

**In the
Supreme Court of Ohio**

RANDY LUDLOW,

Requester-Appellant,

vs.

OHIO DEPARTMENT OF HEALTH,

Respondent-Appellee.

CASE NO. 2022-1391

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 21AP-369

APPELLANT'S REPLY BRIEF

John C. Greiner* (0005551)

**Counsel of Record*

Darren W. Ford (0086449)

FARUKI PLL

201 East Fifth Street, Suite 1420

Cincinnati, OH 45202

Telephone: (513) 632-0315

Fax: (513) 632-0319

Email: jgreiner@fclaw.com

dford@fclaw.com

Counsel for Requester/Appellant

Dave Yost (0056290)

Ohio Attorney General

Benjamin M. Flowers* (0095284)

Solicitor General

**Counsel of Record*

Stephen P. Carney (0063460)

Deputy Solicitor General

Theresa R. Dirisamer (0093374)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, OH 43215

Phone: (614) 644-8830

Fax: (866) 459-6662

Email: Benjamin.Flowers@ohioago.gov

Stephen.Carney@ohioago.gov

Theresa.Dirisamer@ohioago.gov

Counsel for Respondent/Appellee

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I. INTRODUCTION

The issue in this appeal is not—as Appellee Ohio Department of Health's ("ODH" or "Appellant") Response Brief suggests—whether "protected health information" loses its protections upon an individual's death. (Appellee's Br. at 2 (citing *State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 2020-Ohio-5149, ¶ 24).) Rather, the issue is whether a decedent's official cause of death information, which comes into existence after death, is ever "protected" in the first instance. Although the language of R.C. 3701.17 is ambiguous as to whether it could apply to a decedent's official cause of death information, the General Assembly's legislative intent concerning the public's right of access to such information is not. Whether it is the unrestricted right of any member of the public to walk into a registrar's office and copy a death certificate under R.C. 3705.231 free of charge, or the public's right to obtain a copy of a coroner's autopsy report under R.C. 313.10, the General Assembly has demonstrated a clear intent to allow robust public access to a decedent's official cause of death information. The ODH's Electronic Death Registration System ("EDRS") is merely a database that contains this otherwise public information, and as such, R.C. 3701.17 no more restricts access to the cause of death information contained in the EDRS than it does that same information as contained in the death certificates generated from that same database.

ODH is correct in its assertion that the General Assembly is the branch of government that should make policy regarding public access to government records. But that is not what has happened in this case. In the face of the General Assembly's clear intent to permit robust public access to official cause of death information, ODH and the Tenth District have adopted an interpretation of R.C. 3701.17 that ignores this legislative intent, while advancing no identifiable public policy objective. This Court should therefore reverse the Tenth District's

decision and reinstate the decision of the court of claims ordering release of the EDRS data as originally requested.

II. ARGUMENT

A. **Appellant's construction of R.C. 3701.17 is reasonable, and accordingly, the statute is ambiguous.**

Appellee correctly observes that the threshold question for the Court when construing R.C. 3701.17 is whether the statute is ambiguous. (Appellee's Br. at 7.) ODH then asserts, without argument, that R.C. 3701.17 is unambiguous, which assumes that (a) the word "individual" includes a deceased person; and (b) that an official cause of death description in a death certificate necessarily describes an individual's "past, present, or future physical or mental health status or condition." (*Id.* at 8.) Appellee offers no direct argument, however, for why the construction of R.C. 3701.17 advanced by Appellant is **not** reasonable. *See Clark v. Scarpelli*, 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001) ("A statute is ambiguous when its language is subject to more than one reasonable interpretation."). And indeed, Appellant's (and the court of claims's) construction of the term "individual" to apply to "living individuals" is more consistent with the statutory scheme than Appellee's.

Appellee contends that there is no "sound textual basis" for construing the term "individual" to mean a living person. (Appellee's Br. at 12.) This argument not only ignores the General Assembly's use of the term decedent to refer to a deceased person in other provisions of Title 37 of the Revised Code, *see, e.g.*, R.C. 3701.9310, 3705.23, 3705.16, but the text of R.C. 3701.17 itself. The term "protected health information" is defined, in pertinent part, as "information . . . 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 . . ." R.C. 3701.17(A)(2). The type of information described in this definition is the type of health information generated by a person while they are alive, not after they die.

Consequently, for a public agency to release such information, the statute requires written consent of the individual "who is the subject of the information." R.C. 3701(A)(2)(a). If the term "individual" refers to living persons, obtaining such consent is possible, until the person dies. If "individual" includes deceased persons, then obtaining permission to release a person's cause of death information—to extent it falls within the definition of "protected health information"—is never possible after the fact, unless the term "personal representative" is read into the statute, as the Tenth District did. Given that the General Assembly made it exceedingly easy for a member of the public to obtain a decedent's cause of death information through R.C. 3705.231, it would be a glaring oversight if the General Assembly neglected to include a mechanism for obtaining consent to release a deceased person's cause of death information, since such information only comes into existence once the person is no longer able to provide written consent.

Appellee's citation to the Court's decision in *State ex rel. CNN*, 2020-Ohio-5149, is thus inapposite. (Appellee's Br. at 13.) The argument Appellant advances in this case is not that health information generated during an individual's life loses its protected status once that person dies. Rather, Appellant argues that official cause of death information—which is generated after a person dies—is not "information . . . that describes an *individual's* past, present, or future physical or mental health status or condition . . .," because the term "individual" refers to living persons, not decedents. This

Court has no need to address whether protections for health information generated during a person's lifetime expire upon death, as the information collected in the EDRS is only generated after a person dies.

B. The General Assembly has indicated a clear intent to afford robust public access to death certificates, and by extension, official cause of death information recorded in such certificates.

ODH argues that Appellant is "mistaken in relying on the Certified Copy Law" because "[t]he fact that the General Assembly created one means for obtaining this information does not imply that the same information is available through other means." (Appellee's Br. at 15.) In ODH's view, because death certificate information is subject to this limited form of release, it is not publicly available, and there is no inconsistency posed by the contention that publicly available information cannot be deemed "protected" for purposes of R.C. 3701.17.

But ODH's argument is flawed for several reasons. To start, R.C. 3705.23 is not called the "Certified Copy Law" anywhere in the revised code. To suggest that R.C. 3705.23, which provides for copies of vital records, is inextricably bound up with certified copies is misleading. Section 3705.23(A)(1) provides procedures for obtaining a certified copy of a death certificate. But nowhere does that section state that a person may only obtain a copy of a death certificate if it is a "certified" copy. To the contrary, R.C. 3705.231 explicitly provides that "[a] local registrar shall allow an individual to photograph or otherwise copy a birth or death record." Section 3705.231 does not impose the requirements Section 3705.23 imposes to obtain a certified copy. Under 3705.231, any person with the means could copy all of the death certificates maintained by every local registrar. But as the EDRS contains this same information, the public need not incur this time and cost burden. The General Assembly's clear intent is to

afford robust public access to a decedent's official cause of death information, and that information is readily available through the EDRS.

The existence of R.C. 3705.231 also belies ODH's contention that the statutory scheme reflects an intent on the part of the General Assembly to "deter[] people from requesting [cause of death] information except in cases where it provides some real value." (Appellee's Br. at 11.) There is nothing in R.C. 3701.17 that suggests that in seeking to protect the health information of living individuals the General Assembly sought to "sensibly balance[] the public's interest in disclosure with individuals' interests in privacy." (*Id.*) None of the exceptions allow disclosure of "protected health information" in response to a public records request based on mere "public interest in disclosure." Subsection (C), which does allow public disclosure of information that does not identify an individual in summary, statistical, or aggregate form, provides that "[i]nformation that does not identify an individual is not protected health information . . ." (Emphasis added.) In other words, if the information is "protected health information," it can only be disclosed under very narrow circumstances, none of which include general public records requests.

What ODH does not address is the fact that the General Assembly did conduct this balancing of interests in R.C. 149.43 with the "medical records" exception, R.C. 149.43(A)(1)(a). Reflective of its legislative intent to afford the public robust access to cause of death information, the definition of "medical records" excludes "deaths." R.C. 149.43(A)(3). As such, ODH's reliance on R.C. 3701.17, which contains no reference to death certificates or cause of death information, is little more than an end-around this legislative choice.

With respect to Appellant's reliance on R.C. 313.10 to demonstrate the General Assembly's intent regarding access to cause of death information, ODH fails to address the fact that the General Assembly made the conclusions of the coroner, i.e., the official cause of death determination, public. (Appellee's Br. at 16.) R.C. 313.10 does exempt from disclosure other records that may be in the coroner's file, but the fact that the General Assembly did not exempt the coroner's conclusions regarding cause of death is unquestionably reflective of legislative intent to afford public access to such information. *Riffle v. Physicians & Surgeons Ambulance Serv.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶ 21 ("[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law") (quoting *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 24, quoting *State v. Moaning*, 76 Ohio St.3d 126, 128, 666 N.E.2d 1115 (1996)).

Neither the Tenth District, nor ODH squarely contend with the clear legislative intent reflected throughout the Revised Code regarding public access to cause of death information. Nor have they advanced any compelling argument for why the General Assembly would afford such robust and unfettered public access to official cause of death information through R.C. 3705.231 and R.C. 313.10 if the General Assembly intended for its definition of "protected health information" to cover this information.

Appellant's construction of R.C. 3701.17 harmonizes an ambiguous statute with the clear legislative intent reflected throughout the Revised Code, without expanding the rights of the public to access information to which it does not already have access. ODH's simply makes it harder (but not impossible) for the public to access information to which it is entitled, without advancing any obvious legislative purpose. Accordingly, the Court should reverse the

Tenth District and reinstate the decision of the court of claims holding that cause of death information in a death certificate is not protected health information within the meaning of R.C. 3701.17.

III. CONCLUSION

For the reasons set forth above, and in its opening brief, Appellant respectfully requests that the Court reverse the judgment of the Tenth District from which Appellant appeals, and hold that information contained in an Ohio death certificate, and specifically cause of death information of a decedent, is not "protected health information" within the meaning of R.C. 3701.17(A)(2) so as to make such information exempt from disclosure under state law for purposes of the Ohio Public Records Act, R.C. 149.43.

Respectfully submitted,

/s/ Darren W. Ford
John C. Greiner (0005551)
Counsel of Record
Darren W. Ford (0086449)
FARUKI PLL
201 East Fifth Street, Suite 1420
Cincinnati, OH 45202
Telephone: (513) 632-0315
Fax: (513) 632-0319
Email: jgreiner@fclaw.com
dford@fclaw.com

Counsel for Requester/Appellant, Randy Ludlow

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant's Reply Brief has been served via electronic mail pursuant to Sup.Ct.Prac.R. 3.11(C) upon the following counsel of record this 29th day of June, 2023:

Benjamin M. Flowers, Esq.
Stephen P Carney, Esq.
Theresa R. Dirisamer, Esq.
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Benjamin.Flowers@ohioago.gov
Stephen.Carney@ohioago.gov
Theresa.Dirisamer@ohioago.gov

Counsel for Respondent/Appellee

/s/ Darren W. Ford
Darren W. Ford (0086449)

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