

[Cite as *Cincinnati Enquirer v. Ohio Dept. of Health*, 2021-Ohio-3097.]

THE CINCINNATI ENQUIRER,
A DIVISION OF GANNETT GP MEDIA,
INC.

Requester

v.

OHIO DEPARTMENT OF HEALTH

Respondent

Case No. 2020-00500PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

{¶1} The Ohio Public Records Act (PRA) requires that upon request, copies of public records be made available to any person at cost and within a reasonable period of time. R.C. 149.43(B)(1). The people’s entitlement to access to government records serves a critical function in our democratic system, ensuring government accountability, integrity, equity, and transparency. *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 10. *Accord Eye on Ohio v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00279PQ, 2020-Ohio-5278, ¶ 2-3. To that end, the Public Records Act must be construed liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 6. This action is filed under R.C. 2743.75, which provides an expeditious and economical procedure to enforce the PRA in the Court of Claims.

Background

{¶2} On August 6, 2020, Jacalyn Borchardt, a reporter for the Cincinnati Enquirer, made a public records request to Press Secretary Melanie Amato of the Ohio Department of Health (ODH) for, inter alia: “Number of Ohio COVID-19 deaths broken down by long-term care facility, Complaints received about Mercy Franciscan at West Park from March 1 to June 30,” and “COVID-19-related complaints about long-term care

facilities received by ODH from March 1 to June 30.” (Complaint at 3.) Borchardt received no response in the following week.

{¶3} On August 14, 2020, the Enquirer filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records. The case was referred to mediation, during which the parties resolved three other requests for statistical records. On November 25, 2020, ODH filed a motion to dismiss the remaining claims (Response). On December 3, 2020, the Enquirer filed a memorandum in opposition (Reply). On December 18, 2020, ODH filed a response to the reply (Sur-reply). On December 28, 2020, the Enquirer filed a supplemental affidavit. On March 4, 2021, ODH filed a notice of supplemental authority and a response to the court order of February 16, 2021. On April 28, 2021, the US Department of Justice filed a Statement of Interest on behalf of the US Department of Health and Human Services. On April 29, 2021, ODH and the Enquirer each filed responses to the court order of April 14, 2021 for additional information and documents.

Motion to Dismiss

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

{¶5} ODH argues the complaint fails to state a claim because a record of the “number of Ohio COVID-19 deaths broken down by long-term care facility” does not exist. (Response at 6-7.) On review, non-existence of the requested death dataset is not established on the face of the complaint and attachments. Moreover, as the matter is

now fully briefed this argument is subsumed in ODH's defense on the merits. It is therefore recommended that that the motion to dismiss be denied.

Initial Burden of Proof

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

Records at Issue

{¶7} Production of records during mediation rendered the following requests, numbered in their order of appearance in the Enquirer's August 6, 2020 request, moot:

2. Coronavirus case numbers in long term care facilities, broken down by facility and week reported,
3. All notification materials sent to ODH Bureau of Survey and Certification from Mercy Franciscan, as was required by the April 15 health order,
5. Protocol for LTCs to report cases and deaths to local health departments and ODH.

(Oct. 30, 2020 Entry; Response at 5.) The following requests remain in dispute:

1. Number of Ohio COVID-19 deaths broken down by long-term care facility,
4. Complaints received about Mercy Franciscan at West Park from March 1 to June 30,
6. COVID-19 related complaints about long-term care facilities received by ODH from March 1 to June 30.

A Response Requiring the Search for and Assembly of Data from Separate Repositories is not an "Existing" Record

{¶8} A public office has no duty to provide records that do not already exist or that it does not possess. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 8-10. A requester cannot compel the office to create new

records by searching for and compiling information from separate databases. *Speros v. Secy. of State*, Ct. of Cl. No. 2017-00389PQ, 2017-Ohio-8453, ¶ 12-19. Where a respondent denies that a record exists, the requester must show by clear and convincing evidence that the record does exist in the possession of the office. *Cordell* at ¶ 8.

{¶9} ODH denies that it can produce the “number of Ohio COVID-19 deaths broken down by long-term care facility.” (Response at 3-4, 6-7.) ODH provides testimony that to do so it would be required to assemble data from multiple separate databases – a task its current data management system is not programmed to perform. (Response, Exh. D – Tarter Aff. I at ¶ 17-18, 30-38.) Tarter’s affidavit is some evidence supporting the non-existence of the requested record.

{¶10} The Enquirer argues that ODH should be able to compile COVID-19 deaths by long-term care facility in order to perform its duties in the pandemic. (Reply at 5.) However, a requester is only entitled to access records that actually exist, not records it believes the public office should have created. The evidence shows that ODH possessed the requested data, but not in a data management system that can produce the requested dataset through existing programming. In *WCPO-TV v. Ohio Dept. of Health*, Ct. of Cl. No. 2020-00513PQ, 2021-Ohio-1151, the special master reviewed a fact pattern that was functionally identical, and evidence that was fully identical, regarding the numbers of COVID-19 deaths of residents in long-term care facilities. The special master incorporates and refers the court to the expanded consideration of ODH databases and relevant law analyzed in that case. *Id.* at ¶ 9-21.

{¶11} The Enquirer argues that ODH alternatively could have satisfied this request by identifying the “submitted forms” from which the data in the database is derived and providing it with copies of the forms. (Reply at 5.) However, the request on which the complaint is based did not seek the forms, and the court may only consider the claim for statistical output that is before it, i.e., “Number of Ohio COVID-19 deaths

broken down by long-term care facility.” The Enquirer may of course make new requests based on record maintenance and access information acquired in this action.

{¶12} The special master finds the Enquirer has not proven by clear and convincing evidence that a record responsive to its first request existed as available output under existing programming in the ODH data management system at the time of the request. Given this finding, it is unnecessary for the court to address ODH’s assertion that some information in such a compilation would be excepted from disclosure by R.C. 3701.17.

Request for Complaints About Long-Term Care Facilities

{¶13} ODH does not dispute that it received and keeps “Complaints received about Mercy Franciscan at West Park from March 1 to June 30” and “COVID 19 related complaints about long-term care facilities received by ODH from March 1 to June 30.” Unless a public records exception applies, these records are thus subject to disclosure under R.C. 149.43. *State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶ 16. ODH asserts that the complaints may be withheld by application of one federal and two state exceptions. (Response at 9-13, 15.)

Requester is not Seeking to Enforce a Federal Freedom of Information Act (FOIA) Request

{¶14} As a threshold matter, ODH asserts that “the Complaint seeks ODH to comply with FOIA, which does not apply here.” (Response at 8.) However, the complaint and the request on which it is based make no reference to FOIA. The fact that ODH independently forwarded a copy of the request to the Centers for Medicare & Medicaid Services (CMS) (Response, Exh. E) does not disturb the fact that the Enquirer directed its request to ODH under the Ohio Public Records Act. Even had the Enquirer made separate requests to ODH and CMS, the same document can be a “public record” of multiple public offices and is independently subject to production from each. See

Hodge v. Montgomery Cty. Prosecutor's Office, Ct. of Cl. No. 2019-01111PQ, 2020-Ohio-4520, ¶ 10, fn. 1 and cases cited therein. FOIA is not implicated in this action.

ODH's State Health Department Role vs. Federal Survey Agency Role

{¶15} ODH licenses, regulates, and inspects “homes” for compliance with state law. R.C. 3721.02. A home is defined as:

an institution, residence, or facility that provides, for a period of more than twenty-four hours, whether for a consideration or not, accommodations to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging, and a veterans' home operated under Chapter 5907. of the Revised Code,

R.C. 3721.01(A)(1)(a). As to the subset of homes referred to in the Enquirer's requests:

ODH regulates nursing homes and residential care facilities. See R.C. 3721.01(A)(1)(a). *This group is sometimes collectively referred to as 'long-term care facilities.'* See R.C. 3721.21.

(Emphasis added.) (Response at 2.)

{¶16} Reporting abuse, neglect, or exploitation of residents in long-term care facilities is governed by R.C. 3721.22 through R.C. 3721.25. The ODH Office of Health Assurance and Licensing provides a general complaint form for this purpose that is not specific to any ODH power, duty, type of facility, or remedy.¹ ODH states that “[a] complaint against a nursing home may be for joint use – for both licensure and certification.” (Response at 2.) The form makes no mention of federal regulation or agreements. Chapter 3721 provides for investigation of the complaints. See e.g., R.C. 3721.031(A), R.C. 3721.23. The director of ODH may impose sanctions including revocation of the facility's state license if investigation reveals the facility violated provisions of Chapter 3721. R.C. 3721.03(B).

¹ See <https://complainttracking.odh.ohio.gov/publiccomplaint/publiccomplaintform> (Accessed May 20, 2021.)

{¶17} In addition to its state powers and duties, ODH is the federally designated “state agency responsible for establishing and maintaining health standards and serving as the state survey agency for the purposes of Title XVIII and XIX.” R.C. 3721.022(B); 42 U.S.C. 1395a. These duties are carried out in accordance with federal regulations, guidelines, and procedures, including agreements with the federal departments of Medicaid and Health and Human Services (CMS). *Id.* (See Response, Exh. A – Section 1984 Agreement). ODH responsibilities under federal authorities do not include all homes or all long-term care facilities but are limited to nursing facilities, aka nursing homes. See R.C. 5165.01(DD); R.C. 3721.01(A)(1)(b)(i) and (6); Response at 7; DOJ Statement at 2-3; Section 1984 Agreement Art. I.A.4.b.)

{¶18} ODH does not allege that all long-term care facilities for which it receives complaints are nursing facilities falling under federal law. ODH claims only that:

That means complaints related to *some* long-term care facilities fall under federal law. See R.C. 3721.031. This specifically includes nursing homes, among others. See R.C. 3721.01(A)(1)(b)(i) (referencing nursing homes and the Social Security Act).

(Emphasis added.) (Response at 7.) ODH asserts that a request for complaints regarding the broad category *long-term care facilities* “necessarily includes federal facilities.” (*Id.* at 8.) However, the request also necessarily includes non-federal facilities. ODH does not explain which facilities referenced in the responsive complaints are federal (nursing) facilities and which are not.

ODH has Submitted No Proof of Applicability of Federal Regulations to Any Individual Complaint

{¶19} ODH made conclusory assertions in its statutory response that federal exceptions prohibit disclosure of the complaints. (Response at 2, 9-10.) However, a bare, general assertion does not meet ODH’s burden to prove that individual records fall squarely within an exception. In the interest of justice for both parties, the special master thus ordered ODH to file the withheld records under seal for *in camera* review.

Because the parties' descriptions suggested that application of the exceptions might not be apparent on the face of the complaint forms, the special master also ordered ODH to provide a privilege log detailing the application of each exception to each complaint. ODH declined to file either the complaints or a privilege log. ODH has refused to file evidence to justify application of any federal exception to any individual complaint or portion thereof.

Existing Law Requires Individualized *In Camera* Scrutiny of Withheld Records

{¶20} *In camera* review of records allegedly subject to a public records exception is a quintessential function of the trial court. *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 22; *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 2, 4, 12 (review for exception claimed under R.C. 3701.17); *State ex. rel. National Broadcasting Co. v. Cleveland*, 57 Ohio St.3d 77, 81, 566 N.E.2d 146 (1991) (review including a claimed federal exception). In its first review of the Court of Claims public records program, the Supreme Court concisely summarized the procedures and burdens applicable when a public office claims an exception:

If a public office or person responsible for public records withholds a record on the basis of a statutory exception, the "burden of production" is on the public office or records custodian to plead and prove facts clearly establishing the applicability of the exemption. In *State ex rel. Cincinnati Enquirer v. Jones-Kelly*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus, we held that exceptions to disclosure under the Public Records Act, R.C. 149.43, "are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." We further stated that "[a] custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *Id.*, following *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 30.

In *State ex rel. Natl. Broadcasting Co., Inc. v. Cleveland*, 38 Ohio St.3d 79, 83, 526 N.E.2d 786 (1988), we recognized several reasons for placing

this burden of production on the public office or records custodian. First, unlike a party requesting disclosure, the custodian of the record has knowledge of the contents of the record. Second, since Ohio law requires the party asserting an exception to prove the facts warranting the exception, placing the burden of proof on the government is consistent with that law. Third, requiring the government to have the burden of proof is also consistent with this court's strict construction of the exceptions of R.C. 149.43 and resolution of doubt in favor of disclosure.

When the government's asserted exemption is challenged, "the court must make an individualized scrutiny of the records in question. If the court finds that [the] records contain excepted information, this information must be redacted and any remaining information must be released." *Id.* at paragraph four of the syllabus. *See also State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 625, 1994-Ohio-5, 640 N.E.2d 174 (1994) ("To the extent that respondents still assert exemptions, an individualized scrutiny of the subject records and an *in camera* inspection is required pursuant to *State ex rel. Natl. Broadcasting Co., supra*, at paragraph four of the syllabus").

When a public office or records custodian relies on an exemption the application of which is not apparent just from the record itself, the office must provide evidence to support the applicability of the exemption. *See, e.g., State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 401-402, 2000-Ohio-207, 732 N.E.2d 373 (2000) (trade-secret exemption required evidence to support its application). Conclusory statements in an affidavit that are not supported by evidence are not sufficient evidence to establish the exemption's applicability. *Id.* at 401.

Welsh-Huggins v. Jefferson Cty. Prosecutor's Office, Slip Opinion No. 2020-Ohio-5371, ¶¶ 27-30. The Supreme Court does not recognize any exception to this procedure for exemptions based on federal law.

{¶21} The content and provenance of the withheld complaints are clearly relevant to determine both the applicability of claimed exceptions and the extent to which any exempt information may be redacted. The pleadings and attachments make clear that at least some of these complaints are not subject to the claimed federal exception. The state exceptions plainly cover only specific personal identification or health information

within an otherwise public complaint form. Without *in camera* review the special master cannot determine how the exceptions may be applied to individual complaints.

Failure to Submit Evidence as Ordered²

By order of February 16, 2021, ODH was directed to

Provide five (5) unredacted exemplars each of a) complaints received about Mercy Franciscan at West Park from March 1 to June 30, and b) COVID 19 related complaints about long-term care facilities received by ODH from March 1 to June 30. These documents shall be referenced as "the sealed records" and filed under seal as provided below.

In response, ODH provided a link to its blank complaint form but stated:

In terms of exemplars, these are federal records of Centers for Medicare & Medicaid Services and, as such, ODH cannot release. (Correspondence with CMS, Exhibit 1; see *also* Motion to Dismiss).

(March 4, 2021 Response at 2.) The correspondence relied on was email from a person with a CMS email address but otherwise unidentified capacity making conclusory statements without citation to legal authority. (*Id.*, Exhibit 1.)

The special master next explained to ODH that

it is necessary for the court to examine the withheld complaint records to determine both the applicability of claimed exceptions and the extent to which exempt information may be redacted within otherwise releasable, non-exempt portions.

The special master cited ODH to controlling Ohio law regarding *in camera* inspection, including of records with claimed federal exemptions, and ordered ODH to file the withheld complaints under seal. (Order of April 14, 2021.) ODH declined to comply (April 29, 2021 Response to Order), offering no justification other than the alleged federal exceptions.³ ODH referenced penalties for improper disclosure. However, civil and

² "The special master may require either or both of the parties to submit additional information or documentation supported by affidavits." R.C. 2743.75(E)(3)(c).

³ While this issue could be considered "a case of first impression that involves an issue of substantial public interest" and thus subject to dismissal without prejudice to refiling by requester in mandamus, see R.C. 2743.75(C)(2), it turns on judicial authority to review executive branch actions made under color of law, rather than any issue unique to public records. Further, the issue was raised months

criminal sanctions apply to many other state and federal exceptions and the allegedly exempt records are routinely submitted under seal. See e.g., *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939 (Federal Education Rights and Privacy Act); *State ex rel. Jenkins v. Cleveland*, 82 Ohio App.3d 770, 786, 613 N.E.2d 652 (1992) (F.B.I. records); *Shaffer v. Budish*, Ct. of Cl. No. 2017-00690PQ, 2018-Ohio-1539 (Health Information Portability and Accountability Act); *Wengerd v. E. Wayne Fire Dist.*, Ct. of Cl. No. 2017-00426PQ, 2017-Ohio-8951 (Federal Copyright Act). ODH provides no basis for the assertion that filing these records both under seal, and restricted from public access under Sup.R. 45(E), risks disclosure other than *in camera*. On the face of the pleadings, ODH has violated orders of this court to provide withheld records for necessary review *in camera*, a grave challenge to orderly proceedings under R.C. 2743.75.

{¶22} The order of April 14, 2021 separately directed ODH to file a privilege log. The special master did not prescribe the contents of the log. Thus, ODH could have either limited log content to non-exempt information or, if it believed it needed to include protected information to establish application of exceptions, moved to file the log under seal. ODH expressly declined to file a log, claiming that it would disclose information prohibited from release to the public. (*Id.*)

ODH Cannot Prove Application of Federal Exceptions Without Supporting Documents and Evidence

{¶23} ODH does no more than establish a *probability* that *portions* of *some* of the unseen complaints *may* be exempt from disclosure. In the absence of *in camera* review and explanatory testimony, ODH fails to prove that any individual complaint or portion thereof falls squarely within any federal or state exception. Under these circumstances the court is justified, if not compelled, to order ODH to disclose all complaints in their

into litigation intended to provide expeditious resolution. The special master is reluctant to recommend additional delay in resolving the status of information that is itself of substantial public interest.

entirety. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶¶ 63, 77.

{¶24} Alternatively, the court could order ODH to release the complaints to the Enquirer with instructions as to the limited information that may be redacted, subject to court enforcement. See *State ex rel. McDougald v. Greene*, 158 Ohio St.3d 533, 2020-Ohio-287, 145 N.E.3d 296. See also R.C. 2743.05 as incorporated by R.C. 2743.75(H). As detailed below, protected health information and certain identifying information may be redacted from the complaints under the state exceptions. Under this option, disclosure should be ordered accompanied by ODH explanations, including legal authority, for each specific withholding or redaction. R.C. 149.43(B)(3).

{¶25} As a third option, the court could order ODH to show cause why it should not be held in contempt for failure to comply with the April 14, 2021 Order.⁴ If a contempt finding follows, the court could provide ODH with the opportunity to purge the contempt by filing the complaints and a privilege log. Following submission of the required evidence, the court could remand to the special master for further proceedings.

Exceptions Claimed

{¶26} An exception⁵ is a state or federal law prohibiting or excusing disclosure of items that otherwise meet the definition of a “record” of the office, including those listed in R.C. 149.43(A)(1). “[I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.” *James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 637 N.E.2d 911 (1994). Courts and records custodians may not “create new exceptions to

⁴ A special master lacks authority to impose sanctions for contempt. Even analogous judicial officers, magistrates, cannot hold a hearing on contempt if the action is not committed in their presence. See Civ.R. 53(C)(3)(f) and (D)(8).

⁵ The terms “exception” and “exemption” are used interchangeably in case law, and in this report.

R.C. 149.43 based on a balancing of interests or generalized privacy concerns” so as to withhold records that are plainly non-exempt. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d ¶¶ 30-39.

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

Protected Health Information (PHI)

{¶28} R.C. 3701.17 *Protected health information* provides:

(A) As used in this section: * * *

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

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

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

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

(C) Information that does not identify an individual is not protected health information and may be released in summary, statistical, or aggregate form. Information that is in a summary, statistical, or aggregate form and that does not identify an individual is a public record * * *.

The statute protects only information meeting the definition in (A)(2) and not the entire record in which it appears. *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 4, 12. The ODH complaint form expressly advises that a complainant is not required to provide name or address, and indicates that the Section III *Resident(s)/Patient(s) Information* fields are not mandatory.⁶ There is therefore no basis to conclude that all complaints regarding COVID-19 contain the identity of the complainant and/or a resident/patient. Nor does ODH show that a complaint would necessarily include a resident's health information if it concerned only policies, protocols, compliance, trends and the like.

{¶29} I conclude that ODH has failed to show that the entire contents of any withheld complaint falls squarely under this exception. However, complaints received by ODH are plainly information "reported to or obtained by the director of health, [or] the department of health," R.C. 3701.17(B), and any included PHI is therefore within the scope of the statute. The exception permits redaction of portions of complaints that fall within the definition of PHI.

R.C. Chapter 3721.031

{¶30} R.C. 3721.031 provides that:

(A) The director of health may investigate any complaint the director receives concerning a home.

(1) Except as required by court order, as necessary for the administration or enforcement of any statute relating to homes, or as provided in division (C) of this section, the director and any employee of the department of health shall not release any of the following information without the permission of the individual or of the individual's legal representative:

⁶ See <https://complainttracking.odh.ohio.gov/publiccomplaint/publiccomplaintform> (Accessed May 20, 2021.)

- (a) The identity of any patient or resident;
- (b) The identity of any individual who submits a complaint about a home;
- (c) The identity of any individual who provides the director with information about a home and has requested confidentiality;
- (d) Any information that reasonably would tend to disclose the identity of any individual described in division (A)(1)(a) to (c) of this section.

* * *

(B) Except as provided in division (C) of this section, any record that identifies an individual described in division (A)(1)(a) to (c) of this section or that reasonably would tend to identify such an individual is not a public record for the purposes of section 149.43 of the Revised Code, and is not subject to inspection and copying under section 1347.08 of the Revised Code.

Like R.C. 3701.17, R.C. 3721.031 does not make entire documents confidential, but only the personal identity information listed in (A)(1).

{¶31} Unlike the federal statutes, these state statutes expressly apply to “information” and “complaints” “reported to” or “received by” ODH. The Enquirer concedes that complaints are subject to R.C. 3721.031 (Reply at 3) and the special master agrees. Like R.C. 3701.17, this exception is applicable to only those portions of complaints where ODH can establish the statutory elements.

Repealed State Exception does not Apply

Referencing complaints pertinent only to its state duties, ODH asserts that Under state law, ODH licenses and regulates nursing homes and residential care facilities for state law compliance. See R.C. Chapter 3721. These complaints have been treated as confidential for more than 40 years. [citing *Wayside Farms, Inc. v. State*, 50 Ohio Misc. 13, 364 N.E.2d 297 (C.P.1977)]

(Response at 3). The *Wayside* decision relied on language in R.C. 3721.21 that has since been repealed, and engaged in a now-impermissible balancing test between the needs and rights of ODH versus the nursing home operator seeking the records. *WBNS*

TV, Inc. v. Dues, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d ¶¶ 30-36. *Wayside* does not constitute binding or even persuasive precedent.

Federal Survey Agency Records

{¶32} ODH serves as a state agency (SA) to which specific federal survey tasks have been delegated by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). R.C. 3721.022. ODH conducts periodic surveys on behalf of CMS regarding Ohio hospital, nursing facility,⁷ and clinical laboratory compliance with federal conditions for participation in the Medicare and Medicaid programs. (Response at 2-3, Exh. A, *1864 Agreement*, at 3-5.) The survey function involves inquiry and inspection of nursing facilities regarding Medicare and Medicaid certification standards, followed by reporting to CMS. Federal law restricts disclosure of the information and documents ODH acquires while performing functions under the 1864 Agreement. ODH summarizes its argument that COVID-19 related complaints regarding long-term care facilities may be records acquired in the course of its federal role as follows:

Information and documents the state survey agency acquires while “performing functions under the SA’s 1864 Agreement ... are subject to CMS disclosure rules. This means the [State Agency] must comply with 42 CFR Part 401 ... in responding to requests for such documents.” (Exhibit C, p. 2.) (emphasis in original). CMS further provides that “information contained in [ODH’s] records and obtained from the Secretary or from any provider or supplier of services will be disclosed only as provided in the Social Security Act or regulations.” (*Id.*, n. 1) As shown by CMS guidance, complaints are not included as an enumerated exception set out in the federal code. See 42 CFR § 488.325. Federal code provision 42 CFR § 488.325 is part of “42 CFR Part 401.” (Exhibit B, p. 2). This means FOIA controls the release of complaints. (See *Id.*).

(Response at 7.)

Federal Statement of Interest (DOJ Statement)

⁷ See 42 U.S.C. § 1395i-3(g) for the survey and certification process relating to “skilled nursing facilities” reimbursed with federal funds.

{¶33} The DOJ states that HHS has contracted with ODH to conduct investigations on its behalf, referred to as “surveys,” into the quality of care at nursing homes. (DOJ Statement at 2.) The DOJ asserts that “this Court lacks jurisdiction to order production of the federal documents requested by the Cincinnati Enquirer. Therefore, no in camera review is necessary, disclosure should not be ordered, and this case should be dismissed.” (*Id.*) However, the Enquirer’s request did not seek records from HHS, and the Order of April 14, 2021 did not require ODH to obtain records from HHS. Only records kept by ODH are at issue, over which this court does have jurisdiction.

{¶34} The DOJ does not cite authority establishing that initial, unsolicited complaints are records obtained “during a survey” (DOJ Statement at 3) within the meaning of 42 U.S.C. § 1306(a)(1). The DOJ also cites 42 CFR § 488.332(a), which requires a state survey agency investigating “complaints of violations of participation requirements” to take “appropriate precautions to protect a complainant’s anonymity and privacy, if possible.” Neither statute identifies *all* complaints of any kind about state long-term care facilities, or even of federal (nursing) facilities, as “complaints of violation of participation requirements.” Indeed, neither statute expressly includes initial complaints as part of the investigation, or states that complaints are records received “in the course of” a survey agency discharging its duties. In analogous Ohio exceptions for investigatory work product, initial complaints are not considered part of the investigation. See *State ex rel. Beacon Journal Publ. Co. v. Maurer*, 91 Ohio St.3d 54, 56-57, 741 N.E.2d 511 (2001), and cases cited therein.

{¶35} The DOJ asserts that ODH is restricted by federal law from disclosing any federal records ‘obtained at any time by any person’ that would “identify individual patients, individual health care practitioners, or other individuals.’ 42 U.S.C. § 1306(a)(1), (e)(3).” (Emphasis added.) (DOJ Statement at 2.) The cited authorities provide that complaints concerning institutions accredited by the Joint Commission on

Accreditation of Hospitals or the American Osteopathic Association, when subjected to a validation survey, “shall be reported to the Secretary [of Health and Human Services]” (Respondent’s Exh. A, Art. II, B.1), and that federal documents retrieved from the Complaints/Incident Tracking System (ACTS) (Respondent’s Exh. C, Documents Accessible to the SA through Electronic Systems) may be subject to federal control. “Federal documents” apparently refers to “information contained in an SAs records *and obtained from the Secretary or from any provider or supplier of services.*” (Respondent’s Exh. A, Art. XIII, *Confidential Nature and Limitations of Use of Information and Records.*) If specific withheld complaints were received directly from the Secretary of HHS or directly from a provider facility, ODH has not provided evidence of those circumstances.

{¶36} ODH’s federal survey function is separate and distinct from its role in state licensure and revocation. ODH does not deny that it receives, maintains and investigates complaints as part of its independent state programs. CMS directs SAs to “distinguish between information and documents obtained as an agent of the Centers for Medicare & Medicaid Services (CMS) and those documents the State independently acquires through a State program.” (Response, Exh. B, *Guidance for State Survey Agencies Responding to Requests for Survey Documents*, at 2; Exh. C at 1-2.) Information and documents that the State independently acquires through a State program must be handled under State law because the documents are State, not Federal, records. For example, requests for survey or certification documents for Medicaid-only providers would fall under applicable State open records laws because such records are State, not Federal, records. (*Id.*) CMS guidance specifies that “information and documents the SA acquires *solely* in its role as an agent of CMS are subject to CMS disclosure rules.” (Emphasis added.) (Respondent’s Exh. C, Federal Documents Maintained by the SA.) ODH’s comprehensive withholding of all complaints is thus contrary to the federal guidance it cites.

{¶37} While it asserts that survey-related “complaints for nursing homes are maintained in a federal database called the Automated Survey Processing Environment Tracking System (ACTS)” (Robbins Aff. at ¶ 6), ODH does not explain whether the ODH Office of Health Assurance and Licensing keeps them as well. Even if federal law applies to some complaints, 42 CFR § 488.332(a) urges precautions to protect a complainant’s anonymity and privacy only “if possible.” For complaints received by ODH through a provider facility, recent guidance permits release without review by CMS of “[f]acility documents with no privacy concerns (policy memos, staffing schedules) or where such concerns are addressed by blocking the specific [personal identification] information.” (Respondent’s Exh. B at 4, Other Survey Documents the SA May Release (New Guidance.)) Even if complaints are “federal records,” these federal provisions echo the state exceptions limiting protection to only personally identifying and protected health information.

No Federal Exception Expressly Applies to Complaints

{¶38} ODH starts with an unsupported assumption that all complaints are federal records. Proceeding from that assumption, ODH reasons on the basis of *expressio unius est exclusio alterius* that a federal statute’s omission of complaints from a list of permitted disclosures means that disclosure of complaints has been affirmatively prohibited. (Response at 7; DOJ Statement at 3.) This reasoning begs the question of whether such complaints are clearly “federal records” in the first instance, and if so, which. The argument fails because

an assumption does not rise to the level of clear and convincing proof necessary to apply an exception to the Public Records Act. See *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 22-23 (public-records custodian bears the burden of proving that a statutory exception to disclosure applies to the facts of the specific case).

State ex rel. Summers v. Fox, Slip Opinion No. 2020-Ohio-5585, ¶ 33.

{¶39} An exception applies only to the extent its language squarely covers the records. A public office may not expand insufficient statutory language by making assumptions or unsupported inferences. ODH has provided no evidence that any of the complaints were received by ODH from the federal government, or directly from a facility, or otherwise became part of the federal survey function after receipt by ODH. The special master finds that ODH has not met its burden to show that any of the complaints fall squarely under the express terms of a federal statute so as to qualify as “[r]ecords the release of which is prohibited by * * * federal law.” R.C. 149.43(A)(1)(v).

Defense That Compilation of COVID-19 Related Complaints Does Not Exist has been Waived

{¶40} In its response to the order of April 14, 2021, ODH asserts for the first time that there is no existing compilation of COVID-19-related complaints about long-term care facilities received by ODH from March 1 to June 30, 2020. (Response to April 14, 2021 Order at 3, Robbins Aff. at ¶ 9-12.) While a public office may raise additional defenses in litigation that it did not make in its prelitigation response to a records request, R.C. 149.43(B)(3), it must present those defenses timely under the Rules of Civil Procedure. “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that” certain defenses, not applicable in this action, may be made by motion. Civ.R. 12(B). See *also* Civ.R. 8(B) through (D). The belated assertion of a defense either denies the requester the opportunity to argue in opposition or requires the court to delay determination of the case to provide such opportunity. ODH did not assert that it would need to create a new compilation of records in its statutory response to the complaint, see R.C. 2743.75(E)(2), and has thus waived the defense.

{¶41} Even were the defense not waived, ODH ambiguously asserts only that it “does not maintain complaints against nursing homes as ‘COVID-19 related.’”

(Response to April 14, 2021 Order, Robbins Aff. at ¶ 9.) ODH does not attest that it has not otherwise flagged and investigated COVID-related complaints regarding long-term care facilities during the ongoing pandemic. ODH has identified 655 “infection control” complaints about long-term care facilities received by ODH from March 1 to June 30, within which the requested subset of COVID-19 related complaints presumably exist. (Robbins Aff. at ¶ 12.) ODH attests that “staff would have to review each complaint against a nursing home filed between March and June 2020 to determine if COVID-19 is mentioned.” (*Id.* at ¶ 11.) However, in the event the court found the defense of non-existing compilation properly raised, the special master on remand would undertake to elicit evidence necessary to determine the defense, e.g., ODH describes the complaints as maintained electronically and would be required to explain why it could not electronically filter them for the term “COVID.”

Permitted Redaction

{¶42} ODH asserts that a complaint containing any exempt information can be withheld in its entirety. (Response at 9-12.) However, the Public Records Act provides that only exempt information within an otherwise public record may be withheld:

If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

R.C. 149.43(B)(1). See *Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 2013-Ohio-5736, 6 N.E.3d 631, ¶ 5, 29-31 (8th Dist.), affirmed by *Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 4, 12; *State ex rel. Beacon Journal Publ. Co. v. Bond*, 98 Ohio St.3d 146, 2002-

Ohio-7117, 781 N.E.2d 180, ¶ 13. Unless exempt personal identification is “inextricably intertwined” with the remainder of a record, the public office must carefully circumscribe redaction to avoid concealing substantive documentation of governmental functions. See generally *Narciso V. Powell Police Dept.*, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590, ¶ 8-14. Disclosure of government activity in the non-redacted remainder of records satisfies a core purpose of the Act - “The Public Records Act serves a laudable purpose by ensuring that government functions are not conducted behind a shroud of secrecy.” *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 40.

{¶43} No federal or state law cited by ODH clearly prohibits disclosure of any complaint in its entirety. The cited authorities provide at most that protected health information and the identities of complainants, residents, witnesses and, in some cases, alleged wrongdoers may be withheld. See 42 C.F.R. § 488.332(a)(2); R.C. 3701.17(A)(2), (B) and (C); 3721.031(A)(1) and (B). This specific information may be protected, but not the substantive COVID-19 concerns expressed about Ohio long-term care facilities. ODH cites to *State ex rel. Clough v. Franklin Cty. Children Servs.*, 144 Ohio St.3d 83, 2015-Ohio-3425, 40 N.E.3d 1132, in support of broader withholding, but that decision is inapposite. First, Clough’s complaint was based on her statutory right as a parent to examine child abuse files regarding her daughter, not as a request under the Public Records Act. In *dicta*, the Court noted that had the claim been based on a public records request, the records would have been subject to R.C. 2151.421(H)(1). *Id.* at 17-19. However, former R.C. 2151.421(H)(1), unlike the federal exceptions here, expressly provided that an entire child abuse complaint is confidential, and not just certain information in it.⁸ ODH cites no comparable statutory language making adult long-term care facility complaints confidential in their entirety.

⁸ See 2011 HB 153, § 101.01, eff. Sept. 29, 2011, for the version then in effect. The statute labels complaints of mandatory and voluntary reporters of child abuse as “reports,” and except for certain provisions elsewhere in the statute, mandates that “a report made under this section is confidential.”

Conclusion

{¶44} Based on the pleadings and evidence the special master recommends the following:

Request No. 1:

{¶45} The special master recommends the court deny the claim for production of records in Request No. 1.

Request No. 2:

{¶46} As discussed above one or more exceptions apply to some, but clearly not all, of the withheld complaints. By withholding all complaints in their entirety ODH is thus in violation of R.C. 149.43(B)(1) to an extent that cannot be determined on the state of the evidence. The special master recommends the court order respondent to show cause why it should not be held in contempt for failure to comply with court orders to file necessary evidence. If a contempt finding follows, the court could provide ODH with the opportunity to purge the contempt by filing the required complaints under seal and filing a privilege log (either under seal or as a public pleading) addressing application of claimed exceptions to specific portions of the records. Following submission of the required evidence, the court could remand to the special master for further proceedings.

{¶47} In the alternative, the special master recommends the court find that the claimed federal exception has not been proven to apply to any complaint, and order respondent to provide requester with copies of all responsive complaints, redacting information only to the least extent necessary to prevent disclosure of information protected by R.C. 3721.031 and R.C. 3701.17.

{¶48} As a final alternative, the court could order respondent to disclose all withheld complaints in their entirety for failure to meet its burden of proof to show that any part of any specific complaint falls squarely under any claimed exception.

{¶49} If the court orders a final disposition, the special master recommends the court order that requester is entitled to recover from respondent the amount of the filing

fee of twenty-five dollars and any other costs associated with the action that it has incurred. It is recommended court costs be assessed to respondent.

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

JEFF CLARK
Special Master

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