

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Motor Carrier Service, Inc., :
Relator, :
v. : No. 10AP-1178
Carolyn Y. Williams, Ohio Bureau of : (REGULAR CALENDAR)
Motor Vehicles and Thomas J. Stickrath,
Ohio Department of Public Safety, :
Respondents. :

D E C I S I O N

Rendered on June 12, 2012

*Vorys, Sater, Seymour and Pease LLP, Lisa Pierce Reisz,
Kenneth J. Rubin, and Thomas E. Szykowny, for relator.*

*Michael DeWine, Attorney General, Hilary R. Damaser, and
William J. Cole, for respondents.*

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Motor Carrier Service, Inc., seeks a writ of mandamus ordering respondents, the Ohio Bureau of Motor Vehicles ("BMV") and the Ohio Department of Public Safety ("DPS"), to provide an unredacted copy of the driving record of an individual alleged to be relator's employee.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. None of the parties have

objected to the magistrate's findings of fact, and upon an independent review of the record and the magistrate's decision, we adopt them as our own.

{¶ 3} By way of background, relator mailed a letter to the BMV in August 2010 requesting "a copy of the complete driving record" of one of its employees pursuant to Ohio's public records statute, R.C. 149.43. (Stip. Rec., Tab 2.) According to relator, the information was necessary "to verify information relating to his commercial driver's license that is required under the 'Commercial Motor Vehicle Safety Act of 1986.'" (Stip. Rec., Tab 2.) Relator purported to be licensed by the Ohio Department of Transportation and provided an identification number.

{¶ 4} The BMV responded to the request by providing relator a copy of the driving record with the individual's personal information redacted. In a subsequent letter, an attorney for DPS informed relator that the redacted information was prohibited from disclosure by the federal Driver's Privacy Protection Act, 18 U.S.C. 2721 et seq. ("the federal DPPA") and Ohio's analog statute, R.C. 4501.27 ("the state DPPA"). The attorney stated that the DPPAs prohibited the disclosure of personal information "except to certain statutorily exempted requesters for certain statutorily defined purposes." (Stip. Rec., Tab 1.)

{¶ 5} Relator filed this mandamus action, claiming it was entitled to a complete, unredacted copy of the requested driving records at cost. Respondents countered that disclosure was prohibited by the DPPAs unless a statutory exception allowed disclosure, and that relator failed to demonstrate an exception in the manner required by Ohio Adm.Code 4501:1-12-02(D)(2), which allows a requester to obtain unredacted driving records upon satisfying certain conditions. According to respondents, relator instead filed a request under Ohio Adm.Code 4501:1-12-02(D)(1), which only requires the BMV to provide a redacted copy at cost.

{¶ 6} In its decision, the magistrate found that relator was not entitled to a writ of mandamus because relator failed to establish that the BMV owed a clear legal duty to provide an unredacted copy of the requested records. According to the magistrate, disclosure of the records was prohibited by the state and federal DPPAs unless relator demonstrated a permissible use for the record by complying with the procedure for requesting unredacted DPPA materials described in Ohio Adm.Code 4501:1-12-02(D)(2).

Because relator instead made a general public records request via Ohio Adm.Code 4501:1-12-02(D)(1), which only allowed for redacted records, the magistrate found that relator "received exactly what it was entitled to," i.e., a redacted copy of the driving record.

{¶ 7} Relator now raises the following four objections to the magistrate's conclusions of law:

- A. The Magistrate's Decision misses the central issue in this case by erroneously relying upon O.A.C. § 4501:1-12-02 in concluding that Relator, a requester authorized by both the state and federal Driver's Privacy Protection Acts is not entitled to an unredacted copy of its employee's driving record, at cost, under Ohio's public records laws, R.C. § 149.43. Instead, the Magistrate erred in finding that MCS's only option to obtain that record was to utilize a procedure other than a public records request, BMV Form 1173, and pay a \$5.00 fee for a certified abstract pursuant to R.C. § 4509.05 – a product decidedly different from a public record.
- B. The Magistrate's Decision does not recognize the actual conflict between Ohio's public records statute, R.C. § 149.43, and O.A.C. § 4501:1-12-02, an administrative rule passed because of this litigation.
- C. The Magistrate's Decision incorrectly characterizes Relator's argument as it relates to BMV Form 1173 and erroneously concludes that under O.A.C. § 4501:1-12-02, Relator's decision to submit a public records request – which included sufficient information by which the Registrar could determine that MCS was a DPPA authorize (sic) requester – instead of requesting a certified copy of the record using BMV Form 1173 is fatal to its request for an unredacted record.
- D. The Magistrate incorrectly concluded that Respondents are not judicially and/or collaterally estopped from arguing that the federal and/or state Driver's Privacy Protection Act prohibits them from producing an unredacted driving record to Relator, a DPPS authorized requester, under Ohio's public records statute, R.C. § 149.43.

{¶ 8} Relator's first three objections are interrelated, and we will address them together. Essentially, the objections challenge the magistrate's conclusion that relator was required to comply with Ohio Adm.Code 4501:1-12-02(D)(2) in order to obtain an unredacted copy of the requested driving record. According to relator, the administrative

rule conflicts with the public records statute, R.C. 149.43, which allows an individual to obtain copies of public records at cost. We disagree.

{¶ 9} A mandamus action is the appropriate vehicle to compel compliance with R.C. 149.43, Ohio's Public Records Act. R.C. 149.43(C)(1); *State ex rel. Cincinnati Enquirer v. Craig*, ___ Ohio St.3d ___, 2012-Ohio-199, ¶ 11 (slip opinion). Generally, R.C. 149.43(B)(1) requires a public office to, upon request, make copies of "public records" available at cost within a reasonable period of time; however, records are exempt from this requirement if their "release" is prohibited by state or federal law. R.C. 149.43(A)(1)(v).

{¶ 10} The BMV argues that, while R.C. 4501.34(A) broadly states that "all documents in the registrar's possession are public records," disclosure of the records in this case was prohibited by the state and federal DPPAs. The federal DPPA was enacted in 1994 to regulate the disclosure and resale of personal information contained in the records of state motor vehicle departments. *Reno v. Condon*, 528 U.S. 141, 143 (2000). In 2000, the General Assembly amended R.C. 4501.27 to comport with the federal requirements. *See* 2000 H. 600, eff. 6-1-00; *Bailey v. Ohio Dept. of Motor Vehicles*, 10th Dist. No. 02AP-378, 2002-Ohio-7361, ¶ 30.

{¶ 11} The DPPAs prohibit the practice of "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity any personal information about an individual that the bureau obtained in connection with a motor vehicle record." R.C. 4501.27(A); *see also* 18 U.S.C. 2721(a). Personal information means information that identifies an individual, including, but not limited to, an individual's photograph or digital image, social security number, driver or driver's license identification number, name, telephone number, or medical or disability information, or an individual's address other than the five-digit zip code number. R.C. 4501.27(F)(3); *see also* 18 U.S.C. 2725(3). "Sensitive personal information" means "an individual's photograph or digital image, social security number, or medical or disability information." R.C. 4501.27(F)(5); *see also* 18 U.S.C. 2725(4).

{¶ 12} The DPPAs' ban on disclosure is subject to statutory exceptions, some requiring disclosure and others permitting disclosure. For instance, the BMV "shall disclose" personal information for use in carrying out the purposes of certain federal

statutes (none of which are at issue in this case) but "may disclose" personal information sought for one of the statutorily enumerated permissible uses. R.C. 4501.27(B)(1), (B)(2); 18 U.S.C. 2721(b). As pertinent here, one of the permissible uses allows the BMV to disclose personal information "[f]or use by an employer or by the agent or insurer of an employer to obtain or verify information relating to the holder of a commercial driver's license or permit that is required under the 'Commercial Motor Vehicle Safety Act of 1986.'" R.C. 4501.27(B)(2)(j); 18 U.S.C. 2721(b)(9).

{¶ 13} The federal DPPA does not establish any procedure for requesting DPPA-protected material from a state department of motor vehicles, and states bear the responsibility of taking any administrative or legislative measures necessary to ensure compliance. *See Condon* at 150-51. Ohio's DPPA accounts for this by granting the BMV specific rule-making authority: "The registrar of motor vehicles may adopt any forms and rules, consistent with but no more restrictive than the requirements of [the federal DPPA] that are necessary to carry out the registrar's duties under this section." R.C. 4501.27(E). Consistent with its authority, the BMV promulgated Ohio Adm.Code 4501:1-12-02, which mirrors the prohibition and exceptions of the DPPAs and creates the procedure for requesting DPPA-governed materials.

{¶ 14} Specifically, Ohio Adm.Code 4501:1-12-02(D) creates two options for requesting DPPA-protected information: A request can be submitted by (1) "submitting a public records request" or (2) "completing form BMV1173 and submitting any required documentation." While a request under division (D)(1) narrowly authorizes access to a redacted copy, a request under (D)(2) allows "requesters authorized by law" to obtain an unredacted copy by completing form BMV1173 "accompanied by the fees statutorily authorized in the Revised Code." The unredacted copy will only be produced "in a format designed to make duplication or retransmission of any personal information contained on the motor vehicle record difficult." Ohio Adm.Code 4501:1-12-02(D)(2)(a).

{¶ 15} Form BMV1173 must include the identity of the requester with, if the requester is a corporation, a tax identification number, a certified copy of the "Certificate of Good Standing" from the office of the secretary of state in which it is incorporated and the name of its statutory agent. Ohio Adm.Code 4501:1-12-02(G)(1)(b). Additionally, if the requester claims to be eligible for disclosure under one of the exceptions, the requester

must specify which exception permits disclosure. Ohio Adm.Code 4501:1-12-02(G)(1)(c). The form also requires the requester to certify the accuracy and truthfulness of the information provided. (See Relator's Brief, Exhibit D.)

{¶ 16} Contrary to relator's argument, Ohio Adm.Code 4501:1-12-02(D)(2) does not conflict with the public records provisions in R.C. 149.43 because those provisions are inapplicable where the "release" of records is prohibited by "state or federal law." R.C. 149.43(A)(1)(v). Here, the release of the requested driving record was prohibited by the state and federal DPPAs unless relator could certify an authorized use under Ohio Adm.Code 4501:1-12-02(D)(2). " '[R]ules issued by administrative agencies pursuant to statutory authority have the force and effect of law.' " *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47 (1990), quoting *Parfitt v. Columbus Corr. Facility*, 62 Ohio St.2d 434, 436 (1980). A basic limitation on this authority is that "an administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *P.H. English, Inc. v. Koster*, 61 Ohio St.2d 17, 19 (1980).

{¶ 17} The BMV's authority to promulgate Ohio Adm.Code 4105:1-12-02(D)(2) derives from R.C. 4501.02(A)(1), which allows the BMV to "[a]dopt such forms and rules as are necessary to carry out all laws the registrar is required to administer," and R.C. 4501.27(E), which, as explained above, specifically authorizes the BMV to adopt rules and forms necessary to ensure compliance with the state and federal DPPA. Because Ohio Adm.Code 4501:1-12-02(D)(2) was promulgated pursuant to valid statutory authority, it has the force and effect of state law. Accordingly, a requester cannot be "DPPA-authorized" under R.C. 4501.27 or 18 U.S.C. 2721 without identifying itself as such in the manner described by the BMV in Ohio Adm.Code 4501:1-12-02(D)(2). To protect driver confidentiality and avoid the civil penalties for wrongfully disclosing such information, see 18 U.S.C. 2723(b), the BMV has promulgated a rule requiring a requester to provide specific information regarding the purpose of the intended use accompanied by a certification of truthfulness. See Ohio Adm.Code 4501:1-12-02(D)(2). Relator did not follow these procedures, but instead made a general records request under Ohio Adm.Code 4501:1-12-02(D)(1), which only allows access to redacted records. Because relator failed to certify a permissible use through the procedure outlined in Ohio

Adm.Code 4501:1-12-02(D)(2), we agree with the magistrate that relator failed to demonstrate that it was authorized to retain unredacted copies of the driving records.

{¶ 18} Relator essentially complains about the "statutorily authorized fee" referenced in Ohio Adm.Code 4501:1-12-02(D)(2), which relator claims to be the \$5 fee for *certified* driving abstracts described in R.C. 4509.05(B)(2).¹ Relator maintains that any fee requirement conflicts with R.C. 149.43(B)(1), which requires copies of public records to be available "at cost" and that it should not be required to purchase a certified abstract. As explained above, however, the requirements of R.C. 149.43 do not apply to the present case because relator failed to demonstrate that disclosure of the records was authorized by state or federal law.

{¶ 19} Accordingly, relator's first three objections are overruled.

{¶ 20} Relator's fourth objection argues that the BMV was collaterally and judicially estopped from defending its position because, according to relator, the BMV took the opposite position in *Roth v. Guzman*, 650 F.3d 603 (6th Cir.2011). However, relator did not present an estoppel argument in its initial brief or reply brief, and the magistrate already rejected this argument in its June 29, 2011 order denying relator's request for leave to supplement its brief. The magistrate found that *Roth* involved materially different circumstances where the requester actually completed the form BMV1173 and certified that it would use the information for a permissible use. Even if relator's objection were properly preserved, we agree with the magistrate's conclusion that neither judicial nor collateral estoppel apply here. Accordingly, relator's fourth objection is overruled.

{¶ 21} Finally, we must address the "motion to supplement record" filed by relator after the magistrate's decision and after the case was submitted to this court. In reviewing objections to a magistrate's decision, this court "may hear additional evidence but may

¹ Though not at issue here, the fee in R.C. 4509.05 was found unconstitutional by a divided panel of this court in *Ohio Trucking Assn. v. Stickrath*, 10th Dist. No. 10AP-673, 2011-Ohio-4361; however, that case is currently pending on appeal in the Supreme Court of Ohio. See 131 Ohio St.3d 1437, 2012-Ohio-331 (Table, No. 2011-1757).

We also note the existence of the \$5 fee described in R.C. 4506.08(D), which states "Information regarding the driving record of any person holding a commercial driver's license issued by this state shall be furnished by the registrar, upon request and payment of a fee of five dollars, to the employer or prospective employer of such a person and to any insurer."

refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d).

{¶ 22} Relator seeks to supplement the record with documents pertaining to two records requests made several days *after* the magistrate issued her January 11, 2012 decision in this case. With its first request filed January 25, 2012, relator obtained an *unredacted* driving record after submitting form BMV1173 and paying a \$5 fee. With its second request filed February 1, 2012, relator obtained a *redacted* copy after failing to submit the required form and fee. According to relator, the record should include evidence of these subsequent requests "to show that [relator's] decision not to submit BMV Form 1173 with its public records request made no difference in the BMV's response to its request" and that the "BMV's only prerequisite for providing [relator] with an unredacted copy * * * was payment of the \$5.00 certified abstract fee and submission of BMV Form 1173." (Relator's Motion, 3.)

{¶ 23} Essentially, all relator seeks to prove is that the BMV follows its own administrative rule, Ohio Adm.Code 4501:1-12-02(D)(2), which this court has already found to be valid. The requirements of Ohio Adm.Code 4501:1-12-02(D)(2) were known and considered at the time the magistrate issued her decision, and to the extent relator's new public records requests constitute additional "evidence" of the rule's requirements, nothing prevented relator from making such requests before submission of the case to the magistrate. Accordingly, because relator could have, with reasonable diligence, provided such evidence to the magistrate, we deny relator's motion to supplement the record.

{¶ 24} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We therefore overrule relator's objections, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and deny the requested writ of mandamus.

*Motion to supplement the record denied;
objections overruled, writ of mandamus denied.*

BROWN, P.J., concurs.

FRENCH, J., concurs in part, dissents in part.

FRENCH, J., concurring in part and dissenting in part.

{¶ 25} I concur in the majority's denial of relator's motion to supplement the record. I respectfully dissent, however, from the majority's decision to overrule relator's objections and deny the requested writ of mandamus.

{¶ 26} Through its complaint, relator seeks an order requiring BMV to disclose an unredacted copy of its employee's driving record pursuant to Ohio's Public Records Act, R.C. 149.43. In determining a public-records mandamus claim, we must construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376 (1996). We also must construe exceptions to disclosure strictly against the custodian, who has the burden to establish that an exception applies. *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 25. "A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, ¶ 10.

{¶ 27} R.C. 4501.34(A) provides that "all documents in the registrar's possession are public records." Nevertheless, here, BMV argues that the record relator seeks is not a public record because it falls under the exception for "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v).

{¶ 28} BMV argues that state and federal law prohibit the release of individual driving records. I disagree. R.C. 4501.27(B)(2) states that BMV "may disclose personal information, other than sensitive personal information, about an individual" as long as the disclosure is for certain purposes, including for use in the normal course of business by a legitimate business and for a specific purpose. R.C. 4501.27(B)(2)(c). Therefore, while state and federal law certainly *condition* the release of personal information contained within a driving record, state and federal law do not *prohibit* the release of that information.

{¶ 29} To be sure, BMV may not disclose individual driving records in response to every request, and it has an obligation to protect personal information. To meet that obligation, BMV has discretion to adopt a rule, create a form or take other measures to

meet state and federal requirements. And given these requirements, it may be more costly or cumbersome to fulfill such requests. R.C. 149.43 provides for those contingencies, however. R.C. 149.43(B)(1), for example, allows BMV to determine whether the request asks for information that is exempt from disclosure and, if it is exempt, to "make available all of the information within the public record that is not exempt. * * * 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." Where "specifically required or authorized by state or federal law," R.C. 149.43(B)(4) also allows a public office to "limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record." And, although BMV must "make copies of the requested public record available at cost and within a reasonable period of time," R.C. 149.43(B)(1) imposes no specific restriction on the cost of providing a record or the time necessary to do so.

{¶ 30} BMV's administrative rule, Ohio Adm.Code 4501:1-12-02, appears to acknowledge the application of R.C. 149.43 to requests for motor vehicle records. Ohio Adm.Code 4501:1-12-02(C) states: "Pursuant to section 149.43 of the Revised Code, the BMV shall disclose personal information and/or sensitive personal information if the requester is eligible under divisions (B)(2) and (B)(3) of section 4501.27 of the Revised Code and disclosure is not prevented by" other state and federal laws. BMV's rule goes too far, however, in its requirement that a requester eligible under R.C. 4501.27(B)(2) or (B)(3) choose either a public records request to receive a redacted copy or the completion of form BMV1173, request for a certified abstract, and payment of a \$5 fee to get a full copy. Because BMV's records are public records, BMV must treat every request as a public records request under R.C. 149.43 and impose any limitations accordingly. BMV's current rule fails to do so.

{¶ 31} For all these reasons, I would sustain relator's first, second, and third objections, render relator's fourth objection moot, and order BMV to grant relator's request in accordance with R.C. 149.43. Because the majority concludes otherwise, I dissent.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

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 Relator, :
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 Carolyn Y. Williams, Ohio Bureau of : (REGULAR CALENDAR)
 Motor Vehicle and Thomas J. Stickrath,
 Ohio Department of Public Safety, :
 Respondents. :
 :

MAGISTRATE'S DECISION

Rendered on January 11, 2012

Vorys, Sater, Seymour and Pease LLP, Lisa Pierce Reisz, Kenneth J. Rubin, and Thomas E. Szykowny, for relator.

Michael DeWine, Attorney General, Hilary R. Damaser, and William J. Cole, for respondents.

IN MANDAMUS

{¶ 32} Relator, Motor Carrier Service, Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Carolyn Y. Williams as the Registrar of the Ohio Bureau of Motor Vehicles ("BMV" or "respondent") to provide

relator with an un-redacted copy of the driving record of an individual relator asserts is one of its employees.

Findings of Fact:

{¶ 33} 1. In a letter dated August 31, 2010, relator made the following public records request to the BMV:

Pursuant to R.C. § 149.43(B), Motor Carrier Service, Inc. ("MCS") hereby requests a copy of the complete driving record of our employee * * * to verify information relating to his commercial driver's license that is required under the "Commercial Motor Vehicle Safety Act of 1986," 100 Stat. 3207-170, 49 U.S.C. § 2701, et seq., as now or hereafter amended. MCS' professional license number is * * *. MCS is licensed by the Department of Transportation - #303278.

Please promptly prepare and make a copy of this record available by 5:00 p.m. on Wednesday, September 8, 2010.

{¶ 34} 2. In a letter dated September 20, 2010, Ann Vitale, Associate Legal Counsel for the Ohio Department of Public Safety, responded to relator's request as follows:

This letter is in response to your August 31, 2010 public records request. It is my understanding that the BMV promptly responded to your request for a copy of the complete driving record of your employee * * *, pursuant to Ohio Administrative Code section 4501:1-12-02. This response contained redacted information regarding * * * driving record, and you were not notified of these redactions in the original response. I am writing now to apologize for this oversight by the BMV and provide you with the required notification.

Ohio Revised Code section 149.43(B)(1) requires the BMV to notify you of any redactions made to the record(s). The record(s) have been redacted pursuant to Ohio Revised Code section 149.43(A)(1)(v) and the federal and state Driver's Privacy Protection Acts, 18 U.S.C. 2721-2725 and R.C. 4501.27 (collectively, the "DPPA"), which prohibit the

disclosure of any personal information about an individual that the Bureau of Motor Vehicles obtains in connection with a motor vehicle record, except to certain statutorily exempted requesters for certain statutorily defined purposes.

For purposes of the DPPA, "personal information" means "information that identifies an individual, including, but not limited to, an individual's photograph or digital image, social security number, driver or driver's license identification number, name, telephone number, or medical or disability information, or an individual's address other than the five-digit zip code number. 'Personal information' does not include information pertaining to a vehicular accident, driving or traffic violation, or driver's status." R.C. 4501.27(F)(3).

{¶ 35} 3. On December 21, 2010, relator filed its complaint for a writ of mandamus and on January 26, 2011, relator filed an amended complaint.

{¶ 36} 4. The matter is currently before the magistrate.

Conclusions of Law:

{¶ 37} Relator contends that the BMV is required to provide it with an un-redacted copy of the records which relator requested. Relator contends that it is entitled to a complete and un-redacted copy of that record and that the restrictions the BMV has implemented do not comply with Ohio's Public Records Act.

{¶ 38} While the BMV acknowledges that the records requested are public records, the BMV argues that, pursuant to both the Driver's Privacy Protection Act 18 U.S.C. 2721 and a similar state driver's confidentiality statute codified in R.C. 4501.27 (collectively "DPPA"), the release of personal information is limited and made available only under certain circumstances. The BMV argues that, because the release of this information is permissible only under certain circumstances, the BMV has put in place procedures by which statutorily exempted requesters can obtain un-redacted copies for

certain statutorily defined purposes. The BMV asserts that if relator would follow the procedures set up to ensure compliance with the DPPA while, at the same time, allowing access to public records, the BMV would provide relator with an un-redacted copy.

{¶ 39} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the BMV abused its discretion by refusing to provide relator with an un-redacted copy of the personal information of the individual as requested because relator failed to comply with the procedures established by the BMV to ensure that such information is not improperly disclosed.

{¶ 40} R.C. 149.43 pertains to the availability of public records and provides, in pertinent part, as follows:

(A)(1) "Public record" means records kept by any public office[.] * * *

* * *

(B)(1) Upon request[,] * * * all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. * * * [U]pon 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. *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.

* * *

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. * * *

(4) *Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.*

* * *

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. * * *

(7) * * *

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

(Emphasis added.)

{¶ 41} The purpose of the Ohio Public Records Act "is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 264, quoting *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St.3d 350, 355. Scrutiny of public records allows citizens to evaluate the rationale behind government decisions so government officials can be held accountable. See *White v. Clinton Cty. Bd. of Commrs.* (1996), 76 Ohio St.3d 416, 420.

{¶ 42} R.C. 4501.34 provides that the records at issue here are public records. R.C. 4501.27, Ohio's DPPA, restricts the disclosure of un-redacted copies of those records and provides, in pertinent part:

(A) Except as provided in division (B) of this section, on and after September 13, 1997, the registrar of motor vehicles, and *any employee or contractor of the bureau of motor vehicles, shall not knowingly disclose or otherwise make available to any person or entity any personal information about an individual that the bureau obtained in connection with a motor vehicle record.*

* * *

(2) In addition to the disclosure required under division (B)(1) of this section, on and after September 13, 1997, the registrar, or an employee or contractor of the bureau of motor vehicles, *may disclose personal information, other than sensitive personal information, about an individual that the bureau obtained in connection with a motor vehicle record, as follows:*

* * *

(c) For use in the *normal course of business by a legitimate business* or an agent, employee, or contractor of a legitimate business, *but only for one of the following purposes:*

(i) To verify the accuracy of personal information submitted to the business, agent, employee, or contractor by an individual;

(ii) If personal information submitted to the business, agent, employee, or contractor by an individual is incorrect or no longer is correct, to obtain the correct information, but only for the purpose of preventing fraud, by pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

* * *

(E) The registrar of motor vehicles may adopt any forms and rules, consistent with but no more restrictive than the requirements of Public Law No. 130-322, Title XXX, 18 U.S.C. 2721-2725, that are necessary to carry out the registrar's duties under this section on and after September 13, 1997.

(F) As used in this section:

(1) "Motor vehicle record" means a record that pertains to a motor vehicle driver's or commercial driver's license or permit, a motor vehicle certificate of title, a motor vehicle registration or motor vehicle identification license plates, or an identification card issued by the bureau of motor vehicles.

(2) "Person" has the same meaning as in section 1.59 of the Revised Code and does not include this state, another state, or an agency of this state or another state.

(3) "Personal information" means information that identifies an individual, including, but not limited to, an individual's photograph or digital image, social security number, driver or driver's license identification number, name, telephone number, or medical or disability information, or an individual's address other than the five-digit zip code number. "Personal information" does not include information pertaining to a vehicular accident, driving or traffic violation, or driver's status.

(Emphasis added.)

{¶ 43} Ohio Adm.Code 4501:1-12-02 provides further and includes procedures whereby otherwise non-disclosable information can be disclosed under certain circumstances. Specifically, Ohio Adm.Code 4501:1-12-02 provides:

(A) As used in this rule:

(1) "Personal information" means information contained in a motor vehicle record that identifies an individual person, including but not limited to, the person's photograph, digital image, digitalized photograph, social security number, driver or driver's license identification number, name, date of birth, telephone number, medical or disability information, or a person's address other than the county and five-digit zip code. "Personal information" does not include information pertaining to a vehicular accident, driving or traffic violation, or driver's status, or a name that is provided by the requester.

(2) "Motor vehicle record" means a record that pertains to a driver's or commercial driver's license or permit, an identification card, a certificate of title, a motor vehicle registration, or motor vehicle identification license plates, including an enumeration of the motor vehicle accidents in which the driver has been involved[.] * * *

(3) "Requester" means a person who requests release of a motor vehicle record.

(4) "Application" means an application for a driver's or commercial driver's license or permit, an identification card, a certificate of title, or a motor vehicle registration regardless of whether it is made to the bureau of motor vehicles (BMV), a deputy registrar, or a clerk of court of common pleas, and regardless of whether it is made in person with the assistance of a clerk, by mail, or by any other permissible means.

(5) "Applicant" means a person who submits an application.

* * *

(8) "Sensitive personal information" means an individual's photograph, digital image, digitalized photograph, social security number, or medical or disability information.

* * *

(B) Except as provided for by this rule, the registrar of motor vehicles, and any employee or contractor of the BMV, shall not knowingly disclose or otherwise make available to any person or entity any personal information about an individual that the BMV obtained in connection with a motor vehicle record.

(C) *Pursuant to section 149.43 of the Revised Code, the BMV shall disclose personal information and/or sensitive personal information if the requester is eligible under divisions (B)(2) and (B)(3) of section 4501.27 of the Revised Code and disclosure is not prevented by section 4501.15, section 4507.53, or another section of the Revised Code, other state law, the Federal Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721 et seq., as amended, or other federal law.*

Notwithstanding any other provision in this section, sensitive personal information about an individual shall not be disclosed unless the requirements of division (B)(3)(a) of section 4501.27, and division (B)(3)(b) of section 4501.15, and section 4507.53 of the Revised Code are met.

(D) *A requester * * * may request release of a motor vehicle record pertaining to a specified person by either submitting a public records request or by completing form BMV1173 and submitting any required documentation.*

(1) *Upon the receipt of a public records request, the BMV will promptly prepare and make available for inspection a motor vehicle record to any person at all reasonable times during regular business hours, or shall make copies of the motor vehicle record available at cost within a reasonable period of time.*

(a) *The BMV will not provide personal information in response to a public records request for a motor vehicle record. The BMV will provide a redacted copy of the motor vehicle record.*

(b) A requester will be charged the appropriate fees authorized by law and the department of public safety's public records policy.

(c) The BMV shall not limit or condition the availability of a motor vehicle record by requiring the disclosure of the requester's identity or the intended use of the requested public record. The BMV may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the BMV to identify, locate, or deliver the public records sought by the requester.

(2) Upon receipt of a request for a specific motor vehicle record submitted on form BMV1173, and accompanied by the fees statutorily authorized in the Revised Code, the BMV will provide personal information to requesters authorized by law to receive such information.

(a) The BMV will provide un-redacted paper copies of records in a format designed to make duplication or retransmission of any personal information contained on the motor vehicle record difficult. The copies provided to the requester shall indicate the name of the requester.

* * *

(G) Form BMV1173 shall include the following information:

(1) The identity of the requester:

(a) If the requester is a sole proprietorship or individual, the requester shall provide a driver's license number or identification card number. If the requester does not possess a driver's license or identification card, the requester shall provide proof of identity and social security number in accordance with the acceptable documents set forth in rule 4501:1-1-21 of the Administrative Code.

(b) If the requester is a corporation, the requester shall provide a tax identification number, a certified copy of the "Certificate of Good Standing" from the office of the secretary of state in which it is incorporated, and the name of its statutory agent.

(2) If the requester claims to be eligible for the disclosure of personal information, a statement indicating which of the statutory exceptions to nondisclosure of personal information applies. A requester may indicate eligibility on form BMV1173 under only one exception. If a requester is eligible under one or more exceptions, he or she must fill out and submit an individual BMV1173 form for each exception. Personal information shall be disclosed only for the following purposes:

* * *

(c) For use in the normal course of business by a legitimate business or an agent, employee, or contractor of a legitimate business, but only for one of the following purposes:

(i) To verify the accuracy of personal information submitted to the business, agent, employee, or contractor by an individual;

(ii) If personal information submitted to the business, agent, employee, or contractor by an individual is incorrect or no longer correct, to obtain the correct information, but only for the purpose of preventing fraud, by pursuing legal remedies against, or recovering a debt, or security interest against, the individual[.]

* * *

(3) Form BMV1173 shall advise the requester that the requester must comply with the provisions of divisions (B) and (C) of section 4501.27 of the Revised Code when using, selling, or re-disclosing any personal information pertaining to an individual's driving record obtained from the BMV.

(Emphasis added.)

{¶ 44} Although relator argues that respondent has indicated that the records requested are not public records, the magistrate finds that relator has misconstrued

respondent's argument. Respondent acknowledges that these are public records; however, respondent contends that the personal information relator requested can be disclosed only under limited circumstances and the BMV has properly promulgated established procedures whereby a requester can (1) properly identify themselves as an entity to whom the information can be disclosed, (2) certify that the information is being requested for a permissible reason, and (3) upon the payment of a fee, the documents will be provided.

{¶ 45} Relator points to Ohio Adm.Code 4501:1-12-02(D) and argues that it had two separate options to request the records sought here. Relator is correct. Relator could *either* have made a public records request pursuant to Ohio Adm.Code 4501:1-12-02(D)(1) *or* completed form BMV1173 *and* submitted any required documentation pursuant to Ohio Adm.Code 4501:1-12-02(D)(2).

{¶ 46} Here, relator chose to make a public records request. Ohio Adm.Code 4501:1-12-02(D)(1) provides that, in response to relator's public records request:

** * * [T]he BMV will promptly prepare and make available for inspection a motor vehicle record to any person at all reasonable times during regular business hours, or shall make copies of the motor vehicle record available at cost within a reasonable period of time.*

However, (D)(1)(a) limits the information relator would be provided:

The BMV will not provide personal information in response to a public records request for a motor vehicle record. The BMV will provide a redacted copy of the motor vehicle record.

Further, (D)(1)(b) provides that relator "will be charged the appropriate fees authorized by law and the department of public safety's public records policy." By electing to

request the records via a public records request, the BMV was prohibited from limiting or conditioning the "availability of a motor vehicle record by requiring the disclosure of the requester's identity or the intended use of the requested public record." Ohio Adm.Code 4501:1-12-02(D)(1)(c).

{¶ 47} The record demonstrates that the BMV properly followed the above requirements. However, relator wants this court to order the BMV to provide it with an un-redacted copy of the record. As will be explained hereinafter, relator would have been entitled to receive an un-redacted copy *only if* relator would have sought the record via the second available option.

{¶ 48} Relator could have sought the record via Ohio Adm.Code 4501:1-12-02(D)(2). Relator could have requested the "specific motor vehicle record * * * on form BMV1173," and if relator's request would have been "accompanied by the fees statutorily authorized in the Revised Code," then the "BMV [would have] provide[d] personal information to requesters authorized by law to receive such information." Further, the BMV would have been required to "provide un-redacted paper copies of records" to relator which would specifically "indicate the name of the requester." Ohio Adm.Code 4501:1-12-02(D)(2)(a). However, relator chose not to utilize the procedures set forth in Ohio Adm.Code 4501:1-12-02(D)(2) and was not entitled to receive an un-redacted copy.

{¶ 49} Relator received exactly what it was entitled to receive by requesting the record via a public records request. Although relator contends that it was unaware that it needed to follow Ohio Adm.Code 4501:1-12-02(D)(2) in order to receive an un-redacted copy, the fact that relator points out that it had two options from which to

choose makes its argument rather disingenuous. Relator made a public records request under Ohio Adm.Code 4501:1-12-02(D)(1) and received the redacted copy to which it was entitled. Relator could have utilized the procedure provided by Ohio Adm.Code 4501:1-12-02(D)(2) and received an un-redacted copy, but did not.

{¶ 50} In summary, the documents relator requested are public records. However, pursuant to state and federal laws, the personal information contained in those records, while part of a public record, is not to be disclosed except to certain entities and for certain purposes. In the present case, relator never established that it was an entity authorized to receive an un-redacted copy of the records and, as such, the BMV did not provide relator with an un-redacted copy of the records. The BMV followed the law and, contrary to relator's arguments, the BMV is not circumventing Ohio's Public Records Act by requiring that relator identify itself and its purposes prior to the release of the information. Relator has not established that it is entitled to receive an un-redacted copy of the records requested, there is no clear legal duty for the BMV to provide relator with an un-redacted copy of the records and, as such, relator is not entitled to a writ of mandamus.

{¶ 51} Based on the foregoing, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).