ORIGINAL

IN THE SUPREME COURT OF OHIO

State *ex rel.* Data Trace Information Services, LLC, *et al.*,	:	Case No. 2010-2029
Relators,	:	Original Action in Mandamus
v.	:	
Recorder of Cuyahoga County, Ohio,	:	
Respondent.	:	

Brief *Amicus Curiae* of The Reporters Committee for Freedom of the Press in Support of Relators

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and open government litigation since 1970.

Amicus, on behalf of the journalists that it represents, has a long-standing and continual interest in upholding the public's right of access to government records and to ensure the public is not constructively denied access to such records through cost prohibitive fee assessments such as the one at issue in this matter. The Recorder of Cuyahoga County's ("Recorder") broad interpretation of the statutory provision at issue, R.C. 317.32(I),[2] has been repeatedly rejected by the Ohio Attorney General and stands in direct conflict with long-established principles that exceptions to Ohio's public records laws be narrowly construed in favor of the public and interpreted to provide open and ready access for all.

Amicus are specifically concerned that valuable public interest reporting on the Ohio real estate market will be fatally curtailed should this Court uphold the Recorder's sweeping view of the law and its own statutory authority. To this end, *amicus* also provide this Court with multiple examples of reporting done in Ohio using the kinds of records the Recorder claims must be

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[1] On June 13, 2011, counsel of record for The Reporters Committee for Freedom of the Press requested admission *pro hac vice* to file a brief *amicus curiae* in support of Relators in this case. *Amicus* now provisionally files this brief pending the Court's decision on *pro hac vice* admission.

[2] Ohio code sets forth the "base fees for a recorder's services and housing trust fund fees" that a county recorder can charge. OHIO REV. CODE. ANN. § 317.32 (2011). "For photocopying a document, other than at the time of recording and indexing...a base fee of one dollar and a housing trust fund fee of one dollar per page, size eight and one-half inches by fourteen inches, or fraction thereof." *Id.* § (I).

provided electronically at nothing less than $2 "per page."[3] Such public interest stories have, for example, exposed a variety of housing frauds throughout the state. Many such frauds have occurred in Cuyahoga County itself and have contributed to perpetual urban blight within parts of Cleveland.

If this Court adopts the Recorder's interpretation of the law, journalists and the public will often not be able to afford the exorbitant costs proposed for records the Recorder maintains in trust for the public. This poses grave risks to the public's ability to thoroughly monitor and analyze, among other things, real estate sales trends, ownership interests, mortgage transactions and property liens.

This case represents nothing more than an attempt by the Recorder to extort the public through an interpretation of the law that has been repeatedly rejected by the Ohio Attorney General. The Cuyahoga County Recorder seems to stand alone among county recorders throughout the state as it appears to be the only one with the ability to provide electronic access that is not doing so for fees ranging from nothing to $20, with the vast majority of county recorders providing similar information for no more than $2. *See* Relators' Volume 2 of Evidence, Tabs 6-8. Indeed, should this Court adopt the Recorder's expansive view that it is required by law to charge a $2 "per page" fee for electronic records, *all* Ohio county recorders would necessarily be required to do the same despite current practice.

STATEMENT OF FACTS

Amicus hereby adopt and incorporate by reference Relators Data Trace Information Services, LLC and Property Insight, LLC ("Requesters") Statement of Facts including the nature

[3] "Per page" is in reality a misnomer when considering electronic record formats as they do not actually exist in page form. Nonetheless, the phrase is adopted herein to simply illustrate the Recorder's legal position in this matter.

of the case, the statement of facts giving rise to the litigation, the course of proceedings and discovery, and court rulings as set forth in Requesters' Brief on the Merits in this case.

ARGUMENT

Proposition of Law No. I:
The Ohio Attorney General has repeatedly found that the fee provisions in R.C. 317.32(I) apply only in the strictest of circumstances and must be narrowly construed to effect the broad disclosure requirements of Ohio's public records laws.

A. The term "photocopy" has been narrowly defined and limited to circumstances when a recorder's office is providing photocopying "services."

In a 2000 opinion, the Ohio Attorney General ("AG") was asked whether a county recorder is required to "charge and collect the fee prescribed by R.C. 317.32(I) when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains." 2000 Op. Ohio Att'y Gen. No. 046 at 1. The AG noted that while the statute states that a recorder must charge the fee prescribed for "photocopying" a document, the term itself is not explicitly defined under the law. *See id.* at 4.

Instead of resorting to strained, philosophical contortions of what it could mean to "photocopy" a document—as the Recorder has done in this case—the AG took a common sense approach to defining the term. She turned to the most logical resource for an answer: Webster's New World Dictionary. *See id.* The dictionary defines a "photocopy" as a "'copy of printed or other graphic material made by a device (**photocopier**) which photographically reproduces the original.'" *Id.* She concluded that the gerund form of the transitive verb, "photocopy" means "the making of a copy of printed or other graphic material by way of a photocopier or other device that photographically reproduces the original." *Id.* Hence, a county recorder is authorized to charge fees under R.C. 317.32(I) "only when he makes a copy of a record in his

custody by way of a photocopier or other device that photographically reproduces the original record." *Id.*

Turning to the question presented, the AG concluded that a recorder provides no photocopying services when a filed is downloaded from the Internet and printed independently. *See id.* In doing so, she noted that the method of reproduction at issue employed no photographic reproduction processes. Rather, a record accessed over the Internet was "converted electronically into a digital format that is then separated into small data packets."[4] *Id.*

The AG therefore concluded that a county recorder does not make a photocopy under the scenario presented and held R.C. 317.32(I) inapplicable. *See id.* at 5. The AG found additional support for her decision considering that when R.C. 317.32(I) was adopted in 1994, "the number of people accessing information via the Internet was relatively small." *Id.* at 5. Hence, the General Assembly could not have reasonably contemplated the dramatic rise of the Internet as a distribution and reproduction platform nor intended 317.32(I) "photocopying" fees to apply in such cases. *See id.*

The parallels to the present case are obvious. First, despite the Recorder's attempts to establish the contrary, there is in fact a common sense—and now legal—understanding of what it means to "photocopy" a record. It is limited solely to a *photographic* reproduction of a record. It is clear that electronic CD-ROM copies of records are not created through this process and are in fact digital processes where information is duplicated through the replication of a series of computer code "1s" and "0s." Second, just as the General Assembly could not have reasonably contemplated Internet-based delivery and reproduction methods in 1994, it is equally unlikely that it considered electronic reproductions on CD-ROM as "photocopying." Indeed, CD

[4] For further AG discussion of the technological distinctions between photographic and digital reproduction methods, see 2004 Op. Ohio Att'y Gen. No. 011 at 4-5.

"burner" drives were not widely, if at all, available to the general public in 1994. Further, the media used for copying, blank, writable CD-ROM discs upon which one could "burn" material to make an electronic reproduction, were also generally unavailable to the public at that time.

Even when the public employs photographic reproduction methods, the narrow reading that must be given to R.C. 317.32 has been found to restrict the fees that can be imposed in certain circumstances. A county recorder is in fact precluded from charging photocopy fees under R.C. 317.32(I) when the public reproduces records on a publicly accessible photocopying machine housed *within* the recorder's office without recorder or staff assistance. *See* 2004 Op. Ohio Att'y Gen. No. 033. The recorder must instead provide copies of the records "at cost." *See id.* at 5.

Foregoing an explication as to what the opinion solicitor could have possibly meant when referring to a "photocopying machine" for public use, the AG found that R.C. 317.32(I) fees only applied when the recorder's office was actually extending "services" to the public, that is, personal assistance or effort on the part of office personnel. *See id.* at 3. Hence, if a recorder makes a photocopying machine available for the public to independently use, R.C. 317.32(I) fees are inapplicable. *See id.* at 4. "Our conclusion is supported by the courts' recognition that, 'inherent in R.C. 149.43 [Ohio's Public Records law] is the fundamental policy of promoting open government, not restricting it.'" *Id.* (citations omitted). The AG went on to note that "division I of R.C. 317.32 is an exception to the 'at cost' standard of R.C. 149.43, and as such, must be narrowly construed in favor of the public."[5] *Id.*

[5] The Ohio Public Records law states that "upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time." OHIO REV. CODE. ANN. § 149.43(B) (2011).

Attorney General Opinion 2004-033 is further evidence that R.C. 317.32 was intended to apply only to the narrowest of situations explicitly and clearly set forth under its provisions. The only way it can be harmonized with the broad disclosure mandates of the public records law is to construe it in a manner that fosters the greatest means of public access.

B. Technological distinctions between "photocopying" and various other reproduction methods significantly limit the application of R.C. 317.32(I).

As introduced in the previous section, the law has correctly given a common sense meaning to the term "photocopying" and has specifically noted that various reproduction technologies exist distinct from a "photocopying" method. Before Attorney General Opinion 2000-046 found that Internet reproduction methods were not "photocopy" reproductions, prior opinions made similar distinctions regarding other technologies.

In 1994, the AG was asked to render his opinion on the following legal question: "If a microfiche has a hundred documents or a roll of film contains five hundred documents, can a member of the public pay for the cost to reproduce such fiche or roll rather than pay the $1.00 per page charge under [R.C. 317.32(I)]?"[6] 1994 Op. Ohio Att'y Gen. No. 006 at 1. In a scenario that closely tracks the present issue before this Court, the Attorney General answered in the affirmative. *See id.* at 5-6.

The AG acknowledged that this Court has held that computer records and electronic compilations are subject to Ohio's public records laws and that such records can be of particular added value to the public. *See id.* at 6. He further concluded that given the legitimate reasons that can exist for preferring or requiring electronic copies of records, the recorder must provide them in any such available formats if the requester is willing to pay for electronic reproduction

[6] As originally enacted, R.C. 317.32(I) authorized a charge of $1 as opposed to the current $2 fee.

costs in place of the fees prescribed under R.C. 317.32(I).[7] *See id.* Once again, the AG recognized that R.C. 317.32(I) applies only to "photocopy" reproductions and more desirable electronic formats fall outside of the provisions scope with fees limited to actual duplication costs.

Such views were again reinforced when the AG determined that a requester could not be charged fees under 317.32(I) when he made copies of recorder records by taking photographs with a personal digital camera. *See* 2004 Op. Ohio Att'y Gen. No. 011. The AG reasoned that making digital reproductions with one's own camera was the equivalent of asserting a right to inspection only and therefore no copy fees could be assessed. *See id.* at 5-7.

> To broadly interpret R.C. 317.32(I) as authorizing the recorder to charge a fee for making records available for inspection, where the requester then uses his own equipment to make copies of the records he is inspecting, would run afoul of Ohio's strong public policy, expressed by the General Assembly in R.C. 149.43, that the public have access to government records, without cost, to the greatest extent possible. *Id.* at 5.

Finally, the AG reinforced a running theme throughout the office's interpretation of R.C. 317.32(I): photocopying technologies are a distinct and limited class of reproduction methods. Thoroughly documenting the stark technological differences between the processes, the AG found that using a digital camera simply did not constitute "photocopying" as it involved a distinct reproduction method. *See id.* at 4-5.

Perhaps to the Recorder's dismay, electronic reproduction costs for CD-ROMS are negligible relative to the approximately $208,000 they seek to individually charge the Requesters in this matter for two months of records spanning July and August of 2010. However, the law is

[7] 1994 Op. Ohio Att'y Gen. No. 006 apparently contains a typographical error, incorrectly substituting the nonexistent provision R.C. 317.21(I) for the correct provision, R.C. 317.32(I) at various times.

clear that R.C. 317.32(I) is to be applied narrowly and the actual cost standard dictates when anything but a true "photocopy," as that term has been legally defined, is made by Recorder personnel.

C. The public is entitled to share in the benefits of electronic record compilations and absent clear legal authority must only be charged the actual costs of electronic reproduction.

Finally, the law has consistently recognized the public's right to readily share in the benefits of electronic government recordkeeping and dissemination. In 1994 Op. Ohio Att'y Gen. No. 006, the AG emphasized previous decisions of this Court holding that computerized records compilations are public in as much as their paper counterparts and that the public should not have to spend inordinate amounts of time or money reinventing the value that public funds have already created. *See* 1994 Op. Ohio Att'y Gen. No. 006 at 5-6 (citing *Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992) and *Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988)). Quoting from *Margolius*, 62 Ohio St. 3d at 460, 884 N.E.2d at 669, the AG noted:

> [A] set of public records stored in an organized fashion on a magnetic medium also contains an added value that inherently is a part of the public record. Here, the added value is not only the organization of the data, but also the compression of the data into a form that allows greater ease of public access. 1994 Op. Ohio Att'y Gen. No. 006 at 5.

The AG further observed that the Ohio Court of Appeals for the Fourth Appellate District has held that records custodians could violate R.C. 149.43 when they refuse to provide the value-added benefits of electronic access. *See id.* at 6 (citing *Athens County Property Owners Ass'n v. City of Athens*, 85 Ohio App. 3d 129, 619 N.E.2d 437 (Ohio Ct. App. 1992)). While the Recorder will aver that it is not refusing to provide electronic access to bulk compilations, the reality is that its newfound two dollar "per page" electronic record fee effectively forecloses

access to any bulk data despite the negligible actual costs to the Recorder for which the Requesters are more than willing to compensate. As the record indicates, the Requesters cannot efficiently obtain the public records they seek through alternative electronic means such as Internet download, as that would have taken approximately 9.5 hours to download only one day's worth of record instruments. *See* Relators' Volume 3 of Evidence, Tab 36, Affidavit of Kathy Idsvoog dated May 13, 2011. If the Recorder's interpretation of R.C. 317.32(I) prevails, only a slim strata of the most determined and very wealthy segments of the public would be able to access Recorder records in compiled, electronic form.

Taken together, the AG opinions cited within strongly affirm that any law or policy that burdens the public's ability to readily access government records will be strictly interpreted to promote broad access and utility to the requester as required by law. The Recorder's interpretation of R.C. 317.32(I) runs completely counter to these most basic tenets of open government and should be rejected.

Proposition of Law No. II:
Broadly interpreting R.C. 317.32(I) severely jeopardizes the ability of journalists to meaningfully uphold their constitutionally protected watchdog role and report on matters of immense public interest related to real estate and financial markets.

Ohio journalists frequently use the kinds of records at issue in this case to inform the public about important matters of public concern. This often involves the review and analysis of large amounts of recorder records to, for example, trace property histories or analyze trends across multiple properties. Naturally, this tedious and time-consuming process can often be conducted with greater efficiency if journalists have access to electronic records that can be copied in relatively little time and more easily reviewed. While certainly not an exhaustive account of the variety of newsworthy reporting that employs such records, what follows are examples from Ohio journalists who have effectively used real estate records to aid reporting to

the public. Such reporting is threatened with statewide extinction if all county recorders must charge fees like the $208,000 in fees the Recorder seeks to impose.

It has been well documented that the proliferation of subprime mortgages and the packaging of such toxic assets in investment instruments led in significant part to the ongoing global financial crisis. It has resulted in widespread foreclosures and many families owing more money on their home than it is currently worth. In some cases, banks have simply let foreclosed properties lay abandoned. Ohio has been hit particularly hard by recent events and local media have been using property records to report on mortgage fraud and foreclosure acceleration associated with subprime lending in Ohio for years.

For example, in a series of reports in the summer of 2000, *The Plain Dealer* documented how areas of inner-city Cleveland fell victim to property flipping scams where inflated mortgages were obtained based on possible fraudulent real estate appraisals. *See* Bob Paynter, *Buyer Beware? Investors See Little Risk; Inner-City Houses Bought at Premium With Little Checking*, THE PLAIN DEALER (CLEVELAND), Aug. 27, 2000, at 15A, *available at* 2000 WLNR 9035347; *A Boom in Houses of Cards: By Flipping' Inner-City Properties, Owners Inflate Prices and Snare Outside Buyers Who Pay Premium Prices*, THE PLAIN DEALER (CLEVELAND), Aug. 28, 2000, at 1A, *available at* 2000 WLNR 9036228.[8] Journalists reviewed records related to dozens of property transactions within Cleveland to unearth what appeared to be numerous cases where home sale prices were purposely overstated; tainting later appraisals and future mortgages

[8] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided. For a complete description of how *The Plain Dealer* analyzed a property records database consisting of more than 1.2 million transfers in Cuyahoga County to write the series see Bob Paynter, *How the Data Was Analyzed*, THE PLAIN DEALER (CLEVELAND), Aug. 27, 2000, at 15A, *available at* 2000 WLNR 9035381. Among other things, the analysis indicated that 964 "flip" transactions had occurred within Cleveland between 1997 and April 2000, more than in the previous 20 years combined with the majority concentrated in poorer communities. *See id.*

thereby draining any equity value from the property. *See A Boom in Houses of Cards: By Flipping' Inner-City Properties, Owners Inflate Prices and Snare Outside Buyers Who Pay Premium Prices.* In some instances, deed records indicated purchase prices of nearly four times the price indicated on the related sales contract. *See id.*

The investigation focused on a particular individual who records indicated bought and resold at least 50 properties in the course of two years, receiving an investment return of nearly 85 percent while holding on to such properties for an average of only four months. *See id.* Such flipping schemes, according to the report "have sucked tens of millions of dollars in potential value out of mostly East Side properties...leaving neighborhood preservationists to worry that not enough equity remains in the properties to keep landlords afloat and the houses decently maintained." *Id.*

Less than a year later, *The Plain Dealer* reported on a similar investigation into flipping schemes facilitated by lax lending rules in the subprime mortgage market. *See* Bob Paynter, *Modern Mortgage Missionary; Gregory V. Jones Preached Easy Money, But Many Buyers of Run-Down Houses Wound Up Broke*, THE PLAIN DEALER (CLEVELAND), Mar. 25, 2001, at 1A, *available at* 2001 WLNR 244382. Of the 120 deals in which people bought property from one of Jones' companies since 1996, records showed that nearly three out of four were in foreclosure by the end of 2000. *See id.*

Journalists eventually discovered that flipping schemes were not unique to vulnerable inner-city Cleveland properties. In 2006, *The Columbus Dispatch* reviewed mortgages, deeds and other records to uncover a scam propagating through more elite neighborhoods where individuals would offer to purchase properties for sums considerably more than the asking price. *See* Geoff Dutton, *Big Deals Send Up Red Flags; Sales of 14 Upscale Homes at Well-Above-*

Market Prices Raise Suspicions of Flipping, THE COLUMBUS DISPATCH (OHIO), Nov. 5, 2006, at 1A, *available at* 2006 WLNR 19210664. The scam required the seller to agree to immediately refund the difference between the asking price and the sale price to the buyer after closing, allowing the buyer to obtain retain the inflated lender proceeds based on the illusory sale price. *See id.* Local residents fear that the sellers will simply walk away with their ill-gotten profits leaving themselves and lenders left to sort out any abandoned properties. In some cases, the story noted, sellers could be even held liable for a buyer's fraud. *See id.* The newspaper uncovered evidence of at least 14 such closed transactions worth more than $11 million. *See id.*

Finally, a 2008 investigation by *The Plain Dealer* found that between 2002 and 2006 subprime mortgage fraud losses in Cleveland amounted to "several hundred million dollars." *See* Mark Gillespie, *The Subprime Trail of Deceit*, THE PLAIN DEALER (CLEVELAND), May 11, 2008, at A1, *available at* 2008 WLNR 8980560. According to the story, "nearly half of the subprime loans written in 2005 by five of the country's biggest subprime lenders resulted in a foreclosure filing," noting that "[t]axpayers will bear much of the cost of Wall Street bailouts and elimination of blight that mortgage fraud created." *Id.*

Aside from documenting the massive mortgage fraud that proliferated through Ohio during the subprime lending bonanza of roughly the last decade, journalists have also used recorded real estate records to hold government accountable when it acts negligently. For example, the city of Cleveland itself distributed down payment loans through the federally funded "Afford-A-Home" program but did little to verify whether individuals accepting the down payments could actually afford the homes they were purchasing. *See* Mark Gillespie, *How Cleveland Aggravated its Foreclosure Problem and Lost Millions in Tax Dollars*, THE PLAIN DEALER (CLEVELAND), Dec. 13, 2009, at A1, *available at* 2009 WLNR 25219727. Due to what

the newspaper described as a "lack of oversight," records showed that hundreds of program participants slipped into foreclosure between 2000 and 2007. *See id.* Further, records showed that nearly half of the 584 homes sold by the top three companies that utilized the program over the prior eight years went into foreclosure. *See id.* Many homes sat abandoned with banks expressing no interest in salvaging them, and the city losing its investment in the community as well as property tax revenues. *See id.* When the city was informed of *The Plain Dealer's* findings, it pledged to impose stricter eligibility requirements and greater investigations into the true property values of homes potentially purchased under the program. *See id.*

Finally, in 2000 *The Columbus Dispatch* reviewed property records in Franklin County in connection with the federal investigation of a Columbus police officer who may have falsified information in order to take advantage of a federal program known as the "Officer Next Door" program. *See* Jodi Nirode, *HUD Reviews Deal for Officer*, THE COLUMBUS DISPATCH (OHIO), Oct. 12, 2000, at 1A, *available at* 2000 WLNR 9624654. To encourage police officers to buy homes in at-risk neighborhoods, the program allows police officers to purchase a residence at half of its appraised value. *See id.* To be eligible for the program, however, officers may not own any other residential property at the time they purchase the new home nor once they reside in the home. *See id.* While the officer in question represented to federal officials that he owned no other property at the time he purchased his home under the program, property records revealed that he was part-owner of a duplex rental home at the time. *See id.* Three months after closing on the home, records showed that he became sole owner of the duplex and purchased an additional property. *See id.* Records also revealed that after being confronted with *The Dispatch's* reporting, the officer transferred the properties to his mother at no cost. *See id.*

Further records investigations found no evidence of the officer's claims he had previously transferred his properties to his father. *See id.*

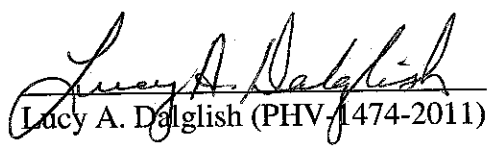
The above stories clearly demonstrate the incredible public value recorded real estate records have to the public as well as the value of having ready access to large compilations of transaction data. This Court should not uphold an interpretation of R.C. 317.32(I) that effectively prevents statewide access to any significant amount of such data by mandating imposition of a $2 "per page" copy fee.

CONCLUSION

For the foregoing reasons, this Court should hold that the fee provisions set forth in R.C. 317.32(I) are to be narrowly construed and cannot be imposed when the public seeks electronic copies of recorded real estate documents. Fees for such electronic copies are instead properly governed by R.C. 149.43(B) which this Court has held mandates records be provided at actual cost.

Dated: June 13, 2011

Respectfully submitted,
Lucy A. Dalglish, Counsel of Record



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CERTIFICATE OF SERVICE

I certify that on this 13th day of June, 2011 the foregoing brief *Amicus Curiae* was sent via ordinary U.S. mail, in sealed wrappers, postage prepaid, by depositing true and correct copies thereof in a secure receptacle under the exclusive care and control of the U.S. Postal Service to the following counsels of record:

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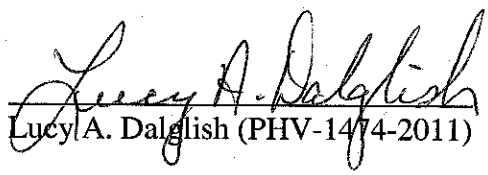

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