

IN THE OHIO COURT OF CLAIMS

WCPO-TV, A DIVISION OF THE	:	
E.W. SCRIPPS COMPANY	:	
	:	Case No. 2020-00513PQ
Requester,	:	
vs.	:	Special Master Jeffrey Clark
	:	
OHIO DEPARTMENT OF HEALTH	:	
	:	
Respondent.	:	

THE OHIO DEPARTMENT OF HEALTH'S MOTION TO DISMISS

The Ohio Department of Health moves for this Court to dismiss the Complaint because requested records do not exist in the program used by the Ohio Department of Health, and records that may exist cannot be produced under state and federal law. A memorandum in support is attached.

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MEMORANDUM IN SUPPORT

The State of Ohio is facing unprecedented challenges because of the COVID-19 pandemic. To fight the spread of the novel coronavirus, the Ohio Department of Health (“ODH”) has used its data system to provide helpful tools to Ohioans. It has also created new tools targeted towards specific risk groups. The need for information, and records, is important. That is why ODH produced all the records the Requester is entitled to. But what the Requester now seeks does not exist, and cannot be created. Moreover, if the records existed, then they could not be produced. For these reasons, the Complaint should be dismissed.

I. FACTS

A. ODH Receives Complaints Because It Regulates “Long-Term Care Facilities” Under Federal And State Law.

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. ODH’s Bureau of Survey and Certification carries out this regulatory function. As the name suggests, oversight manifests in two ways: “surveys” (i.e., inspections) and licenses or delegated certification enforcement. *See* R.C. 3721.03; 42 U.S.C. 1396r. A complaint against a nursing home may be for joint use - for both licensure and certification.

Under federal law, ODH carries out oversight of long-term care facilities that are reimbursed for services with federal funds under a “1984” agreement. (Exhibit A). As a result, ODH serves as the state survey agency for the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (“CMS”). 42 U.S.C. 1395a; R.C. 3721.022. As the state survey agency, ODH conducts surveys for compliance with federal conditions of participation requirements for certification. (Exhibit B) (CMS, September 16, 2011, Ref: S&C-11-39-ALL); (Exhibit C) (CMS, Admin Info: 07-06, January 12, 2007). Under state law, ODH licenses and

regulates nursing homes and residential care facilities for state law compliance. *See* R.C. Chapter 3721.

B. ODH Maintains Records In “Ohio Disease Reporting System” And Cannot Search For COVID-19 Deaths By Long-Term Care Facility.

For around the last 20 years, ODH has primarily used the Ohio Disease Reporting System (“ODRS”) for processing data it uses to carry out its duties. (*See* Exhibit D) (Affidavit of the Tuberculosis, Healthcare-Associated Infections, and Outbreak Response Section Manager). ODRS is a state-created system. (*Id.*, ¶7). It handles information entered by local health districts, laboratories, healthcare providers, and others, all in real time. (*Id.*, ¶11).

Information in ODRS is categorized by person. (*Id.*, ¶10). For each person, there are various “fields” and “free form” boxes. (*Id.*, ¶15). A field has a pre-determined answer, such as “yes,” or a particular county, such as “Franklin.” (*Id.*). Another field asks whether an individual lives in a long-term care facility—a “yes,” “no,” or “unknown” answer is required. (*Id.*). The name of the facility is not recorded. A “free form” response does not have a specified answer; instead, it allows general comments. (*Id.*, ¶21). Examples of information that can be captured in the free form text include an individual’s address and notes from a contact tracer. (*Id.*, ¶¶21–22). ODRS can only filter or search by fields, not by free form entries. (*Id.*, ¶23). By filtering by fields, ODH can create charts that show long-term care facility deaths related to COVID-19 by county. (*Id.*, ¶24). But because the facility is not recorded in ODRS, an output that shows COVID-19 deaths by specifically named long-term care facilities cannot be created, and in fact, does not exist. (*Id.*).

Because of the limitations of ODRS,¹ ODH created other tools to educate Ohioans about the risk of the novel coronavirus. (*Id.*, ¶27). To do so, ODH asked long-term care facilities to

¹ Jackie Borchardt, *Ohio Daily COVID-19 Numbers Delayed Hours Due To ‘Technical Glitch,’ ‘Overburdened Health Departments’*, THE COLUMBUS DISPATCH, November 18, 2020, available at <https://www.dispatch.com/story/news/2020/11/18/ohio-daily-covid-19-numbers-delayed->

provide aggregate numbers of residents and staff who test positive for COVID-19. (*Id.*, ¶28). This is entirely separate from ODRS. (*Id.*). Additionally, unlike ODRS, it is not organized by individual. (*Id.*). Since this is a stand-alone system, it also cannot produce an output that shows COVID-19 deaths organized by long-term care facility. (*Id.*).

C. The WCPO-TV Seeks COVID-19 Records And ODH Produces All The Records It Can.

On June 15, 2020, Paula Christian, on behalf of WPCO-TV, requested that ODH produce the following records:

- 1) The number of COVID-19 deaths in 2020 from Residents at Burlington House and Alzheimer's Care Center on Springdale Road in Hamilton County. The Ohio Department of Health website lists 78 residents at this facility have tested positive for COVID-19. Please provide the date of death and any other information that can be publicly released about those deaths (age, race, sex, etc.).
- 2) The total number of COVID-19 deaths in 2020 from residents of any nursing home or long-term care facility in Hamilton, Butler, Warren, and Clermont counties. I would please request the name of the facility, and the number of deaths of residents from COVID-19.

(Complaint, Exhibit A).

ODH denied the request, finding that such records would be protected health information. *See* R.C. 3701.17(A)(2). On August 20, 2020, WPCO-TV filed a complaint with this Court alleging violations of Ohio's Sunshine Law. Around that same time, the *Cincinnati Enquirer* filed a similar complaint with this Court, Case No. 2020-00500PQ. Because the media Requesters sought similar records and were represented by the same counsel, the cases were jointly mediated. Mediation terminated on October 30, 2020. This Court allowed until November 25, 2020, to respond.

hours-due-technical-glitch/3770422001/ (accessed November 19, 2020) ("The system is about 20 years old and DeWine has lamented the system's inability to track sources of outbreaks")

II. DISCUSSION

A. Standard Of Review.

Under R.C. 2743.75(F)(1), a Requester must establish that he is entitled to relief by “clear and convincing evidence.” *Speros v. Secy. of State*, Ct. of Cl. No. 2017-00389-PQ, 2017-Ohio-8453, ¶ 3 (citing *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14, 995 N.E.2d 1175). Because the requested records do not exist, and requested records would be prohibited from release if they did exist, the Requester cannot meet that burden. *Id.* Accordingly, the Complaint should be dismissed. *Id.*

B. The Requested Records Do Not Exist So They Cannot Be Produced.

ODH does not maintain records by COVID-19 deaths from specific long-term care facilities so the Complaint should be dismissed. (Exhibit D). A public body does not have to create new records. *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 275, 1998-Ohio-242, 695 N.E.2d 256. This remains true when a public body maintains data and the request seeks “new compilations of dispersed data.” *Speros v. Secy. Of State*, Ct. of Cl. No. 2017-00389-PQ, 2017-Ohio-8453, ¶14. In *Speros*, a requester sought election data about the 2002–2016 elections in a single, comprehensive file from the Secretary of State. *Id.* Because the data as requested did not exist, this Court dismissed the Complaint. *Id.* This Court reasoned that to comply with the request would require the Secretary of State to make new records, which is beyond the purpose of the Public Records Act. *Id.*, ¶¶18–19. *See also State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, ¶6 (holding that for a record to exist the requested information must be retrievable by “inputting search terms” in an existing dataset).

Here, ODH’s program cannot produce the requested record so the Complaint should be dismissed. *Speros v. Secy. of State*, Ct. of Cl. No. 2017-00389-PQ, 2017-Ohio-8453, ¶14. The Requests seek COVID-19 deaths sorted by long-term care facility. (Complaint). But that is not

how ODH maintains its records. (Exhibit D). ODH uses ODRS to keep its records. (*Id.*, ¶10). This system has limited capability, including sorting information by various fields. (*Id.*, ¶19). Because living in a long-term care facility is a risk indicator, ODH has a field for that response. (*Id.*, ¶13). However, the *actual* facility is not listed. (*Id.*, ¶34). As a result, just as in *Speros*, ODH cannot produce “COVID-19 deaths” by “long-term care facility,” so the Complaint as it relates to this request should be dismissed. *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 275, 1998-Ohio-242, 695 N.E.2d 256; *Speros v. Secy. of State*, Ct. of Cl. No. 2017-00389-PQ, 2017-Ohio-8453, ¶14.

C. Alternatively, If The Requested Records Existed, Then They Would Be Prohibited From Release As “Protected Health Information,” So The Complaint Should Be Dismissed.

Assuming ODH could create an output that showed COVID-19 deaths per long-term facility (which it cannot), such an output could not be released. That is because state law prohibits the release of records that could link to an individual with a health condition. *See Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 10.

The Revised Code prohibits ODH from releasing “protected health information.” *See* R.C. 3701.17(A)(2). This includes “information” that describes an individual’s “condition” and “could be used to reveal the identity of the individual who is the subject of the information . . . by using . . . information that is available to the predictable recipients of the information.” *Id.*, (A)(2)(b). In other words, ODH cannot release health information that could be paired with generally available information to identify someone. *Id.*

The Ohio Supreme Court, applying R.C. 3701.17(A)(2), unanimously held that an individual’s address and health information is “protected health information” and therefore not a public record. *See Cuyahoga Cty. Bd. of Health*, 2016-Ohio-556, ¶10. In *Cuyahoga County*, a

requester sought documentation of all homes where a minor child was found to have an elevated blood lead level. *Id.* The Court found that the records were prohibited from release by R.C. 3701.17(A)(2). The Court reasoned that the request sought to pair a health condition (elevated blood lead level) with a child’s address, and it is “undeniable” that an address could be used to identify a child. *Id.* Because the health condition and the individual could be linked, the request for the blood lead reports was properly denied for seeking “protected health information.” *Id.* As a result, health information maintained by ODH that could be linked to an individual is not a “public record.” *See* R.C. 149.43(A)(1)(v).

The parties agree that a death caused by COVID-19 is a “health status or condition.” *See* R.C. 3701.17(A)(2). The only issue before this Court is whether this health information could be linked to an individual. *Id.* Because it could be linked, if the record existed, then it would be protected and prohibited from release. *See* R.C. 149.43(A)(1)(v). The link between COVID-19 and the long-term care facilities is made by obituaries and other public information. *See* R.C. 3701.17(A)(2). The statute only requires that a link between COVID-19 and an individual “could” happen. *See* R.C. 3701.17(A)(2). That is all the Court required in *Cuyahoga County*—a possibility that an address could be linked with a name. *Id.*, ¶10. That exists here.

Using the requested information, there is little doubt that a requester could use COVID-19 death records organized by long-term care facility to reveal the identity of an individual. The *Alliance Review*, for example, linked an individual’s passing to a long-term care facility, but only after a surviving member of the family contacted the reporter.² Other articles draw similar links,

² Shane Hoover, *Coronavirus’ Toll Devastates Copeland Oaks Family*, THE ALLIANCE REVIEW, June 14, 2020, available at <https://www.the-review.com/story/news/local/2020/06/14/coronavirusrsquo-toll-devastates-copeland-oaks-family/113386540/> (accessed November 24, 2020).

but again, only after contact by a surviving family member.³ But if ODH was required to create and provide this information by facility, then a reporter could make the connection—and publish—without contacting the family. *Id.* Indeed, COVID-19 deaths per facility is the missing information that prevents this from happening—and why it is requested now. As a result, if ODH maintained records that show the COVID-19 deaths per long-term health facility, then that information would be “protected health information” and prohibited from release under the Public Records Act. *See Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶10.

Finally, the information produced by ODH also shows why the requested information is protected. ODH *does* release some COVID-19 information by long-term care facility—positive test results. But unlike deaths, there is no other “information that is available to predictable recipients of the information” that could link positive results by facility to an individual. *See* R.C. 3701.17(A)(2). A positive test result, unlike a death, is not a public event. A positive test result is not recorded in the paper of record or a publicly available document. For this reason, a positive test result cannot be linked to an individual. As a result, ODH may publish positive test results by long-term care facility without running afoul of R.C. 3701.17(A)(2). What the requester seeks goes a step too far. For all these reasons, in the alternative, the Complaint should be dismissed. R.C. 3701.17(A)(2); *See Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 145 Ohio St.3d 446, 2016-Ohio-556, 50 N.E.3d 499, ¶ 10.

³ Larry Seward, *COVID-19 Clusters Discovered At Hamilton County Nursing Homes*, May 1, 2020, WCPO, available at <https://www.wcpo.com/news/local-news/covid-19-clusters-discovered-at-hamilton-county-nursing-homes> (accessed November 24, 2020).

III. CONCLUSION

For all the reasons above, this Court should dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of November, 2020 a copy of the foregoing was served via e-mail upon the following:

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One of the Attorneys for the Respondent