

[Cite as *Whitehead v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-1600.]

DENNIS WHITEHEAD

Requester

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION –  
BUREAU OF RECORD MANAGEMENT

Respondent

Case No. 2020-00116PQ

Special Master Jeff Clark

SUPPLEMENTAL REPORT  
AND RECOMMENDATION

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{¶1} On October 1, 2020, the court issued a Decision and Entry remanding this matter to the special master for further proceedings:

The court directs the special master to issue a supplemental R&R advising the court (1) whether R.C. 5120.21 (F) should apply in this instance to an inmate who was formerly committed to ODRC and (2) whether in this matter R.C. 5120.21(F) precludes ODRC from being compelled to produce additional records, since, according to R.C. 5120.21(F), records of inmates committed to ODRC are not considered public records as defined in R.C. 149.43. The court remands the matter to the special master for further proceedings consistent with this decision, which may include a referral of this cause to mediation if both parties agree.

On October 2, 2020, the special master referred the case for further mediation, during which ODRC fully or partially disclosed several hundred additional pages of records to Whitehead. (Remand Response at 15, 18; Exh. E.) However, mediation terminated on December 15, 2020 without the resolution of all claims. The special master ordered further briefing and on January 22, 2021, ODRC filed its response (Remand Response).<sup>1</sup> The matter is now ripe for submission of the supplemental report and

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<sup>1</sup> Whitehead failed to attach proof of service to any post-complaint document submitted to the court, despite repeated court orders (March 12, 2020 Order, Oct. 1, 2020 Decision and Entry at 3, Feb. 26, 2021 Order), and receiving examples of certificates of service on each pleading filed by ODRC. Pursuant to Civ.R. 5(B)(4), the special master shall not consider any post-complaint document submitted by Whitehead.

recommendation. For brevity, the special master will avoid repeating the findings and analysis of the initial report and recommendation, which are hereby incorporated other than as modified or overruled by the court in its October 1, 2020 Decision and Entry.

### **Suggestion of Mootness**

{¶2} ODRC first maintains that all remaining records responsive to Whitehead's requests have now been provided, rendering the claim for production of records moot. (Remand Response at 4-15.) However, while Whitehead gave examples of "principal" areas of interest (Complaint at 1) that ODRC alleges have now been resolved, the original and underlying request for "available public records from the incarceration of Postel LASKEY from 1967 to his death in 2007" (Complaint at 6) is far broader in scope. The court noted the breadth of this request and inclusion of non-medical records in overruling ODRC's objection that it had earlier provided all responsive records. (Decision and Entry at 5-6.) The broad request on which the complaint is based is clearly not satisfied when ODRC admits that thousands of pages of records fitting that description remain withheld. (Remand Response at 18, Exh. E.) The special master finds that ODRC's voluntary disclosure of some additional records is commendable but has not rendered the claims in this action moot.

### **The Exception Contained in R.C. 5120.21(F) Applies to the Requested Records**

{¶3} The court sustained ODRC's objection that it had sufficiently asserted R.C. 5120.21(F) as a free-standing exception and directed the special master to determine whether the statute applies to records of a deceased inmate. R.C. 5120.21(F) provides:

(F) Except as otherwise provided in division (C) of this section [concerning medical records], *records of inmates committed to the department of rehabilitation and correction* as well as records of persons under the supervision of the adult parole authority shall not be considered public records as defined in section 149.43 of the Revised Code.

(Emphasis added.)

{¶4} The recent case of *State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Sch.*, Slip Opinion No. 2020-Ohio-5149 addresses the application of similar language in R.C. 3319.321(B). The statute establishes a public records exception for certain information concerning “*any student attending a public school.*” The Court found that despite the use of the present tense the statutory language unambiguously

speaks to whether the information at issue relates to a student’s attendance at a public school, regardless of the student’s status at the time the information is requested. In other words, the statute is concerned not with the current status of the person whose information is being requested but rather with whether the personally identifiable information at issue relates to an individual’s attendance at the public school.

*Id.* at ¶ 10-14. The Court held the exception thus unambiguously applied to a former student who had died. *Id.* at ¶ 17. The Court further found its conclusions consistent with provisions in the same statutory scheme allowing disclosure of covered records with the permission of the student, and with the absence of any exception to the primary records exception based on death of an adult former student, *Id.* at ¶ 18. These statutory conditions are analogous to provisions in R.C. 5120.21(C)(2) for limited inmate-approved disclosure of medical records, and the absence of any express exception to R.C. 5120.21(F) based on the death of the inmate.

{¶5} Whitehead’s request sought only records “from the incarceration of” inmate Laskey, and thus the remaining records withheld by ODRC fall within the exception in R.C. 5120.21(F). See *Bello v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2020-00129PQ, 2020-Ohio-4559, ¶ 14. The reasoning in *CNN v. Bellbrook-Sugarcreek* supports the conclusion that the exception for “records of inmates committed to the department of rehabilitation and correction” applies despite the status of the individual as a former or deceased inmate at the time of the request. Under the facts and circumstances of this case there is thus no need to conduct further review of the actual records withheld.

**R.C. 5120.21(F) does not Preclude ODRC from Producing Additional Records**

{¶6} The wording of the exception in R.C. 5120.21(F), that subject records “shall not be considered public records as defined in section 149.43 of the Revised Code,” does not expressly prohibit their disclosure, but merely provides that their disclosure is not mandated. *Bello* at ¶ 12; 2000 Ohio Op. Atty. Gen. No. 021. The administrative rules adopted by ODRC amplify R.C. 5120.21 in this regard, providing that

Non-public records of the department may, in the sole discretion of the director, or designee, be made available to counsel of record of an inmate or releasee, researchers, law enforcement agencies, or other persons with a need for access to such documents, subject to other restrictions on such access as may be provided by law.

O.A.C. 5120:9-49(G). The special master concludes that under the above authorities, by which ODRC provided Whitehead with the records disclosed to date, ODRC is not precluded from disclosing additional records of inmate Laskey, unless a particular record is subject to some other prohibition provided by law.

**Conclusion**

{¶7} The special master recommends the court find that R.C. 5120.21(F) applies to the remaining records withheld by ODRC but does not itself preclude further disclosure. It is recommended court costs be assessed equally between the parties.

{¶8} *Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity*

*all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).*

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JEFF CLARK  
Special Master

**Filed April 15, 2021**  
**Sent to S.C. Reporter 5/7/21**