In the
Supreme Court of Ohio

CHRISTOPHER HICKS,	:	Case No. 2023-0580
	:	
Appellant,	:	On Appeal from the
	:	Clermont County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
UNION TOWNSHIP, CLERMONT	:	
COUNTY BOARD OF TRUSTEES,	:	Court of Appeals
	:	Case No. CA2022-10-057
Appellee.		

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE UNION TOWNSHIP BOARD OF TRUSTEES

BRODI J. CONOVER (0092082)
Bricker Graydon LLP
2 East Mulberry Street
Lebanon, Ohio 45036
(t) 513-870-6693
bconover@brickergraydon.com

Counsel for Appellee
Union Township Board of Trustees

CHRISTOPHER R. HICKS
444 Woodwick Court
Cincinnati, Ohio 45255
(t) 513-289-4341
chris@hickspub.com

Pro Se Appellant

DAVE YOST (0056290)
Attorney General of Ohio

MICHAEL J. HENDERSHOT* (0081842)
Chief Deputy Solicitor General
**Counsel of Record*
JANA M. BOSCH (0102036)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
michael.hendershot@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

The State and its subdivisions collect and use vast amounts of information. Some of it documents the government's internal processes or decisions. Other information does not, such as lists of personal contact information that the government uses to communicate with private citizens. Ohio's Public Records Act applies only to "records," which are defined as items that document the "organization, functions, policies, decisions, procedures, operations, or other activities of" a government office. R.C. 149.011(G). Christopher Hicks requested lists of email and home addresses that Union Township uses for distributing newsletters and updates. Those lists are not public records because they do not fit the definition of "records."

Indeed, if citizens' contact information is a public record, other citizens could use that information to harass those on this list. And that in turn would lead citizens who want nothing more than to keep abreast of what their public servants are doing to opt out of receiving any information the government aims to send to citizens. Such citizen opt-out, of course, would sabotage the transparency goals of the Public Records Act.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is the "chief law officer for the state and all its departments." R.C. 109.02. He is interested in the correct application of Ohio law. As the head of a state entity, he is also interested in the interpretation of the State's public records laws, which affect countless state and local agencies, and private individuals as well.

STATEMENT OF THE CASE AND FACTS

1. Union Township keeps in touch with its residents in several ways, including a website, social media pages, and a newsletter. With these tools, it can keep Union Township residents apprised of anything of local interest, from farmers markets and pickleball tournaments to zoning regulation and road improvements. Email updates go out to whomever requests them by submitting their name and email address on the Township's website. *Hicks v. Union Twp.*, 2023-Ohio-874 ¶6 (12th Dist.) ("App.Op."). The mailed newsletters go to all Township residents. A third-party vendor compiles the list of addresses, maintains it, and sends the mailings out. *Id.* The newsletters are also available in an archive open to the public on the Township's website. *See* Union Township Document Center, Newsletters, https://www.union-township.oh.us/DocumentCenter/Index/197 (last visited Oct. 10, 2023); also available at https://perma.cc/CR9S-UKAJ.

2. Ohio's Public Records Act permits "any person" to request any "public record." R.C. 149.43(B)(1). For an item to be a public record, it must first be a "record" which, means it must "serve[] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). Christopher Hicks, a Union Township resident, requested the email and home address lists that the Township uses to send its newsletters. App.Op.¶2. The Township denied the request because the lists do not "document the activities or function of the Township" and thus

are not public records under the statute. *Id.* Hicks sued the Township under the statutory alternative to a writ of mandamus, R.C. 2743.75, and lost in the Court of Claims, R.27, Sept. 13, 2022 Decision and Entry, *Hicks v. Union Twp.*, Ohio Ct. of Claims, Case No. 2022-00408PQ; *see also* App.Op.¶¶3–14.

Hicks appealed to the Twelfth District, arguing that the mailing lists qualified as public records. App.Op.¶¶15–16. The Twelfth District concluded that, while the newsletters themselves qualified as public records, the email and home address lists did not. App.Op.¶24. The Twelfth District reasoned that the email list was not a "record" because, "[s]tanding alone, the names and email addresses do nothing to document any aspect of the Township's newsletter program." App.Op.¶34. The court applied similar reasoning to the physical-address list: "mailing addresses do not provide any insight into the Township's newsletter program beyond that already available from accessing the newsletter itself or from accessing the Township's policies regarding the creation and distribution of the newsletter." App.Op.¶41. Judge Powell dissented in part; he would have held that the mailing-address lists documented "the distribution aspect of the program." App.Op.¶45 (Powell, J., concurring in part and dissenting in part).

Hicks appealed to this Court.

ARGUMENT

Attorney General's Proposition of Law:

> *Lists of citizens' email and home addresses generally do not "document the organization, functions, policies, decisions, procedures, operations, or other activities of" a government office.*

Ohio's Public Records Act serves an important role in our State. It ensures that public records are properly treated as "the people's records," with government officials as their faithful "trustees." *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 109 (1976). The "purpose of Ohio's 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, Inc. v. Petro*, 80 Ohio St. 3d 261, 264 (1997) (quotation omitted).

Still, the law's scope is not infinite, and overextending the Act has consequences for private citizens. Unlike a private entity, , the State's records may be divulged to any person for any reason, not just trusted confidants. For that reason, public agencies keeping individuals' personal information should abide by the statutory text and divulge no more than the statute dictates. Failure to do so not only overextends the statute; it violates the people's trust and their privacy.

I. Public records are only those items that document official activities.

In Ohio, "any person" may request any "public record." R.C. 149.43(B)(1). Only "records" under the statute's definition can be "public records." *See* R.C. 149.43(A)(1); R.C. 149.011(G). The Revised Code defines a record as "any document, device, or item,

regardless of physical form or characteristic … 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." *Id.*

Fleshing out the meaning of "record" requires turning to familiar rules of statutory interpretation. For starters, courts consider the "plain, everyday meanings," of the statutory language and to look "to how such words are ordinarily used." *State ex rel. More Bratenahl v. Vill. of Bratenahl*, 157 Ohio St. 3d 309, 2019-Ohio-3233 ¶12. They must avoid giving words a "hyperliteral meaning" and focus instead on how words are "used within the surrounding text." *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St. 3d 199, 2018-Ohio-5207 ¶9 (quotation omitted). Finally, courts must "give effect to every word and clause" in a statute and avoid an interpretation that renders a statutory "provision meaningless or inoperative." *Athens v. McClain*, 163 Ohio St. 3d 61, 2020-Ohio-5146 ¶35 (quotation omitted).

These principles of statutory interpretation show that the lists of citizen email and home addresses are not generally records under the Public Records Act.

For the purposes of this case, the most relevant portion of the statutory definition is the requirement that a "record" "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). That requirement indicates that not all information becomes a record "simply because [it] is

received and kept by a public office." *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384, ¶29. Information becomes a record only if it reveals something "about an agency's own conduct" or sheds "light on the conduct of any Government agency or official." *State ex rel McCleary v. Roberts*, 88 Ohio St. 3d 365, 368 (2000) (quotation omitted). If the General Assembly had intended to classify *all* the information the government stores as "records," it "would not have included the requirement in the [Act's] definition of 'records' that the document, device, or item in question 'document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.'" *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶29 (quoting R.C. 149.011(G)). But the General Assembly did include it, and the Court "cannot delete this statutory prerequisite." *Id.*

The statutory "prerequisite" that a record must "document" government conduct means that a record must serve to document an activity "of the office," not the information or activities of a private person. Abiding that statutory distinction, this Court's cases trace a consistent line between records *about* collecting citizen information, which are public records, and the citizen information itself, which generally is not a public record.

On the side of the line qualifying as records, for example, is a policy of collecting home addresses of government employees. *Dispatch Printing Co*, 106 Ohio St. 3d 160 at ¶26. Or if the government creates a program for collecting information about children

who will use a community pool, information about "when the program was initiated, the purpose of the program, how the program operates," and the fact "that the Department possesses certain personal information" would constitute public records. *McCleary*, 88 Ohio St. 3d at 369. Likewise, if the government creates or approves a jury questionnaire, the questions themselves "serve to document the activities of a public office." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117 at ¶13.

Contrast those records with what this Court has said are not: instances in which information kept by the government did not document anything about the "office." First, although the policy of collecting home addresses documents a government activity, "the home addresses themselves would not do so" because they document information about an individual and "reveal little or nothing about the employing agencies or their activities." *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶¶25–27 (quotation omitted). Likewise, personal information in a database of children who use a community pool documents only their use of the pool and other personal details; instead of shedding light on the government, it "merely records what the Government happens to be storing." *McCleary*, 88 Ohio St. 3d at 368 (quotation omitted). Finally, while a blank jury questionnaire may document something about the government's functions, the juror's answers document only their own personal thoughts and experiences. *Beacon J. Publ'g Co.*, 98 Ohio St. 3d 146 at ¶11–13. The "disclosure of information about private citizens is not required when such information reveals little or nothing about an agency's own

conduct" and "would do nothing to further the purposes of the Act. *Id.* at ¶11 (quotation omitted).

As this Court has summarized, documents kept by the State are "records" if they "create a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the state agencies." *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶22. But documents are not "records" if they "would reveal little or nothing" about any "agencies or their activities." *Id.* at ¶27 (quotation omitted).

Another section of the Revised Code confirms that the Public Records Act is best read as permitting the government to keep and use citizen contact information without that data becoming a public record. "The Revised Code, like any document, is designed to be understood as a whole." *State v. Porterfield*, 106 Ohio St. 3d 5, 2005-Ohio-3095 ¶12. The Personal Information Systems Act governs agencies that "[c]ollect, maintain, and use" people's "personal information that is necessary and relevant to the functions that the agency is required or authorized to perform." R.C. 1347.05(H). The Act protects "any information that describes anything about a person" from "unauthorized … disclosure." R.C. 1347.05(G); R.C. 1347.01(E). But it also provides that it does not "prohibit the release" under the Public Records Act of "personal information contained in a public record." R.C. 1347.04(B). In other words, releasing "personal information contained in a public record" is "not an improper use of personal information" under the Personal Information

Systems Act. *Id.* "To the extent that an item is not a public record and is 'personal information,'" under the Personal Information Systems Act, "a public office would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure." *State ex rel. Fant v. Enright*, 66 Ohio St. 3d 186, 188 (1993) (quotation omitted); *see also State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 385 (1985); *McCleary*, 88 Ohio St. 3d at 367.

If information always qualified as a public record merely because the State keeps and uses it, the Personal Information Systems Act would do nothing. The entire scope of the Act is "personal information" that the government may "use" for its official "functions." R.C. 1347.05(H). If all that information is necessarily a public record because the State uses the information for its official functions, then the exception deferring to the Public Records Act would swallow the Personal Information Systems Act whole. This Court "should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172 ¶26 (quotation omitted).

II. The personal information Hicks requested does not document official functions.

With the Act's scope in focus, it is easy to see why the Public Records Act does not include the personal information about private citizens that Hicks requested: like the lists of addresses at issue in *McCleary*, *Beacon Journal*, and *Dispatch Printing Co.*, the information that Hicks seeks does not "document" the "organization, functions, policies,

decisions, procedures, operations, or other activities" of the government. *See* R.C. 149.011(G). When a person enters their name and email address into the email subscription service, that documents personal information (the name and email address) and a private action (the fact that this person subscribed to the email list). Likewise, when the Township's mailing company compiles a list of addresses in the Township, it documents a fact about the private addresses: they are inside the Township. Neither "serves to document" the *government's* actions or policies. *See id.*

Consider the oddity of the alternative. If the list of email addresses "document[ed]" the Township's "policy," then every time someone subscribed or unsubscribed from the email list, that alone would alter the Township's policy or other activities. Likewise, if a new house were built in the Township and added to the mailing list, this act would alter the Township's "policy." Neither aligns with the ordinary meaning of "document" or "policy." Any interpretation that requires such an unnatural linguistic contortion does not commend itself to the "rules of grammar and common usage." *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶21 (quotation omitted).

This Court's precedents about citizen information point the same way. "Standing alone," information such as "home addresses" does "nothing to document any aspect of" the government's activities. *McCleary*, 88 Ohio St. 3d at 368. The same is true of personal addresses of State employees: "in general," they "reveal little or nothing about the employing agencies or their activities" and "do not document the organization, functions,

policies, decisions, procedures, operations, or other activities of the state and its agencies." *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶¶1, 27 (quotation omitted). "At best, home addresses represent contact information used as a matter of administrative convenience." *Id.* at ¶25; *see also State ex rel. DeGroot v. Tilsley*, 128 Ohio St. 3d 311, 2011-Ohio-231 ¶8. As a result, "[p]ersonal information of private citizens, obtained by a 'public office,' reduced to writing and placed in record form and used by the public office in implementing some lawful regulatory policy, is not a 'public record' as contemplated by [the Public Records Act]." *McCleary*, 88 Ohio St. 3d 365 at syl. Indeed, these are the same cases the Attorney General has relied on when analyzing public-records questions about citizen information in the past. *See, e.g.*, *Attorney General Opinion No. 2014-029* at 4–5 (July 10, 2014).

The same privacy interests that animated these decisions apply with equal force here. Hicks seeks information about private citizens, but just like the public employees whose addresses were at issue in, none of the private citizens who signed up to receive township newsletters agreed to become readily available targets for communications from Hicks. *See Dispatch Printing* 106 Ohio St. 3d 160 at ¶26; *see also McCleary*, 88 Ohio St. 3d at 369–70.

This Court's holdings about citizen information also align with the Public Records Act's purpose. "Inherent in Ohio's Public Records Act is the public's right to monitor the conduct of government," but disclosing personal information "would do nothing to

further the public's knowledge of the internal workings of governmental agencies" and thus "would do nothing to further the purposes of the Act." *McCleary*, 88 Ohio St. 3d at 369. For the same reason that the information does not document the State's "organization, functions, policies, decisions, procedures, operations, or other activities," it also has no relationship to the purpose of the Act. Put another way, the purpose of the Public Records Act is "monitor" and "expose" the *government*, not private individuals. *Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶27.

As a final note, addresses may be public records in some circumstances even though they do not qualify here. For example, when deciding on whether lead-hazard questionnaires were public records, this Court has distinguished information that did not document government activity—including names and phones numbers—from information that was "pertinent to an analysis of whether [the government] took steps to provide safe housing in specific [government-owned] dwellings with possible lead hazards." *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St. 3d 149, 2012-Ohio-115 ¶34. The portion of those documents that qualified as public records was the narrow sliver necessary to "hold [the government] accountable for its statutory duty of reducing or eliminating any lead-related hazard"—specifically, the address and generic "nonidentifying" information about lead hazards. *Id.* Under *O'Shea*, like the other precedent already discussed, the email and home addresses at issue here are not public records because, instead of documenting a government activity, they

document an individual's choice to subscribe to an email list or a residence's existence inside Township limits.

III. Hicks's arguments to the contrary are unavailing.

Hicks's main argument appears to be that applying the definition of "records" straightforwardly to his request would "green light unchecked government propaganda to target audiences" without providing him the ability to request and compare any different distribution lists. Hicks Br.15–16. Hicks's policy arguments cannot overcome the text of the Public Records Act. If a document does not qualify as a record, Hicks's *reasons* for wanting the information cannot transform the lists into a public record.

Hicks also assails the idea of "administrative convenience" as a "creature of caselaw" rather than the statute. Hicks Br.15. Not so. This Court uses the phrase "administrative convenience" to describe a category created by statute: "personal information" that the government may "use" for its official "functions," R.C. 1347.05(H), that nonetheless does not itself document the "organization, functions, policies, decisions, procedures, operations, or other activities of the office," R.C. 149.011(G); *see Dispatch Printing Co.*, 106 Ohio St. 3d 160 at ¶25. Hicks himself recognizes that the government's need to keep "ancillary information" without opening it to the public is "common sense." Hicks Br.16. He merely disagrees that such principle should apply to his request. Hicks Br.16–17.

Hicks objects to a "universal 'personal information' exception" to the Public Records Act. Hicks Br.17 (emphasis omitted). On this point, he is correct. There is no "personal information exception" to the Public Records Act, as emphasized in the public-records exception in the Personal Information Systems Act. R.C. 1347.04(B). But that does create an inverse rule that all personal information *is* a public record. The analysis should always begin with the statute's definition of "records." And to be sure, the content of the information requested will determine whether it documents the office's activities. But the mere fact that a document contains personal information does not itself establish whether it is a public record.

Hicks argues the only way that he can ensure that the Township is not abusing its power to distribute newsletters is if the Township gives him the list of personal email and home addresses to which it sends those newsletters. Hicks Br.14–15. That argument does not align with his requests in this case, which requests lists, not the material distributed to those lists. Indeed, Hicks has described the kinds of (as-yet unrequested) records that *would* document government activities: documents related to "the creation of [the] communication vehicles and [the] distribution system," communications from when the Township "hired vendors and tasked employees to build and disseminate the messages," documents related to creating the "online capabilities to opt-in and opt-out from electronic distribution," or any other document evidencing the Township's "curation approach." Hicks Br.19. He did not request any such records, and the Township never

denied that they would be records. Indeed, he could have added a request for the newsletters themselves (undoubtedly public records) to see if, as he feared, separate newsletters existed for separate groups within the Township.

Hicks and the dissent below point to two cases, but neither analyzed the relevant statutory text. Hicks relies heavily on *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518, 2006-Ohio-1215; Hicks Br.20–21. That case is of little relevance here because it involved a different question. At issue in that case was whether the records in question contained protected health information, *not* whether they documented the activities of a governmental agency. *See Daniels*, 108 Ohio St. 3d at ¶17 (distinguishing *McCleary*).

The dissent below pointed to *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, App.Op.¶47, but the parties in that case apparently disputed the exceptions rather than the definition of "records," and the Court's analysis on what constituted a "record" was a single sentence unrelated to the statutory text. 118 Ohio St. 3d 81, 2008-Ohio-1770, ¶¶7, 9. Likely for that reason, this Court has never cited *Jones-Kelley* for its analysis of the meaning of "record." Even so, the lists in *Jones-Kelley* at least served to document the fact that the government had certified those listed as foster caregivers. *See id.* at ¶7. Here, the email list documents only individuals' choices to subscribe, and the mailing list documents only the existence of a property inside the Township. Neither is an activity of the government, so neither list qualifies as a record.

As a final note, Hicks imagines a world with "secret profiling files" that are inaccessible to citizens who are the subject of the files. Hicks Br.18. The General Assembly already thought of that. And instead of broadening the definition of "records," it gave every Ohioan a special right to inspect their own personal information in government data systems. R.C. 1347.08(A). More than that, he may "dispute" the information in his file and ask the agency to investigate, correct its data, or add a statement of dispute in his own file. R.C. 1347.09(A). Thus, in addition to distracting from proper textual analysis, this policy concern has no grounding.

* * *

All government acts merely as the "agents and trustees of the people." The Federalist No. 46, p. 294 (C. Rossiter ed. 1961) (J. Madison). When the people want to keep tabs on their trustees and agents by receiving information from the government, the people do not themselves enter the political fray. The people should be able to request information that lets them monitor their agents without exposing their contact information to public display. A contrary rule—which lets anyone access private citizen information, and use that information to harass private citizens—has the perverse effect of making government *less* transparent by making citizens less informed. Citizens who do not want to enter the fray will opt out of programs that let their government keep those citizens informed. That is so because disclosing contract information "enable[s] private citizens and elected officials to implement political strategies *specifically calculated*

to … prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 483 (2010) (Thomas, J., concurring in part and dissenting in part).

CONCLUSION

For the above reasons, the Court should affirm the Twelfth District's decision.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Michael J. Hendershot
MICHAEL J. HENDERSHOT* (0081842)
Chief Deputy Solicitor General
**Counsel of Record*
JANA M. BOSCH (0102036)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
michael.hendershot@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee Union Township Board of Trustees was served this 23d day of October, 2023, by e-mail on the following:

Brodi J. Conover
Bricker Graydon LLP
2 East Mulberry Street
Lebanon, Ohio 45036
bconover@brickergraydon.com

Christopher R. Hicks
444 Woodwick Court
Cincinnati, Ohio 45255
chris@hickspub.com

/s Michael J. Hendershot
Michael J. Hendershot
Chief Deputy Solicitor General