

**In the
Supreme Court of Ohio**

STATE EX REL. KATHRYN HUWIG,	:	
	:	
Relator,	:	Case No. 2023-0936
	:	
vs.	:	
	:	Original Action for Writ of Mandamus
OHIO DEPARTMENT OF HEALTH,	:	
ET AL.,	:	
	:	
Respondents.	:	

RESPONDENTS' BRIEF

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I. INTRODUCTION

The Relator in this action, Ms. Kathryn Huwig, sought voluminous customized reports from computer databases that contain highly personal health information of millions of Ohio citizens. These databases contain Protected Health Information that the Ohio Dept. of Health (“Department”) is legally required to withhold from public records requests; namely, private health data of millions of Ohioans, including their COVID vaccination status, their diagnoses and other health care information, and causes of their deaths.

The Department goes to great lengths to maintain the security of this data, which is collected for specific, statutorily-authorized purposes. Access to the data is limited, even within the Department. And the various types of software that are used to receive, maintain, and transfer the data are programmed to function in the manner necessary for the Department to carry out its authorized functions. None of the available data systems are programmed to create a report containing the specific information requested by Ms. Huwig. And the reports she requests serve no purpose for the Department.

While the Department maintains the confidentiality of each individual’s Protected Health Information, the Department regularly releases de-identified and aggregate health information as a service to the public. The Department creates monthly reports listing the names and dates of death of deceased Ohioans. It also provides a searchable online portal that contains de-identified data regarding Ohio deaths, and an online “dashboard” that displays de-identified data regarding COVID-19 vaccines. Ms. Huwig was offered copies of the Department’s existing public reports and was referred to the Department’s publicly-available resources. She was also made aware of the Department’s process for requesting custom reports for research purposes. She rejected these

offers, and insisted on requesting voluminous custom reports that do not exist and that include fields that would reveal individual Ohioans' private health information.¹

Ms. Huwig focuses on whether the Department has the technical capability to run the reports she requests—but that is not fundamental issue here. The question is whether the Department is *required* to create these reports. Given unlimited time and resources, the Department could create an almost endless variety of reports from its many databases. But the Public Records Act does not require an agency to create a record, or a compilation of records, that does not exist. The databases are not programmed to create these reports, and significant programming would be required to produce them. Moreover, these particular databases contain sensitive information that make it exceedingly important to withhold information that would allow for identification of the individuals. These privacy issues create further challenges that make the required programming even more complicated and time-consuming.

Ms. Huwig has not met her burden to establish by clear and convincing evidence that she is entitled to the custom reports she requests. First, the requests are overly broad and require the creation of reports with millions of pieces of data. Second, the custom reports that Ms. Huwig requests do not exist and the databases at issue are not programmed to create the specific compilation of records that she seeks. The evidence shows that creating either one of the reports she seeks is a laborious process that would require significant effort and new programming. Developing the queries alone would take several hours, in addition to the time to download a copy of the file, run and test the query, and transfer the data to Ms. Huwig. Third, the fields she requested

¹ Ms. Huwig eventually stated that the Department could redact what it believed to be Protected Health Information, but she did not remove the fields containing Protected Health Information from her request, and she made clear that she did not agree that the information was protected, and that she intended to challenge redactions of Protected Health Information. Resp. Ex. O-1 at 34.

include Protected Health Information not subject to disclosure. The need to exclude this protected data further complicates the programming and production of the requested reports.

This case has implications not only for the Department, but for all government agencies that maintain electronic databases. Government agencies should not be required to reprogram their systems to create reports that do not exist, without regard for the burden on the agency's time and resources. This Court should therefore grant judgment in favor of Respondents, and hold that the Department is not required to engage in the significant effort that would be required to create these custom reports, which do not exist and would require new programming to produce.

II. STATEMENT OF FACTS

A. Protected Health Information

Ms. Huwig submitted public records requests to the Department, seeking records relating to Ohio deaths in 2021, and records of administrations of COVID-19 vaccinations in Ohio in 2021. State's Ex.O-1 at 38-42.² The records she requested would contain Protected Health Information that the Department is required to keep confidential pursuant to Ohio law. *See* R.C. 3701.17(B).

Protected Health Information ("PHI") is defined as information that "describes an individual's past, present, or future physical or mental health status or condition, [or] receipt of treatment or care" if the information "reveals the identity of the individual who is the subject of the information, or the information *could be used* to reveal the identity of the individual." (Emphasis added.) R.C. 3701.17(A)(2). Subject to certain limited exceptions, the Department is not permitted to release PHI without written consent of the individual. R.C. 3701.17(B). The

² The Amended Complaint was marked as an exhibit during Ms. Huwig's deposition and was filed with the Respondents' Exhibits as Ex. O-1.

Department would therefore be required to redact any PHI before it produced the custom reports requested by Ms. Huwig.

The Department may, however, release de-identified information in “summary, statistical, or aggregate form.” R.C. 3701.17(C). The Department regularly releases this type of de-identified public health information, and also makes such information available through its public website, [odh.ohio.gov](https://odh.ohio.gov/explore-data-and-stats). See <https://odh.ohio.gov/explore-data-and-stats>.

Ms. Huwig’s Amended Complaint does not allege that it would be improper for the Department to redact PHI from the reports she requests. The issue of whether information within the Department’s Death Database constitutes PHI has been conclusively determined by this Court in *Ludlow v. Ohio Department of Health*, 2024-Ohio-1399, ¶ 24, which held that the name and address of a decedent, when combined with information regarding cause of death, is PHI under R.C. 3701.17 and not subject to disclosure as a public record. That is because the combination of information “reveals the identity of the decedent and the decedent’s past physical-health status.” *Id.* at ¶ 1.

B. The Department’s Death Records

Ms. Huwig requested records from the Department’s Electronic Death Registration System (“EDRS”) and a related database, EnterpriseDatawarehouseSecure (referred to herein as “Secure Data Warehouse”). Resp. Ex. O-1 at 38-42.

1. The Electronic Death Registration System (“EDRS”)

EDRS is an electronic system that collects information regarding deaths that occur in the State of Ohio, for the purpose of producing death certificates. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3. The sole programmed output of EDRS is to produce a death certificate. *Id.* at ¶ 3(A)(i); see also Resp. Ex. A (Priddle Dep.) at p. 13. EDRS does not offer an export or report function and

does not produce spreadsheets or similar files. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(A)(iv).

Because the EDRS has limited functionality, most, but not all, EDRS data is transferred daily to the Secure Data Warehouse. *Id.* at ¶ 3(B). The Secure Data Warehouse dataset is created using a specially created software “bridge” (a/k/a “translation box”) programmed solely to perform this specific task. *Id.* A diagram showing the flow of mortality data can be found at Respondents’ Exhibit C-2.

2. The Secure Portal

The Secure Data Warehouse includes line-level entries for each decedent, with multiple fields of data for each decedent. Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(C). “Line-level” in this context refers to tabular data where each row of data relates to a single individual, and columns are labeled with different categories of information, referred to as “fields.” The fields in the Secure Data Warehouse include PHI such as the immediate cause of death and other conditions that contributed to the death, along with personal identifiers such as the decedent’s name, address, date of birth, race, etc. *Id.* at ¶ 4(C); Resp. Ex. O-1 at 12-21.

The Secure Data Warehouse was the information source for the Ohio Public Health Information Warehouse (“Warehouse”). Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(B). The Warehouse had a secure version (“Secure Portal”) and a public version (“Public Portal”). *Id.* Because the Secure Portal contained PHI, access to it is limited to designated State of Ohio employees and local health department employees or contractors with an approved need for access. *Id.*; Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(E).

The Warehouse has since been replaced by the DataOhio Portal, part of the Innovate Ohio Platform, which is administered by the Department of Administrative Services. Resp. Ex. A (Priddle Dep.) at 17-18, 22-23; Resp. Ex. F (Fowler Dep.) at 13-14. The Department has access to

the DataOhio Portal, and it is nearly identical to what was in the Warehouse. Resp. Ex. A (Priddle Dep.) at 23, 25; Resp. Ex. F (Fowler Dep.) at 14. Like the Warehouse, the DataOhio Portal has both a secure module and a public module. Resp. Ex. F at 16. For purposes of this Brief, the Department will continue to refer to this database as the “Warehouse” as it is the terminology used by the parties and witnesses during the relevant periods in the litigation.

The Secure Portal does not have functionality to redact or obscure data fields for a particular custom data request. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(B)(ii). Staff previously programmed each dataset to export a particular set of variables. *Id.* The Warehouse is programmed to create mortality files that update daily with data relating to all deaths that occurred in Ohio in a given year. Resp. Ex. A (Priddle Dep.) at p. 19. This mortality file contains PHI, including cause of death information. Resp. Ex. C (3/04/24 Priddle Aff.) ¶ 3(B)(ii). Staff can download data from the Secure Portal, but the download cannot exclude select fields; it must download all the programmed variables, including those containing PHI. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(B)(ii).

The Warehouse is also programmed to generate a Deceased Ohioans Report, which is output as a CSV file. Resp. Ex. A (Priddle Dep.) at 31-32. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(B). The Deceased Ohioans Report is a programmed extract of specific fields that is updated nightly and produced monthly and yearly. *Id.* at ¶ 3(D). The Deceased Ohioans Report is created by a scheduled data query that was programmed by technical developer staff to be made available in a Microsoft Excel format. *Id.* at ¶ 3(D). It contains 15 data fields and contains the names and dates of death for Ohioans whose death certificates were filed in the previous month. *Id.* It does not contain the cause of death or other PHI as defined in R.C. 3701.17. *Id.* The fields were chosen

to meet the reporting requirements in R.C. 3503.18, which requires the Department to report deaths to the Secretary of State for the purpose of removal from voter rolls. *Id.*

3. The Public Portal

The Public Portal is an online portal where members of the public can access de-identified and aggregate data from the Secure Data Warehouse, including a mortality dataset with data relating to deaths of Ohio residents. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(C), 3(C)(4). Aggregate data is data that is combined to reflect a statistical overview of the underlying line-level data. Rather than displaying one row of data per person, aggregate data would be displayed in tables or charts reflecting the total number of people who fit within a particular category or combination of categories. Aggregate data could show, for example, the number of women within a particular age group who died from a stroke in a particular county in a particular year.

Through the Public Portal, members of the public can view canned reports, such as “Number of resident deaths by year in Ohio,” or they can build custom reports, using row and column variables from a list of 50 available variables including cause of death, county, age, race, ethnicity, sex, etc. *Id.* at ¶ 3(C). The public can view, download or print these reports. *Id.* At the time of Ms. Huwig’s request, the Public Portal could be accessed at the following link: publicapps.odh.ohio.gov/EDW/DataBrowser/Browse/Mortality. *Id.* at ¶ 3(C).³

4. Triangulation and the Small Numbers Policy

EDRS and the Secure Data Warehouse each contain confidential PHI that is exempted from the Public Records Act pursuant to R.C. 3701.17(B). Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(B)(i). The data available in the Public Portal comes from the Secure Data Warehouse, but information

³ Publicly-available data is now available at the DataOhio Portal, a link to which can be found at <https://odh.ohio.gov/explore-data-and-stats>.

has been de-identified and aggregated, and PHI is excluded, as provided in R.C. 3701.17(B). *Id.* at ¶ 3(C)(4).

When data includes PHI, Brian Fowler explained that even when names and addresses are withheld, the identity of individuals can be revealed through “triangulation.” Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i). Triangulation refers to overlapping different data points until the identity of the subject of the information is revealed to a reasonable level of confidence. Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(M). Information can be obtained from an internet search, news articles, obituaries, property records, and other publicly available information that, when combined with information in the database, could lead to the identification of individuals and reveal their private health information. Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i). Mr. Fowler pointed out that the amount of information available on the internet is “almost infinite,” making it easier for people to use triangulation to identify individuals. Resp. Ex. F (Fowler Dep.) at 27. Because of the high likelihood of identifying an individual even after removing name and address information, the Department does not publish line-level death data on the Public Portal, or create or release custom reports with line-level death data in response to public records requests. Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i).

This policy is consistent with State health departments nationwide. *Id.* Mr. Fowler stated that in his 24-year career working with public health organizations, he “had not run across an organization that has a policy allowing for the public release of line-level data from datasets containing protected health information.” *Id.* The likelihood of identifying an individual is simply too high. *Id.*

The Department allows for access to line-level data for research purposes, under limited circumstances with protections for individual privacy. The Department has established a Data

Governance Council and the Institutional Review Board (“IRB”) to review applications to obtain access to custom reports of line-level data. Resp. Ex. G (8/12/24 Fowler Aff.) ¶ 4(i). The IRB reviews applications for custom reports for data involving human subjects to ensure that the individuals’ rights and privacy are being protected. Resp. Ex. M (Locklin Dep.) at 10; Resp. Ex. N-1 (Application). The IRB considers the interests of these individuals, and also reviews the feasibility of the request, from the standpoint of technology and staffing. *See* Resp. Ex. N-2. Legal issues regarding confidentiality are considered by the data stewards for the data being sought, as well as the Data Governance Board. Resp. Ex. M (Locklin Dep.) at 15. To prevent public release of the data, applicants explain how the data will be securely stored, and must submit confidentiality agreements signed by all persons who would have access to the data if the application were granted. Resp. Ex. N-1 at 1, 8. The IRB reviews the applicant’s protocols to ensure that line-level data will be protected. *See* Resp. Ex. N-1.

Moreover, even when data is aggregated, it is still possible to use triangulation to identify individuals when small numbers within specific geographic areas and other demographic information are combined. *Id.* For example, if aggregated data indicated that there was one Asian female between the ages of 30 and 35 in Noble County, Ohio who died of AIDS in a particular timeframe, a person might be able to determine the person’s identity. *Id.* at ¶ 4(Q). Special software has been applied to the data in the Public Portal to prevent the publication of information that, even though aggregated, could be used to identify individuals whose information is maintained in the database. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(C)(3); Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(J).

The software was created to comply with the Department’s Disclosure Limitation Standard, which is also known as the “Small Numbers Policy.” *Id.* This Small Numbers Policy is in place to comply with R.C. 3701.17, which prohibits the disclosure of PHI and defines PHI as

including information that “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)(b).⁴

Pursuant to the Small Numbers Policy, if the value in a particular cell is less than a designated number, the data in that cell is not disclosed to the public. It is common for public health agencies to set this value at 10. Ex. G (8/12/24 Fowler Aff.) at ¶ (4)(ii). The Department, however, established a more liberal policy that permits the disclosure of more aggregated data.

The software for the Public Portal applies a filtering algorithm based on the Small Numbers Policy. The affidavits of Brian Fowler, Respondents’ Exhibits G, H and I—and, particularly, Exhibit I—explain the algorithm in more detail. Resp. Ex. I (9/30/22 Fowler Aff.) at ¶ 4(c). An example of the application of the policy is shown in chart form in Respondent’s Exhibit G. Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(ii).

The Department’s filtering algorithm uses a “denominator minus the numerator” calculation for suppressing aggregated data tables. Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i). The calculation is explained in more detail in Respondent’s Ex. G, but the Department’s policy takes into account the size of the population that the individual is drawn from, i.e., the denominator. *Id.* at ¶ 4(ii). Only if the value of the denominator (the group population) minus the numerator (the number in the limited category) is less than 10 would the number be suppressed. *Id.* Under the Department’s Small Numbers Policy, if the population in the group is larger, small number values would likely still be disclosed. *Id.* “The policy was adopted to allow for the release of as much data as possible without compromising the confidentiality of the individuals contained in the dataset.” *Id.*

⁴ This is the “triangulation,” explained above, that the Small Numbers Policy seeks to prevent.

Because access to the Secure Portal is limited and is not available to the public, the Secure Portal does not have software that applies a filtering algorithm to avoid triangulation of data. Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(R). To prevent the release of PHI in a custom report from the Secure Portal, the Department would be required to reprogram the system to filter and suppress data that could lead to the identification of individuals. *Id.* The filtering algorithm applied to the Public Portal would not work in the Secure Portal, because that algorithm was designed to apply to aggregate data, not line-level data. Resp. Ex. F (Fowler Dep.) at 25. Unlike an aggregate table that displays a number in each cell, the line-level tables in the Secure Portal have cells with a variety of types of content, many of which are *words* (such as male, female, Asian, Black), rather than numbers. Words cannot be calculated by the algorithm.

5. New Programming Needed

The report requested by Huwig for data from the Death Database does not exist and if created solely for Huwig would have no operational or administrative value for the Department or the Bureau of Vital Statistics, as it does not document the organization, functions, policies, decisions, procedures, and essential transactions of the Department or the Bureau. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(F). Contrary to the claims in Ms. Huwig’s Brief, creating the custom reports that Ms. Huwig requested would take significant time and reprogramming.

Because the Death Database is not programmed to create a custom report, data would need to be transferred and a software query would need to be created and run to pull selected information from the Death Database and compile it into a CSV file. *See, e.g.,* Resp. Ex. F (Fowler Dep.), at p. 50-51. Thus, to provide the report requested by Huwig, the Department would be required to export the data to a separate file and then use additional licensed software such as “SAS” (SAS Institute Inc. Statistical Analysis System (SAS) software) or “SSMS” (Microsoft SQL Server

Management Studio). A new query would need to be developed to extract and organize information from the Secure Data Warehouse, selecting the fields requested by Ms. Huwig but excluding PHI. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(F).

Developing an appropriate query and running the search to create a custom report takes significant time and resources. In some instances, staff work on SQL queries for months. Resp. Ex. F (Fowler Dep.), at 49. “[If you wanted to, for example, run something that pulled out multiple parameters or applied specific logic, such as something like the disclosure limitation standard and things like that, it would be a lot more complicated to do.” *Id.* As noted above, the algorithm applied to the Public Portal would not work in the Secure Portal. The Department would need to develop a new algorithm that would identify data in the line-level table that would be suppressed in *any* configuration of aggregate tables in the Public Portal.

Additionally, “when you have a large data set, it can take time for the – the computers to process the request, depending on the complexity.” *Id.* For example, some SQL queries can run “overnight” or “take days, depending on the complexity.” *Id.* Fowler Dep. at 48. And, in the context of this case, a custom CSV file would not exist until a query is run to create it. *Id.* at 54.

Ms. Priddle stated that developing and testing a custom query to extract the data requested by Ms. Huwig from the Death Database would likely take “several hours.” Ex. B (Priddle Aff.) ¶ 3(A)(ii). Additional time would be needed to run the report and review it for inconsistencies, inadvertent disclosure of PHI, or other problems. *Id.*

Ms. Huwig points to Devon Priddle’s deposition testimony relating to creating a CSV file from the death data and manually deleting or redacting information in a CSV file. Relator’s Brief at 3-5. But when Ms. Priddle testified about outputting certain records from the Death Database,

she was explicitly not addressing a request for a custom report. Instead, she was talking about the output of *existing* reports that the system is *already programmed* to create.

For example, the following exchange occurred during Ms. Priddle's deposition:

BY MR. CONNORS:

Q The capacity to output a CSV file is a general functionality of the secure database; correct?

A It is a function of the -- the warehouse, and also the DataOhio Portal.

Q Outputting putting a CSV file, is there anything about doing that that would interfere with the operations of either the warehouse or the Ohio Data Portal?

A No. It's a programmed output of the warehouse and the DataOhio Portal.

Q So there's nothing about that that would necessarily interfere with the day-to-day functioning of those, of the data portal or the warehouse?

A No.

BY MS. DIRISAMER:

Q When you were just answering his last questions about outputting CSV files, were you referring to all types of CSV files?

A No, just this Deceased Ohioans Report is a programmed CSV file that the warehouse generates nightly.

Resp. Ex. A (Priddle Dep.) at 31-32. Ms. Priddle was, therefore, specifically noting that the creation of the *pre-programmed* Deceased Ohioans Report does not interfere with the day-to-day functions of the Department. Similarly, the testimony that Ms. Huwig quotes at pages 3 to 5 of her brief discusses "yearly reports" that the Warehouse is "programmed to export," i.e., the yearly mortality file and the annual Deceased Ohioans Report, which are reports for which there is already

“a code in place that creates the file.” *Id.* at 19, 30, 33. She was not talking about a custom report like the one requested by Ms. Huwig.

After the query is developed and applied to the database to create the custom report, the Department would then be required to transfer this data to another format, such as Microsoft Excel, before providing the report to Ms. Huwig. *Id.* Due to the size of the file, it would need to be transferred to a secure server, and Ms. Huwig would need to obtain a login and password to access and download the file. *Id.*

C. COVID-19 Vaccination Records

1. The Vaccine Database

Ms. Huwig also requested records relating to COVID-19 vaccinations. The Department maintains an immunization registry known as Ohio Impact Statewide Immunization Information System (“ImpactSIIS” or “Vaccine Database”). Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(A). The registry was created as a voluntary, person-based system designed to serve the citizens of Ohio. *Id.* Healthcare providers who administer vaccinations may, with the patient’s consent, enter immunization data into the Vaccine Database. *Id.* at ¶ 3(A)(i). The system then serves as a convenient record for a patient to use with healthcare providers, schools, WIC, and managed care organizations when needed to verify which vaccinations the patient has received. *Id.* at ¶ 3(A)(ii). The Vaccine Database was designed and programmed solely to provide access to these immunization records. *Id.* at ¶ 3(B).

The Vaccine Database contains PHI, and access to this database is therefore controlled and limited through administrative and technical means, even within the Department. *Id.* at ¶ 3(B)(i), 3(C)(iv)(2). Healthcare providers and other caregivers outside of the Department who are granted access to the program can enter individual patient names to check that patient’s vaccination history.

2. Programming for COVID-19 Vaccinations

When vaccinations for COVID-19 became publicly available in December of 2020, all COVID-19 vaccines were provided by the United States government free of charge. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(C). The federal government required that providers report information to the United States Centers for Disease Control and Prevention (“CDC”) for each COVID-19 dose administered.⁵ *Id.* at ¶ 3(C)(i), (iii). Ohio chose to use the Vaccine Database for this purpose. *Id.* at ¶ 3(C)(ii). Providers who administer COVID-19 vaccines enter information relating to the administration into the Vaccine Database. *Id.* at ¶ 3(A), (C). COVID-19 vaccinations are the only vaccinations in Ohio that are *required* to be reported to the Vaccine Database; all other vaccination reports to the Vaccine Database are optional. *Id.* at ¶ 3(C)(i), (v).

The Vaccine Database does not have a report-building function. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(B)(iv). To comply with the federal requirements, the Department had to program the Vaccine Database to create reports that met the specifications of the CDC. *Id.* at ¶ 3(C)(iv). The software was programmed to automatically generate a report with the fields required to be sent to the CDC. Specialized software was used to write Structured Query Language queries to extract relevant information for CDC, transform the data into the format requested by CDC, and export a daily file. *Id.* at ¶ 3(C)(iv).

Nearly 16 million doses of COVID-19 were administered in Ohio in 2021 and reported to the CDC. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(C)(iv). As many as 37 fields of data are included in the report to the CDC for each of these 16 million doses. *Id.* at ¶ 3(C)(iv). The information provided to CDC is de-identified. The Department does not provide the CDC with the patient’s

⁵ Patients consented to this reporting when they consented to administration of the COVID-19 vaccine. *Id.* at ¶ 3(C)(iii).

name, address, or zip code, and the Department uses a unique identification number for each person who received the COVID vaccine in Ohio. *Id.* at ¶ 3(C)(iv)(2). The Department does not release the identification numbers to the public, as they constitute PHI under R.C. 3701.17. During 2021, these reports were generated and transferred to the CDC on a daily basis. *Id.* at ¶ (C)(iv).

3. Programming Needed for Ms. Huwig’s Custom Report

The reports sent to the CDC do not contain all the fields that Ms. Huwig requested in her public record requests. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ (C)(iv)(2). Ms. Huwig asked the Department to generate a report from the Vaccine Database to include 25 fields of data for all COVID-19 vaccinations administered in 2021. Resp. Ex. O-1 at 39-40. Given that approximately 16 million COVID-19 doses were administered in Ohio in 2021, the custom report requested by Ms. Huwig would contain approximately 400 million cells.

The report that Ms. Huwig requests does not exist, and the Vaccine Database is not programmed to create a report with the specific compilation of data she requests. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(D); Resp. Ex. J (Napier Dep.) at 43. To provide the custom report, the Department would be required to transfer a copy of the file and use specialized software such as Oracle SQL Developer software to extract and organize information and to program the system to include the fields she requested, but exclude PHI. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E). *See also* Resp. Ex. J (Napier Dep.) at p. 25-26, 43-48.

Running this report would interfere with the function of the program. Mr. Napier stated that the file “would be so large that the query *could not be run against the registry as it would negatively affect the users of the system while the program was running.*” (Emphasis added.) Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E)(i). Instead, the Department “would be required to pull the information from a recent copy of the data on the State’s servers,” and “SQL software would then

be used to program a query to create the customized report.” Although Mr. Napier testified that using SQL queries is a “common way” for people to extract data, he further stated that creating a custom query to extract the data requested by Ms. Huwig from the Vaccine Database would likely take four to twelve hours, and running the report could take up to 24 additional hours. Resp. Ex. J (Napier Dep.) at 48-49; Resp. Ex. K (8/12/24 affidavit of Brian Napier) at ¶ 3(A)(ii).

“For the data to be readable to a non-SQL user,” the Department “would then be required to transfer this data to another format, such as a .csv file (similar to a Microsoft Excel spreadsheet).” Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E)(i). *See also* Resp. Ex. J (Napier Dep.) at 43-48. Due to the expected size of a .csv file containing millions of data points, the document would likely be too large for Microsoft Excel and too large to email. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E)(ii). The Department would need to transfer the file to a secure server, and Ms. Huwig would need to obtain a login and password to download the file from that server. *Id.*

4. Making De-identified Data Available

There is no question that the Vaccine Database contains PHI. Receiving a vaccination is a medical treatment that constitutes PHI under R.C. 3701.17(A)(2). Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(D)(iii); Resp. Ex. O (Huwig Dep.) at 23. The individuals who receive vaccinations are entitled to privacy in their health records. Moreover, the decision to receive a COVID-19 vaccine unfortunately became highly politicized, and individuals who received or did not receive the vaccine could be subject to harassment if the data was disclosed. The Department must carefully protect the confidentiality of these individuals’ PHI.

While protecting the privacy of these individuals, the Department provides an extensive amount of de-identified data to the public. The Department maintains an archived COVID-19 Vaccine Dashboard that is available to the public at the following link:

<https://data.ohio.gov/wps/portal/gov/data/view/archived-covid-19-reporting?visualize=true>.⁶ The dashboard provides de-identified and aggregate data relating to COVID-19 vaccinations administered in Ohio. *Id.* at ¶ 3(H)(i). Members of the public can select different variables, such as counties, dates or demographic categories, to view different sets of data including the number of people who have had at least one dose of COVID-19 vaccine, completed a second dose, or received booster doses. *Id.* at ¶ 3(H)(i). Members of the public can also download a document from the archived COVID-19 Vaccine Dashboard that shows the raw data underlying the charts and tables on the Dashboard. *Id.* at ¶ 3(H)(ii). The document is an Excel spreadsheet that contains over 95,000 line-items with seven columns, listed in order by County and then date. *Id.* at ¶ 3(H)(ii). It can be downloaded by clicking on the word “CSV” at the same link. *See* <https://data.ohio.gov/wps/portal/gov/data/view/archived-covid-19-reporting?visualize=true>.

D. Ms. Huwig’s Requests and the Department’s Offers of Publicly Available Records

On May 12, 2023, Ms. Huwig requested reports from the Department based on selected fields from the Secure Data Warehouse. Resp. Ex. O-1 at 38-42. Specifically, Ms. Huwig made two public records requests: (1) a request for “all records contained in” a list of 84 fields from the Department’s EDRS and EnterpriseDatawarehouseSecure database” for each of the years 2017 through 2023; and (2) a request for “all records contained in a list of 25 fields from ImpactSIIS” for the years 2020 through 2023. *Id.* at 38-41. She asked that the record be produced in a .csv file format. *Id.* at 39.

The Department responded to Ms. Huwig’s requests and advised that no responsive record matching her description existed, and that the Department was not required to search for records

⁶ The Dashboard was formerly available at <https://data.ohio.gov/wps/portal/gov/data/view/covid-19-reporting> Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(H).

containing selected information or to create a record by searching for and compiling information that may be of interest to the requester. Resp Ex. O-1 at 34-37. The Department also advised Ms. Huwig that the records she sought would reveal PHI, and that the Department would not produce PHI in response to a public records request. *Id.* at 37-39.

Ms. Huwig then revised her request on May 17, 2023, to include “the entire [death] and [vaccine] database record(s) for the years and in the file format originally requested.” Resp. Ex. O-1 at 34. She further advised that the Department could redact any PHI and to “make any redactions plainly visible” and she would “address that matter as appropriate.” Resp. Ex. O-1 at 33-34. The Department responded the same day, and advised that the data within the individual fields she requested were not records as they do not “document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” Resp. Ex. O-1 at 30. The Department further advised that the revision to her requests constituted a request for a reproduction of an entire data set, and the requests were therefore vague and overbroad. Resp. Ex. O-1 at 31.

The Department also advised Ms. Huwig that if she was seeking to perform research, the Department has a process for receiving and reviewing such research requests. Resp. Ex. O-1 at 32. Requests to conduct research using the Department’s secure databases are considered by the Data Governance Committee and the Institutional Review Board (“IRB”). Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(F). The Department referred Ms. Huwig to the Data Governance Committee and the IRB if she wished to explore the research dataset process. Resp. Ex. O-1 at 32. Ms. Huwig never pursued this process.

Ms. Huwig argued that the IRB is “meaningless,” pointing to an affidavit by Catherine Stein in which she claims that she submitted an application to the IRB that was “ignored.” Relator’s

Mem. Opp MJOP at 9, citing Ex. C . But Ms. Stein never submitted an application to the IRB. The purported application was an email to individuals who are not employed by the Department and who have no association with the IRB. Resp. Ex. M (Locklin Dep.) at 11-12. Contrary to Ms. Huwig's claims, the IRB has approved multiple requests for data from the Death Database and the Vaccine Database *Id.* at 14, 16.

The Department asked Ms. Huwig if she wished to revise her request, and also referred Ms. Huwig to the Department's Public Portal, which contains de-identified death data. Resp. Ex. O-1 at 29. Ms. Huwig asked for further explanation as to how the databases are organized. *Id.* at 28. The Department responded that both the death database and the vaccine database are "person-based" systems and are indexed according to the decedent or the person receiving a vaccine. *Id.* at 27. The Department had also provided Ms. Huwig with a list of all the fields that existed in the "Secure Data Warehouse" and in the Vaccine Database, which she refers to in the Amended Complaint as "data dictionaries." Am. Compl. ¶ 9. The Department again advised that Ms. Huwig was requesting PHI, and even if the protected information were removed, she was requesting a report that did not exist and that the Department did not have a duty to create. Resp. Ex. O-1 at 27.

Ms. Huwig then revised her request to be limited to the year 2021. Resp. Ex. O-1 at 26. Ms. Huwig stated that she was requesting "a compilation of information gathered from public records." *Id.* The Department responded that it was not obligated to create such a compilation, and that her request was overbroad. *Id.* at 25. The Department again explained that the records were organized by person. *Id.*

Ms. Huwig's attorney then contacted the Department regarding Ms. Huwig's requests. Resp. Ex. O-1 at 43-44. The Department referred the attorney to the previous correspondence with Ms. Huwig, and again advised that Ms. Huwig is not entitled to receive PHI, and that the

Department is not required to create custom reports in response to a public records request. *Id.* at 43. The Department noted that although it “may have, as a courtesy, used system-external, third-party software to create a custom report in the past,” the Department was not obligated to do so. *Id.* The Department offered to provide a copy of the Deceased Ohioans file, which is a publicly available report that lists names and dates of death. *Id.* Ms. Huwig did not accept this offer. The Department again noted that Ms. Huwig could explore de-identified data through the Public Portal. *Id.*

III. STATEMENT OF THE CASE

Ms. Huwig filed an original action in this Court on July 26, 2023. The case was temporarily stayed pending mediation, and then returned to the regular docket. Ms. Huwig filed the Amended Complaint on February 13, 2024. The Amended Complaint asserts that The Department was required to produce the requested records. Am. Compl. ¶ 44-45. The Amended Complaint does not contain an allegation that it is improper for the Department to redact the PHI from the reports Ms. Huwig requested. The Department filed an Answer and a Motion for Judgment on the Pleadings, which was denied. Ms. Huwig filed her merit brief, and the Department now responds.

IV. STANDARD OF REVIEW

Ms. Huwig brings this original action seeking a writ of mandamus requiring production of records requested pursuant to the Public Records Act. To be entitled to the writ, Ms. Huwig must establish a “clear legal right to the requested relief and a clear legal duty on the part of [the Department] to provide it.” *State ex rel. Gilreath v. Cuyahoga Job & Fam. Servs.*, 2024-Ohio-103, ¶ 17. Unlike other mandamus actions, in a public records mandamus action, the requestor need not establish the lack of an adequate remedy in the ordinary course of law. *Id.* The requestor must, however, establish entitlement to relief by “clear and convincing evidence.” *Id.*

V. ARGUMENT

A. Not all databases are public records.

Ms. Huwig contends that electronic government databases are public records. Relator's Brief at 16-17. As an initial matter, this Court has not held that all electronic government databases are public records. For example, in *State v. Hubbard*, 167 Ohio St.3d 77, ¶ 29 (2021), this Court discussed the violent-offender database, which it said was "not a public record, cannot be accessed by the public over the Internet, and is available only to federal, state, and local law-enforcement officers." *See* R.C. 2903.43(F)(2) (stating that violent offender database is not public record). Here, Ms. Huwig similarly seeks information from two databases that are not accessible by the public and that require a user name and password to access. *See* Resp. Ex. A (Priddle Dep.) at 13, 24; Resp. Ex. J (Napier Dep.) at 22-23, 44-45. The Ohio Revised Code notes that information "that is in summary, statistical, or aggregate form and that does not identify a person is a public record . . . " R.C. 3701.14(D), 3701.17(C). This suggests that these particular databases—because of their limited access and sensitive information—are not public records.

However, even if it were true that the Death Database and the Vaccine Database are public records, Ms. Huwig should still not prevail. As further explained below, Ms. Huwig's request was overly broad, and the Department had no obligation to create a record that does not exist.

B. Ms. Huwig's requests are overly broad.

1. Ms. Huwig seeks voluminous records that approximate a complete duplication of the Department's files.

Ms. Huwig argues that the overbreadth exception to the Public Records Act only applies if the agency cannot identify the records sought. Relator's Brief at 22-23. She further argues that the Department can easily produce the requested records and should therefore not be entitled to claim overbreadth. *Id.* at 24-25. Ms. Huwig misunderstands both the law and the facts.

First, Ms. Huwig is incorrect about the applicability of the overbreadth exception; she misconstrues the statutory language and ignores this Court’s precedent. Relator’s Brief at 22-23. The relevant provision in R.C. 149.43(B)(2) states, “If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested” This wording presents three options: (1) an ambiguous request, (2) an overly broad request, or (3) difficulty in making a request such that the public office cannot reasonably identify what records are being sought. Contrary to Ms. Huwig’s claims, the statute does not mean that a request is only overly broad if records cannot be identified.

Additionally, this Court has consistently held that the Public Records Act ““does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies.”” *State ex rel. Zidonis v. Columbus State Cmty. College*, 2012-Ohio-4228, ¶ 21, quoting *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624 (1994). *See also State ex. rel. Glasgow v. Jones*, 2008-Ohio-4788, ¶ 17. Prevailing caselaw is clear that a request can be overly broad even if the records can be identified, if production would amount to a duplication of agency files.

The determination as to whether a request is overly broad is to be analyzed under “the totality of facts and circumstances.” *Zidonis*, 2012-Ohio-4228, ¶ 26. Even when a request is limited to a particular timeframe, this Court has held that a request may be so broad as to be improper. In *Zidonis*, this Court held that a request for complaint files and litigation files covering a six-year retention period was overly broad. *See id.* at ¶ 25, 27. This Court has also held that a request for purchasing records for a period of seven years was overbroad. *See State ex rel. Dehler v. Spatny*,

2010-Ohio-5711, ¶ 3. And even requests for records from a shorter time period may be considered improper. *See Glasgow*, 2008-Ohio-4788 at ¶ 14, 19. In *Glasgow*, this Court held that a request for all correspondence of a state representative for a period of only six months was overly broad. *Id.*

Moreover, even requests that do not constitute a “complete duplication” of an entire file can be considered overly broad. In *Glasgow*, this Court held that the request was overbroad because it “approximated” a complete duplication of the representative’s files. *Id.* at ¶ 19. Similarly, in *Dehler*, the request was for a prison quartermaster’s purchasing records relating only to orders and receipts for clothing and shoes. *See* 2010-Ohio-5711, at ¶ 3. Although the requested records were not a “complete duplication” of the quartermaster’s records,⁷ this Court found the request to be overbroad. *Id.*

This Court should similarly find that Ms. Huwig’s requests are overly broad. Although Ms. Huwig limited her requests to one year of records, her requests were for vast amounts of data. From the Department’s death records, she sought 84 fields of data for all of the approximately 148,000 Ohioans who died in 2021, which would result in a report with over 12 million data points, or “cells,” of information. Resp. Ex. O-1 at 34-41; Resp. Ex. C at ¶ 3(B)(i). She did not request records relating to any particular demographic category or other subject matter limitation; she asked for 84 fields of data for every death recorded in 2021.

From the Vaccine Database, Ms. Huwig sought 25 fields of data relating to approximately 16 million doses of vaccine—for a whopping total of almost **400 million** cells of data. Resp. Ex.

⁷ In addition to clothing and shoes, the quartermaster is responsible for providing linens including towels and bedding. *See* TCI Offender Handbook, May 2014, at 31. <https://www.law.umich.edu/special/policyclearinghouse/Documents/Ohio%20Trumbull%20CI%20Inmate%20Handbook.pdf>. (Accessed on March 2, 2024.)

L (3/4/24 Napier Aff.) at ¶ 3(C)(iv)(1), (2). At the time of Ms. Huwig’s request, the COVID-19 vaccine data in the database covered approximately two and a half years, beginning in December of 2020, and she asked for one year (2021) of that data. Approximately 21 million doses of COVID-19 vaccine have been administered in Ohio, and the vast majority—approximately 16 million—were administered in 2021. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(C)(iv)(1); <https://data.ohio.gov/wps/portal/gov/data/view/archived-covid-19-reportinh?visualize=true>; usafacts.org/visualizations/covid-vaccine-tracker-states/state/ohio. The reports that Ms. Huwig requests are so voluminous, and make up such a large portion of the database that they should be considered an “approximation” of the complete record for these databases, as in *Glasgow* and *Dehler*. See *Glasgow*, 2008-Ohio-4788 at 19; *Dehler*, 2010-Ohio-5711 at ¶ 3.

Ms. Huwig asserts that “this Court held in *Gambill* and *Data Trace* that such databases are public records which must be disclosed by public offices without any hint of overbreadth concerns.” Relator’s Brief at 24, citing *State ex el. Gambill v. Opperman*, 2013-Ohio-761, ¶ 17, 26; *State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 2012-Ohio-753, ¶ 1, 38, 65. But there is no indication that the overbreadth exception was raised for the Court’s consideration in either case. And contrary to Ms. Huwig’s representation, the Court in *Gambill* held that the agency was *not* required to produce the database because it was inextricably intertwined with copyright protected software. See 2013-Ohio-761, at ¶ 25.

Moreover, Ms. Huwig is incorrect about the ease of production. Ms. Huwig makes several conclusory statements about the Department’s record-keeping and the Department’s ability to download and format the requested records. See Relator’s Brief at 23-24. Ms. Huwig posits that “the Databases and Reports are compilations, not the underlying records, and can be downloaded in a short period of time in an easily manageable format.” *Id.* at 24. She accuses the Department

of “using the complexity of computers and database management software to obscure the simple reality of downloading a database file.” *Id.* But it is Ms. Huwig who fails to understand the reality of the Department’s electronic records, their storage, and how they can be searched and exported.

Ms. Huwig misrepresents the deposition testimony when she says that “[t]he Department’s information and data managers have testified that outputting the requested records would not unreasonably interfere with operations.” Relator’s Brief at 25. As discussed above, when Devon Priddle testified that outputting certain records would not interfere with the system, she was talking about the output of *existing* reports that the systems are *already programmed* to create. Resp. Ex. A (Priddle Dep.) at 31-33. When asked if outputting CSV files “in general” would interfere with operations, Ms. Piddle stated that she did not know. *Id.* at 32-33. Ms. Huwig has presented no evidence that running the reports would not interfere with the system.

Ms. Huwig also misrepresents Brian Napier’s statements. Mr. Napier explained that to provide Ms. Huwig’s requested custom report, the Department would need to use specialized software to “extract and organize information” and exclude PHI from the Vaccine Database. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E). Mr. Napier affirmatively contradicts Ms. Huwig’s claim that such production would not interfere with the Department’s functioning; he stated that the file “would be so large that the query *could not be run against the registry as it would negatively affect the users of the system while the program was running.*” (Emphasis added.) *Id.* at ¶ 3(E)(i). Instead, the Department “would be required to pull the information from a recent copy of the data on the State’s servers,” “SQL software would then be used to program a query to create the customized report,” and “[f]or the data to be readable to a non-SQL user,” the Department “would then be required to transfer this data to another format, such as a .csv file (similar to a Microsoft Excel spreadsheet).” *Id.* See also Resp. Ex. J (Napier Dep.) at p. 43-48. Ms. Huwig, therefore, has *not*

“identified the requested records which are “retrievable by existing or reasonable programming.” Relator’s Brief at 25.

In further considering the totality of the facts and circumstances, this Court should consider that the compilation of records requested do not currently exist. As described above and explained in more detail below, the Department would be required to undertake considerable effort to create and transfer the custom reports that Ms. Huwig requests. Large requests can put a strain on computer systems that can negatively impact the ability to use the system. Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E). And Ms. Huwig is only one requestor. Additional requests would increase the impact on computer systems throughout the State if this Court holds that the Department (and other State agencies) are required to produce these types of voluminous custom reports on a regular basis.

This Court should also include in its consideration of the totality of the circumstances that the reports that Ms. Huwig’s requests contain PHI that must be excluded or redacted, and the resulting information would be similar to the de-identified information that the Department already makes available to the public. Ms. Huwig could obtain useful information from the de-identified data. Review of the aggregate data could show if there is any correlation between the number of COVID-19 vaccinations in a particular county or in different demographic categories, and the number of deaths due to COVID-19, or other conditions, in those same counties or categories. Ms. Huwig seeks line-level data, and limited line-level data for COVID vaccines is available online. See <https://data.ohio.gov/wps/portal/gov/data/view/archived-covid-19-reporting?visualize=true>. De-identified data can be obtained without requiring the creation of voluminous custom reports or accessing millions of private individuals’ PHI. And if the PHI is redacted from a custom report, as

it should be, the resulting report may not provide much value over the published de-identified or aggregate data.

In addition, the Department has established the IRB to review requests for custom reports involving individual's PHI. The IRB considers privacy interests, but the IRB process also involves a review of whether the Department has the technical capabilities to create the report, and whether the Department has the staffing and resources to produce the data requested. Resp. Ex. M (Locklin Dep.) at 10; Resp. Ex. N-2. The necessity for this process reflects the enormous amount of personal data that is maintained in the Department's databases, as well as the privacy and resource issues that are at issue when a custom report is sought. Under the totality of facts and circumstances, this Court should hold that Ms. Huwig's requests were overly broad.

2. The Department satisfied the requirements for responding to an overbroad request.

Ms. Huwig also argues that the Department cannot rely on the overbreadth exception because it did not inform her how the records are maintained and accessed. Relator's Brief at 20-21. The Court should reject this claim.

The Public Records Act provides that if a requester makes an overly broad request, the agency "may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties." R.C. 149.43(B)(2). The Department did so here. The Department informed Ms. Huwig that its databases are "person-based and information is recalled by person." Resp. Ex. O-1 at 24. Ms. Huwig also admitted that the Department provided her with a file layout for the mortality file and a data description for the Vaccine Database in response to her public records request, both of which

explained how information was housed in the databases. Resp. Ex. O (Huwig Dep.) at 13-14; Resp. Ex. O-1 at 12-23.

The Department also invited Ms. Huwig to revise her request. Resp. Ex. O-1 at 32 (“If you wish to amend or modify your request . . . feel free to let me know . . .”). It gave her guidance as to how to do so. *Id.* at 24. (“The systems are person-based and information is recalled by person. If you are requesting information for a specific person or persons, feel free to pursue the procedures outlined previously.”). It also offered other avenues through which she might obtain death certificates and immunization records. *See id.* at 27. This denial language is consistent with the Public Records Act. In *State ex rel. Bristow v. Baxter*, 2018-Ohio-1973 (6th Dist.), the court discussed the denial of public records requests as overly broad. The respondents “invited Bristow to revise his requests (which Bristow declined to do).” *Id.* at ¶ 13. The court held that, “[a]lthough respondents’ denials do not mirror the statutory language, we nonetheless find that respondents’ offer of an opportunity to narrow the requests to ‘specific topics or subject matter’—indicating that respondents organize their email files by subject—is sufficient to comply with R.C. 149.43(B)(2).” *Id.* Here, too, the Department informed Ms. Huwig as to how these systems were maintained (by person’s names) and advised that she could modify her request. *See* Resp. Ex. O-1 at 24-42. The Department’s conduct therefore complies with R.C. 149.43(B)(2).

C. Ms. Huwig is not entitled to the custom reports she seeks.

1. The requested records contain confidential PHI.

There is no question that the Death Database as well as the Vaccine Database contain confidential PHI. The administration of a vaccine constitutes medical treatment as provided in R.C. 3701.17(A)(2). And this Court recently held in the *Ludlow* case that a decedent’s cause of death falls within the definition of PHI because it reveals the decedent’s past physical-health status.

See 2024-Ohio-1399, at ¶ 1. To produce a report from these databases, the Department must therefore develop programming to exclude PHI from both requested reports.

Ms. Huwig’s contention that “the Department has not provided any specific explanation or evidence to Ms. Huwig or this Court which would factually support how the requested information would permit personal identification” is flatly wrong. Relator’s Brief at 28. She ignores both the plain language of the PHI statute and the extensive evidence in the record regarding triangulation of data.

First, Ms. Huwig is not applying the correct definition of PHI. The statute defines PHI as health information that “*could*” be used to reveal the identity of an individual, not that “*would*” lead to identification. R.C. 3701.17(A)(2)(b). Ms. Huwig’s assertion that the Department “must prove that disclosure *would* lead to personal identification” is directly contrary to the plain language of the statute. Relator’s Brief at 29.

Second, contrary to Ms. Huwig’s claims that the Department has not supported its position, the Department has repeatedly explained its filtering algorithm and triangulation concerns. Most recently, Brian Fowler provided an affidavit explaining the triangulation issue:

Other variables about an individual contained in a dataset such as simple demographics can lead to the identification of an individual using a simple internet search. News articles, obituaries, property records, and other publicly available information can be used to put the pieces of the puzzle together to re-identify the individual. Once the identifying information is known, it can be associated with the row in the line-level record and the entire database can be pieced together. This was referred to as “triangulation” in my previous affidavit.

Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i). *See also* Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(J)-(Q). He further explained that that the Department’s mortality data and immunization data “contain many hundreds of variables,” so while “changing the date of death to month of death and removing the name and address variables in the secure mortality CSV file could reduce the risk of identifying

the individual somewhat,” it “would not eliminate the risk given the other variables present.” Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i).

Ms. Huwig argues that the Department’s policies relating to triangulation cannot override the law, but the Department’s policies flow directly from with the statutory definition of PHI. The statute defines PHI as information that could reveal the identity of an individual “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)(b). The statute itself incorporates the concept of triangulation—the ability to identify individuals by combining disclosed information with other available information.

Ms. Huwig criticizes the Department’s policies, but the Department has implemented a common-sense approach to protecting the private health information of Ohioans. Brian Fowler explained that the Department’s “disclosure limitation standard is less restrictive than the policies that most states health departments use” and is “even less restrictive than other state agencies in Ohio.” Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(i).

Ms. Huwig implies that rather than applying a consistent policy such as the Small Numbers Policy, the Department should review each individual cell of data and “assess whether there’s private data out there that may have the personal identification.” Resp. Ex. F (Fowler Dep.) at 27. Mr. Fowler testified that this would be “an impossible task” because the amount of publicly available data on the internet is “almost infinite.” *Id.* And Ms. Huwig does not attempt to explain how any agency could conduct such a cell-by-cell analysis when she has requested two reports that each contain *millions* of cells.

Ms. Huwig’s claimed ignorance as to how certain variables she requested—including date of birth, date of death, city, marital status, and zip code—could possibly be used to identify

someone is, at best, not credible. Ms. Huwig herself lamented that the public portal “limited the number of things you could [] associate together,” and that she was had been unable to associate the date of infection and date of hospitalization with the date of death. Resp. Ex. O (Huwig Dep.), at 17-18, 20. Her complaints show her intention to combine data, and because of the public nature of the Deceased Ohioans Report and the availability of obituaries and other information online, the information could certainly lead to identification. This is particularly concerning given her stated intention of posting on her Facebook page information she would receive from the Department. *Id.* at 31.

Ms. Huwig attempts to support her claim by again mischaracterizing deposition testimony. She asserts that Mr. Fowler testified that it would be difficult to personally identify an individual if name, address, and contact information were not provided. Relator’s Brief at 28. But Mr. Fowler was asked if it would be difficult for a person to “simply use cause of death” to identify a person, and he responded, “cause of death *with no other information?* Potentially, yes.” (Emphasis added.) Resp. Ex. F (Fowler Dep.) at 30. The mere fact that Ms. Huwig did not request name and address does not mean that she did not request any identifying information, and the Department has repeatedly explained the risk of identification and the steps it takes to mitigate that risk.

Ms. Huwig’s discussion of *Ludlow* is also misguided. *See* Relator’s Brief at 29. She asserts that the Department’s disclosure limitation standard did not preclude the Department from disclosing fields at issue in prior cases. *Id.* But this is immaterial. The fact that the Department previously released information that was not a public record does not require the Department to release similar material again.

Ms. Huwig is wrong to imply that the Department needs to “provide an explanation or evidence justifying the change” in its position. *Id.* Estoppel does not apply to the State, and the

Department is not required to produce confidential records simply because it produced a similar record in the past. *Hortman v. City of Miamisburg*, 2006-Ohio-4251, ¶ 25 (“It is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function.”) (citations omitted.); *Walsh v. Ohio Dep’t of Health*, 2022-Ohio-272, ¶ 21 (10th Dist.) (“[T]hat ODH’s statutory interpretation may have changed . . . has no impact on our application of the pertinent plain and unambiguous statutes.”), citing *State ex rel. Dispatch Printing Co. v. Johnson*, 2005-Ohio-4384, ¶ 38 (prior release of information to the public does not preclude government office from later denying request for the release of the same information). The Department is entirely justified in withholding PHI.

Ms. Huwig also argues that the Department’s PHI argument is precluded because the Department should have provided non-exempt records with redactions. Relator’s Brief at 25-26. Ms. Huwig ignores the Department’s primary reason for denying Ms. Huwig’s request, which is that she requested records that did not exist. *See* Resp. Ex. O-1 at 24-42. Accordingly, the Department had no obligation to provide any records to Ms. Huwig.

Moreover, Ms. Huwig misapplies R.C. 149.43(B)(2), arguing that the failure to provide redacted records deprived her of the opportunity to revise her request and cure any defect. Relator’s Brief at 27. But the opportunity to revise a request is only required under R.C. 149.43(B)(2) if the request is denied as ambiguous, overly broad, or because it is made in such a way that the records cannot be identified. It does not apply to denials based on exemptions from production, such as inclusion of confidential PHI.

Ms. Huwig then inaccurately states that “[t]he Department admits that it can output the requested records as CSV files and that it can use its Excel software to accomplish such redactions.” Relator’s Brief at 26. Again, this assertion misrepresents the deposition testimony.

Neither Devon Priddle nor Brian Napier were talking about Ms. Huwig’s public records request when discussing the Department’s output capabilities. As noted above, Ms. Priddle testified regarding the export and redacting of the *pre-programmed* mortality data file. Resp. Ex. A (Priddle Depo.) at 19-20. And with respect to the Vaccine Database, Mr. Napier specifically testified that there is **not** a function that allows the Department to only select certain requested fields. Resp. Ex. J (Napier Dep.) at p. 43. Neither witness stated that the Department could output the specific requested dataset as a file and then redact it using only existing programming. Indeed, as Brian Fowler explained, the Department’s filtering algorithm is built into the Public Portal, but not the Secure Portal. *See* Resp. Ex. H (3/4/24 affidavit of Brian Fowler) at ¶ 4(J) Therefore, “[n]ew software and/or programming would be required to apply the filtering algorithm to the Secure Portal.” *Id.* at 4(R).

The presence of PHI in the data requested by Ms. Huwig complicates her requests, and responding to her requests would require the Department to develop new software or programming to prevent disclosure of that data. The Department is therefore entitled to rely on the presence of PHI as a basis for denying Ms. Huwig’s request, and it properly did so here.

2. The Department has no duty to create reports that do not exist.

The issue before this Court is not whether the Department has the *ability*, assuming the expenditure of unlimited time and resources, to create the requested reports, but whether the Department is *required* to create them. It is well established that there is no duty under R.C. 149.43 “to create records that do not exist.” *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 2012-Ohio-4246, ¶ 26. Similarly, there is no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records. *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 155 (1999) (per curiam). This Court has held that, “[A] compilation of

information must already exist in public records before access to it will be ordered.” *State ex rel. Kerner v. State Teachers Ret. Bd.*, 82 Ohio St.3d 273, 274 (1998) (per curiam). This Court has made clear that a request that requires the government agency to “create a new document by searching for and compiling information from existing records” is not a proper public records request. *See State ex rel. Carr. London Corr. Inst.*, 2015-Ohio-2363, ¶ 22. Yet this is exactly what Ms. Huwig has asked the Department to do.

Existing public records jurisprudence exempts a government agency from having to create a new record to comply with R.C. 149.43, even if it has the capability and knowledge to do so. An agency is not obligated to compile information to create a new document in response to a public records request. *See, e.g., McCaffrey, supra*, at 26; *White, supra*, at 155. The Department is under no obligation to create a new document that meets the parameters of Ms. Huwig’s requests. *See, e.g., White* at 155.

In *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 376 (1989), *overruled on other grounds by State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 427 (1994), the relator requested that the respondent use its computer system to compile “records of all dispositions of criminal cases” concerning him. This Court considered “whether such a compilation exists as a ‘document’ included within the definition of ‘records’ in R.C. 149.011,” and it found that “a compilation of information must already exist in public records before access to it will be ordered.” *Scanlon* at 379. *Scanlon* held that the clerk “could not be required to create a new ‘document’ by compiling material to facilitate review of the public record.” *Id.* In dicta, the Court stated that, “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.” *Id.* Even if this statement in *Scanlon* was intended

as binding precedent, the Department is not required to program its computer systems to create the custom reports sought by Ms. Huwig.

In *Scanlon*, there was no dispute that the database contained the information that the relator sought; yet, this Court found that the respondent was not required to compile material to facilitate review of public records. *See* 45 Ohio St.3d at 379. Here, too, the Department should not be obligated to use third-party software to compile specific information from its databases into customized reports that do not currently exist.

Ms. Huwig cites to other cases in which agencies were required to produce records from electronic databases, but *none* of those cases are binding on this Court. Relator's Brief at 18-19. Moreover, the cases are distinguishable and are not consistent with the dicta in *Scanlon* upon which Ms. Huwig relies.

First, the other states at issue had different legal requirements for computer databases. In the Massachusetts case cited by Ms. Huwig, regulations specifically applicable to electronic databases compelled Massachusetts agencies to produce custom reports. *See Attorney General v. District Att'y for the Plymouth Dist.*, 484 Mass. 260, 275-76 (2020) (hereinafter "*Plymouth*"). Massachusetts regulations provided that when a government agency is developing an electronic database, it "'shall ensure, to the extent feasible' that it 'allows for information storage and retrieval methods permitting retrieval of public portions of records to provide maximum public access.'" *Id.* at 275, quoting 950 Code Mass. Regs. § 32.07(1)(e)(2) (2017). Thus, because agencies were required to develop a system with "maximum public access," they could not complain that the system was not programmed to produce requested records. In addition, another Massachusetts regulation provided that, "'furnishing a segregable portion of a public record shall not be deemed to be creation of a new record. This applies to a responsive record in the form of an

extract of existing data.”” *Plymouth* at 276, quoting 950 Code Mass. Regs. § 32.07(1)(f). Finally, Massachusetts law allows an agency to recover its costs and to charge an hourly rate for excessive employee time spent responding to a request. *See* 484 Mass. at 278, citing ALM G.L. Ch. 66, § 10(d). Ohio’s Public Records Act, however, contains no similar provisions.

In the Nevada case cited by Ms. Huwig, the public records act similarly provided for agencies to be reimbursed when new programming is required to respond to records requests. *See Public Employees Ret. Sys. of Nev. v. Nevada Policy Research Inst., Inc.*, 134 Nev. 669, 678 (2018). The Nevada court held that the agency could not evade disclosure by asserting the need to create a new program because Nevada law provides that if an agency were required “to make extraordinary use of its personnel or technological resources,” to respond to a request, the agency could charge a fee for its costs. *Id.* Nevada law contemplates that extraordinary resources may need to be expended in responding to a request, and provides for reimbursement of those costs. Nevada therefore requires its agencies to develop programs necessary to respond to a request if the requestor is willing to pay. *Id.* Because the agency is required by statute to develop new programming, the court held that a record will be considered to “exist” even if a new program must be created to obtain it. *Id.*

In a state like Massachusetts or Nevada where an agency can charge the requestor for the personnel and technology costs of creating a custom report, it is reasonable to require the agency to create custom reports. But in Ohio, an agency is permitted to charge only for the cost of making copies, packaging, and postage or delivery. *State ex rel. Call v. Fragale*, 2004-Ohio-6589, ¶ 6-7. Because an Ohio agency cannot recoup its expenditure of time and resources in responding to a public records request, it makes sense that Ohio law does not require an agency to expend excessive resources to compile data or create a record that does not already exist.

The remaining cases cited by Ms. Huwig are factually distinguishable. Ms. Huwig cites to two additional cases from other states holding that searching or “pulling” information from a database does not constitute creating a record. *ACLU v. Arizona Dep’t of Child Safety*, 240 Ariz. 142, ¶ 13 (2016); *Commonwealth of Penn. v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct.⁸ 2012). But neither of these cases appear to involve the significant expenditure of time and resources that would be required to respond to Ms. Huwig’s requests.

Further, *Miller v. Ohio Dep’t of Health*, 2021-Ohio-1901, ¶ 2 (Ct. Claims), is also distinguishable because it involved a less complicated records request, and the evidentiary record concerning the time and resources necessary to produce the requested reports was not as extensive as the record before this Court. Moreover, the Department appealed the lower court’s holding in *Miller* that the Department was “simply” required to input search criteria and produce a report from the Death Database. *Id.* at ¶ 8. On appeal, the Tenth District ruled in the Department’s favor on the confidentiality of death information, but declined to decide the “existing report” issue, concluding that the issue was moot. *See Miller v. Ohio Dep’t of Health*, 2022-Ohio-357, ¶ 7-8 (10th Dist.). The Department maintains that the Court of Claims decision in *Miller* was wrong, as well as distinguishable, and should not be followed by this Court.

⁸ Ms. Huwig’s citation to *Cole* indicates that the decision is from Pennsylvania’s Supreme Court, but the decision is actually a decision of Pennsylvania’s Commonwealth Court, which is an intermediate appellate court.

3. Significant programming would be required to create the custom reports requested by Ms. Huwig.

To the extent that this Court holds, consistent with the dicta in *Scanlon*, that agencies are required to produce reports that a database is “already programmed” to produce, this Court should conclude that the Death Database and Vaccine Database are not “already programed” to create the custom reports Ms. Huwig seeks. *See Scanlon*, 45 Ohio St. at 367.

The Department cannot create the reports at issue by merely clicking a few keys in the existing systems. Significant effort and programming would necessary. As explained above, the Department would be required to use third-party software and to export data from the Department’s database to a separate file. The file would then need to be opened using the third-party software, and a person trained in the third-party software would need to program the system to create a report with the fields requested by Ms. Huwig, but withholding the cells that include PHI. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(F); Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E).

Developing the queries to create the reports requested by Ms. Huwig would require significant programming. As noted above, developing the query for the Death Database would likely take several hours, or even days or weeks, Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(iii) & Resp. Ex. B (8/9/24 Priddle Aff.) at ¶ 3(A)(ii), and developing the query for the Vaccine Database would likely take four to twelve hours, Resp. Ex. K (8/12/24 Napier Aff.) at ¶ 3(A)(ii). This does not include the time it would take the queries to run. *See id.* To prevent disclosure of PHI, the Department would be required not only to create a query that eliminates the fields that contain obviously identifiable information, such as name, address, etc. It would also need to program the report not to include information that could reveal PHI through triangulation. Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(R).

The Department's filtering software programs that have been developed and applied in accordance with the "Small Numbers Policy" apply to publication of *aggregate* data, not to individual line-level reports. *Id.* at ¶ 3(I), (J). *See also* Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(ii). The aggregate reports contain numbers in each cell, displaying the number of individuals that fall within a particular category; for example, the number of females within a particular age group who died in a particular county. When the Department publishes a report with aggregate data, if the algorithm calculates that the denominator minus the numerator for a particular cell is less than ten, the data in that cell is suppressed and not published in the aggregate report. *Id.*

The Secure Data Warehouse and the Vaccine Database are not currently programmed to filter information in a custom line-level report, so new programming would need to be applied to filter that type of information. Resp. Ex. H (3/4/24 Fowler Aff.) at ¶ 4(R). As noted above, the existing filtering software applied to the Public Portal, even if copied and applied to the data in the Secure Portal, would not work on a line-level report. The existing software would be looking for numbers to perform a calculation, but most of the cells in the Secure Portal would contain words, not numbers that can be calculated. Resp. Ex. F (Fowler Dep.) at 25-26.

To create a report without disclosing PHI, the Department would either have to develop new programming that could identify and suppress similar "Small Numbers" information in a line-level report, or create a query that contains blanket exclusions for any category, such as race, ethnicity, etc., that could lead to identification of individuals. In either case, new programming would need to be developed. After the programming is completed, the query would be run to extract the data, which would also likely take significant time and would require manual review to ensure that proper linkage occurred. *See* Resp. Ex. B (8/9/24 Priddle Aff.) at ¶ 3(A)(ii); Resp. Ex. G (8/12/24 Fowler Aff.) at ¶ 4(iii). Third-party software would need to be used to transform the

data to a readable CSV format, and transfer the file to a secure server where Ms. Huwig could download the file with a login and password. Resp. Ex. C (3/4/24 Priddle Aff.) at ¶ 3(F); Resp. Ex. L (3/4/24 Napier Aff.) at ¶ 3(E). The significant time, effort, and steps required to create these reports show that the systems are not “already programmed” to create them. *See Scanlon*, 45 Ohio St.3d at 367. Nor should the Court require these efforts.

4. The Public Records Act does not require the Department to create new programming to respond to Ms. Huwig’s requests.

As it did in *Scanlon*, this Court should hold that the Department is not obligated to compile specific information from its databases into a customized report. *See* 45 Ohio St.3d at 379. A ruling to the contrary would have substantial effects not only on the Department, but on every State, county, and local government in Ohio that maintains electronic databases. The practical effect of a ruling in Ms. Huwig’s favor would be that a government agency would be obligated to reprogram its systems and develop a custom query to search through its databases, sort through the results to identify relevant categories of information for an unlimited number of data fields for an unlimited number of individuals, ensure that no confidential information is included, and create a customized dataset for anyone who asks for one. That is not what R.C. 149.43 obligates the government to do, and such a requirement runs afoul of the spirit—in addition to the language—of public records law. *See, e.g., McCaffrey*, 133 Ohio St. at ¶ 26; *White*, 85 Ohio St. at 155.

Ohio’s Public Records Act should not be read to require an agency to create new computer programming in response to a public records request, particularly without regard to the time or resources necessary to develop that programming. Such a requirement goes beyond even the dicta in *Scanlon*, which referenced systems that were “already programmed” to produce the record requested. 45 Ohio St. at 367. Moreover, mandating that agencies create new programming would result in agencies expending unlimited time and resources drafting, developing, and testing

queries, and perhaps even hiring outside IT support, to respond to public records requests, with no regard to the burden on the agency. This cannot be the result intended by the legislature and goes well beyond the *Scanlon* dicta that Ms. Huwig relies upon.

This Court should reject Ms. Huwig's claims, and hold: (1) that the reports she has requested do not exist; (2) that the Death Database and Vaccine database are not "already programmed" to provide these reports; and (3) that the Department is not required to create new programming to create the requested reports.

D. The availability of alternative records is relevant to this action.

Ms. Huwig states, without citation, "The Department suggests that it doesn't have to provide the Databases and Reports because it has made available mortality data from the Public Portal or Covid-19 vaccination data from the Warehouse, the DataOhio Portal or from reports to the CDC." Relator's Brief at 30. In a similar vein, Ms. Huwig argues that "[t]he Department can't lawfully fail to provide such requested output, by pointing to other output that it would prefer to provide." Relator's Brief at 32. That is not the Department's argument or what the Department is doing; rather, the Department's position is that it is not required to provide any of the records that Ms. Huwig requested because those records (1) do not exist; and (2) would require new programming to create the reports and ensure that confidential information is not disclosed.

However, the availability of existing reports, aggregate data, and the considerations in the IRB process should be considered as part of the "totality of circumstances" relating to the overbreadth of Ms. Huwig's requests. In addition, the Department's publication of data and the implementation of the IRB process demonstrates the Department's good faith commitment to transparency while also protecting individuals' confidential health information.

E. The Court should not award damages or attorney's fees because the Department acted in good faith.

Even if this Court finds that the Department is required to produce the requested records, this Court should not award attorney's fees because Ms. Huwig admitted under oath that her attorney is not charging any fees. This Court should also not award attorney's fees or statutory damages because the Department acted in good faith.

1. The Court must not award attorney's fees.

a. Ms. Huwig has incurred no attorney's fees.

If attorney's fees are awarded, "[t]he fees awarded shall not exceed the total of the reasonable attorney's fees incurred before the public record was made available to the relator and the fees described in division (C)(4)(c) of this section" and "[r]easonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees." R.C. 149.43(C)(4)(b), (c). Thus, fees must actually be incurred in order for a fee award to be granted.

This Court has held the same, noting "[a]n award of attorney fees pursuant to R.C. 149.43 is intended to reimburse a party for the successful prosecution of a mandamus action necessary to obtain the disclosure of a public record. . . . Consequently, the party against whom an award of fees is assessed should be responsible for those fees incurred only as a direct result of that party's failure to produce the public record." *State ex rel. Gannett Satellite Info. Network v. Petro*, 81 Ohio St.3d 1234, 1235 (1998). *See also State ex rel. Citizens for Open, Responsive & Accountable Gov't v. Register*, 2007-Ohio-0238, ¶ 24 (an award of attorney's fees under R.C. 149.43 "must actually be incurred by the party seeking the award"); *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St.3d 166, 175 (2000) (relator not entitled to attorney's fees where there is no

evidence they paid any fees to counsel); *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542 (2000) (same).

Ms. Huwig has not incurred any fees in this case. When questioned about her attorney's fees during her deposition, Ms. Huwig stated, with respect to her attorney, "He is not paid." Resp. Ex. O (Huwig Dep.) at 36. She confirmed that they did not have a fee agreement and he had agreed to represent her without charging her. *Id.* She further stated she had neither paid him nor received a bill, had not agreed to pay him, and had not budgeted to pay him. *Id.* at 37-38.

Because Ms. Huwig has not incurred any attorney's fees, this Court should decline to award fees even if it finds in Ms. Huwig's favor on the merits of her claim.

b. The Department did not act in bad faith.

The Court should additionally decline to award attorney's fees because the Department did not act in bad faith. Under the Public Records Act, the Court could award attorney fees if it finds that the Department acted in bad faith. *See* R.C. 149.43(C)(3)(b)(iii). There is no presumption that the public office acted in bad faith even if it provides the public records after the commencement of a mandamus action. *See id.* Instead, "'bad faith' generally implies something more than bad judgment or negligence.'" *State v. Powell*, 2012-Ohio-2577, ¶ 81, quoting *State v. Tate*, 2008-Ohio-3759, ¶ 13 (5th Dist.). Bad faith "embraces actual intent to mislead or deceive another." *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148 (1962), paragraph two of the syllabus.

The Department did not act in bad faith, and Ms. Huwig has not alleged any facts to support a finding of bad faith. *See* R.C. 149.43(C)(3)(a)(ii). The record shows that the Department timely responded to each of Ms. Huwig's requests and explained the multiple legal grounds to deny the requests. The Department explained how the records were organized, and provided Ms. Huwig with a list of all the fields in the databases she was interested in. The Department also offered to

provide Ms. Huwig with existing public records such as the Deceased Ohioan's Report, and referred her to the Department's website, where she could obtain customized reports of de-identified, aggregate data. The Department also referred Ms. Huwig to the IRB, where she could have applied to obtain access to data for research purposes. Resp. Ex. O-1 at 32.

Moreover, the Public Records Act provides that the Court "shall not" award attorney's fees if the court finds that a "well-informed public office or person" responsible for public records would believe that the office was not violating the Public Records Act, and that a well-informed public office or person would believe that the agency's actions "serve the public policy" that underlies the asserted authority for the agency's actions. R.C. 149.43(C)(3)(c). Here, a well-informed person would believe that Ms. Huwig's requests for custom reports contain millions of fields of data were overly broad. *See, e.g., Glasgow*, 2008-Ohio-4788, at ¶19. This Court has held that the Public Records Act was not intended to require an agency to respond to an overly broad request that requires an agency to produce what amounts to an almost complete duplication of voluminous files. *Glasgow* at ¶ 19. The Department's responses were consistent with this precedent. To the extent this Court adopts Ms. Huwig's reading of R.C. 149.43 and finds, for the first time, that the overbreadth exception only applies if the agency cannot identify the records sought, the Department still should be found to have acted in bad faith because it acted consistent with then-existing precedent.

Caselaw further supports the policy that agencies are required to produce existing records and are not required to create or compile records that do not exist or that the agency's systems are not programmed to produce. *Scanlon* at 379. A well-informed person would believe that the Department was not required to create a custom report that did not exist, and that its systems were not programmed to produce. *Scanlon*, 45 Ohio St. 3d at 379. Given the many steps and

configurations of analytics that would need to occur for the Department to create these custom reports, it was reasonable for the Department to conclude that it was not required to create them.

And the Department's conduct certainly demonstrated a good-faith concern that the Ms. Huwig was requesting reports that would reveal PHI. The Department's conduct supports the policy of protecting individual's private medical information and limiting its expenditure of resources for the creation of custom reports that do not exist and require additional programming. For these reasons, even if the Court grants relief to Ms. Huwig, the Court should find that the Department meets the requirements of R.C. 149.43(C)(3)(c), and that attorney's fees cannot be awarded.

In the alternative, this Court should reduce any award of attorney's fees because "alternative means should have been pursued to more effectively and efficiently resolve the dispute." R.C. 149.43(C)(4)(d). In particular, Ms. Huwig filed an amended complaint in this case, but it appears that the only significant amendment she made was to add allegations regarding a grant that the Department received relating to an Immunization and Vaccines for Children program. Am. Compl. ¶ 33-36. These allegations have no relevance to Ms. Huwig's public records requests. They are not even mentioned in her Brief. Amending the Complaint to add these irrelevant allegations was not an effective or efficient way to resolve this case. Accordingly, if attorney's fees are awarded in this action, fees should be reduced to the extent they were used to pursue and file the Amended Complaint. (However, as stated above, the evidence shows that Ms. Huwig has not incurred, and will not incur, any attorney's fees, which is an independent reason to deny a fee award.)

2. The Court should not award statutory damages.

The Public Records Act state provides for an award of statutory damages if “a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.” R.C. 149.43(C)(2). “The amount of statutory damages *shall be fixed* at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, *up to a maximum of one thousand dollars.*” (Emphasis added.) *Id.* Thus, statutory damages may not exceed \$1,000.

Moreover, the court may reduce an award of statutory damages or not award statutory damages if the court determines that, “based on the ordinary application of statutory law and case law as it existed at the time of the conduct” of the public office, a “well-informed public office or person” responsible for public records would believe that the office was not violating the Public Records Act and that a well-informed public office or person would believe that the agency’s actions “serve the public policy” that underlies the asserted authority for the agency’s actions. R.C. 149.43(C)(2).

For the same reasons stated above with respect to attorney’s fees, this Court should find that the Department had a reasonable basis to deny Ms. Huwig’s requests, and that the Department’s actions supported the policy behind their decisions. This is especially true in light of Ms. Huwig’s argument that this Court’s precedent regarding the applicability of the overbreadth exception should be ignored. *See Relator’s Brief* at 22-23. Prevailing caselaw is clear that a request can be overly broad, even if the records could be identified, if production would amount to a duplication of agency files. *See Zidonis*, 2012-Ohio-4228, ¶ 21; *Glasgow*, 2008-Ohio-4788, ¶ 19.

The Department's conduct must be assessed "based on the ordinary application of statutory law and case law *as it existed at the time of the conduct*" at issue. R.C. 149.43(C)(2).

This Court should also specifically reject Ms. Huwig's request for multiple awards of statutory damages in the amount of \$2,000 each. Relator's Brief at 36. Statutory damages are capped at \$1,000, so \$2,000 in damages is not available to her. *See* R.C. 149.43(C)(2).

Accordingly, if this Court finds in Ms. Huwig's favor, the Department asks this Court to nonetheless decline to award damages, or to reduce any award of damages.

VI. CONCLUSION

This Court should hold that the Department is not required to create the custom reports requested by Ms. Huwig. A ruling to the contrary would impose unreasonable burdens on government agencies to expend unlimited resources reprogramming computer systems every time a request is made for records that a system is not programmed to produce. Requiring the production of these types of overly broad custom reports is particularly problematic when the databases contain highly sensitive personal information.

For the foregoing reasons, Respondents request that this Court deny the requested writ of mandamus, assess costs to Relator, and award any other relief to Respondents deemed necessary and just by the Court.

Respectfully submitted,

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/s/Katherine Bockbrader

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Respondents' Brief* was served on October 1, 2024, via email to Thomas Connors, tconnors@warnermendenhall.com, Counsel for Relator.

/s/Katherine Bockbrader

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