

**OHIO BOARD OF TAX APPEALS**

Cleveland Clinic Foundation )  
(Beachwood Family Health and )  
Surgery Center), )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and the )  
Beachwood City School District )  
Board of Education, )  
Appellees. )

CASE NO. 2005-V-1726  
  
(REAL PROPERTY  
TAX EXEMPTION)  
ORDER  
  
(Denying Motion for Sanctions,  
Establishing Pretrial Hearing for In  
Camera Inspection of Exhibits,  
Finding R.C. 5715.27(G) Not  
Applicable to Documents Sought in  
Discovery, Denying Motion in  
Limine, Granting Amended Answers  
to Admissions, and Approval of  
Stipulated Confidentiality Order)

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Cleveland Municipal School District )  
Board of Education, )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and )  
The Cleveland Clinic Foundation )  
(Taussig Cancer Center), )  
Appellees. )

CASE NO. 2006-V-99  
  
(REAL PROPERTY  
TAX EXEMPTION)

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Cleveland Municipal School District )  
Board of Education, )  
Appellant, )  
vs. )  
William W. Wilkins, )  
Tax Commissioner of Ohio, and )  
Fairview Hospital, )  
Appellees. )

CASE NO. 2006-H-117  
  
(REAL PROPERTY  
TAX EXEMPTION)

APPEARANCES:

For the Property Owners - Jones Day  
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Entered April 14, 2009

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

These matters are considered again by the Board of Tax Appeals following the decision and remand order of the Ohio Supreme Court in the case of *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197. On December 4, 2008, the court instructed this board to:

“(1) determine the trade-secret status of particular documents, (2) determine whether CCF’s pursuit of the exemption applications constitutes a waiver of its trade-secret rights in these proceedings, and (3) afford adequate protection such as the sealing of particular documents, to the extent that trade-secret status has been properly established and has not been waived.” *Cleveland Clinic Found.*, supra, at ¶16.

Through a January 6, 2009 interim order reinstating these matters, this board invited the parties to submit briefs regarding the court’s second remand instruction as to whether the pursuit of exemption applications by The Cleveland

Clinic Foundation (“CCF”)<sup>1</sup> “constitutes a waiver of its trade-secret rights in these proceedings.” For the reasons stated below, we find CCF’s exemption applications do not result in a waiver of confidentiality as to certain documents produced through discovery. Also before this board is a motion for sanctions filed March 30, 2009 by the Beachwood City School District Board of Education and Cleveland Municipal School District Board of Education (collectively “BOE”), a February 25, 2008 motion to amend its answers to CCF’s requests for admissions filed by the commissioner, a February 25, 2008 motion in limine filed by the commissioner, and a proposed confidentiality agreement filed by the parties on April 1, 2009.

### **Discovery and Motion for Sanctions**

On January 25, 2008, the Board of Tax Appeals journalized an interim discovery order granting in part and denying in part motions to compel filed by BOE and motions for a protective order filed by CCF. *Cleveland Clinic Found. v. Wilkins* (Interim Order, Jan. 25, 2008), BTA Nos. 2005-V-1725, et al., unreported. This board also approved the stipulation and confidentiality orders, as modified, between CCF and BOE.

Given the protective order and confidentiality agreement, we compelled CCF to respond to BOE’s discovery and again rejected as premature CCF’s call to seal certain alleged trade-secret documents as a condition precedent for proceeding with the discovery phase in these appeals.<sup>2</sup>

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<sup>1</sup> CCF collectively refers to Beachwood Family Health and Surgery Center, Taussig Cancer Center, and Fairview Hospital.

<sup>2</sup> This board had previously denied CCF’s motions to conduct an ex parte hearing, perform an in camera inspection, and, pursuant to R.C. 1333.61(D), seal as “trade secrets” documents responsive to

The court held that the portion of this board's order dealing with CCF's claims of loss of confidentiality through the discovery process did not justify an immediate appeal from the January 25, 2008 order under R.C. 2505.02(B)(2). The court stated:

“We hold that with respect to the protection of documents during the discovery process, the January 25, 2008 interim order is not final and appealable pursuant to R.C. 2505.02(B)(2).

“\*\*\* Because the BTA adopted the stipulated order that the parties drafted and agreed to, it has afforded a great measure of protection to CCF's alleged confidentiality rights during the discovery process. As a result, the discovery process presents no threat of a loss of confidentiality that is grave enough to justify an immediate appeal from the January 25, 2008 order under R.C. 2505.02(B)(2).” *Cleveland Clinic Found. v. Levin*, supra, at ¶¶10-11.

Based on the court's pronouncement, this board's January 25, 2008 order compelling CCF to respond to BOE's discovery requests is in effect. Accordingly, CCF shall respond to the discovery requests consistent with the case schedule set forth below. We further deny BOE's March 27, 2009 motion for sanctions as premature.

### **Trade Secret Confidentiality and Exhibits at Trial**

While our interim order was limited to issues involving discovery, before the Supreme Court, CCF argued that it could potentially suffer irretrievable loss if this board were to decline to determine the trade-secret status of particular documents prior to being introduced at hearing. Consistent with the court's remand

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discovery requests. See *Cleveland Clinic Found. v. Wilkins* (Interim Orders, Apr. 6, 2007), BTA Nos. 2005-V-1726, et al., unreported.

instructions, which include a requirement for this board to conduct a hearing to determine the trade-secret status of particular documents and afford adequate protection such as the sealing of particular trade-secret documents, this board sets forth the following revised schedule of events leading up to, including, and following the evidentiary hearing.

Based upon the court's pronouncement, this board issues the following scheduling order, which requires this board to conduct an in camera inspection of all hearing exhibits, subject to temporary seal, prior to hearing.

- ? Completion of fact discovery by June 19, 2009.
- ? Exchange of expert reports by July 17, 2009.
- ? Filing deadline for pre-hearing or discovery motions by July 31, 2009.
- ? Completion of expert witness discovery by July 31, 2009.
- ? Submission of separately numbered exhibits, under temporary seal, at pretrial hearing before this board on Friday, August 7, 2009 for the limited purposes of an in camera inspection to determine trade secret status.
- ? Announcement to the parties of any trade secret status accorded to separately numbered exhibits by August 31, 2009.
- ? Exchange of hearing exhibits and identification of witnesses by September 18, 2009.
- ? Filing with the board of joint stipulations of fact, if any, by September 18, 2009.
- ? Hearing on September 30, 2009.
- ? Filing with the board of appellant's post-hearing brief - 30 days after filing of hearing transcript.

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? Filing with the board of appellees' post-hearing briefs - 30 days after service of appellant's brief.

? Filing with the board of appellant's reply brief - 15 days after service of appellees' briefs.

The board's Rules of Practice and Procedure shall remain in effect except that discovery shall occur pursuant to this order. Given the determination herein, the discovery period is extended consistent with the instant scheduling order.

**Waiver and R.C. 5715.27(G)**

In its decision, the Supreme Court required this board to address the issue raised before the court of the applicability of R.C. 5715.27(G) and whether CCF has waived any right to keep documents requested in discovery confidential. R.C. 5715.27(G) provides:

“Applications and complaints, and documents of any kind related to applications and complaints, filed with the tax commissioner under this section, are public records within the meaning of section 143.43 of the Revised Code.”

The court cited its decision in *State ex rel. Allright Parking, Inc. v. Cleveland* (1992), 63 Ohio St.3d 772. In *Allright*, the court considered the denial of a petition in mandamus to require the city of Cleveland to produce documents concerning an application for abatement of an urban redevelopment project. At issue was the interpretation of R.C. 1728.06, which governs the filing of an application of a community redevelopment corporation seeking tax abatement for improvement projects before a municipality. R.C. 1728.06 provides that “[t]he application shall be a matter of public record upon receipt by the mayor.” In *Allright*, the municipality

refused to make available some of the documents submitted in conjunction with the abatement application, arguing said documents constituted trade secrets of businesses involved with the redevelopment project.

In granting the petition for mandamus against the city, the appellate court held that the materials submitted as an application for abatement were public records pursuant to statute, and found it unnecessary to reach the issue of whether said documents constituted trade secrets.

The court held that the appellate court erred in not conducting an in camera inspection of the records to determine: 1) whether the documents contained trade secrets; and 2) whether the documents at issue were “submitted as a part of the tax abatement application, or whether the documents were simply ancillary thereto.” *Id.* at 776. The court reasoned that only after first conducting said in camera inspection of the documents should the court then consider which are a matter of public record under R.C. 1728.06.

Although arguably analogous, differences abound between the facts and statute construed in *Allright* when compared to the case at hand. In *Allright*, relator was seeking documents submitted with the application. Here, we are asked to determine whether waiver applies to documents not submitted with CCF’s exemption application(s) or even produced at a later time before the commissioner; but rather, documents a party seeks to obtain through discovery.

The statutory directive construed in *Allright* (“[t]he application shall be a matter of public record”) contains no qualifications or limitations. Here, we read

R.C. 5715.27(G) to include only an application or complaint and any documents related to said application or complaint that have been filed with the commissioner. We decline to read the foregoing statute to reach untold documents sought by a party on appeal before this board. Therefore, we conclude that CCF has not waived its right to the confidentiality of documents sought by BOE in discovery.

### **Commissioner's Motions**

On February 22, 2008, CCF filed its appeal of this board's January 25, 2008 interim order, granting in part and denying in part motions to compel and motions for protective order, and approving, as amended, stipulation and confidentiality orders, to the Supreme Court of Ohio. Additionally, on February 22, 2008, the commissioner filed a "motion to amend answers to admissions" and "appellee's motion in limine, or in the alternative for clarification or modification of order of January 25, 2008." Further, on April 1, 2009 the commissioner submitted a revised stipulation and confidentiality agreement of the parties.

### **Motion in Limine**

In this board's January 25, 2008 order, we found that BOE's discovery requests were overbroad and onerous insofar as BOE had provided no basis for seeking information from CCF regarding years outside those identified in the exemption application(s). The commissioner now asks for a pretrial ruling as to "which evidence will be admitted at \*\*\* hearing\*\*\*." Motion at 1. The commissioner argues that the evidence presented at hearing should be limited to the tax years at issue, or, in the event that evidence is admitted for other tax years, that he

be permitted to conduct discovery for any other potential tax years. No other party has responded to the commissioner's motion.

This board's January 25, 2008 order speaks for itself. This board has not favored motions in limine as a method of excluding testimony prior to hearing. *Advantage Services, Inc. v. Tracy* (Interim Order, Apr. 14, 1997), BTA No. 1995-T-1391, unreported; *Cleveland Hts./University Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Oct. 30, 1992), BTA No. 1991-A-1051, unreported. Therefore, this board finds the commissioner's motion in limine is premature and overrules the same. This board can consider counsel's challenges as they arise during the hearing.

#### **Motion to Amend Answers to Admissions**

The commissioner seeks to amend his answers numbered 4, 7, and 12 to the requests for admissions propounded by CCF. No other party has responded to the commissioner's motion. Pursuant to Civ.R. 36(B), the commissioner's modification is allowed.

#### **Revised Stipulation and Confidentiality Order**

On April 1, 2009, the commissioner submitted a revised stipulation and confidentiality order signed by counsel for the parties. Upon review, we find said revised stipulation and confidentiality order is consistent with this board's modifications made and approved January 25, 2008, and includes provisions for the appellee Tax Commissioner, Ohio Tax Department, and the Ohio Attorney General. Therefore, said April 1, 2009 revised stipulation and confidentiality order is approved.

Therefore, based upon the foregoing, CCF shall comply with the discovery requests of BOE; pursuant to this board's scheduling order, exhibits identified prior to hearing will be entitled to an in camera inspection to determine trade secret status. This board finds that, pursuant to R.C. 5715.27(G), CCF has not waived its opportunity to seek confidentiality of documents sought in these proceedings. The commissioner's motion in limine is denied; the commissioner's motion to amend specific answers to admissions is approved; and the revised stipulation and confidentiality agreement of the parties is approved.

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