birth;

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ODH's press secretary "wrote that such information was exempt from release and redacted as 'personal information'" pursuant to R.C. 3701.17. But, according to Ludlow, ODH "did ultimately provide dates of birth, but continued to withhold names and addresses;" and

On January 26, 2021, he submitted this request: "Please provide a copy of the Electronic Death Reporting System database – in digital spreadsheet form – of all death certificates delivered to the department from March 1, 2020 to Jan. 26, 2021 by all local health departments in the state."

The Court referred the case to mediation. After mediation failed to successfully resolve all disputed issues between the parties, the Court returned the case to the Special Master's docket. ODH thereafter filed a response to Ludlow's complaint and moved to dismiss the complaint.

On June 8, 2021, the Special Master issued a Report and Recommendation (R&R). The Special Master recommended denying ODH's motion to dismiss. (R&R, 2.) And the Special Master "recommend[ed] the court order respondent to provide requester with the requested records," and "further recommended the court order that requester is entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that he has incurred. It is recommended costs be assessed to respondent." (R&R, 2, 12.)

On June 23, 2021, ODH filed written objections to the Special Master's R&R. Five days later Ludlow filed a response in opposition.

II. Law and Analysis

A. Legal Standard

R.C. 2743.75(F)(2) governs objections to a special master's report and recommendation. Pursuant to R.C. 2743.75(F)(2), either party "may object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the

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other party by certified mail, return receipt requested. * * * If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The court, within seven business days after the response to the objection is filed, shall issue a final order that adopts, modifies, or rejects the report and recommendation.”

B. ODH's Objections

R.C. 2743.75(F)(2) requires any objection to a report and recommendation to be “specific and state with particularity all grounds for the objection.” ODH presents its objections in a narrative format. ODH asserts that (1) the information sought by Ludlow includes Protected Health Information, (2) the R&R incorrectly found that R.C. 3701.17 does not apply to death information, and also conflated death certificates with death information. (3) R.C. 149.43 does not entitle Ludlow to the Protected Health Information he seeks, regardless of the existence of R.C. 3705.23, (4) ODH is not required to create a new document to comply with R.C. 149.43, and (5) ODH fulfilled its obligation under R.C. 149.43 by providing Ludlow with the Secure Mortality Module dictionary to allow Ludlow to revise his request.

The Court finds that, notwithstanding ODH's objections, the Special Master identified the pertinent issues and reached the correct legal determination based on the ordinary application of statutory law and case law, as they existed at the time of the filing of the complaint. Pursuant to R.C. 3701.17(A)(2), as used in R.C. 3701.17, protected health information

means information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products, if either of the following applies:

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(a) The information reveals the identity of the individual who is the subject of the information.

(b) The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information.

The Court agrees with the Special Master's view that "[w]hat little case law exists for R.C. 3701.17 involves its application to health agency records of living individuals[.] * * * Indeed, if R.C. 3701.17 did apply squarely to death certificate contents then ODH and local registrars have been violating the statute each time they release a certified death certificate pursuant to R.C. 3705.23(A)." (R&R, 9.) Moreover, to fulfill Ludlow's request ODH was not required to search through voluminous documents or create a new document by searching for and compiling information from existing records to fulfill Ludlow's public-records request. Rather, ODH was required to use its existing software, input search criteria, and produce a report with information that was readily available. ODH's suggestion that this Court should follow *Patrick Walsh v. Ohio Dept. of Health et al.*, C.P. Franklin No. 20 CV 006561 (February 26, 2021) to support ODH's claim that Ludlow seeks "protected health information" is unpersuasive, as that case does not constitute binding precedent, and because this Court has previously rejected the holding in *Walsh*. See *WCPO-TV v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00513PQ, 2021-Ohio-1566, ¶ 19.¹ In addition, *Walsh* is currently on appeal to the Tenth District Court of Appeals. (10th Dist. Franklin No. 21 AP-000109).

¹ In *Gulfstream Aero. Corp. v. Camp Sys. Internatl.*, S.D.Ga. No. 405CV018, 2007 U.S. Dist. LEXIS 64142, at *6-7 (Aug. 30, 2007), quoting Charles A. Sullivan, *On Vacation*, 43 Hous. L. Rev. 1143, 1146-48 (footnotes omitted), a federal district court discussed the meaning of precedent:

[T]he law uses "precedent" in two very different ways. In the weaker sense, "precedent" merely refers to any authoritative pronouncement of a court that other courts have an obligation to respect; in this sense, any court decision may be a "persuasive precedent," although precisely what that means--how respectful a court must be--is unclear. The

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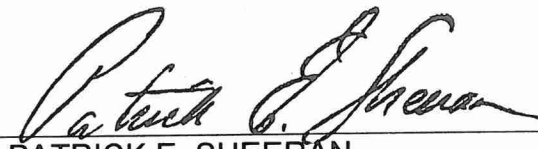
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Additionally, the Court agrees with the Special Master's view that death certificate data is made expressly public by R.C. 3705.23(A). Finally, although ODH may have complied with R.C. 149.43(B)(2)'s requirement to provide Ludlow with an opportunity to revise his request, the Court does not agree with ODH's contention that it fulfilled its obligation under R.C. 149.43.

III. Conclusion

The Court overrules ODH's objections. The Court adopts the Special Master's Report and Recommendation. The Court ORDERS ODH to forthwith provide Ludlow with the requested records in accordance with the Special Master's recommendation. Ludlow is entitled to recover from ODH the amount of the filing fee of twenty-five dollars and any other costs associated with the action that are incurred by Ludlow, but Ludlow is not entitled to recover attorney fees. Court costs are assessed to ODH. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.


PATRICK E. SHEERAN
Judge

second, and stronger, sense is "binding precedent," which means that a lower court, subject to the appellate jurisdiction of the higher court, is required to follow the decisions of that court, or, more accurately, to follow the "holdings" of that court. This is sometimes called the doctrine of vertical precedent; "*stare decisis*" is also sometimes used to refer to binding precedent in this sense, although it is often used to refer only to what has been called horizontal precedent, the obligation of a court to follow its own precedents.

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IN THE COURT OF CLAIMS OF OHIO

RANDY LUDLOW

Requester

v.

OHIO DEPARTMENT OF HEALTH

Respondent

Case No. 2021-00040PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

The Ohio Public Records Act (PRA) requires copies of public records to be made available to any person upon request. The state policy underlying the PRA is that open government serves the public interest and our democratic system. To that end, the public records statute must be construed liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 6. This action is filed under R.C. 2743.75, which provides an expeditious and economical procedure to enforce the PRA in the Court of Claims.

Request for Ohio Death Data Records

Beginning on April 20, 2020, requester Randy Ludlow, then a reporter for the Columbus Dispatch, made public records requests to respondent Ohio Department of Health (ODH) for first all and then selected portions of the ODH Electronic Death Reporting System (EDRS) database. ODH initially denied the requests, but later downloaded and delivered all selected EDRS data except the names and addresses of decedents. (Complaint at 3-19.) On January 26, 2021, Ludlow made the final, comprehensive request at issue in this action:

Please provide a copy of the Electronic Death Reporting System database -- in digital spreadsheet form -- of all death certificates delivered to the department from March 1, 2020, to Jan. 26, 2021 by all local health departments in the state.

We acknowledge that the department has provided a copy of the database -- except for names and addresses which it insists are exempt from release -- and file this request to update the dates for which the database is sought.

We continue to contend that the names and addresses in the death certificate database are public record and again seek their release.

(*Id.* at 20.) On January 28, 2021, Ludlow filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, ODH filed a response to requester's complaint and motion to dismiss (Response) on April 23, 2021. On May 10, 2021, Ludlow filed a reply. On May 17, 2021, ODH filed a sur-reply.

Motion to Dismiss

To dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the claimant can prove no set of facts warranting relief after all factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor. *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581, 669 N.E.2d 835 (1996). As long as there is a set of facts consistent with the complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 10.

ODH argues the complaint fails to state a claim because, 1) the request is for an entire database, 2) the request requires a search, and 3) the request seeks information exempt from disclosure under R.C. 3701.17(A)(2). On review, none of these defenses is conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed these arguments are subsumed in ODH's defense on the merits. It is therefore recommended that the motion to dismiss be denied.

Initial Burden of Proof

A requester must establish a public records violation by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). At the outset, the requester bears the burden to show that he seeks identifiable public records pursuant to R.C. 149.43(B)(1). *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 33.

The Request Identifies Existing Records

Each death in Ohio is documented with a local registrar of vital statistics. R.C. 3705.16(B). The local registrar, attending physician or coroner, and others complete the death certificate data using electronic or paper death certificate forms prescribed by ODH. R.C. 3705.08(A) and (D); R.C. 3705.16(C); OAC 3701-5-02(A)(2) Certificate of Death (Appendix B, dated 6/23/2016). (See Response, Sorrell Aff. ¶ 7 – Exh. A at ¶ 7.) The local registrar obtains a certificate number from the state Electronic Death Registration System (EDRS) and transmits the completed death certificate to the ODH office of vital statistics. R.C. 3705.07(A). ODH verifies the information and certificates received from the local registrar, secures omitted information as necessary, and maintains the completed death certificate data in its records management system. R.C. 3705.02, 3705.07(A). As ODH's record copy of Ohio death certificates, the EDRS database is the electronic equivalent of a file cabinet of physical death certificates.

Any person may obtain a copy of any death certificate from the EDRS, which ODH prints out and certifies. R.C. 3705.23(A)(1); R.C. 3705.01(O). There is no limitation on who may obtain death certificates, or for what purpose. ODH routinely uses EDRS data to create “a monthly public record (the Deceased Ohioans File).” (Complaint at 7-8.) ODH also publishes leading causes of death and other mortality statistics as “an important component of public health surveillance and assessment.”¹ The electronic

¹ <https://odh.ohio.gov/wps/portal/gov/odh/explore-data-and-stats/published-reports/data-and-stats-mortality-leading-cause-reports> (Accessed June 3, 2021.) (Complaint at 6-7.)

death data received, checked, maintained, and used to perform and document the functions, operations, and other activities of ODH thereby “exists” as a record of the office. R.C. 149.011(G); See *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 38; *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 7.

A data dictionary or Death Data File layout, labeled the “Monthly statistical mortality file description” was provided to Ludlow to inform his selection of available death certificate .csv columns.² (Response, Sorrell Aff. Exh. B.) The EDRS is programmed with a Reports function, supported by a Reports Wizard. (Sorrell Aff. – Exh. G – EDRS Menu Screen Shots.) EDRS is also programmed with a Batch > Export function used by, among others, funeral directors to download data sorted by date and available fields. (*Id.*, Exh. D, p. 50-60 and Exh. G.) ODH can and has exported multiple categories of the EDRS database, up to and including the full Death Data file set. (Response, Sorrell Aff. – Exh. A at ¶ 4.)³ At least two department databases – the EDRS itself and the EnterpriseDataWarehouseSecure Secure Mortality Module – are programmed to pull and export data from the EDRS Death Data file. The latter can export any or all Death Data File content in various formats. (Response at 3.) Individual columns can be redacted. (Complaint at 7.) For more detail on the capabilities of ODH database software and relevant law, see *Miller v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00618PQ, 2021-Ohio-996 at ¶ 10-20.

² The Comma Separated Values (CSV) format uses commas to separate alphanumeric data fields. CSV files are often used for exchanging data between different applications and formats, such as database and spreadsheet programs. https://en.wikipedia.org/wiki/Comma-separated_values (Accessed June 7, 2021.)

³ ODH refers to the use of database output functions as “creating a customized report.” It provides no evidence that using these functions requires adding new coding or programming to the existing software. See *Miller* at ¶ 13-17.

ODH thus possesses the death certificate data, the office software to download it as requested, and experience in performing such downloads. The special master finds this is clear and convincing evidence that Ludlow requested an existing ODH record.

The Request Does Not Require a “Search” Through the Database

ODH is fully capable of and practiced in exporting data from the EDRS. Nevertheless, it argues

Further, the Department is not required to search the database to locate records that meet specific criteria. *State ex rel. Shaughnessy v. City of Cleveland* 149 Ohio St.3d 612, 614-615, 76 N.E 3d 1171, 1175 (2016).

(Response at 5.) Retrieving reasonably identified records from where they are maintained is the statutory duty of every public office under the Public Records Act. R.C. 149.43(B)(2). Straightforward retrieval of records does not constitute a search or research by the office. Instead, “to constitute improper research, a record request must require the government agency to either search through voluminous documents for those that contain certain information or to create a new document by searching for and compiling information from existing records.” (Citations omitted.) *State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 22.

The *Shaughnessy* case relied on by ODH involved complex requests for a police department to, e.g., “search its database for reports that involved (1) incidents of “aggravated assaults” or “assaults,” (2) occurring within a specific geographical location, (3) with victims who sought medical care at a hospital, but (4) who were not victims of domestic violence.” *Shaughnessy* at ¶ 10. The Court found this required the city to engage in multiple search, evaluation and culling steps rather than clearly identifying the specific reports sought. *Id.* at ¶ 4, 11, 18, 20, and 22. This bears no resemblance to Ludlow’s straightforward request for all database fields within a defined time period.

ODH has provided Ludlow with various datasets from the EDRS in the past. (Complaint at 13-20; Response at 2-4, 7-8.) ODH’s previous disclosure of EDRS content does not estop the office from asserting any applicable public records exception

going forward. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 38. However, it does establish that existing ODH software can export the requested records using existing programming.

Public records law requires production of existing records that are already compiled in export-capable databases.

The Public Records Law, R.C. 149.43, does not exempt compilations of information contained in public records and does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials.

State ex rel. Post, 38 Ohio St.3d 170, 527 N.E.2d 1230 (1988).

Similarly, a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.

State ex rel. Margolius v. Cleveland, 62 Ohio St.3d 456, 460, 584 N.E.2d 665 (1992). With respect to whether requested records “exist” in a computer system:

We hold that the clerk could not be required to create a new “document” by compiling material to facilitate review of the public records. Conversely, if the clerk’s computer were already programmed to produce the desired printout, the “document” would already exist for the purpose of an R.C. 149.43 request.

State ex rel. Scanlon v. Deters, 45 Ohio St.3d 376, 379, 544 N.E.2d 680 (1989). *Accord State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 274-275, 695 N.E.2d 256 (1998) (“In order to create the requested records, the board would have had to reprogram its computer system.”)

Together, the evidence of EDRS menu options, ODH descriptions of EDRS and EnterpriseDatawarehouseSecure output functions, the Death Data File Layout, multiple databases accessing all EDRS data, multi-format export capability, and examples of previous death data output are clear and convincing evidence that ODH database systems have produced such output for requesters in the past and remain capable of

producing Ludlow's requested output. The special master finds that production of records in response to Ludlow's request does not require ODH to reprogram its computer system or otherwise perform a search or research.

This Request for Duplication of a Database is not Overly Broad

ODH did not deny Ludlow's request for a time period of the entire EDRS as overly broad in its correspondence (Complaint at 3-12), asserting only during litigation that "Mr. Ludlow's request for the entire computer file of death data is an overbroad public records request."⁴ (Response at 5.). A public official may not oppose a request as overbroad for the first time in litigation, as this would enable the official to avoid his duty to provide the requester with an opportunity to revise the request by informing him of the manner in which records are maintained and accessed by the public office. *State ex rel. Summers v. Fox*, Slip Opinion No. 2020-Ohio-5585, ¶ 73-74. Accordingly, the special master finds that ODH has waived the defense of overbreadth.

Even were the defense properly raised, a public official may not rely on the bare assertion of overbreadth without offering any support. *Id.* at ¶ 84. ODH provides little argument and no evidence that Ludlow's request is overly broad. ODH immediately recognized the EDRS as the repository of the requested records and provided Ludlow with an EDRS data dictionary to further inform his request. (Complaint at 13.) Ludlow's selection of all EDRS data fields for an eleven-month date range is clearly defined, discrete in scope, and thus proper under the Public Records Act. See *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga County Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 9, 64-66; *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, ¶ 10, 17-20; *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 7-8; *State ex rel. Margolius v. Cleveland*, 62 Ohio St.3d 456, 459, 584 N.E.2d 665 (1992);

⁴ To be clear, Ludlow's request does not seek the entire EDRS database but only data from March 1, 2020, to Jan. 26, 2021.

Speros v. Secy. of State, Ct. of Cl. No. 2017-00389PQ, 2017-Ohio-8453, ¶ 8. The special master finds that Ludlow's request "reasonably identif[ied] what public records are being requested" and is not overly broad. R.C. 149.43(B)(2).

Burden of Proof in Asserting Public Records Exceptions

The burden to establish a claimed exception rests on the public office. *State ex rel. Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 35. Exceptions to disclosure are strictly construed against the public-records custodian. *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 7. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception. *State ex ref. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus. Any doubt should be resolved in favor of disclosure of public records. *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169, 637 N.E.2d 911 (1994).

R.C. 3701.17 Does Not Apply to Death Certificate Data Made Expressly Public by R.C. 3705.23(A)⁵

In R.C. Chapter 3701, applicable to ODH generally, R.C. 3701.17 provides in pertinent part:

(A) As used in this section:

* * *

(2) "Protected health information" means information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products, if either of the following applies:

(a) The information reveals the identity of the individual who is the subject of the information.

⁵ For an expanded version of this section, see *Miller v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00618PQ, 2021-Ohio-996 at ¶ 24-30.

(b) The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information.

(B) Protected health information reported to or obtained by the director of health, the department of health, or a board of health of a city or general health district is confidential and shall not be released without the written consent of the individual who is the subject of the information * * *

ODH claims that R.C. 3701.17 prohibits release of protected health information from death certificate data. However, even assuming *arguendo* that the cause of death reported in a death certificate is information describing an identified individual's past physical status or condition, ODH cites no case law or even ODH policy applying R.C. 3701.17 to death certificates or their contents. What little case law exists for R.C. 3701.17 involves its application to health agency records of living individuals, e.g., *Bd. of Health v. Lipson O'Shea Legal Group*, 2013-Ohio-5736, 6 N.E.3d 631 (8th Dist.), affirmed by *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499. Indeed, if R.C. 3701.17 did apply squarely to death certificate contents then ODH and local registrars have been violating the statute each time they release a certified death certificate pursuant to R.C. 3705.23(A). Consistent with this history of non-application, there is no evidence that ODH or local registrars have been redacting cause of death when they produce certified death certificates, or that they have ever been sued for failure to do so.

Further, ODH's emergent claim that any content of statutorily public death certificates is subject to a general personal health information statute is barred by the "well-settled principle of statutory construction that 'when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply.'" *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354, 814 N.E.2d 55, ¶ 14, quoting *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 429,

627 N.E.2d 993. See also R.C. 1.51. The General Assembly has preempted application of exceptions that might otherwise apply to death certificate data by mandating the public disclosure of death certificates. R.C. 3705.23. Death certificates are prepared on a prescribed form, R.C. 3705.16(C), O.A.C. 3701-5-02(A)(2) *Certificate of death* (Appendix B); O.A.C. 3701-5-02(B)(1) to (3). One required item is “28. Part I. Enter the disease, injuries, or complications that caused the death.” Copies of death certificates can be obtained from both ODH and local registrars, and are utilized by probate courts, cemeteries, funeral directors, and commercial lenders,⁶ in addition to their unconditional release to any person who requests a certified copy. Every decedent’s cause of death is a personally identified datum contained in a document that is statutorily required to be disclosed to the public. A decedent’s cause of death is thus public information.

The statute mandating release of death certificates places no restriction on further dissemination of their contents. Rather, the General Assembly anticipates dissemination and use of death certificate content by accrediting a certified copy as “prima facie evidence of the facts stated in it in all courts and places.” R.C. 3705.23(A)(3). See *Perez v. Cleveland*, 66 Ohio St.3d 397, 399, 613 N.E.2d 199 (1993) (referencing cause of death “as declared in the death certificate, which is indisputably a public record”). Records thus established as public cannot be made confidential merely by placing them in a different location. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 378, 662 N.E.2d 334 (1996) (9-1-1 call recordings are public when made and are not susceptible to general exceptions when later aggregated by law enforcement investigators, prosecutors, or grand juries.) “Once clothed with the public records cloak, the records cannot be defrocked of their status.” *Id.* Accord *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor’s Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64, ¶ 9-14; *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 316, 750 N.E.2d 156 (2001). See also 1996 Ohio Op. Atty. Gen. No. 034 (where county

⁶ See R.C. 2105.35, R.C. 3705.17, and R.C. 1321.66.

recorder receives and publicly records instruments in accordance with statutory directives, social security numbers included in the records are not subject to the general exemption that would otherwise apply). The requirement that death certificates be recorded, printed out on demand, and serve as evidence of their contents “in all courts and places” establishes an expectation that the cause of death associated with every decedent “will be recorded and disclosed to the public.” See *Enquirer v. Hamilton Cty.* at 378. The requested death data is thus expressly and indisputably “public.”

ODH cites a contrary conclusion in *Patrick Walsh v. Ohio Department of Health et al.*, Franklin C.P. No. 20 CV 006561, *8 (February 26, 2021), appeal pending in 10th Dist. Franklin No. 21 AP 109. (Response at 5-7.) However, the decision in *Walsh* did not involve all the arguments and evidence addressed in this action. On April 9, 2021, consistent with this court’s decision in a previous case, the special master denied ODH’s motion to stay pending the appellate outcome in *Walsh*. See *WCPO-TV v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00513PQ, 2021-Ohio-1566, ¶¶ 17-19. ODH’s citation to *McGlone v. Centrus Energy Corp.*, S.D. Ohio No. 2:19-cv-2196, 2020 U.S. Dist. LEXIS 138449, at *4-5 (Aug. 4, 2020) (Response at 7) is inapposite because that case did not involve a statute affirmatively making the requested data public, like R.C. 3705.23(A).

Despite the public nature of certified printed death certificates, the General Assembly could have enacted an exemption shielding the electronic death data compilations from the public. For example, records of criminal arrests and convictions are statutorily public in the hands of law enforcement agencies and courts, but are subject to an exception from public records disclosure where gathered and maintained in the Ohio Bureau of Criminal Identification and Investigation database. R.C. 109.57(D)(1)(a). The General Assembly crafted a similar exception for “medical records, law enforcement investigative records, coroner investigative records, laboratory reports, and other records concerning a decedent” aggregated by ODH in the Violent Death

Reporting System, even though some of these could be public at their source. However, there is no statutory provision to treat electronically compiled death certificate data any differently from the same data when printed out as a certificate from the same database.

Under the facts and circumstances of this case, the special master concludes that ODH has not met its burden to prove that the withheld death data falls squarely within the exception contained in R.C. 3701.17.

Conclusion

The special master recommends the court order respondent to provide requester with the requested records. It is further recommended the court order that requester is entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that he has incurred. It is recommended costs be assessed to respondent.

Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).



JEFF CLARK
Special Master

Case No. 2021-00040PQ

-13- REPORT AND RECOMMENDATION

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